



RailCorp Rolling Stock Public Private Partnership
Updated summary of contracts

Rolling Stock PPP project contracts as at 2 March 2012



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| | | |
|----------|---|----------|
| 1 | Introduction | 1 |
| 1.1 | The project | 1 |
| 1.2 | Processes for selecting and contracting with the private sector parties | 4 |
| 1.2.1 | Shortlisting of proponents | 4 |
| 1.2.2 | Selection of the successful proponent. | 5 |
| 1.2.3 | Execution of the original (2006) contracts | 7 |
| 1.2.4 | March 2007 to January 2012 amendments and additional contracts | 7 |
| 1.2.5 | February 2012 “restructure agreements” | 7 |
| 1.3 | The structure of this report | 7 |
| 2 | Overview of the project’s contracts | 8 |
| 2.1 | The participants in the project | 8 |
| 2.1.1 | Public sector parties to the contracts | 8 |
| 2.1.2 | Private sector parties to the contracts. | 8 |
| 2.2 | Contractual structure | 13 |
| 2.2.1 | An introduction to the Project Contract | 13 |
| 2.2.2 | Equity and debt financing arrangements | 14 |
| 2.2.3 | Design, manufacture and commissioning of the trains and the simulators | 16 |
| 2.2.4 | Design and construction of the Maintenance Facility. | 18 |
| 2.2.5 | RailCorp’s “delivery phase” obligations. | 18 |
| 2.2.6 | PPP Co’s train availability and “through life support” service obligations. | 18 |
| 2.2.7 | RailCorp’s “TLS phase” obligations | 19 |
| 2.2.8 | Ending of the project. | 19 |
| 2.2.9 | Arrangements for RailCorp to access computer source codes. | 19 |
| 2.2.10 | Appointments of independent experts for dispute resolution. | 20 |
| 2.2.11 | Settlements and releases of claims | 20 |
| 2.2.12 | “Step in” and other rights and obligations following defaults etc | 21 |

| | | |
|--------|---|----|
| 2.2.13 | Performance securities and guarantees and the interactions of the parties' securities and "step in" rights. | 21 |
| 2.2.14 | "The RailCorp project agreements" | 22 |
| 2.3 | Conditions precedent. | 22 |
| 2.3.1 | The original (2006) contracts. | 22 |
| 2.3.2 | The March 2007 to January 2012 amendments and additional contracts | 23 |
| 2.3.3 | The February 2012 "restructure agreements" | 24 |

3 The Project Contract and associated intellectual property, lease, licence, step-in and novation arrangements 25

| | | |
|----------|--|----|
| 3.1 | General obligations of PPP Co and RailCorp and general acceptance of risks by PPP Co | 25 |
| 3.1.1 | PPP Co's principal obligations | 25 |
| 3.1.2 | RailCorp's principal obligations | 25 |
| 3.1.3 | No restrictions on RailCorp's or other authorities' statutory powers | 26 |
| 3.1.4 | General acceptance of risks by PPP Co | 26 |
| 3.1.5 | General warranties by PPP Co and PPP Co Finance Co. | 26 |
| 3.1.6 | General indemnities by PPP Co and PPP Co Finance Co | 26 |
| 3.2 | Design, manufacture and commissioning of the trains and simulators | 28 |
| 3.2.1 | Scope of the works | 28 |
| 3.2.1.1 | Option to delete separate guards' cabs | 28 |
| 3.2.1.2 | Option to order more trains | 28 |
| 3.2.2 | Approvals | 28 |
| 3.2.3 | Design obligations | 29 |
| 3.2.4 | General manufacturing and delivery obligations | 29 |
| 3.2.5 | Timeframes | 30 |
| 3.2.6 | Subcontracting. | 31 |
| 3.2.7 | Management plans, records, reports, inspections and audits | 32 |
| 3.2.8 | Downer EDI Rail's Cardiff Maintenance Depot Lease and PPP Co's right to "step in" | 34 |
| 3.2.9 | Network access for the testing and commissioning of the trains. | 34 |
| 3.2.10 | Testing and commissioning | 35 |
| 3.2.11 | Completion requirements and reliability testing of the trains | 35 |
| 3.2.11.1 | Practical completion. | 35 |
| 3.2.11.2 | Final completion. | 38 |
| 3.2.12 | Completion of the simulators. | 38 |
| 3.3 | Design, construction and commissioning of the maintenance facility | 38 |
| 3.3.1 | Scope of works | 38 |
| 3.3.1.1 | RailCorp's "enabling works" | 38 |
| 3.3.1.2 | PPP Co's works. | 39 |
| 3.3.2 | Planning and other approvals | 39 |
| 3.3.3 | Design obligations | 40 |
| 3.3.3.1 | RailCorp's design obligations | 40 |
| 3.3.3.2 | PPP Co's design obligations | 40 |
| 3.3.4 | Construction site access. | 40 |
| 3.3.5 | Site conditions, contamination and utilities. | 40 |
| 3.3.6 | General construction obligations | 41 |
| 3.3.6.1 | RailCorp's "enabling works" | 41 |
| 3.3.6.2 | PPP Co's works. | 41 |
| 3.3.6.3 | Coordination | 41 |
| 3.3.7 | Timeframes | 41 |
| 3.3.7.1 | RailCorp's "enabling works" | 41 |
| 3.3.7.2 | PPP Co's works. | 42 |
| 3.3.8 | Subcontracting by PPP Co | 42 |
| 3.3.9 | PPP Co construction management plans, records, reports, inspections and audits | 42 |
| 3.3.10 | Native title | 43 |
| 3.3.11 | Archæological and heritage artefacts | 43 |
| 3.3.12 | Testing and commissioning of the maintenance facility. | 43 |

| | | |
|----------|--|----|
| 3.3.13 | Completion | 43 |
| 3.3.14 | The “return” of certain facilities to RailCorp | 44 |
| 3.4 | “Delivery phase” security bonds and RailCorp payments | 44 |
| 3.4.1 | Security bonds | 44 |
| 3.4.2 | “Milestone” payments | 44 |
| 3.4.3 | Payment of an adjustment for the cost of the trains’ earthing systems | 45 |
| 3.5 | Train “availability” and “through life support” obligations | 45 |
| 3.5.1 | General “availability” obligations | 45 |
| 3.5.1.1 | Routine “availability” requirements | 46 |
| 3.5.1.2 | Additional “availability” requirements for special events and ad hoc needs | 46 |
| 3.5.1.3 | Train deliveries and substitutions | 46 |
| 3.5.1.4 | Deemed “availability” | 47 |
| 3.5.2 | General TLS obligations | 48 |
| 3.5.2.1 | Existing PPP Co and RailCorp obligations | 48 |
| 3.5.2.2 | Option for CityRail’s <i>Millennium</i> trains also to be maintained by PPP Co at the maintenance facility | 50 |
| 3.5.3 | Leasing and licensing of the maintenance facility | 50 |
| 3.5.4 | Licence to access RailCorp’s “rail corridor” and “out depots” | 51 |
| 3.5.5 | Subcontracting | 51 |
| 3.5.6 | Management plans, records, reports and RailCorp inspections and audits | 52 |
| 3.5.7 | Extensions of the term of the project | 53 |
| 3.5.8 | Decommissioning and/or RailCorp acquisition of the trains | 53 |
| 3.5.9 | Remediation of the maintenance facility over the last five years of the project | 54 |
| 3.5.10 | Arrangements at the end of the project | 54 |
| 3.6 | “TLS phase” RailCorp and PPP Co payments | 55 |
| 3.6.1 | Monthly “availability payments” to PPP Co by RailCorp | 55 |
| 3.6.1.1 | Formulae for calculating the “availability payments” | 55 |
| 3.6.1.2 | “Reliability and disruption adjustments” | 56 |
| 3.6.1.3 | Liabilities if a calculated “availability payment” is negative | 57 |
| 3.6.2 | Monthly “reimbursable TLS payments” to PPP Co by RailCorp | 58 |
| 3.6.3 | Monthly “key performance indicator payments” to PPP Co by RailCorp | 58 |
| 3.6.4 | Quarterly “interest payment adjustment” payments by RailCorp or PPP Co | 58 |
| 3.6.5 | “Incident response payments” to RailCorp by PPP Co | 58 |
| 3.7 | Miscellaneous general provisions of the Project Contract and the other RailCorp project agreements | 59 |
| 3.7.1 | Rail safety | 59 |
| 3.7.2 | Occupational health and safety | 60 |
| 3.7.3 | Industrial relations | 60 |
| 3.7.4 | Local content and apprenticeship requirements and local industry participation | 60 |
| 3.7.5 | Environment protection | 60 |
| 3.7.6 | Intellectual property and moral rights | 61 |
| 3.7.7 | Liabilities for taxes, rates, charges and stamp duty | 61 |
| 3.7.8 | Confidentiality | 62 |
| 3.7.8.1 | The Project Contract’s confidentiality restrictions | 62 |
| 3.7.8.2 | Confidentiality restrictions for the “restructure agreements” | 62 |
| 3.7.8.3 | Project Contract restrictions on public statements by the private sector parties | 63 |
| 3.7.9 | Alerts and incident management | 63 |
| 3.7.10 | Insurance and loss or damage | 63 |
| 3.7.10.1 | PPP Co’s insurance obligations | 63 |
| 3.7.10.2 | Annual reviews and the sharing of changes in insurance costs | 64 |
| 3.7.10.3 | Liabilities for and responses to loss or damage | 65 |
| 3.7.10.4 | “Uninsurable” risks | 68 |
| 3.7.11 | Updating of the project’s financial model | 69 |
| 3.7.12 | Financial reporting and audits | 70 |
| 3.7.13 | Changes in law | 70 |
| 3.7.14 | Variations | 71 |
| 3.7.14.1 | RailCorp-initiated variations | 71 |
| 3.7.14.2 | PPP Co-initiated variations | 71 |

| | | |
|----------|---|----|
| 3.7.15 | Amendments to and waivers of the project agreements | 72 |
| 3.7.16 | Restrictions on changes of ownership or control, assignments, encumbrances and refinancing | 72 |
| 3.7.16.1 | Changes of ownership or control | 72 |
| 3.7.16.2 | Transfers and encumbrances | 73 |
| 3.7.16.3 | Refinancing | 73 |
| 3.7.17 | Dispute resolution | 75 |
| 3.7.18 | <i>Force majeure</i> | 76 |
| 3.8 | Defaults and termination of the Project Contract | 77 |
| 3.8.1 | Termination for an “uninsurable” risk or <i>force majeure</i> | 77 |
| 3.8.2 | “Voluntary” termination by RailCorp | 79 |
| 3.8.3 | Actions to remedy PPP Co breaches, TLS Contractor FMFS breaches, “events of default” and “termination events” | 80 |
| 3.8.3.1 | Appointment by PPP Co of replacement subcontractor(s). | 80 |
| 3.8.3.2 | RailCorp’s general power to “step in” following any unremedied PPP Co breach of any RailCorp project agreement | 81 |
| 3.8.3.3 | The Security Trustee’s general powers to “step in” and take other actions to remedy any PPP Co breach of any project contract | 81 |
| 3.8.3.4 | RailCorp’s “step in” rights under the Rolling Stock Manufacture Contract Side Deed | 82 |
| 3.8.3.5 | RailCorp’s “step in” rights under the Maintenance Facility Construction Contract Side Deed | 83 |
| 3.8.3.6 | RailCorp’s “step in” rights under the TLS Contract Side Deed. | 83 |
| 3.8.3.7 | RailCorp’s “step in” rights under the FMFS Side Deed | 83 |
| 3.8.3.8 | Notices about “unacceptable” train availability or reliability | 84 |
| 3.8.3.9 | Notices about persistent or frequent PPP Co breaches of any RailCorp project agreement | 84 |
| 3.8.3.10 | Procedures for PPP Co to remedy a “PPP Co event of default” | 85 |
| 3.8.3.11 | RailCorp’s rights to sue PPP Co for breaches of any RailCorp project agreement or rely on its securities | 86 |
| 3.8.3.12 | RailCorp’s termination rights and the Security Trustee’s “step in” and transfer rights following a “PPP Co termination event” | 87 |
| 3.8.3.13 | PPP Co finance defaults | 88 |
| 3.8.4 | Termination by RailCorp for a “PPP Co termination event” | 88 |
| 3.8.4.1 | General termination arrangements. | 88 |
| 3.8.4.2 | Overview of train sale prices or “termination payments” for “PPP Co termination event” terminations before the original expiry date | 89 |
| 3.8.4.3 | Train sale prices or “termination payments” if new tenders are called | 89 |
| 3.8.4.4 | Train sale prices or “termination payments” if the project is not retendered or if retendering is not successful | 90 |
| 3.8.5 | Termination by PPP Co for a “RailCorp termination event” | 91 |

4 The RailCorp Deed of Charge and interactions between RailCorp’s securities and the debt financiers’ securities 93

| | | |
|-----|--|----|
| 4.1 | The RailCorp Deed of Charge | 93 |
| 4.2 | Consents to and priorities between RailCorp’s charges and the debt financiers’ securities. | 93 |

5 The NSW Government’s guarantee of RailCorp’s performance 95

6 The State’s potential capital contribution and other aspects of the February 2012 ‘restructure agreements’ 96

| | | |
|-------|--|----|
| 6.1 | The State’s capital commitment | 96 |
| 6.1.1 | Conditions precedent to the State’s capital commitment | 96 |
| 6.1.2 | The State’s capital contribution | 97 |

| | | |
|---------|--|-----|
| 6.1.3 | Assignments of the State's rights and obligations under the Capital Commitment Deed. | 98 |
| 6.1.3.1 | Assignments without consent to "permitted" State transferees | 98 |
| 6.1.3.2 | Assignments without consent to any new party after a specified date. | 98 |
| 6.1.3.3 | Other assignments with consent | 98 |
| 6.2 | The State's purchase of the existing investors' shares, units and notes | 98 |
| 6.2.1 | Share, unit and note purchases | 98 |
| 6.2.2 | Assignments of the State's rights under the Existing Investors Side Deed | 99 |
| 6.2.2.1 | Assignments without consent to "permitted" State transferees | 99 |
| 6.2.2.2 | Assignments without consent to any new party after a specified date. | 99 |
| 6.2.2.3 | Other assignments with consent | 99 |
| 6.3 | "Equity upside" arrangements | 99 |
| 6.4 | Other associated "restructure" commitments | 100 |
| 6.4.1 | State "fee" payments to and from the Financial Guarantors and enforcement waivers by the Financial Guarantors | 100 |
| 6.4.2 | Assignments of the State's rights and obligations under the Financial Guarantors' Undertakings Deed | 101 |
| 6.4.2.1 | Assignments without consent to "permitted" State transferees | 101 |
| 6.4.2.2 | Assignments without consent to any new party after a specified date | 101 |
| 6.4.2.3 | Other assignments with consent. | 101 |
| 6.4.3 | "Commitment fee" payments to the State | 101 |
| 6.4.4 | The Reliance Rail Undertakings Deed | 101 |
| 6.4.5 | Other facilitation of the "restructure" | 102 |
| 6.5 | RailCorp's consents | 102 |

1 Introduction

This report summarises the main contracts, from a public sector perspective, for the Rolling Stock Public Private Partnership (PPP) project.

The original (December 2006) version of this document was prepared by Rail Corporation New South Wales (“RailCorp”) in accordance with the public disclosure requirements of sections 3.7 and 7.1 of the New South Wales 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.

The triggers for the preparation of this second, updated summary of the Rolling Stock PPP project’s contracts have been a series of contract amendments and new contracts associated with the financing of the project in February and March 2012.

Revised and expanded public disclosure requirements for privately financed “public private partnership” projects in New South Wales are now set out in section 5.2 of the NSW Government’s December 2006 *Working with Government Guidelines for Privately Financed Projects*, which have been incorporated within the *National Public Private Partnership Guidelines* adopted by the Council of Australia Governments on 29 November 2008. In accordance with these new guidelines, and also in an effort to assist readers in understanding the project’s current overall contractual structure, this revised summary is not confined to these latest changes to the project, but rather is a comprehensive update of the December 2006 summary as a whole, including coverage of several earlier amendments of the contracts.

In line with the *National Public Private Partnership Guidelines* and the December 2006 *Working with Government Guidelines for Privately Financed Projects*, this updated report:

- Focuses on the project contracts to which the State of NSW and/or RailCorp are parties or which otherwise have a potentially substantive impact on public sector benefits or risks. 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 any matters which are expressly confidential under the contracts or any other “commercial in confidence” provisions of the contracts. The *Guidelines* define the latter as any provisions revealing the contractors’ financing arrangements, cost structures, profit margins, “base case” financial model(s), intellectual property or “any

matter whose disclosure would place the contractors at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future”.

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 2 March 2012. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.

1.1 The project

The Rolling Stock PPP project involves:

- Private sector financing, design, manufacturing and commissioning of 626 new *Waratah* double-deck carriages, providing 78 new trains and two spare carriages for CityRail services in metropolitan Sydney, with the first of these trains originally to have been introduced into service by April 2010 and with all of the carriages originally to have been operational by September 2013, along with an option for RailCorp to order up to additional 20 trains (as discussed later in this report, in practice there have been significant delays in these delivery timeframes)
- Private sector financing, design, construction, manufacturing and commissioning of a new maintenance facility for these trains in Auburn and new train simulators for the training of RailCorp drivers and guards
- An obligation on the private sector parties to make at least 72 of the new trains (and more for special events) available for RailCorp’s CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational period for some or all of the trains
- Private sector maintenance, cleaning, repair and refurbishment of the new trains, maintenance facility and train simulators, to RailCorp-specified standards, throughout their operational periods
- Private sector decommissioning of the trains, and/or handing over of some or all of the trains to RailCorp, at the end of their operational periods, and
- Handing over of the train maintenance facilities to RailCorp at the end of the operational period

in return for specified support and payments by RailCorp during the delivery phase of the project and specified support and performance-based monthly payments by RailCorp throughout the rest of the project.



Waratah trains on CityRail's Inner West line and in the new Auburn train maintenance facility

Further support for the project has recently been provided in the form of undertakings by the State of NSW, effective from 20 February 2012, to provide a capital contribution to the project in specified future circumstances.

In contrast to tollroad projects, which partly depend on revenue from tolls paid by users, the private sector participants in the project have not taken and will not be taking any “demand risk”. In other words, the payments to them are not and will not be based on CityRail’s farebox revenue or patronage.

The Rolling Stock PPP project represents the largest single order for new passenger trains ever undertaken in Australia.

The new *Waratah* carriages will replace all of the remaining 498 non-airconditioned CityRail carriages in Sydney and provide additional rolling stock to accommodate forecast growth in CityRail’s patronage.

Each of the new airconditioned, stainless steel trains will seat about 880 passengers and feature passenger information screens, 16 wheelchair spaces, improved resistance to vandalism and crash damage, improved security (including CCTV cameras) and a traction interlocking system that will prevent the train from moving off until all its doors are closed.

The project’s private sector participants have advised RailCorp that at present (in March 2012) the project is employing:

- 230 people, including nine apprentices, at Cardiff, west of Newcastle, where the trains’ crew cabs are being manufactured and assembled and final assembly, fit-out and some testing and commissioning of the trains are taking place
- 183 people, including eight apprentices, at the new *Waratah* train maintenance facility in Auburn, and

- 114 people at an office of the private sector participants in Granville.

The cost of building the new trains, the maintenance facility and the simulators was estimated in 2006 at around \$2 billion, excluding financing costs.

The private sector participants in the project include:

- Downer EDI, AMP, the Royal Bank of Scotland (which has replaced ABN AMRO) and International Public Partnerships (which has replaced Babcock & Brown), as equity investors in the project (through “Reliance Rail” entities described later in this report) and, in the case of the Royal Bank of Scotland, also as the project’s principal debt finance underwriter
- Westpac, National Australia Bank, Mizuho and Sumitomo Mitsui Finance, as debt financiers for the project
- FGIC UK and Syncora Guarantee Inc (formerly known as XL Capital Assurance Inc), two monoline financial guarantee insurers which have guaranteed the project’s debts, and
- Downer EDI Rail (formerly known as EDI Rail), Hitachi, the Changchun Railway Vehicles Company and John Holland as the principal designers and builders of the new trains, train maintenance centre and train simulators and, in the case of a subsidiary of Downer EDI Rail, also as the maintainer of these assets.

In 2006 the NSW Treasury estimated that the present value of the cost of the new trains, associated facilities and maintenance services to RailCorp over the next 37 years, of around \$3.65 billion, would be approximately 30% lower than it would have been under conventional public sector delivery, assuming the same timeframes for both methods of delivery (**Table 1.1**).

Table 1.1. NSW Treasury’s 2006 “value for money” comparison between public sector and private sector project delivery.

| Delivery method | “Public sector comparator” (PSC) (hypothetical, risk-adjusted estimate of the cost of the most efficient likely method of public sector delivery) | | | Private sector delivery |
|--|--|--|--|-------------------------|
| | “PSC best case” (95% probability that PSC cost would be higher than this) | “PSC most likely case” (mean of PSC cost estimates) | “PSC worst case” (95% probability that PSC cost would be lower than this) | |
| Estimated present value of the financial cost of the project (over 37 years) to RailCorp | \$4, 914 m | \$5,203 m | \$5,511 m | \$3,648 m |
| Estimated saving achieved through private sector delivery | 26% | 30% | 34% | |

The “most likely” cost estimate for the “public sector comparator” of \$5,203 million included a “raw” capital cost estimate with a present value (@6.16% pa) of \$2,047 million, a “raw” operational cost of \$1,304 million, a risk adjustment of \$1,225 million, and a competitive neutrality adjustment of \$61 million.

The cost estimate for private sector delivery of \$3,648 million included a notional upward adjustment reflecting NSW Treasury estimates of the value of risks which were not then anticipated as being transferred to the private sector parties, so as to permit a “like for like” comparison with the cost estimates for the “public sector comparator”. Its present value was estimated using an evaluation discount rate that incorporated a systemic risk premium of 0.9%, in accordance with NSW Treasury policies on the assessment of complying proposals.

Adjustments were made to both the “public sector comparator” and private sector cost estimates to recognise ancillary RailCorp costs of \$566 million for items that were not included in the project itself but were nonetheless required for the delivery of the project.



Drivers' cab, with a workstation for guards on the right



One of the simulators for drivers' and guards' training in Petersham



1.2 Processes for selecting and contracting with the private sector parties

1.2.1 Shortlisting of proponents

On 31 August 2004 RailCorp issued a *Request for Expressions of Interest* in the financing, design, manufacturing and maintenance of a sufficient number new carriages to ensure approximately 125 four-carriage "sets" (with drivers' cabs at both ends) would be available at all times for CityRail services.

This *Request* indicated that RailCorp was reviewing its operational requirements, and that its final requirements might include single-deck carriages and/or eight-carriage rather than four-carriage train "sets", but specified that proponents should demonstrate their abilities to design and manufacture trains suitable for CityRail's current operating configurations.

Responses to the *Request for Expressions of Interest* were received, by the closing date of 13 October 2004, from six consortia.

These *Responses* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury and the NSW Ministry of Transport, assisted by three advisory committees on legal and commercial issues, financial issues and technical issues and external advice from PricewaterhouseCoopers (financial issues), Clayton Utz (legal issues) and Halcrow (technical issues).

The Evaluation Committee's activities were overseen by a Project Steering Group, with members from RailCorp, NSW Treasury, the NSW Cabinet Office and the NSW Ministry of Transport', and by independent probity auditors from Deloitte Touche Tohmatsu.

The proponents were not asked to submit specific designs at this *Expressions of Interest* stage, and the evaluation criteria initially adopted in evaluating the six *Responses* were directed primarily at the proponents' demonstrated experience, capabilities and capacities.

These criteria were grouped into six categories: safety management (20% weighting), project management (10% weighting), design, manufacturing and commissioning (20%), maintenance (20%), financial and commercial (20%) and the proponents' overall approach (10%).

On 14 December 2004 RailCorp issued all six proponents with an *Addendum* to the original *Request for Expressions of Interest*, inviting updated *Responses* in the light of RailCorp decisions that the Rolling Stock PPP project would now involve two separate sets of contracts, one for single-deck carriages (with at least 208 always to be available for CityRail services) and the other for double-deck carriages.

This *Addendum* indicated that:

- About 500 carriages would be required, but the actual numbers of carriages to be contracted for would be decided on the basis of further RailCorp operational analyses and an assessment of the relative value for money of the detailed



The PPP Rolling Stock project's new Waratah train maintenance facility in Auburn. (The older MainTrain train maintenance facility is in the background.)

proposals to be submitted by the shortlisted respondents later in the project's procurement process

- RailCorp expected to ask for eight-carriage rather than four-carriage train "sets", and
- RailCorp would require at least 20% local (Australian and New Zealand) content.

The six proponents were invited to bid for the single-deck carriages component of the project, the double-deck carriages component or both.

In line with RailCorp's encouragement of both domestic and international participation in the project, the criteria for evaluating the revised *Responses* to the amended *Request for Expressions of Interest* were expanded to encompass the experience, capabilities and capacities not just of the proponents themselves but also of their major suppliers and/or maintainers.

All six of the proponents submitted revised *Responses* by the closing date, 2 February 2005.

On 1 March 2005 RailCorp announced that four of the original six proponents had been shortlisted to submit detailed proposals for the single-deck carriages and that two of them had also been shortlisted for the double-deck carriages as well.

1.2.2 Selection of the successful proponent

On 20 May 2005 RailCorp issued two *Requests for Detailed Proposals* to the shortlisted proponents, one for a sufficient number of new single-deck carriages to ensure 26 single-deck

eight-carriage train "sets" would be available at all times for CityRail services and the other for a sufficient number of new double-deck carriages to ensure 33 double-deck eight-carriage train "sets" would be available at all times for CityRail services.

Proponents tendering for the double-deck train contract were also asked to submit a priced option for an "availability" of 26 double-deck trains, to permit direct value-for-money comparisons with the single-deck train proposals.

The members of the shortlisted proponents executed **Deeds of Disclaimer and Confidentiality**, after their shortlisting and again at the time they submitted their *Detailed Proposals*, warranting to RailCorp that in preparing their *Detailed Proposals* they would not be relying on specified "information documents" provided by RailCorp and promising to comply with confidentiality requirements.

All four of the shortlisted proponents for the single-deck carriages component of the project and both of the shortlisted proponents for the double-deck carriages component submitted *Detailed Proposals* by the closing date, 10 October 2005.

The *Detailed Proposals* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury and the NSW Ministry of Transport, assisted by four advisory committees on legal and commercial issues, financial issues, technical issues and secondary evaluation issues and by external advice from PricewaterhouseCoopers (financial issues), Clayton Utz

(legal issues), Halcrow (technical issues) and Horsell (insurance issues).

As before, this Evaluation Committee's activities were overseen by the Project Steering Group and by independent probity auditors from Deloitte Touche Tohmatsu.

The *Detailed Proposals* were initially evaluated in terms of their compliance (on a pass/fail basis) with two "mandatory" evaluation criteria (satisfaction of the 20% local content requirement and a requirement for at least one apprentice to be employed for every nine tradespersons who are locally employed on the project).

Proposals satisfying these two mandatory criteria were then evaluated in terms of a series of "primary" evaluation criteria, broadly categorised into eight groups of technical criteria, two groups of legal and commercial criteria and three groups of financial criteria, one of them the net present cost of the project to RailCorp.

Six of the groupings of technical criteria (safety, contract management, train performance, "through life support", the maintenance facility and the simulators) were applied to relevant individual parts of the *Detailed Proposals*, while the other two (the proponents' understanding of and compliance with the project's specifications and other technical requirements, and their relevant technical experience, capabilities and capacities) were applied to all six of these aspects of the *Detailed Proposals*.

For example, the "Safety" section of each *Detailed Proposal* was assessed in terms of specified and detailed "safety" technical criteria and also in terms of the two generally applied groupings of technical criteria.

The scores awarded were then adjusted to reflect pre-determined relative weightings: safety 15%, contract management 22%, train performance 28%, "through life support" 22%, the maintenance facility 7% and the simulators 6%.

While "safety" was treated as a separate area for the purposes of assessing matters such as rail safety accreditations and proponents' safety management systems, safety was also a factor in all of the other technical areas, so its overall importance in the evaluations was higher than the 15% weighting for the specific "safety" area might appear to suggest.

The first grouping of legal and commercial criteria related to the proposed commercial terms of the project, and especially the extent to which RailCorp's proposed terms had been accepted. Where possible, proposed material alterations to the terms were assigned a value that was subsequently taken into account in calculating the net present cost of the project. If a value could not be assigned, a qualitative assessment was undertaken.

The second grouping of legal and commercial criteria concerned the extent to which each proponent's proposed project structure would deliver a single point of accountability. This was assessed in terms of their proposed contract structures (50% weighting), equity structures (25%) and organisational structures (25%).

The financial criteria other than the net present cost related to the deliverability of the proposed funding arrangements (50%) and financial robustness (50%).

In calculating the final primary evaluation criterion, the net present cost of the project to RailCorp, the Evaluation Committee took account of payments to the private sector, adjustments for the value of the retained risk (as affected by the proposed commercial terms) and adjustments for inadequacies in the pricing and scope of the technical parts of the *Detailed Proposals*.

No weightings were applied to the total scores for the three broad categories of grouped "primary" criteria (technical, legal and commercial and financial).

In the case of *Detailed Proposals* assessed on the basis of the "primary" criteria as being candidates for further shortlisting, an additional evaluation was conducted, applying two groupings of "secondary" criteria, to:

- Determine whether RailCorp should proceed with the proposed single-deck trains component of the project or switch entirely to double-deck trains, and
- If relevant, assess the desirability of any one proponent's being shortlisted for both the single-deck train and double-deck train components of the project.

The first grouping of "secondary" criteria involved comparisons of the net present costs to RailCorp of the various proposals for 26 "available" single-deck eight-carriage train sets with the net present costs of equivalent proposals for 26 "available" double-deck train sets.

The second grouping of "secondary" criteria, the security and contestability of supply, related to the proponents' abilities to satisfy the requirements of both the single-deck contracts and the double-deck contracts and whether a single supplier would support a contestable marketplace for the supply, maintenance, modification and refurbishment of electric passenger trains.

On 4 May 2006 the NSW Premier, Mr Morris lemma, announced that it had been decided not to proceed with the procurement of single-deck trains. RailCorp would, however, seek final proposals from the two shortlisted double-deck train proponents.

On 31 May 2006 RailCorp invited both of these proponents to submit *Final Committed Proposals* for a sufficient number of new double-deck carriages to ensure 72 double-deck eight-carriage train "sets"—including 13 train "sets" added to the project to accommodate future patronage growth—would be available for CityRail services at all times, with four more during special events. RailCorp subsequently amended this "sufficiency" requirement to specify that at least 78 train sets must be manufactured.

The closing date for these *Final Committed Proposals* was 10 August 2006.

On 10 August 2006 the members of the two finally shortlisted proponents executed further **Deeds of Disclaimer and Confidentiality**, warranting to RailCorp that in preparing their

Final Committed Proposals they would not be relying on specified “information documents” provided by RailCorp and promising to comply with confidentiality requirements.

The *Final Committed Proposals* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury, NSW Treasury Corporation and the NSW Ministry of Transport, again assisted by advisory committees and the same professional advisers.

The criteria for these evaluations were very similar to those applied in assessing the *Detailed Proposals*, but differed in some of their details within the groupings described above. The changes mainly reflected the changes made by RailCorp to the scope of the project, a greater focus on any subcontractors taking significant project risks, a greater focus on organisational accountabilities and the fact that funding commitments were now being sought.

For the technical evaluations, the relative weightings accorded to the maintenance facility and simulator groupings of criteria were also slightly adjusted, to 10% and 3% respectively. The “single point of accountability” criteria were separated from the legal and commercial evaluation and their weightings were amended to 40% for the proponents’ proposed contractual structures, 20% for their proposed equity structures and 40% for a new requirement, their organisational accountability plans.

On 10 November 2006 the NSW Premier, Mr Morris Iemma, announced the selection of Reliance Rail as the successful proponent for the project, subject to final documentation being concluded in a form satisfactory to RailCorp.

1.2.3 Execution of the original (2006) contracts

Following final negotiations, the execution of all but one of the original project contracts to which RailCorp is a party was completed on 3 December 2006, and the execution of the final 2006 contract was completed on 5 December 2006.

Most of these contracts took effect immediately, but the principal provisions of three of them—the main Project Contract, a Debt Finance Side Deed and a Call Option Deed—took effect only upon “financial close”, on 7 December 2006 (see section 2.3.1 of this report).

All of the other original project contracts were executed on or before 7 December 2006 and took effect on or before that date.

1.2.4 March 2007 to January 2012 amendments and additional contracts

Between 30 March 2007 and 19 January 2012 RailCorp executed:

- Several deeds and exchanges of letters, as envisaged in the original contracts, amending minor aspects of the original contracts, along with 274 sets of changes to the main contract’s technical specifications, again under arrangements set out in the original contracts, 34 of them initiated by RailCorp and 240 of them initiated by the private sector parties

- A series of deeds designed to ensure RailCorp has access to the source codes of various computer programs used by the private sector parties’ subcontractors
- A series of rail safety interface agreements
- Deeds appointing independent experts for the dispute resolution procedures set out in the project’s principal contracts
- A deed related to a new private sector subcontract for part of the private sector parties’ maintenance obligations, and
- A series of deeds releasing RailCorp from claims by the private sector parties and settling other claims arising from various disputes.

All of these contracts took effect as soon as they were executed.

During this period the NSW Treasurer extended his 2006 approval of the project’s financing arrangements under the Public Authorities (Financial Arrangements) Act (NSW) to match these amended and additional contract provisions.

1.2.5 February 2012 ‘restructure agreements’

On 3 February 2012 the NSW Treasurer, RailCorp and the private sector parties executed a series of “**restructure agreements**”, including a contract under which the State of NSW has promised to make a \$175 million capital contribution to the project if specified circumstances arise in the future.

Some of these contracts took effect immediately, but most took effect on 20 February 2012 (see section 2.3.3 of this report).

The February 2012 “restructure agreements” and the equity and debt financing contracts they most directly affect are introduced in section 2.2.2 of this report, and more details of the aspects of these agreements affecting the rights and obligations of the State of NSW and/or RailCorp are provided in section 6.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the Rolling Stock PPP project as at 2 March 2012—the February 2012 “restructuring” agreements having all become effective on or before 20 February 2012—and explains the inter-relationships of the various agreements between the public and private sector parties as at that date.

Sections 3, 4, 5 and 6 then summarise the main features of the agreements affecting public sector rights and liabilities and the sharing of the project’s benefits and risks.

Section 3 focuses on the parties primary contractual obligations, while section 4 summarises RailCorp’s securities for the private sector parties’ performance of their obligations, section 5 summarises the NSW Government’s guarantee of RailCorp’s performance under specified contracts and section 6 summarises the “restructuring” arrangements concerning the NSW Government’s potential capital contribution to the project.

2 Overview of the project's contracts

2.1 The participants in the project

2.1.1 Public sector parties to the contracts

The public sector parties to the Rolling Stock PPP project (*Figures 2.1 and 2.2*) are:

- **Rail Corporation New South Wales** (ABN 59 325 778 353) ("**RailCorp**"), a NSW Government agency (and previously a statutory State-owned corporation) established by section 4 of the Transport Administration Act (NSW), and
- The **NSW Treasurer**, for and on behalf of the **State of New South Wales**, who has executed a guarantee by the State of RailCorp's performance of its obligations under many of the project's contracts (see section 5 of this report) and who has more recently entered into arrangements for a potential capital contribution by the State in specified circumstances in the future and other, associated "restructure agreements" aimed at strengthening the project's finances (see section 6 of this report).

RailCorp's powers to enter into the project's contracts arose and arise from:

- The Transport Administration Act's stipulations that one of RailCorp's principal objectives is to "deliver safe and reliable passenger railway services in New South Wales in an efficient, effective and financially responsible manner", that its functions include the operation of railway passenger services and that it may conduct any business which it considers will further its objectives
- Prior to 1 January 2009, RailCorp's powers, then as a statutory State-owned corporation under the State Owned Corporations Act (NSW), to enter into contracts, acquire and deal with property and do anything else that was necessary or convenient for, or in connection with, the performance of its functions
- Since 1 July 2010, RailCorp's powers under the Transport Administration Act to exercise its functions through a partnership, joint venture or other association with other persons or bodies
- Express approvals to enter into this project's original (2006) contracts, granted on 23 November 2006 by the NSW Premier and the NSW Minister for Finance, as RailCorp's voting shareholders, in accordance with section 20X of the State Owned Corporations Act
- An approval granted by the NSW Treasurer, on 20 November 2006, for RailCorp to enter into the project's financing

arrangements, in accordance with section 20(1) of the Public Authorities (Financial Arrangements) Act (NSW)

- Updatings of this Public Authorities (Financial Arrangements) Act approval, adding further agreements to the definition of the financing arrangements approved under section 20(1) of that Act, on 26 August 2009 and 3 February 2012, with the latter set of additions including several of the project's February 2012 "restructure agreements", and
- In the case of the February 2012 "restructure agreements" to which RailCorp is now a party, a 23 December 2011 direction to RailCorp's Chief Executive by Transport for New South Wales, under section 3G(1) of the Transport Administration Act, to enter into these contracts.

The NSW Treasurer's powers to enter into the project's contracts for and on behalf of the State of NSW arose and arise from:

- In the case of the State's guarantee of RailCorp's performance under the original (2006) contracts, sections 22B, 22E and 22F of the Public Authorities (Financial Arrangements) Act, and
- In the case of the February 2012 "restructure agreements" to which the State is now a party,
 - An 18 January 2012 approval by the NSW Governor, on the advice of the Executive Council, and
 - The Public Authorities (Financial Arrangements) Amendment (Reliance Rail) Regulation 2012, which took effect on 3 February 2012, amending the Public Authorities (Financial Arrangements) Regulation 2005 so as to authorise the Treasurer to make direct or indirect investments in specified private sector participants in the Rolling Stock PPP project.

2.1.2 Private sector parties to the contracts

The private sector parties which have contracted with RailCorp and/or the NSW Treasurer are:

- **Reliance Rail Pty Ltd** (ACN 111 280 427, ABN 18 111 280 427) ("**PPP Co**")—a special purpose vehicle which was established for this project and which may not conduct any other business unless RailCorp consents—in its capacity as the trustee of the Reliance Rail Trust (ABN 48 077 619 824), which was established on 7 December 2006 under a Trust Deed (Operating) – Reliance Rail Trust executed by PPP Co on 24 November 2006.

All of the shares in PPP Co and all of the units in the Reliance Rail Trust are held by **Reliance Rail Holdings Pty Ltd** (ACN 111 280 169, ABN 46 111 280 169) (“**PPP Co Holding Co**”), as the trustee of the Reliance Rail Holding Trust, which was established on 7 December 2006 under a Trust Deed (Holding) – Reliance Rail Holding Trust executed by PPP Co Holding Co on 24 November 2006.

In turn, on the date of financial close for the project’s original contracts, 7 December 2006, the shares in PPP Co Holding Co and the units in the Reliance Rail Holding Trust were held by:

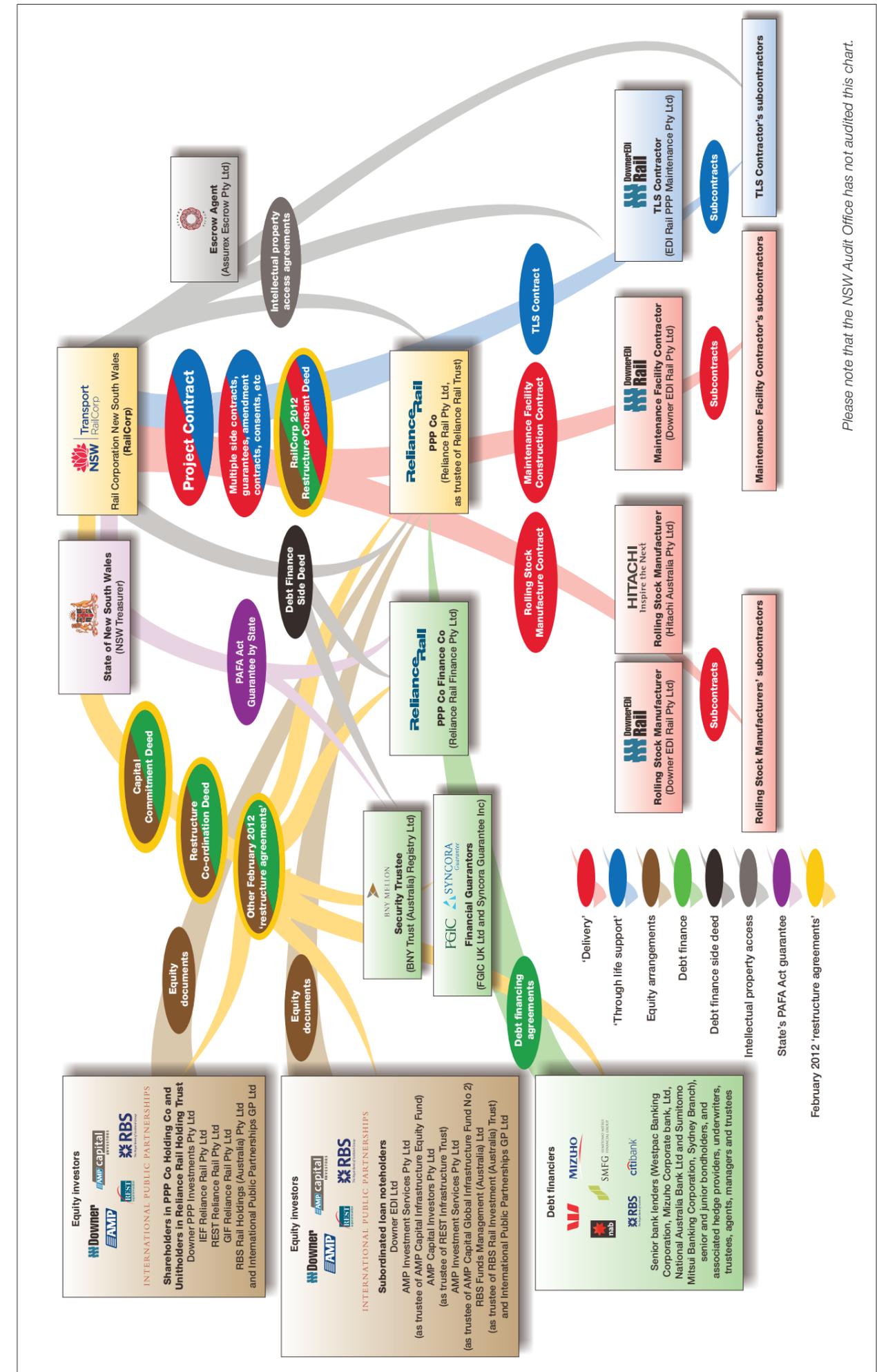
- **Downer PPP Investments Pty Ltd** (ACN 122 730 152, ABN 16 122 730 152), a wholly owned subsidiary of Downer EDI Ltd (ACN 003 872 848, ABN 97 003 872 848), a public company listed on the Australian Stock Exchange (49% holding)
- **IEF Reliance Rail Pty Ltd** (ACN 122 695 970), which was and is wholly owned by AMP Investment Services Pty Ltd (ACN 063 986 989, ABN 71 063 986 989)—a wholly owned subsidiary of AMP Capital Holdings Ltd (ACN 078 651 966, ABN 69 078 651 966) and ultimately of AMP Ltd (ACN 079 354 519, ABN 49 079 354 519), a public company listed on the Australian Stock Exchange—as the trustee of the AMP Investments Infrastructure Equity Fund (ABN 51 728 262 954) (17.2% holding)
- **REST Reliance Rail Pty Ltd** (ACN 122 695 934), which was and is also wholly owned by AMP Investment Services Pty Ltd and hence ultimately by AMP Ltd (6.8% holding)
- **GIF Reliance Rail Pty Ltd** (ACN 122 696 002), which was and is wholly owned by AMP Investment Services Pty Ltd as the trustee of the AMP Capital Global Infrastructure Fund No 2 (ABN 89 564 003 117) (1.5% holding)
- **ABN AMRO Rail Holdings Pty Ltd** (ACN 120 875 765), which was wholly owned by ABN AMRO Investments Australia Ltd (ACN 120 541 988, ABN 95 120 541 988) as the trustee of the ABN AMRO Rail Investment Trust (12.75% holding), and
- **Babcock & Brown Public Partnerships GP Ltd** (incorporated in England and Wales, registration no 05938778), which was a wholly owned subsidiary of Babcock & Brown International Holdings Pty Ltd, as the general partner of Babcock & Brown Public Partnerships Limited Partnership (UK registration no LP11596) (12.75% holding).

Since then,

- ABN AMRO Rail Holdings Pty Ltd has changed its name to **RBS Rail Holdings (Australia) Pty Ltd**, ABN AMRO Investments Australia Ltd has changed its name to **RBS Funds Management (Australia) Ltd** and the ABN AMRO Rail Investment Trust is now known as the

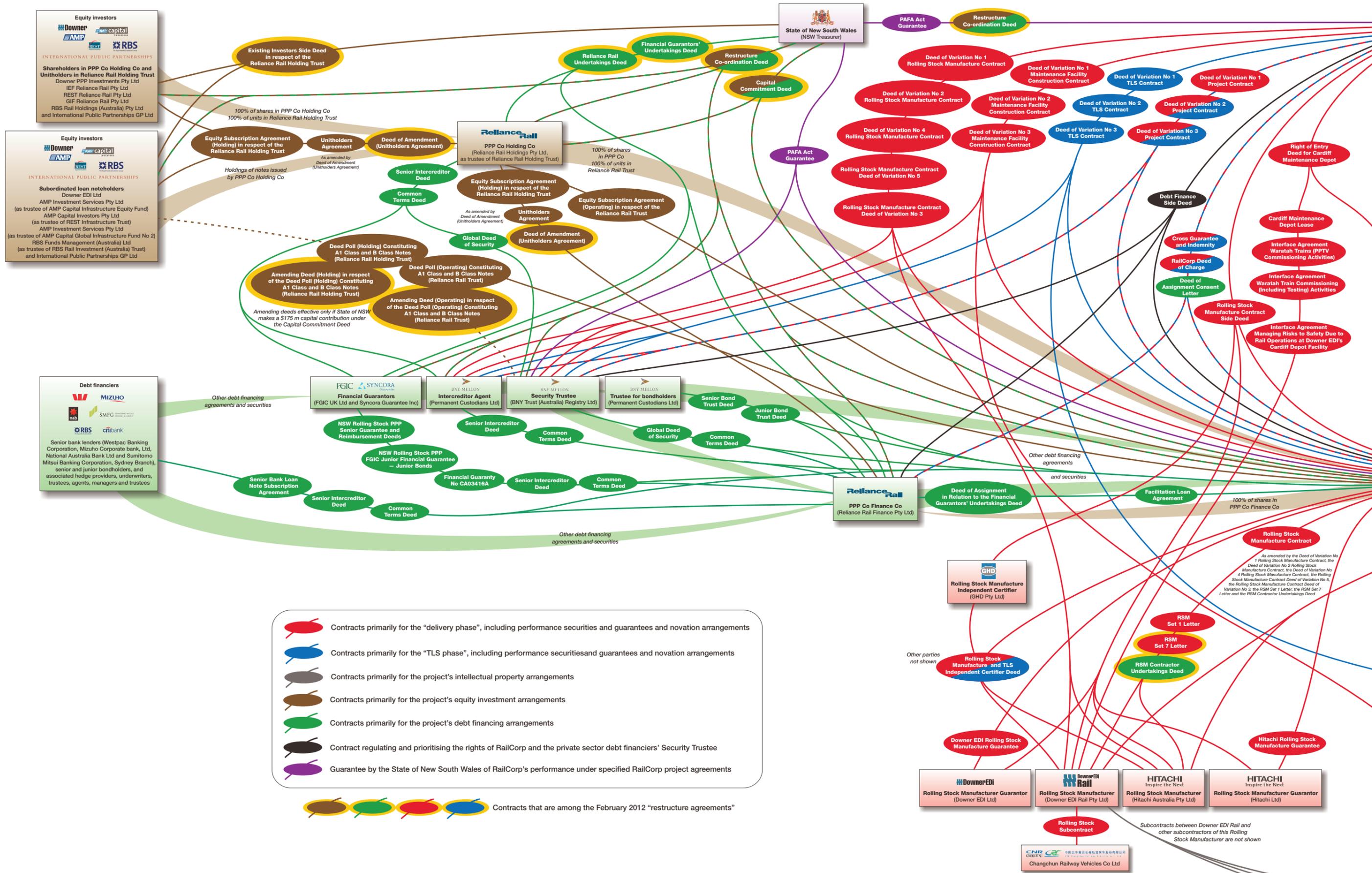
RBS Rail Investment (Australia) Trust (these name changes took effect on 16 March 2009), and

- Babcock & Brown Public Partnerships GP Ltd has changed its name (from 8 July 2009) to **International Public Partnerships GP Ltd** and is now a wholly owned subsidiary of Amber Infrastructure Group Ltd (UK registration no 06812600), and the partnership it manages, Babcock & Brown Public Partnerships Limited Partnership, has changed its name to **International Public Partnerships Limited Partnership** (UK registration no LP11596).
- RailCorp and the NSW Treasurer have contracted directly with PPP Co Holding Co’s shareholders and Reliance Rail Holding Trust’s unitholders, as listed above, in several of the February 2012 “restructure agreements”.
- **Reliance Rail Finance Pty Ltd** (ACN 120 380 805, ABN 23 120 380 805) (“**PPP Co Finance Co**”), a special purpose vehicle, wholly owned by PPP Co, which is:
 - Borrowing funds from the project’s debt financiers, including four major banks (Westpac Banking Corporation, Mizuho Corporate Bank, Ltd, National Australia Bank Ltd and Sumitomo Mitsui Banking Corporation) and bondholders, and
 - On-lending these funds to PPP Co.
- In addition to these arrangements, the project’s equity investors have supplemented their shareholding and unitholding investments by making loan payments to PPP Co (via PPP Co Holding Co) as noteholders in a series of subordinated debt agreements.
- These noteholders were and are **Downer EDI Ltd** (49% holding), **AMP Investment Services Pty Ltd** as the trustee of the Infrastructure Equity Fund (17.2%) and as the trustee of the AMP Capital Global Infrastructure Fund No 2 (1.5%), **AMP Capital Investors Ltd** as the trustee of the REST Infrastructure Trust (6.8%), ABN AMRO Investments Australia Ltd, now known as **RBS Funds Management (Australia) Ltd**, as the trustee of the ABN AMRO Rail Investment Trust, now known as the **RBS Rail Investment (Australia) Trust** (12.75%), and Babcock & Brown Public Partnerships GP Ltd, now known as **International Public Partnerships GP Ltd**, as the general partner of Babcock & Brown Public Partnerships Limited Partnership, now known as **International Public Partnerships Limited Partnership** (12.75%).
- RailCorp and the NSW Treasurer have contracted directly with these noteholders in several of the February 2012 “restructure agreements”.
- **BNY Trust (Australia) Registry Ltd** (ACN 000 334 636, ABN 88 000 334 636), known as Permanent Registry Ltd prior to 4 April 2007 (“**the Security Trustee**”), as the security trustee for the project’s debt financiers under a NSW Rolling Stock PPP Security Trust Deed executed by PPP Co, PPP Co Finance Co, PPP Co Holding Co and the Security Trustee on 1 December 2006.



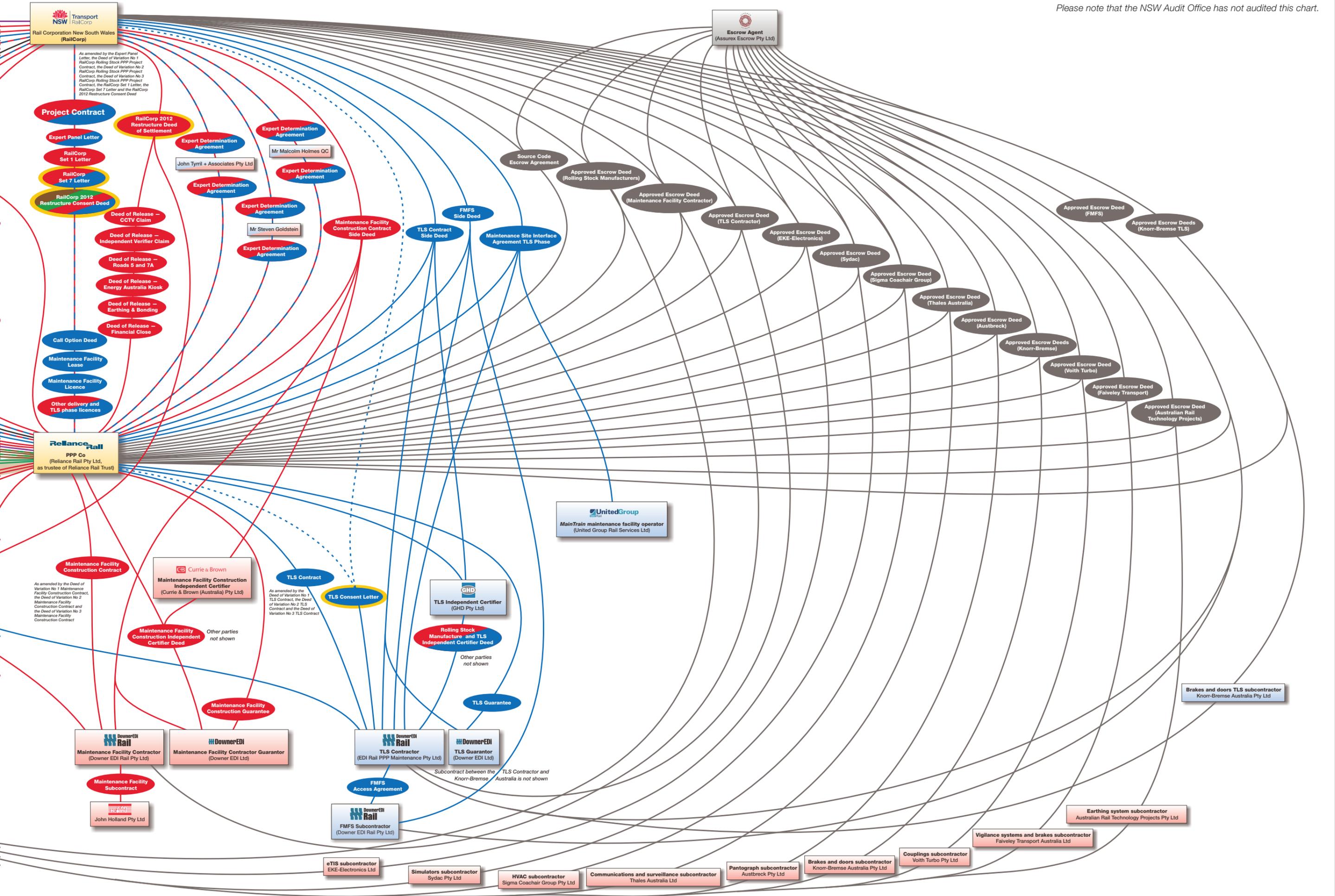
Please note that the NSW Audit Office has not audited this chart.

Figure 2.1. A highly simplified overview of the structure of the Rolling Stock PPP project's contracts as at 2 March 2012 from a public sector perspective (i.e. focussing on the contracts which have public sector parties or which otherwise directly affect public sector benefits and risks). A more detailed (but still simplified) overview is presented overleaf, in Figure 2.2.



Please note that the NSW Audit Office has not audited this chart.

Figure 2.2. A more detailed (but nonetheless still simplified) overview of the structure of the Rolling Stock PPP project's contracts as at 2 March 2012 from a public sector perspective (i.e. focussing on the contracts which have public sector parties or which otherwise directly affect public sector benefits and risks).



BNY Trust (Australia) Registry Ltd is wholly owned by BNY Mellon Australia Pty Ltd (ACN 113 947 309, ABN 83 113 947 309), which is wholly owned by BNY Holdings (Australia) Pty Ltd (ACN 114 463 937, ABN 48 114 463 937), which in turn is wholly owned by BNY International Financing Corporation and ultimately by The Bank of New York Mellon Corporation.

- **FGIC UK Ltd**, a London-based insurer (UK registration no 5030956), and **Syncora Guarantee Inc**, a New York-based insurer previously known as **XL Capital Assurance Inc** (“**the Financial Guarantors**”), which have provided a series of financial guarantees for the project’s debt financing arrangements.

FGIC UK Ltd is a wholly owned subsidiary of Financial Guaranty Insurance Company (New York, NAIC company code 12815), which is wholly owned by FGIC Corporation. Syncora Guarantee Inc is a wholly owned subsidiary of Syncora Holdings Ltd, based in Bermuda.

- **Permanent Custodians Ltd** (ACN 001 426 384, ABN 55 001 426 384) (“**the Intercreditor Agent**”), as the intercreditor agent for the project’s debt financiers under a NSW Rolling Stock PPP Senior Intercreditor Deed executed by PPP Co, PPP Co Finance Co, PPP Co Holding Co, the project’s debt financiers, the Financial Guarantors and the Intercreditor Agent on 1 December 2006.

Permanent Custodians Ltd is wholly owned by BNY Mellon Australia Pty Ltd, which as described above is ultimately wholly owned by The Bank of New York Mellon Corporation.

- **Downer EDI Rail Pty Ltd** (ACN 000 002 031, ABN 92 000 002 031), known as EDI Rail Pty Ltd prior to 22 June 2007, and **Hitachi Australia Pty Ltd** (ACN 075 381 332, ABN 34 075 381 332) (“**the Rolling Stock Manufacturers**”), which are jointly and severally obliged to PPP Co to design, manufacture and commission the new train carriages—which are called “cars” in the project’s contracts—and the train simulators, thereby assisting PPP Co to meet its obligations to RailCorp to design, manufacture and commission the trains and simulators.

Downer EDI Rail Pty Ltd is a wholly owned subsidiary of Downer EDI Ltd and Hitachi Australia Pty Ltd is wholly owned by Hitachi Ltd (ACN 002 539 693, ABN 35 002 539 693), a Japanese listed company.

- **Downer EDI Ltd** and **Hitachi Ltd** (“**the Rolling Stock Manufacturer Guarantors**”), which have provided parent company guarantees of the Rolling Stock Manufacturers’ performance of their obligations to PPP Co and have entered into an associated side contract with RailCorp.

- **GHD Pty Ltd** (ACN 008 488 373, ABN 39 008 488 373) (“**the Rolling Stock Manufacture Independent Certifier**”), which has been and is providing independent certification services to PPP Co, the Rolling Stock Manufacturers and other private sector parties during the design, manufacture and commissioning of the trains and simulators and has entered into an associated side contract with RailCorp.

- **Downer EDI Rail Pty Ltd** (as “**the Maintenance Facility Contractor**”), which was obliged to PPP Co to design and construct the maintenance facility in Auburn, thereby assisting PPP Co to meet its obligations to RailCorp to design and construct this facility.

- **Downer EDI Ltd** (as “**the Maintenance Facility Contractor Guarantor**”), which provided a parent company guarantee of the Maintenance Facility Contractor’s performance of its obligations to PPP Co and entered into an associated side contract with RailCorp.

- **Currie & Brown (Australia) Pty Ltd** (ACN 007 406 840, ABN 15 007 406 840) (“**the Maintenance Facility Construction Independent Certifier**”), which provided independent certification services to PPP Co, the Maintenance Facility Contractor and other private sector parties during the design and construction of the maintenance facility and entered into an associated side contract with RailCorp.

- **EDI Rail PPP Maintenance Pty Ltd** (ACN 122 730 116, ABN 97 122 730 116) (“**the TLS Contractor**”), which has been and is obliged to PPP Co to provide maintenance services and other “through life support” services for the trains, the simulators and the maintenance facility, thereby assisting PPP Co to meet its obligations to RailCorp to provide this “through life support”.

EDI Rail PPP Maintenance Pty Ltd is wholly owned by Downer EDI Rail Pty Ltd and thus ultimately by Downer EDI Ltd.

- **Downer EDI Ltd** (as “**the TLS Guarantor**”), which has provided a parent company guarantee of the TLS Contractor’s performance of its obligations to PPP Co and has entered into an associated side contract with RailCorp.

- **Downer EDI Rail Pty Ltd** (as “**the FMFS Subcontractor**”), which has been and is obliged to provide access by the TLS Contractor to the FMFS Subcontractor’s “Fleet Management Facility System” in order to monitor the performance of its TLS obligations and provide detailed management information on the maintenance of the trains, the maintenance facility and other plant and equipment.

- **GHD Pty Ltd** (as “**the TLS Independent Certifier**”), which has been providing and will provide independent certification services to PPP Co, the TLS Contractor and other private sector parties concerning the “through life support” and has entered into an associated side contract with RailCorp.

- The operator of the existing *MainTrain* train maintenance facility immediately adjacent to the PPP Rolling Stock project’s new Auburn train maintenance facility, **United Group Rail Services Ltd**, which has entered into an agreement with RailCorp, PPP Co and the TLS Contractor concerning rail safety interfaces around the new maintenance facility site.

- **Assurex Escrow Pty Ltd** (ACN 008 611 578, ABN 64 008 611 578) (“**the Escrow Agent**”), which has entered into a series of contracts with RailCorp, PPP Co, the Rolling Stock

Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and a series of subcontractors to the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor concerning access to the source code of computer programs (**EKE-Electronics Ltd** (ABN 42 805 512 597), **Sydac Pty Ltd** (ACN 008 178 676, ABN 64 008 178 676), **Sigma Coachair Group Pty Ltd** (ACN 000 900 970, ABN 31 000 900 970), **Thales Australia Ltd** (previously known as ADI Ltd, ACN 008 642 751, ABN 66 008 642 751), **Austbreck Pty Ltd** (ACN 005 560 743, ABN 79 005 560 743), **Knorr-Bremse Australia Pty Ltd** (ACN 092 562 671, ABN 31 092 562 671), **Voith Turbo Pty Ltd** (ACN 008 763 808, ABN 48 008 763 808), **Faiveley Transport Australia Ltd** (ACN 000 611 898, ABN 41 000 611 898), **Australian Rail Technology Projects Pty Ltd** (ACN 127 774 627, ABN 33 127 774 627) and the **FMFS Subcontractor**).

- **John Tyrill + Associates Pty Ltd** (ACN 100 659 256, ABN 86 100 659 256), **Mr Steven Goldstein** (ABN 51 040 199 176) and **Mr Malcolm Holmes QC** (ABN34 089 792 625), who have entered into agreements with RailCorp and PPP Co for the appointment of Mr John Tyrill, Mr Goldstein and Mr Holmes (“**the Independent Experts**”) as independent experts for the purposes of dispute resolution procedures specified in some of the project’s contracts.

2.2 Contractual structure

The contractual structure of the project as at 2 March 2012, inasmuch as the contracts have affected, affect or potentially affect public sector rights and obligations, is summarised in an extremely simplified form in **Figure 2.1** and in more detail (but still in a simplified form) in **Figure 2.2**.

2.2.1 An introduction to the Project Contract

The principal contract is **RailCorp Rolling Stock PPP Project Contract No C01645** (“**the Project Contract**”), dated 3 December 2006, between RailCorp and PPP Co.

This contract comprises a brief “Deed of Agreement”, detailed “Conditions of Contract” attached to this Deed of Agreement, 22 “Schedules” and 18 “Exhibits”, but is described in this report simply as “the Project Contract”.

In the period since it was executed the Project Contract has been amended by:

- A letter dated 30 March 2007, headed *Project Contract No C01645 RailCorp Rolling Stock PPP Contract—Subject: Expert Panel* and signed by representatives of RailCorp on 30 March 2007 and PPP Co on 4 April 2007 (“**the Expert Panel Letter**”), which amended the Project Contract’s procedure for selecting an Independent Expert for the resolution of a dispute from a panel of three experts.
- A **Deed of Variation No 1 RailCorp Rolling Stock PPP Project Contract No C01645**, executed by RailCorp, PPP Co, the Security Trustee and the Intercreditor Agent on 15 February 2008 (“**the Deed of Variation No 1 Project**

Contract”), which adjusted and clarified the Project Contract’s minimum requirements for PPP Co’s design submissions to RailCorp.

- A **Deed of Variation No 2 RailCorp Rolling Stock PPP Project Contract No C01645**, also executed by RailCorp, PPP Co, the Security Trustee and the Intercreditor Agent on 15 February 2008 (“**the Deed of Variation No 2 Project Contract**”), which amended the Project Contract’s communications procedures to encompass communications by email.
- A **Deed of Variation No 3 RailCorp Rolling Stock PPP Project Contract No C01645**, again executed by RailCorp, PPP Co, the Security Trustee and the Intercreditor Agent on 15 February 2008 (“**the Deed of Variation No 3 Project Contract**”), which amended the Project Contract’s requirements concerning the parties’ key personnel.
- A letter to PPP Co on 9 June 2011, countersigned by PPP Co on 30 June 2011 to indicate its agreement, temporarily setting aside, for the first eight-carriage *Waratah* train “set” only, a number of the Project Contract’s detailed pre-requisites for practical completion of this “set”, including the correction of a specified list of defects and the performance and passing of specified tests, and instead requiring these matters to be corrected by later, specified times. This letter is referred to in some of the project’s contracts as “the RailCorp Set 1 Waiver Letter”, but in this summary it is referred to simply as “**the RailCorp Set 1 Letter**”.
- A letter dated 3 February 2012, headed *Waiver of Preconditions to PC of Set 7*, signed by representatives of RailCorp and PPP Co and effective from 20 February 2012, expressly setting aside requirements in the Project Contract concerning the initial in-service reliability of the first six eight-carriage *Waratah* train “sets” and instead imposing new requirements for the reliability of the eighth to seventeenth “sets”, and also expressly setting aside several other pre-requisites for practical completion of the seventh “set”, including the correction of six specified remaining defects in the first “set”, and instead requiring the “set 1” defects to be corrected by a later, specified time (as detailed in section 3.2.11.1 of this report). This letter is referred to in some of the project’s contracts as “the RailCorp Set 7 Waiver Letter”, but in this summary it is referred to simply as “**the RailCorp Set 7 Letter**”.
- A **2012 Restructure Consent Deed** executed by RailCorp and PPP Co on 3 February 2012 (“**the RailCorp 2012 Restructure Consent Deed**”), which amended the Project Contract’s definitions of various categories of documents associated with the project.
- 274 sets of changes to the Project Contract’s technical specifications, comprising a “pre-agreed variation” that deleted the original requirements for separate, centrally located guards’ cabs on the trains (see section 3.2.1.1), 33 other variations initiated by RailCorp through *Requests for*

Technical Amendments, under Project Contract procedures described in section 3.7.14.1, and 240 *Request for Technical Amendment* variations initiated by PPP Co or its contractors (see section 3.7.14.2). The “pre-agreed variation” reduced the cost of the project to RailCorp by \$3.267 million, while eleven of the 273 *Request for Technical Amendments* variations further reduced the costs of the project to RailCorp, by \$2.11 million in total, and 28 increased the costs of the project to RailCorp, by \$46.29 million in total. The other technical variations have been assessed as having no impact on RailCorp’s costs.

The Project Contract, as amended, sets out the terms under which:

- PPP Co has had to and must finance, design, construct and commission the trains, simulators and maintenance facility
- During this “delivery phase” of the project, until the completion of the last of the trains, RailCorp has had to and must carry out a specified series of obligations to PPP Co
- PPP Co must:
 - ♦ Make at least 72 of the new trains (and more for special events) available for RailCorp’s CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational period for some or all of the trains, and
 - ♦ Maintain, clean, repair and refurbish the trains, simulators and maintenance facility and provide other specified “through life support” (“TLS”) services, to RailCorp-specified standards, throughout their operational periods
- Throughout the “TLS phase” of the project, from the practical completion of the maintenance facility on 18 June 2010 until the expiry or earlier termination of the project’s contracts, RailCorp has had to and must meet a further specified series of obligations to PPP Co, and
- PPP Co must decommission the trains, and/or hand over of some or all of the trains to RailCorp, at the end of their operational periods, and hand over the maintenance facilities to RailCorp at the end of its operational period.

Introductory summaries of the contractual structures associated with each of these elements of the Project Contract and related contract provisions are presented below.

2.2.2 Equity and debt financing arrangements

To assist it in satisfying its Project Contract and other contractual obligations to RailCorp, PPP Co has entered or may enter into contracts for:

(a) Equity investments and subordinated loans by the project’s equity investors, as described in section 2.1.2, including arrangements under:

- ♦ An **Equity Subscription Agreement (Operating) in respect of the Reliance Rail Trust** executed by PPP Co and PPP Co Holding Co on 27 November 2006.

- ♦ An **Equity Subscription Agreement (Holding) in respect of the Reliance Rail Holding Trust and a Unitholders Agreement** executed by PPP Co, PPP Co Holding Co, PPP Co Finance Co, Babcock & Brown Australia Pty Ltd, ABN AMRO Australia Pty Ltd, the PPP Co Holding Co shareholders/Reliance Rail Holding Trust unitholders listed in section 2.1.2 and the subordinated debt noteholders listed in section 2.1.2 on 27 November 2006. The Unitholders Agreement has been amended by one of the February 2012 “restructure agreements”, a **Deed of Amendment (Unitholders Agreement)**, executed by PPP Co, PPP Holding Co, PPP Finance Co and the shareholders/unitholders and noteholders listed in section 2.1.2 on 3 February 2012, so as to facilitate a possible future sale of the existing shareholders’/ unitholders’ shares and units and the existing noteholders’ notes to the State of NSW, as set out in another “restructure agreement”, an **Existing Investors Side Deed in respect of the Reliance Rail Holding Trust**, executed by the NSW Treasurer (for and on behalf of the State of NSW) and the shareholders/unitholders and noteholders listed in section 2.1.2 on 3 February 2012 (for details, see section 6 of this report).
- ♦ Another of the February 2012 “restructure agreements”, a **Capital Commitment Deed in respect of the Reliance Rail Holding Trust (“the Capital Commitment Deed”)**, executed by the NSW Treasurer (for and on behalf of the State of NSW), PPP Co, PPP Co Holding Co and PPP Co Finance Co on 3 February 2012, under which the State has promised to make a \$175 million capital contribution to the project if specified circumstances arise in the future, in the form of a subscription to new subordinated notes that would be issued by PPP Co Holding Co, as detailed in section 6 of this report.
- ♦ A **Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust)** executed by PPP Co on 27 November 2006. This deed poll will be amended in the future by another of the February 2012 “restructure agreements”, an **Amending Deed (Operating) in respect of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust)**, executed by PPP Co on 3 February 2012, if the State in fact makes a capital contribution as specified in the Capital Commitment Deed (see section 6).
- ♦ A **Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust)** executed by PPP Co Holding Co on 27 November 2006. This deed poll will also be amended in the future by another of the February 2012 “restructure agreements”, an **Amending Deed (Holding) in respect of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding**

Trust), executed by PPP Co Holdings Co on 3 February 2012, if the State in fact makes a capital contribution as specified in the Capital Commitment Deed (see section 6).

- A further “restructure agreement”, a **Restructure Co-ordination Deed** executed by the Treasurer (for and on behalf of the State of NSW), RailCorp, PPP Co, PPP Co Holding Co, PPP Co Finance Co, the shareholders/unitholders and noteholders listed in section 2.1, the Finance Guarantors, the Security Trustee, the Intercreditor Agent and the Rolling Stock Manufacturers on 3 February 2012, which sets out general arrangements for the “restructure agreements” as a whole.

In line with the *Working with Government Guidelines for Privately Financed Projects* (see section 1 of this report) and the express confidentiality provisions of the project’s contracts (see section 3.7.8), the details of the project’s equity investments, other than aspects of the recently executed (February 2012) “restructure agreements” concerning the State’s potential capital contribution and purchases of equity, are generally beyond the scope of this report.

In accordance with “RailCorp consent” provisions of the Project Contract and other contracts summarised later in this report, RailCorp has consented to the “restructure agreements”, and these and other transactions contemplated by them, in the **RailCorp 2012 Restructure Consent Deed** executed by RailCorp and PPP Co on 3 February 2012.

(b) **Loans** to PPP Co by PPP Co Finance Co, under a **NSW Rolling Stock PPP Facilitation Loan Agreement (“the Facilitation Loan Agreement”)** between PPP Co and PPP Co Finance Co dated 1 December 2006, supported by:

- **Bank loans to PPP Co Finance Co by four “senior bank lenders”**, Westpac Banking Corporation (ACN 007 457 141, ABN 33 007 457 141), Mizuho Corporate Bank, Ltd (ACN 099 031 106, ABN 83 099 031 106), National Australia Bank Ltd (ACN 004 044 937, ABN 12 004 044 937) and Sumitomo Mitsui Banking Corporation, Sydney Branch (ARBN 114 053 459), under a **NSW Rolling Stock PPP Senior Bank Loan Note Subscription Agreement (“the Senior Bank Loan Note Subscription Agreement”)**, executed by PPP Co, PPP Co Finance Co, these banks and Westpac Banking Corporation as their agent on 1 December 2006, and associated debt financing and hedging agreements
- **Bonds** that have been issued or may be issued under a series of senior and junior bond financing agreements, including a **NSW Rolling Stock PPP Senior Bond Trust Deed (“the Senior Bond Trust Deed”)** and a **NSW Rolling Stock PPP Junior Bond**

Trust Deed (“the Junior Bond Trust Deed”), executed by PPP Co, PPP Co Finance Co and Permanent Custodians Ltd, as the trustee of and manager for (respectively) the senior and junior bondholders, on 1 December 2006, and associated underwriting agreements

- A **NSW Rolling Stock PPP Global Deed of Security**, executed by PPP Co, PPP Co Finance Co, PPP Co Holding Co and the Security Trustee on 1 December 2006, and a series of other documents securing the loans
- Four **financing guarantees** by the Financial Guarantors, a **NSW Rolling Stock PPP Senior Guarantee and Reimbursement Deed** executed by FGIC UK Ltd, PPP Co and PPP Finance Co on 1 December 2006, a **NSW Rolling Stock PPP Senior Guarantee and Reimbursement Deed** executed by XL Capital Assurance Inc (now Syncora Guarantee Inc), PPP Co and PPP Finance Co on 1 December 2006, a **NSW Rolling Stock PPP FGIC Junior Financial Guarantee – Junior Bonds** deed poll executed by FGIC UK Ltd on 7 December 2006, and **Financial Guaranty No CA03416A**, also concerning the junior bonds, executed by XL Capital Assurance Inc on 7 December 2006 (collectively, “**the Finance Guarantees**”)
- The **NSW Rolling Stock PPP Senior Intercreditor Deed (“the Senior Intercreditor Deed”)**, governing the interrelationships of the various debt financing instruments and parties, executed on 1 December 2006 by PPP Co, PPP Co Finance Co, PPP Co Holding Co, the Intercreditor Agent, the Security Trustee, the Financial Guarantors and various agents, underwriters and hedge providers under PPP Co Finance Co’s debt financing arrangements
- A **NSW Rolling Stock PPP Common Terms Deed (“the Common Terms Deed”)**, executed on 1 December 2006 by the same parties, setting out provisions common to these various debt financing arrangements, and
- Arrangements under the Project Contract for RailCorp and PPP Co to share the risks associated with movements in interest rates, as described later in this report (see section 3.6.4).

Aspects of these debt financing arrangements are affected by some of the February 2012 “restructure agreements”, as described in section 6 of this report.

In particular,

- The **Capital Commitment Deed** sets out arrangements for PPP Co, PPP Co Finance Co and PPP Co Holding Co to procure “top up” funding from the creditors under the project’s debt financing arrangements, or from others, and for the State of

NSW to reimburse part or all of this “top up” amount in specified circumstances

- A **Reliance Rail Undertakings Deed**, executed by the NSW Treasurer (for and on behalf of the State of NSW), PPP Co, PPP Co Finance Co, PPP Co Holding Co and the Financial Guarantors on 3 February 2012, reinforces these “top up” funding arrangements in the case of any “top up” funding by the Financial Guarantors, commits PPP Co Finance Co to drawing down its bank debts under the Senior Loan Note Subscription Agreement, subject to specified conditions, specifies how PPP Co, PPP Co Finance Co and PPP Co Holding Co must apply any excess funds, and commits them to applying any capital contribution from the State, and other specified funds, to the repayment of the project’s senior debts, to an extent specified in the Capital Commitment Deed
- A **Financial Guarantors’ Undertakings Deed**, executed by the NSW Treasurer (for and on behalf of the State of NSW), PPP Co, PPP Co Finance Co, PPP Co Holding Co and the Financial Guarantors on 3 February 2012, sets out revised fee arrangements, including new fees now payable to the Financial Guarantors by the State of NSW, and waives the Financial Guarantors’ rights, including their rights to take enforcement action, following some types of financing defaults, until the bank debts are fully funded or, if it is earlier, the State of NSW has made its \$175 million capital contribution under the Capital Commitment Deed, and
- Under a **Deed of Assignment in relation to the Financial Guarantors’ Undertakings Deed** executed by PPP Co and PPP Co Finance Co on 2 March 2012, PPP Co Finance Co has irrevocably assigned to PPP Co its rights to and interests in specified fees and other amounts payable to it by the Financial Guarantors under the Financial Guarantors’ Undertakings Deed.

RailCorp consented to this assignment in a “**Deed of Assignment Consent Letter**” dated 2 March 2012.

In line with the *Working with Government Guidelines for Privately Financed Projects* (section 1 of this report) and the express confidentiality provisions of the project’s contracts (section 3.7.8), the details of the project’s debt financing arrangements, other than provisions for the sharing of interest rate risks and those aspects of the recently executed (February 2012) “restructure agreements” affecting the rights and obligations of the State of NSW and RailCorp, are generally beyond the scope of this report.

2.2.3 Design, manufacture and commissioning of the trains and the simulators

PPP Co has contracted with the Rolling Stock Manufacturers, jointly and severally, for them to design, manufacture and commission the trains and simulators under a **Rolling Stock**

PPP Rolling Stock Manufacture Contract (“the Rolling Stock Manufacture Contract”), executed by PPP Co and the Rolling Stock Manufacturers on 6 December 2006.

PPP Co may also appoint other rolling stock manufacturers.

In the period since it was executed the Rolling Stock Manufacture Contract has been amended:

- On 15 February 2008 by a **Deed of Variation No 1 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract (“the Deed of Variation No 1 Rolling Stock Manufacture Contract”)**, a **Deed of Variation No 2 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract (“the Deed of Variation No 2 Rolling Stock Manufacture Contract”)** and a **Deed of Variation No 4 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract (“the Deed of Variation No 4 Rolling Stock Manufacture Contract”)** executed by RailCorp, PPP Co, the Rolling Stock Manufacturers, the Security Trustee and the Intercreditor Agent. These amendments mirrored the three sets of amendments made to the Project Contract on the same date (see section 2.2.1).
- On 29 December 2008, by a **Rolling Stock Manufacture Contract RailCorp Rolling Stock PPP Deed of Variation No 5 (“the Rolling Stock Manufacture Contract Deed of Variation No 5”)**, again executed by RailCorp, PPP Co, the Rolling Stock Manufacturers, the Security Trustee and the Intercreditor Agent, and on 28 May 2010, by a **Rolling Stock Manufacture Contract RailCorp Rolling Stock PPP Deed of Variation No 3 (“the Rolling Stock Manufacture Contract Deed of Variation No 3”)**, executed by the same parties. These amendments concerned payment arrangements for the two Rolling Stock Manufacturers under the Rolling Stock Manufacture Contract.
- On 30 June 2011, by a letter headed *Final Conditional Determinations Regarding Defects for Set 1 (Train A03)*, signed by representatives of PPP Co and the Rolling Stock Manufacturers, temporarily setting aside, for the first train “set” of eight carriages only, a number of the Rolling Stock Manufacture Contract’s detailed pre-requisites for practical completion of this “set”, including the correction of a specified list of defects and the performance and passing of specified tests, and instead requiring these matters to be corrected by later, specified times (“**the RSM Set 1 Letter**”). These changes mirrored the Project Contract changes and new requirements imposed on PPP Co by RailCorp under the RailCorp Set 1 Letter.
- On 20 February 2012, by a letter dated 3 February 2012, headed *Waiver of IRR as a Precondition to PC of Set 7*, signed by representatives of PPP Co and the Rolling Stock Manufacturers, expressly setting aside requirements in the Rolling Stock Manufacture Contract concerning the initial in-service reliability of the first six eight-carriage *Waratah* train “sets” and instead imposing new requirements for the reliability of the eighth to seventeenth “sets” (“**the RSM Set 7 Letter**”). These changes, and others, mirrored the Project

Contract changes and new requirements imposed on PPP Co by RailCorp under the RailCorp Set 7 Letter.

- Also on 20 February 2012, by another of the “restructure agreements”, an **RSM Contractor Undertakings Deed**, executed by PPP Co and the Rolling Stock Manufacturers on 3 February 2012. This deed has amended the payment provisions of the Rolling Stock Manufacture Contract by permitting PPP Co to retain a specified sum in a specified “delay account” until the first refinancing of the project’s debts in 2018 and permitting PPP Co to retain this amount absolutely if it is required for the refinancing of the project in a form acceptable to the State of NSW, one of the preconditions for the State’s potential \$175 million capital contribution under the Capital Commitment Deed.

Downer EDI Rail Pty Ltd’s performance of its obligations to PPP Co as a Rolling Stock Manufacturer under the Rolling Stock Manufacture Contract has been and is guaranteed to PPP Co by Downer EDI Ltd, as one of the Rolling Stock Manufacturer Guarantors, in a **Rolling Stock PPP Parent Company Guarantee (“the Downer EDI Rolling Stock Manufacture Guarantee”)** between PPP Co and Downer EDI Ltd, dated 2 December 2006.

Similarly, Hitachi Australia Pty Ltd’s performance of its obligations to PPP Co as the other Rolling Stock Manufacturer under the Rolling Stock Manufacture Contract has been and is guaranteed to PPP Co by Hitachi Ltd, as the other Rolling Stock Manufacturer Guarantor, in a **Rolling Stock PPP Parent Company Guarantee (“the Hitachi Rolling Stock Manufacture Guarantee”)** between PPP Co and Hitachi Ltd.

In carrying out their obligations to PPP Co the Rolling Stock Manufacturers have executed, and may execute, a series of supply contracts and other subcontracts, many of them with Australian and New Zealand firms. One of the most important of PPP Co’s subcontracts is a **RailCorp Rolling Stock PPP Double Deck Trains Deed of Agreement and General Conditions of Contract (“the Rolling Stock Subcontract”)** between Downer EDI Rail Pty Ltd and Changchun Railway Vehicles Co Ltd, a leading rolling stock manufacturer in China, dated 3 December 2006.

In addition,

- RailCorp has continued and updated its lease of its Cardiff maintenance depot to one of the Rolling Stock Manufacturers, Downer EDI Rail Pty Ltd (**“the Cardiff Maintenance Depot Lease”**), thereby permitting these premises to be used for part of the manufacture of the new trains (a new form of this lease is currently being negotiated), and
- RailCorp and Downer EDI Rail Pty Ltd, the Rolling Stock Manufacturer occupying the Cardiff maintenance depot and commissioning the trains, have entered into three “interface agreements” related to construction and commissioning rail safety issues:
 - ◊ An **Interface Agreement Waratah Trains (PPTV Commissioning Activities)**, dated 22 April 2010,

concerning the commissioning of a prototype train, variously known as the “pre-production tuning vehicle” or “pre-production test vehicle” (“PPTV”)

- ◊ A more generally applicable **Interface Agreement Waratah Train Commissioning (Including Testing) Activities**, dated 12 August 2010, and
- ◊ An **Interface Agreement Managing Risks to Safety Due to Rail Operations at Downer EDI’s Cardiff Depot Facility**, dated 22 November 2010, concerning the interfaces between RailCorp and Downer EDI Rail activities at this site.

The first *Waratah* train “set” of eight carriages was originally targeted for “practical completion”, as defined in the Project Contract, by 20 April 2010, with the seventh “set” being targeted for practical completion by 15 September 2010 and the 78th by 5 September 2013.

In practice,

- Practical completion of the first train “set” was achieved on 30 June 2011, and then only after RailCorp had issued the RailCorp Set 1 Letter to PPP Co on 9 June 2011, countersigned by PPP Co on 30 June 2011 to indicate its agreement, temporarily setting aside, for that “set” only, a number of the Project Contract’s detailed pre-requisites for practical completion of this “set”, including the correction of a specified list of defects and the performance and passing of specified tests, and instead requiring these matters to be corrected by later, specified times.

As indicated above, these changes have been mirrored by changes in the Rolling Stock Manufacturers’ obligations under the Rolling Stock Manufacture Contract, through the RSM Set 1 Letter.

- Practical completion of the second to sixth “sets” was achieved progressively between 23 August and 7 December 2011.
- Practical completion of the seventh “set” was achieved on 20 February 2012. As already indicated, this was preceded by RailCorp’s issuing of the RailCorp Set 7 Letter to PPP Co on 3 February 2012—countersigned by PPP Co on 3 February 2012 to indicate its agreement, and effective from 20 February 2012 (see section 2.3.3)—expressly setting aside pre-requisite requirements in the Project Contract concerning the initial in-service reliability of the first six “sets” and instead imposing new requirements for the reliability of the eighth to seventeenth “sets” (as detailed in section 3.2.11.1 of this report), and also expressly setting aside a number of other pre-requisites for practical completion of the seventh “set”, including the RailCorp Set 1 Letter’s requirements for the correction of six specified defects in the first “set”, and instead permitting and requiring these six “set 1” defects to be corrected by a later, specified time (again as detailed in section 3.2.11.1 of this report).

As indicated above, the RailCorp Set 7 Letter’s changes were mirrored by changes in the Rolling Stock

Manufacturers' obligations under the Rolling Stock Manufacture Contract, through the RSM Set 7 Letter.

The simulators were originally targeted for "practical completion", again as defined in the Project Contract, six months before PPP Co expected to achieve practical completion of the first train "set". In practice, practical completion of the simulators was achieved on 31 August 2010.

2.2.4 Design and construction of the Maintenance Facility

PPP Co contracted with the Maintenance Facility Contractor for it to design and construct the maintenance facility under a **Rolling Stock PPP Rolling Stock Maintenance Facility Design and Construct Contract** ("the **Maintenance Facility Construction Contract**"), executed by PPP Co and the Maintenance Facility Contractor on 6 December 2006.

PPP Co could also have appointed other maintenance facility design and construction contractors.

The Maintenance Facility Construction Contract was amended on 15 February 2008 by a **Deed of Variation No 1 RailCorp Rolling Stock PPP Rolling Stock Maintenance Facility Design and Construct Contract** ("the **Deed of Variation No 1 Maintenance Facility Construction Contract**"), a **Deed of Variation No 2 RailCorp Rolling Stock PPP Maintenance Facility Contract** ("the **Deed of Variation No 2 Maintenance Facility Construction Contract**") and a **Deed of Variation No 3 RailCorp Rolling Stock PPP Maintenance Facility Contract** ("the **Deed of Variation No 3 Maintenance Facility Construction Contract**") executed by RailCorp, PPP Co, the Maintenance Facility Contractor, the Security Trustee and the Intercreditor Agent. These amendments mirrored the three sets of amendments made to the Project Contract on the same date (see section 2.2.1).

The Maintenance Facility Contractor's performance of its obligations to PPP Co under the Maintenance Facility Construction Contract was guaranteed to PPP Co by the Maintenance Facility Contractor Guarantor in a **Rolling Stock PPP Parent Company Guarantee** ("the **Maintenance Facility Construction Guarantee**") between PPP Co and the Maintenance Facility Contractor Guarantor, dated 2 December 2006.

In turn, the Maintenance Facility Contractor further subcontracted the design and construction of the maintenance facility to John Holland Pty Ltd (ACN 004 282 268, ABN 11 004 282 268) under a **Rolling Stock Maintenance Facility Design and Construct Subcontract** ("the **Maintenance Facility Subcontract**"), dated 3 December 2006.

The original target date for practical completion of the maintenance facility was 20 January 2010. In practice, practical completion was achieved on 18 June 2010.

2.2.5 RailCorp's 'delivery phase' obligations

During the "delivery phase" of the project, until the practical completion of the last of the trains, RailCorp has had to and must:

- Design and construct specified "**enabling works**" associated with the Auburn maintenance facility and the housing of the train simulators
- Grant PPP Co **licences** to use the maintenance facility's construction site for preliminary site investigations and then for the design and construction of the facility
- Give PPP Co specified **rights of access to the rail network** for the testing and commissioning of the new trains, including a dedicated section of track adjacent to and northwest of the new maintenance facility
- **Provide train crews** for this testing and commissioning of the trains
- Provide transitional "**stabling**" (train parking) locations, away from the maintenance facility, for trains that are being commissioned
- Make a series of **payments to PPP Co at specified "milestones"** in its planning for and delivery of the trains, simulators and maintenance facility, and
- Comply with the **rail safety interface requirements** of the Interface Agreement Waratah Trains (PPTV Commissioning Activities), the Interface Agreement Waratah Train Commissioning (Including Testing) Activities and the Interface Agreement Managing Risks to Safety Due to Rail Operations at Downer EDI's Cardiff Depot Facility.

2.2.6 PPP Co's train availability and 'through life support' service obligations

As already indicated, PPP Co must:

- Make at least 72 of the new trains (and more for special events) available for RailCorp's CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational period for some or all of the trains, and
- Maintain, clean, repair and refurbish the trains, simulators and maintenance facility and provide other specified "through life support" services, to RailCorp-specified standards, throughout their operational periods.

To assist it to satisfy these Project Contract obligations to RailCorp, PPP Co has contracted with the TLS Contractor for the TLS Contractor to provide "through life support" services to PPP Co under a **Rolling Stock PPP Through Life Support (TLS) Contract** ("the **TLS Contract**"), dated 6 December 2006. PPP Co may also appoint other TLS contractors.

The TLS Contract has been amended, on 15 February 2008, by a **Deed of Variation No 1 RailCorp Rolling Stock PPP Through Life Support (TLS) Contract** ("the **Deed of Variation No 1 TLS Contract**"), a **Deed of Variation No 2 RailCorp Rolling Stock PPP Through Life Support (TLS) Contract**

("the Deed of Variation No 2 TLS Contract") and a **Deed of Variation No 3 RailCorp Rolling Stock PPP Through Life Support (TLS) Contract** ("the Deed of Variation No 3 TLS Contract") executed by RailCorp, PPP Co, the TLS Contractor, the Security Trustee and the Intercreditor Agent. These amendments mirrored the three sets of amendments made to the Project Contract on the same date (see section 2.2.1).

The TLS Contractor's performance of its obligations to PPP Co under the TLS Contract has been guaranteed to PPP Co by the TLS Guarantor in a **Rolling Stock PPP Parent Company Guarantee** ("the TLS Guarantee") between PPP Co and the TLS Guarantor, dated 2 December 2006.

In turn, to assist it to satisfy its TLS Contract obligations to PPP Co the TLS Contractor has entered into a further subcontract with the FMFS Subcontractor, a **Through Life Support (TLS) – Fleet Management System Access Agreement** executed in August 2011 ("the FMFS Access Agreement"), under which the TLS Contractor may access the FMFS Subcontractor's "Fleet Management Facility System" in order to monitor the TLS Contractor's performance of its TLS obligations and be able to provide detailed management information on the maintenance of the trains, the maintenance facility and other plant and equipment. RailCorp consented to this FMFS Access Agreement on 17 August 2011.

Rail safety interface procedures and other requirements concerning the PPP Rolling Stock project's Auburn maintenance facility, the adjacent *MainTrain* train maintenance facility and adjacent RailCorp operations during the "TLS phase" of the project, from the practical completion of the Auburn maintenance facility on 18 June 2010 until the expiry or earlier termination of the PPP project's contracts, are governed by a **Maintenance Site Interface Agreement TLS Phase** executed by RailCorp, PPP Co, the TLS Contractor and the operator of the *MainTrain* facility, United Group Rail Services Ltd, on 11 May 2009.

Following the completion of the maintenance facility on 18 June 2010, RailCorp became obliged, after a request on 1 July 2010 by PPP Co in accordance with a **Call Option Deed** between RailCorp and PPP Co dated 3 December 2006, to grant a **Maintenance Facility Lease** and a **Maintenance Facility Licence** for this facility and its access routes, on terms specified in the Call Option Deed, until the date 30 years after the practical completion of the 69th train "set" or until any earlier termination of the project's contracts. Because surveys as specified in the Call Option Deed had not yet been carried out and, as a result, registrable plans of subdivision had not been registered, this lease and licence were not able to be executed or registered at the time, and although the specified surveys have now been completed the lease and licence have still not been executed or registered. In the meantime, however, under the Call Option Deed RailCorp is deemed to have granted PPP Co licences of the relevant areas (see section 3.5.3).

The TLS Contractor has formally advised RailCorp and PPP Co, in a letter dated 3 February 2012 ("the TLS Consent Letter"), that:

- It is aware of the RailCorp Set 7 Letter and the RSM Set 7 Letter and the changes and new requirements on PPP Co and the Rolling Stock Manufacturers set out in those letters (see sections 2.2.1 and 2.2.3), and
- Its obligations to PPP Co under the TLS Contract are not affected or qualified by the Set 7 Letters' arrangements.

2.2.7 RailCorp's 'TLS phase' obligations

Throughout the "TLS phase" of the project, from the practical completion of the maintenance facility on 18 June 2010 until the expiry or earlier termination of the project's contracts, RailCorp has had to and must:

- Grant PPP Co and its associates a **licence to use RailCorp's rail network land and train "stabling" depots** to maintain and repair the trains and recover any trains that break down
- Provide **train crews at the maintenance facility** for the trial running of trains and the preparation of trains stabled on its sidings
- **Make performance-based monthly payments to PPP Co**, as detailed later in this report (see section 3.6), and
- Comply with the **rail safety interface requirements** of the Maintenance Site Interface Agreement TLS Phase.

2.2.8 Ending of the project

As previously indicated, PPP Co must decommission the trains, and/or hand over of some or all of the trains to RailCorp, at the end of their operational periods, and hand over the maintenance facilities to RailCorp at the end of its operational period.

2.2.9 Arrangements for RailCorp to access computer source codes

In order to ensure RailCorp has been, is and will be able to exercise its rights under the Project Contract to obtain the source code of various computer programs used and developed by PPP Co and its contractors, RailCorp has entered into:

- An **Original Source Code Escrow Agreement** ("the **Source Code Escrow Agreement**") with PPP Co and the Escrow Agent, dated 3 December 2006
- An **Approved Escrow Deed (Core Contractors)** ("the **Approved Escrow Deed (Rolling Stock Manufacturers)**") with PPP Co, the Escrow Agent and the Rolling Stock Manufacturers, dated 3 December 2006
- An **Approved Escrow Deed (Core Contractors)** ("the **Approved Escrow Deed (Maintenance Facility Contractor)**") with PPP Co, the Escrow Agent and the Maintenance Facility Contractor, dated 3 December 2006

- An **Approved Escrow Deed (Core Contractors)** (“**the Approved Escrow Deed (TLS Contractor)**”) with PPP Co, the Escrow Agent and the TLS Contractor, again dated 3 December 2006
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (EKE-Electronics)**”) with PPP Co, the Escrow Agent, one of the Rolling Stock Manufacturers (Downer EDI Rail Pty Ltd) and EKE-Electronics Ltd, an electronic train information system (“eTIS”) subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Sydac)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Sydac Pty Ltd, a simulators subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Sigma Coachair Group)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Sigma Coachair Group Pty Ltd, an HVAC subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Thales Australia)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Thales Australia Ltd (previously known as ADI Ltd), a communications and surveillance subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Austbreck)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Austbreck Pty Ltd, a pantograph subcontractor of Downer EDI Rail, dated 12 August 2011
- Two **Approved Escrow Deeds (Subcontractors)** (“**the Approved Escrow Deeds (Knorr-Bremse)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Knorr-Bremse Australia Pty Ltd, a brakes and doors subcontractor of Downer EDI Rail, both dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Voith Turbo)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Voith Turbo Pty Ltd, a couplings subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Faiveley Transport)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Faiveley Transport Australia Ltd, a vigilance systems and brakes subcontractor of Downer EDI Rail, dated 12 August 2011
- An **Approved Escrow Deed (Subcontractors)** (“**the Approved Escrow Deed (Australian Rail Technology Projects)**”) with PPP Co, the Escrow Agent, Downer EDI Rail and Australian Rail Technology Projects Pty Ltd, an earthing system subcontractor of Downer EDI Rail, as yet undated
- Two **Approved Escrow Deeds (Subcontractors)** (“**the Approved Escrow Deeds (Knorr-Bremse TLS)**”) with PPP Co, the Escrow Agent, the TLS Contractor and

Knorr-Bremse Australia Pty Ltd, a brakes and doors TLS subcontractor of the TLS Contractor, dated 12 August 2011, and

- An **Approved Escrow Deed (DEDIR)** (“**the Approved Escrow Deed (FMFS)**”) with PPP Co, the Escrow Agent, the TLS Contractor and the FMFS Subcontractor, dated 1 March 2012.

2.2.10 Appointments of independent experts for dispute resolution

RailCorp and PPP Co have appointed three Independent Experts who may be called upon to resolve any disputes between RailCorp and PPP Co arising out of the Project Contract and the Call Option Deed (see section 3.7.17). These experts are:

- Mr John Tyrnil, appointed under an **Expert Determination Agreement** between RailCorp, PPP Co and John Tyrnil + Associates Pty Ltd dated 6 June 2007
- Mr Steven Goldstein, appointed under a second **Expert Determination Agreement**, between RailCorp, PPP Co and Mr Goldstein, also dated 6 June 2007, and
- Mr Malcolm Holmes QC, appointed under a third **Expert Determination Agreement**, between RailCorp, PPP Co and Mr Holmes, dated 14 September 2007.

2.2.11 Settlements and releases of claims

As part of the “restructure” of the project’s finances in February 2012, RailCorp, PPP Co and the Rolling Stock Manufacturers agreed to settle a series of claims that had arisen from disputes between them since 2007 under the Project Contract and the Rolling Stock Manufacture Contract. The terms of this agreement have been formalised in a **Deed of Settlement** between these four parties dated 3 February 2012 (“**the RailCorp 2012 Restructure Deed of Settlement**”), which specifies that its terms are to remain confidential except in specified circumstances.

PPP Co has also released RailCorp from a series of six other claims by PPP Co concerning disputes dating back to 2007, under:

- A **Deed of Release—CCTV Claim** and a **Deed of Release—Independent Verifier Claim** executed by RailCorp and PPP Co on 17 May 2010, and
- A **Deed of Release—Roads 5 and 7A**, a **Deed of Release—Energy Australia Kiosk**, a **Deed of Release—Earthing & Bonding** and a **Deed of Release—Financial Close** executed by RailCorp and PPP Co on 19 January 2012.

Again, these releases specify that their terms are to remain confidential except in specified circumstances.

2.2.12 'Step in' and other rights and obligations following defaults etc

Should PPP Co default on its obligations to the Rolling Stock Manufacturers under the Rolling Stock Manufacture Contract, or should RailCorp terminate the Project Contract during the project's "delivery phase" for any reason (see section 3.8 of this report), RailCorp will be entitled, under a **Rolling Stock Manufacture Contract Side Deed** between RailCorp, PPP Co, the Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors and the Rolling Stock Manufacture Independent Certifier, dated 5 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees and the **Independent Certifier Deed ("the Rolling Stock Manufacture and TLS Independent Certifier Deed")** under which the Rolling Stock Manufacture Independent Certifier was appointed.

Similarly,

- Had PPP Co defaulted on its obligations to the Maintenance Facility Contractor under the Maintenance Facility Construction Contract, or should RailCorp terminate the Project Contract during the project's "delivery phase" for any reason, RailCorp was and will be entitled, under a **Maintenance Facility Construction Contract Side Deed** between RailCorp, PPP Co, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor and the Maintenance Facility Construction Independent Certifier, dated 3 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee and the **Independent Certifier Deed ("the Maintenance Facility Construction Independent Certifier Deed")** under which the Maintenance Facility Construction Independent Certifier was appointed.
- Should Downer EDI Rail Pty Ltd, one of the Rolling Stock Manufacturers, become insolvent, default on its obligations to RailCorp under the Cardiff Maintenance Depot Lease or default on its obligations to PPP Co under the Rolling Stock Manufacture Contract, PPP Co will be entitled, under a **Right of Entry Deed for Cardiff Maintenance Depot** between RailCorp, PPP Co and Downer EDI Rail Pty Ltd, dated 3 December 2006, to "step in" and effectively assume most of Downer EDI Rail's rights and obligations under the Cardiff Maintenance Depot Lease, and RailCorp will not be entitled to terminate this lease during any such "step in" period.
- Should PPP Co default on its obligations to the TLS Contractor under the TLS Contract, or should RailCorp terminate the Project Contract during the project's "TLS phase" for any reason, RailCorp will be entitled, under a **TLS Contract Side Deed** between RailCorp, PPP Co, the TLS Contractor, the TLS Guarantor and the TLS Independent Certifier, dated 3 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the TLS Contract, the TLS Guarantee and the Rolling Stock

Manufacture and TLS Independent Certifier Deed under which the TLS Independent Certifier was appointed.

- Should the TLS Contractor seriously default on its obligations to the FMFS Subcontractor under the FMFS Access Agreement, or should the FMFS Subcontractor otherwise become entitled to terminate or rescind the FMFS Access Agreement or suspend its performance under that subcontract, or should RailCorp terminate the Project Contract during the project's "TLS phase" for any reason, RailCorp will be entitled, under a **FMFS Access Agreement Side Deed** between RailCorp, PPP Co, the TLS Contractor and the FMFS Subcontractor dated 19 January 2012 ("**the FMFS Side Deed**"), to "step in" and effectively assume the TLS Contractor's rights and obligations under the FMFS Access Agreement.

Some of RailCorp's rights and obligations under the Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed have been and are subject to restrictions or additional process requirements under the **Debt Finance Side Deed** between RailCorp, PPP Co, PPP Co Finance Co and the debt financiers' Security Trustee, dated 3 December 2006. As an example, this agreement requires RailCorp to notify the Security Trustee before it terminates the Project Contract for a default by PPP Co, giving the Security Trustee an opportunity to cure the default.

2.2.13 Performance securities and guarantees and the interactions of the parties' securities and 'step in' rights

Under the **RailCorp Deed of Charge** between RailCorp, PPP Co and PPP Co Finance Co, dated 3 December 2006, all of the obligations of PPP Co and PPP Co Finance Co to RailCorp under the project's contracts are secured by charges over the assets, undertakings and rights of PPP Co, the Reliance Rail Trust and PPP Co Finance Co.

Priorities between RailCorp's charges and securities held by the project's private sector debt financiers are governed by the **Debt Finance Side Deed**, which also:

- Records RailCorp's consent to the private sector securities and the Security Trustee's consent to RailCorp's charges
- Records the consent of RailCorp and the Security Trustee to each other's "step in" rights under the project's contracts
- Regulates the exercise of these "step in" rights, and
- Records PPP Co's and PPP Co Finance Co's consents to these arrangements.

The Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor, the TLS Contractor and the TLS Contractor Guarantor have also expressly consented to RailCorp's charges, in the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility

Construction Contract Side Deed and the TLS Contract Side Deed.

Under a **Cross Guarantee and Indemnity** between RailCorp, PPP Co and PPP Co Finance Co, dated 3 December 2006,

- PPP Co has given RailCorp an irrevocable and unconditional guarantee of PPP Co Finance Co's obligations to RailCorp under or in any way associated with any of the project contracts to which RailCorp is a party
- PPP Co Finance Co has promised to pay RailCorp, on demand, any overdue amounts of money that are to be paid to RailCorp by PPP Co under any of the project contracts to which RailCorp is a party, and
- PPP Co and PPP Co Finance Co have irrevocably, unconditionally, jointly and severally indemnified RailCorp against any loss, expense, damage or liability arising out of any failure, by either of them, to perform their obligations under or in any way associated with any of the project contracts to which RailCorp is a party, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1).

Similarly, a **Deed of Guarantee ("the PAFA Act Guarantee")** between the NSW Treasurer (on behalf of the State of NSW), RailCorp, PPP Co and the Security Trustee, dated 3 December 2006 provides a guarantee by the State of NSW, in accordance with section 22B of the Public Authorities (Financial Arrangements) Act (NSW), of RailCorp's performance of its obligations under the Project Contract, any "maintenance site safety interface agreement" required under rail safety arrangements described in section 3.7.1 (including the Maintenance Site Interface Agreement TLS Phase), the three Expert Determination Agreements, the Call Option Deed, the Maintenance Facility Lease, the Maintenance Facility Licence, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Approved Escrow Deed (EKE-Electronics), the Approved Escrow Deed (Sydac), the Approved Escrow Deed (Sigma Coachair Group), the Approved Escrow Deed (Thales Australia), the Approved Escrow Deed (Austbreck), the two Approved Escrow Deeds (Knorr-Bremse), the Approved Escrow Deed (Voith Turbo), the Approved Escrow Deed (Faiveley Transport), the Approved Escrow Deed (Australian Rail Technology Projects), the two Approved Escrow Deeds (Knorr-Bremse TLS), the Approved Escrow Deed (FMFS), the Rolling Stock Manufacture Contract Side Deed, the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity and any other documents approved, in writing, by the NSW Treasurer in the future.

2.2.14 'The RailCorp project agreements'

The Project Contract, the RailCorp Set 1 Letter, the RailCorp Set 7 Letter, any "maintenance site safety interface agreement" required under rail safety arrangements described in section 3.7.1 (including the Maintenance Site Interface Agreement TLS Phase), the three Expert Determination Agreements, the Call Option Deed, the Maintenance Facility Lease, the Maintenance Facility Licence, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Rolling Stock Manufacture Contract Side Deed, the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the FMFS Side Deed, the Debt Finance Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity, the Restructure Co-ordination Deed, the RailCorp 2012 Restructure Consent Deed, the RailCorp 2012 Restructure Deed of Settlement, the Deed of Release—CCTV Claim, the Deed of Release—Independent Verifier Claim, the Deed of Release—Roads 5 and 7A, the Deed of Release—Energy Australia Kiosk, the Deed of Release—Earthing & Bonding, the Deed of Release—Financial Close and any other documents approved, in writing, by the NSW Treasurer in the future are collectively referred to in the project contracts as "**the RailCorp project agreements**", and this terminology is adopted in this report.

2.3 Conditions precedent

2.3.1 The original (2006) contracts

Although the Project Contract and the other original (2006) RailCorp project agreements were executed on 3 and 5 December 2006, and most of these 2006 RailCorp project agreements took effect immediately, under the terms of the Project Contract, the Debt Finance Side Deed and the Call Option Deed most of the provisions of these three contracts were not to become legally binding until:

- The 2006 RailCorp project agreements (other than the Maintenance Site Safety Interface Agreement, the Expert Determination Agreements, the Maintenance Facility Lease and the Maintenance Facility Licence) and other specified 2006 project agreements to which RailCorp is not a party—the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees, the Rolling Stock Subcontract, the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee, the Maintenance Facility Subcontract, the TLS Contract, the TLS Guarantee, the project's private sector equity documents and the project's private sector debt financing documents (other than a mortgage on the Maintenance Facility Lease)—had all been executed and their own conditions precedent, other than any requiring the Project Contract to have taken effect, had been satisfied or waived. This condition precedent was satisfied on 6 December 2006.

- The NSW Minister for Transport had recommended, and the NSW Treasurer had granted, an approval for RailCorp’s entering into the project’s joint financing arrangements under section 20(1) of the Public Authorities (Financial Arrangements) Act (NSW). This condition precedent was satisfied on 20 November 2006, when the NSW Treasurer executed a section 20(1) approval in response to a recommendation by the Minister for Transport on 17 November 2006.
- The NSW Treasurer had approved a guarantee of RailCorp’s performance under section 22B of the Public Authorities (Financial Arrangements) Act. This condition precedent was satisfied on 24 November 2006, when the Treasurer agreed to the form of the PAFA Act Guarantee that was ultimately executed on 3 December 2006.
- RailCorp had received two unconditional and irrevocable bank bonds, for a total of \$50 million, as securities for PPP Co’s performance of its “delivery phase” obligations to RailCorp. This condition precedent was satisfied on 6 December 2006.
- PPP Co had effected “delivery phase” insurance policies as specified in the Project Contract and RailCorp had received certified copies of these policies or coverage placement slips. This condition precedent was satisfied on 6 December 2006, with RailCorp waiving some of the Project Contract’s detailed requirements for some of these initial insurance policies.
- PPP Co had given RailCorp a tax opinion, satisfactory to RailCorp, confirming that changes made to the project’s contracts since the Australian Taxation Office issued a ruling on the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project had not adversely affected this ruling. This condition precedent was satisfied on 5 December 2006.
- RailCorp had received the private sector participants’ audited “base case” financial model for the project, in a form satisfactory to RailCorp, and an associated letter of confirmation and audit report. This condition precedent was satisfied on 7 December 2006.
- RailCorp had received specified details (constitutions, trusts, powers of attorney and copies of relevant board minutes) concerning all of the parties to the RailCorp project agreements, other than RailCorp itself. This condition precedent was satisfied on 5 December 2006, with the exception of five waivers on particular matters granted by RailCorp and confirmed on 6 and 7 December 2006.
- PPP Co had given RailCorp a legal opinion, satisfactory to RailCorp, concerning the validity and enforceability of Hitachi Ltd’s execution of the Rolling Stock Manufacture Contract Side Deed. This condition precedent was satisfied on 5 December 2006.

RailCorp and PPP Co certified on 7 December 2006 that all of these conditions precedent had been satisfied or waived in accordance with the Project Contract and that “financial close” had occurred on that date.*

Accordingly, of the original (2006) RailCorp project agreements,

- The Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity and the PAFA Act Guarantee have been binding since they were executed on 3 December 2006
- The Rolling Stock Manufacture Contract Side Deed has been binding since it was executed on 5 December 2006, and
- The Project Contract, the Debt Finance Side Deed and the Call Option Deed have been binding since 7 December 2006.

All of the other project contracts executed on or before 7 December 2006, including the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees, the Rolling Stock Subcontract, the Rolling Stock Manufacture and TLS Independent Certifier Deed, the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee, the Maintenance Facility Subcontract, the Maintenance Facility Construction Independent Certifier Deed, the TLS Contract, the TLS Guarantee and the private sector parties’ equity and debt financing agreements, have been binding since 7 December 2006 at the latest.

2.3.2 The March 2007 to January 2012 amendments and additional contracts

As already indicated, all of the March 2007 to January 2012 contracts described in section 1.2.4 took effect as soon as they were executed.

* The accepted satisfaction or waiver of all of the conditions precedent on or before 7 December 2006 rendered redundant provisions in the Project Contract which stipulated that if any of the conditions precedent had not been satisfied or waived by 11:59 pm on 8 December 2006, or any other deadline date agreed by RailCorp and PPP Co, either RailCorp or PPP Co could have notified the other party that it would terminate the Project Contract if the condition precedent(s) were not satisfied or waived by the end of a notice period of at least five business days.

Had the relevant condition precedent(s) not been satisfied or waived by the end of any such notice period, the Project Contract and all the other RailCorp project agreements would have automatically terminated, RailCorp would have had to return the “delivery phase” bank bonds, and neither party would have been able to make any claim against the other party under any of the RailCorp project agreements, or seek any reimbursement of its costs associated with the project, except in the case of a breach of the limited number of Project Contract provisions that had taken effect on 3 December 2006 without being subject to the conditions precedent.

In addition, the accepted achievement of “financial close” on 7 December 2006 marked the end of an “early payment option” under which RailCorp could have immediately acquired all of the trains and simulators. RailCorp did not exercise this option.

2.3.3 The February 2012 'restructure agreements'

Of the February 2012 "restructure agreements" to which the Treasurer (for and on behalf of the State of NSW) and/or RailCorp are parties,

- The Restructure Co-ordination Deed and the RailCorp 2012 Restructure Consent Deed have been binding since they were executed on 3 February 2012.
- The Capital Commitment Deed, the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, the Reliance Rail Undertakings Deed, the Financial Guarantors' Undertakings Deed and the RailCorp 2012 Restructure Deed of Settlement were to become effective only when:
 - ♦ PPP Co had provided all the other parties to the "restructure agreements" with an updated financial model reasonably acceptable to the State, together with an audit letter issued by Mercer (Australia) Pty Ltd concerning this financial model and its assumptions
 - ♦ PPP Co had given the State a copy of its tax advice on the restructure, and the conclusions of this advice were reasonably acceptable to the State
 - ♦ All of the other "restructure agreements" had been entered into by all of their parties and were not subject to any conditions precedent other than those listed here
 - ♦ Legal opinions concerning the due execution of the "restructure agreements", satisfactory to the State and the Intercreditor Agent, acting reasonably, had been provided to the parties to these agreements, as specified in the Restructure Co-ordination Deed
 - ♦ The parties to the "restructure agreements" had all provided verification certificates, in a form specified in the Restructure Co-ordination Deed, to the extent required for these legal opinions to be given, and
 - ♦ Evidence had been provided that one of the Financial Guarantors, FGIC UK Ltd, had irrevocably appointed a process service agent in NSW for each of the "restructure agreements" to which it is a party,

or the State had waived all of these conditions precedent that had not been satisfied.

On 20 February 2012 the State formally notified all the other parties to the "restructure agreements", in a facsimile letter transmitted late on 17 February 2012 but deemed under the Restructure Co-ordination Deed not to have been received by the other parties until 9 am on 20 February 2012, that all of these conditions precedent had been satisfied.

- The RailCorp Set 7 Letter was to become effective only when the first four of the above conditions precedent (other than the requirement for legal opinions concerning the execution of "restructure agreements" by the two Financial Guarantors) had all been satisfied or waived by the State.

On 20 February 2012 the State notified all the other parties to the "restructure agreements", in the same facsimile letter transmitted on 17 February 2012 but deemed under the Restructure Co-ordination Deed not to have been received by the other parties until 9 am on 20 February 2012, that all of these conditions precedent to the RailCorp Set 7 Letter had been satisfied.

Of the "restructure agreements" involving only private sector parties but referred to in sections 2.2.2, 2.2.3 and/or 6 of this report,

- The Deed of Amendment (Unitholders Agreement) and the RSM Contractor Undertakings Deed were subject to the same conditions precedent as the Capital Commitment Deed, the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, the Reliance Rail Undertakings Deed, the Financial Guarantors' Undertakings Deed and the RailCorp 2012 Restructure Deed of Settlement, and therefore became effective on 20 February 2012
- The RSM Set 7 Letter was subject to the same conditions precedent as the RailCorp Set 7 Letter, and therefore became effective on 20 February 2012, and
- The Amending Deed (Operating) in respect of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust) and the Amending Deed (Holding) in respect of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust) will take effect only if the State makes a capital contribution as specified in the Capital Commitment Deed, from the date on which this contribution is made.

3 The Project Contract and associated intellectual property, lease, licence, step-in and novation arrangements

3.1 General obligations of PPP Co and RailCorp and general acceptance of risks by PPP Co

3.1.1 PPP Co's principal obligations

As already indicated in section 2.2, PPP Co's main obligations under the Project Contract have been and are to:

- Finance, design, construct and commission the trains, simulators and maintenance facility:
 - ♦ Using its best endeavours to complete the trains, simulators and maintenance facility by dates specified in the Project Contract, and
 - ♦ In accordance with detailed standards, specifications and other requirements set out in Schedules and Exhibits to the Project Contract.

The trains and simulators to be designed, manufactured and commissioned by PPP Co are described in section 3.2.1 below, and the scope of PPP Co's maintenance facility works is described in section 3.3.1.2.

- Make at least 72 of the new trains (and more for special events) available for RailCorp's CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational periods for some or all of the trains.

The scope of these "availability" obligations is described in section 3.5.1 below.

- Maintain, clean, repair and refurbish the trains, simulators and maintenance facility and provide other specified "through life support" ("TLS") services, in accordance with detailed standards, specifications and other requirements set out in schedules and exhibits to the Project Contract, throughout their operational periods.

The scope of these "TLS" obligations is described in section 3.5.2 below.

- Decommission the trains, and/or hand over of some or all of the trains to RailCorp, at the end of their operational periods, as described in section 3.5.8.

- Hand over the maintenance facilities to RailCorp at the end of its operational period, as described in section 3.5.10.

3.1.2 RailCorp's principal obligations

Again as already indicated in section 2.2, RailCorp's main obligations under the Project Contract have been and are:

- During the project's "delivery phase", until the completion of the last of the trains, to:
 - ♦ Design and construct specified "enabling works" associated with the maintenance facility and the housing of the train simulators
 - ♦ Grant PPP Co licences to use the maintenance facility's construction site for preliminary site investigations and then for the design and construction of the facility
 - ♦ Give PPP Co specified rights of access to the rail network for the testing and commissioning of the new trains, including a dedicated section of track adjacent to and northwest of the new maintenance facility
 - ♦ Provide train crews for this testing and commissioning of the trains
 - ♦ Provide transitional "stabling" (train parking) locations, away from the maintenance facility, for trains that are being commissioned, and
 - ♦ Make a series of payments to PPP Co at specified "milestones" in its planning for and delivery of the trains, simulators and maintenance facility, as described in section 3.4.2 below.
- During the project's "TLS phase", from the practical completion of the maintenance facility on 18 June 2010 until the expiry or earlier termination of the project's contracts, to:
 - ♦ Grant PPP Co the Maintenance Facility Lease and the Maintenance Facility Licence, if (as has happened) PPP Co has called upon RailCorp to do so
 - ♦ Grant PPP Co and its associates a licence to use RailCorp's rail network land and train "stabling" depots to maintain and repair the trains and recover any trains that break down

- Provide train crews at the maintenance facility for the trial running of trains and the preparation of trains stabled on its sidings, and
- Make performance-based monthly payments to PPP Co, as described in section 3.6 below.

RailCorp has not been and is not obliged to perform any work or provide any facilities to PPP Co beyond the express requirements of the Project Contract.

3.1.3 No restrictions on RailCorp's or other authorities' statutory powers

Except for RailCorp's express contractual obligations under the RailCorp project agreements, the RailCorp project agreements do not in any way fetter RailCorp's exercising of any of its statutory functions or powers.

PPP Co has also acknowledged that, subject to any express provisions of the Project Contract, it bears the risk that other government, semi-government, administrative and judicial authorities or owners of utility services might exercise their statutory functions or powers in ways that might interfere with PPP Co's performance of its obligations under the Project Contract.

3.1.4 General acceptance of risks by PPP Co

Apart from specific assumptions of risk by RailCorp under the Project Contract, as described in this report, PPP Co has, as between itself and RailCorp, accepted all of the risks associated with the project.

(As previously indicated, the February 2012 "restructure agreements", aimed primarily at strengthening the project's finances, have now supplemented these risk allocations under the Project Contract, and the State's guarantee of RailCorp's performance under the PAFA Act Guarantee, by introducing contingent rights and obligations for the State of NSW and RailCorp if specified circumstances arise in the future, as described in section 6 of this report.)

The risks accepted by PPP Co expressly include the risks that the project's costs might be higher than estimated, that the time required to meet PPP Co's "delivery phase" obligations (and hence the time before PPP Co receives monthly payments from RailCorp) might be greater than expected, that the number of train carriages PPP Co manufactures might prove insufficient for it to satisfy its "availability" obligations, that changes in rail patronage might mean the maintenance requirements for the trains are greater than PPP Co has estimated, and that PPP Co might have made inadequate provisions for the work and materials required to meet its obligations.

PPP Co has also expressly acknowledged that:

- RailCorp has made no representations or warranties concerning the project's contracts or arrangements, or any other matter relevant to PPP's decision to enter into the project's contracts, other than the RailCorp representations and promises set out in the Project Contract itself

- PPP Co has assessed the project's risks itself, doing everything that would be expected of a leading world expert in the most modern design, manufacture and commissioning of trains and simulators and a prudent, competent and experienced designer, builder and maintainer of facilities similar to the maintenance facility, and has not relied on any pre-contractual information of any type provided by RailCorp, and
- More specifically, PPP Co has not relied and will not rely on specified non-contractual "information documents" provided by RailCorp, and RailCorp will not be liable for any of these documents, even if they were or are "misleading or deceptive" or "false and misleading" under the Trade Practices Act (Cth) or equivalent State legislation.

3.1.5 General warranties by PPP Co and PPP Co Finance Co

PPP Co and PPP Co Finance Co have each made a series of general warranties to RailCorp, in the Project Contract and the Cross Guarantee and Indemnity respectively, concerning their legal and financial status, their relationships with other entities, their compliance with the project's contracts (including restrictions limiting their trading purposes to this project) and, in PPP Co's case, the status of the Reliance Rail Trust.

Most of PPP Co's warranties are deemed to be repeated by PPP Co on a daily basis throughout the term of the project, while most of PPP Co Finance Co's are similarly deemed to be repeated, but only on each day during which any of the payments guaranteed by PPP Co Finance Co are still outstanding.

3.1.6 General indemnities by PPP Co and PPP Co Finance Co

PPP Co has promised in the Project Contract that it will indemnify RailCorp against any claim or loss RailCorp suffers as a result of any deaths, injuries, property damage or loss of use of property, or any reasonably foreseeable economic losses directly arising from property damage or a loss of use of property, that is caused by, or contributed to by,

- Any PPP Co breach of any RailCorp project agreement, or
- Any negligent or other wrongful act or omission, concerning PPP Co's obligations under the Project Contract or the use or occupation of the maintenance facility construction site or associated work sites, by PPP Co, PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entities controlled by them, PPP Co's contractors (at any level), the project's equity investors, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above,

but excluding any claims or losses to the extent that:

- They are indirect, consequential or purely economic losses beyond any amounts for these losses that are recovered under the insurance policies specified in the Project Contract

or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1)

- They arise from a RailCorp breach of any RailCorp project agreement or any fraudulent, negligent or other wrongful act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation
- They are economic losses resulting from any event for which RailCorp's monthly "TLS phase" "availability payments" to PPP Co have been reduced, because of the lateness, cancellation, withholding or withdrawal of trains, under "reliability and disruption adjustment" arrangements described in section 3.6.1.2 of this report
- They are losses of any type arising from a loss of use of the trains or any RailCorp property as a result of an event for which RailCorp's monthly "availability payments" to PPP Co have been reduced under these "reliability and disruption adjustment" arrangements
- RailCorp has assumed control of the claim, or an associated insurance claim, and this has directly or indirectly reduced the available insurance proceeds
- Any other RailCorp act or omission has directly or indirectly reduced insurance proceeds, *unless* this action has been taken in good faith (a) to protect RailCorp passengers or employees, the general public, RailCorp infrastructure or other property or (b) in accordance with RailCorp's statutory functions or powers, or
- Any failure by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation to mitigate the losses or effects of the claim, again unless this failure has arisen from action taken in good faith to (a) protect RailCorp passengers or employees, the general public, RailCorp infrastructure or other property or (b) in accordance with RailCorp's statutory functions or powers.

However, PPP Co's total liabilities to RailCorp (on *any* legal or equitable bases, not limited to contractual claims) for any individual event:

- Triggering this indemnity, or
- More generally, causing
 - ◊ Indirect, consequential or pure economic losses
 - ◊ Increased costs of working (or losses of net revenue, business or opportunities) arising from property damage or losses, or
 - ◊ Third party claims or liabilities

that are in any way connected with PPP Co's obligations under the Project Contract or any project-associated act or omission by PPP Co, PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entities controlled by them, PPP Co's contractors (at any level), the project's equity investors, any related corporation of any of the above or any

officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above

are capped at \$250 million, indexed to the Consumer Price Index (CPI) from the June quarter of 2006, *except* in the cases of:

- "Reliability and disruption adjustments" to RailCorp's monthly "TLS phase" "availability payments" to PPP Co (see section 3.6.1.2)
- Third-party claims or liabilities for deaths or personal injuries or diseases
- Liabilities for losses—other than indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations—caused by malicious or fraudulent acts by PPP Co, PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entities controlled by them, PPP Co's contractors (at any level), the project's equity investors, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above
- Any liability that is otherwise limited by the Project Contract
- Any liability which PPP Co may not lawfully limit or exclude
- Any total liability exceeding the cap, to the extent that it is recovered by PPP Co under the insurance policies specified in the Project Contract or would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1), and
- Any total liability—not counting any liability for any indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations—exceeding the cap, to the extent that it is recovered by PPP Co from another third party, such as PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entity controlled by them, a PPP Co contractor (at any level), an equity investor, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above.

In addition to these arrangements under the Project Contract, under the Cross Guarantee and Indemnity PPP Co and PPP Co Finance Co have (as already indicated in section 2.2) irrevocably, unconditionally, jointly and severally indemnified RailCorp against any loss, expense, damage or liability arising out of any failure, by either of them, to perform their obligations under or in any way associated with any of the RailCorp project agreements, other than any indirect, consequential or purely economic loss that is not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

3.2 Design, manufacture and commissioning of the trains and simulators

3.2.1 Scope of the works

As indicated in sections 2.2.3 and 3.1.1, PPP Co has had to and must finance, design, construct and commission the trains and simulators:

- Using its best endeavours to complete the trains and simulators by dates specified in the Project Contract, and
- In accordance with detailed standards, specifications and other requirements set out in the Project Contract.

The principal technical requirements for the trains have been and are set out in an Exhibit to the Project Contract, a *RailCorp Train Performance Specification*, and the principal technical requirements for the simulators have been and are set out in another Exhibit to the Project Contract, a *RailCorp Simulator Specification*. However, the technical specifications that have had to be and must be followed by PPP Co also include a *Train Design Book* and a *Simulator Design Book*, both of which were prepared by PPP Co and are additional Exhibits to the Project Contract.

Each of the new trains—other than a three-carriage prototype—has had to have and must have eight carriages (“cars”), joined together to form an eight-car “set” with a drivers’ cab at each end.

3.2.1.1 Option to delete separate guards’ cabs

Under the original (December 2006) specifications, each train “set” was to have a separate guards’ cab in at least one of the two central cars. However, RailCorp had an option to delete this requirement for a guards’ cab at any time before 30 June 2007, and it exercised this option on 27 June 2007.

When RailCorp exercised this option the specifications were amended accordingly and PPP Co became obliged:

- On 30 June 2007, to pay RailCorp a sum equal to \$500,000 divided by the number of whole calendar months between the date on which RailCorp notified PPP Co of its decision and 30 June 2007 (so, in practice, no payment was required on this date), and
- On the date of practical completion of the seventh train “set”—originally targeted for 15 September 2010, although in fact practical completion of this “set” was not achieved until 20 February 2012 (see sections 2.2.3 and 3.2.5)—to pay RailCorp a further \$3,267,000.

Had RailCorp informed PPP Co before 30 June 2007 that it had decided not to change the original requirement for a guards’ cab, PPP would have been obliged, on 30 June 2007, to pay RailCorp a sum equal to \$500,000 divided by the number of whole calendar months between the date on which RailCorp notified PPP Co of its decision and 30 June 2007.

Any other changes to the scope or nature of PPP Co’s obligations under the current Project Contract concerning the

design, manufacture and commissioning of the trains and/or the simulators have been and are governed by the Project Contract’s variation provisions, described in section 3.7.14 of this report.

3.2.1.2 Option to order more trains

PPP Co has agreed to manufacture and commission 78 train “sets”, and may build and commission more if it wishes. As already indicated in section 3.1.4, PPP Co has accepted the risk that the number of “sets” it manufactures and commissions might not be sufficient for it to fulfil its obligations to make specified numbers of “sets” available for CityRail services during the “TLS phase” of the project (see section 3.5.1).

RailCorp also has an option to order the manufacturing of up to 20 additional trains.

Under this option, RailCorp may, at any time 18 months or more before the then-expected date of completion of the 78th “set” (originally targeted for 5 September 2013), issue a written notice:

- Requiring PPP Co—or, if PPP Co prefers, the Rolling Stock Manufacturers and/or, if relevant, the TLS Contractor—to negotiate in good faith for the manufacture of:
 - ♦ A specified number of up to 20 additional trains and (if required by RailCorp) the provision of associated “through life support” services during the “TLS phase” of the project, and/or
 - ♦ A specified number of additional train simulators and (if required by RailCorp) the provision of associated “TLS” services, and
- Specifying the extent to which RailCorp requires PPP Co or its relevant contractor(s) to finance these works and services.

If RailCorp issues such a notice, PPP Co or the relevant contractor(s) will have three months to respond with a proposal for pricing and other terms which must be referable to the terms of the Project Contract, and the parties must then commence negotiations, in good faith, within 20 business days, with a view to reaching agreement on any of the proposed terms that are not initially acceptable to RailCorp.

If agreement cannot be reached, PPP Co will not be obliged to manufacture additional trains, unless it finds it needs to do this to satisfy its train “availability” obligations (section 3.5.1).

3.2.2 Approvals

In carrying out its obligations to design, manufacture and commission the trains and simulators PPP Co has had to and must:

- Obtain, maintain and comply with all the statutory and other approvals, licences and permits required for it to meet its obligations under the Project Contract, including, in particular, the rail safety requirements described in section 3.7.1, under which PPP Co has also been obliged to assist RailCorp to obtain a variation to its own rail safety accreditation, and the environmental requirements described in section 3.7.5

- Ensure that its contractors (at any level), PPP Co Finance Co, PPP Co Holding Co and any other associates of PPP Co, and their officers, employees, agents, contractors, consultants, advisers, nominees and licensees, do likewise, and
- Ensure that PPP Co, its associates and the trains and simulators comply with all applicable laws.

3.2.3 Design obligations

PPP Co has had to and must design the trains and simulators and prepare detailed design documentation in accordance with the Project Contract and, more specifically,

- The *RailCorp Train Performance Specification*, PPP Co's *Train Design Book*, the *RailCorp Simulator Specification* and PPP Co's *Simulator Design Book*
- Detailed RailCorp *Contract Management Requirements*, described in section 3.2.7 below, and
- Any variations directed or approved by RailCorp under the Project Contract's variation provisions, described in section 3.7.14 below.

PPP Co has warranted that all of its design documents for the trains and simulators, including its *Design Books*, have been, are and will be safe and fit for their intended purposes.

Intellectual property and moral rights in the designs have been and are governed by the arrangements described in section 3.7.6.

PPP Co has had to and must conduct a series of five technical reviews of its designs with RailCorp, as specified in the *Contract Management Requirements* described in section 3.2.7, so as to permit RailCorp to monitor its progress and provide feedback on its compliance with the requirements of the Project Contract.

In the case of the first three of these reviews—a “system definition” review, a “preliminary” design review and a “critical” design review—PPP Co had to submit design documentation to RailCorp, at times set out in a *Delivery Programme* that had to be developed by PPP Co in accordance with the *Contract Management Requirements* (see sections 3.2.5 and 3.2.7), and RailCorp could (but did not have to) review this documentation and provide feedback to PPP Co within 20 business days.

If RailCorp indicated any of the design documentation did not comply with the requirements of the Project Contract, it had to provide reasons, and PPP Co had to submit amended design documentation for RailCorp's review within 20 business days.

Each of these first three technical reviews was to be regarded as completed only when a period of 20 business days had elapsed without RailCorp's indicating the relevant design documentation did not comply with the requirements of the Project Contract.

The resultant “final” design documentation after the “critical” design review may now be amended only under the Project Contract's variation provisions, described in section 3.7.14, or through the submission of revised documentation to RailCorp and the elapse of a period of 20 business days without

RailCorp's indicating that the amended design documentation does not comply with the requirements of the Project Contract.

RailCorp and PPP Co acknowledged that the design development processes summarised above could result in changes to the designs specified in the *Design Books*, and agreed that these changes could be made if and only if:

- PPP Co satisfied RailCorp that the change was necessary to comply with other requirements with a higher priority than the *Design Book* in question
- PPP Co satisfied RailCorp that the change complied with the other specifications, was consistent with the design intent of the relevant *Design Book* and would not lessen any standard, level of service, scope or requirement of any part of the project's works, or
- A variation had been directed or approved under the arrangements described in section 3.7.14.

3.2.4 General manufacturing and delivery obligations

PPP Co has had to and must manufacture the trains and simulators in accordance with the Project Contract and, more specifically,

- The *RailCorp Train Performance Specification*, PPP Co's *Train Design Book*, the *RailCorp Simulator Specification* and PPP Co's *Simulator Design Book*
- The detailed RailCorp *Contract Management Requirements* described in section 3.2.7 below
- PPP Co's “final” design documentation after a “critical” design review (see section 3.2.3), and
- Any variations directed or approved by RailCorp under the Project Contract's variation provisions, described in section 3.7.14 below.

PPP Co has warranted that the completed trains and simulators are, will be and will remain safe and fit for their intended purposes, and has undertaken that in manufacturing and commissioning the trains and simulators it has been and will be:

- Using workmanship which is fit for its purpose and of a standard prescribed in the specifications listed above or, in its absence, a standard consistent with best industry standards, and
- Using parts, components, goods and materials which have been and are of merchantable quality and fit for their intended purposes and which have complied and comply with the specifications listed above or, in their absence, have been and are new and consistent with best industry standards.

RailCorp has had to and must provide rooms to house the main train simulator at the Australian Rail Training Facility in Petersham, and had to give PPP Co and its contractors reasonable access to these areas for the installation of this simulator.

3.2.5 Timeframes

PPP Co has had to and must regularly and diligently progress its design, manufacturing and commissioning of the trains and use its best endeavours to complete each eight-car train “set” by its “date for practical completion”, as set out in a Schedule to the Project Contract, with the first “set” being listed in this Schedule for practical completion by 20 April 2010, the seventh by 15 September 2010 and the 78th by 5 September 2013.

PPP Co also had to use its best endeavours to complete the simulators six months before the date on which it expected to achieve practical completion of the first train “set”.

PPP Co has had to and must develop and periodically update a *Delivery Programme* in accordance with the *Contract Management Requirements* (see section 3.2.7) or any other reasonable RailCorp requirements, and has had to and must give RailCorp copies of each updated *Delivery Programme* and monthly *Delivery Phase Progress Reports*, again as specified in the *Contract Management Requirements*.

If PPP Co became or becomes aware of any matter which might delay the completion of a train “set” or the simulators, it has had to and must notify RailCorp as soon as reasonably practicable, providing details and a *Corrective Action Plan*. Similarly, PPP Co has had to and must submit a *Corrective Action Plan* if RailCorp reasonably believed or believes PPP Co would or will be delayed in completing a “set” or the simulators and had or has notified PPP Co of this belief.

In these circumstances PPP Co has then had to (or must) implement its *Corrective Action Plan*, unless notified by RailCorp within 15 business days that RailCorp did not (or does not) believe the *Plan* would (or will) allow PPP Co to avoid, mitigate or minimise the consequences of the delay, in which case PPP Co was (or is) obliged to amend and resubmit the *Corrective Action Plan*. RailCorp was not, is not and will not be liable for any delays or losses incurred by PPP Co as a result of these processes.

PPP Co has been and is free to accelerate the progress of its works, and RailCorp could and may assist in this, although it has been and is under no obligation to do so.

However,

- The date of practical completion of the *first* of the train “sets” to be completed could not be earlier than six months after the practical completion of the simulators (i.e. in practice, six months after 31 August 2010) or earlier than three months after the practical completion of the maintenance facility (i.e. in practice, three months after 18 June 2010).

As already discussed in section 2.2.3, practical completion of the first train “set” was in fact achieved on 30 June 2011, and then only after RailCorp had issued the RailCorp Set 1 Letter, temporarily setting aside, for that “set” only, a number of the Project Contract’s detailed pre-requisites for practical completion of that “set”, including the correction of a specified list of defects and the performance and passing of specified tests (see section 3.2.11.1), and instead requiring

these matters to be corrected by later, specified times. These changes were mirrored by changes in the Rolling Stock Manufacturers’ obligations under the Rolling Stock Manufacture Contract, through the RSM Set 1 Letter.

- The practical completion of the *seventh* of the train “sets” was originally not to occur until specified requirements for the weight and initial in-service reliability of the first six “sets” had been satisfied (see section 3.2.11.1), agreement had been reached on “deemed action times” to be assumed for the resolution of particular types of operational problems as part of these and other reliability tests and as part of the calculation of RailCorp’s “TLS phase” “availability payments” to PPP Co (see section 3.6.1.2), and RailCorp was satisfied with a specified *Implementation Safety Assurance Report (Revenue Operation)* which PPP Co had to prepare for revenue operation of the trains (see sections 3.2.7 and 3.7.1).

However, as already discussed in section 2.2.3,

- Under the RailCorp Set 7 Letter, which became effective on 20 February 2012, RailCorp expressly set aside the pre-requisite requirements in the Project Contract concerning the initial in-service reliability of the first six “sets” and instead imposed new requirements for the reliability of the eighth to seventeenth “sets” (as detailed in section 3.2.11.1), and also expressly set aside a number of other pre-requisites for practical completion of the seventh “set”, including the correction of six specified defects in the first “set”, instead requiring these “set 1” defects to be corrected by a later, specified time (again as detailed in section 3.2.11.1 of this report).

These changes were mirrored by changes in the Rolling Stock Manufacturers’ obligations under the Rolling Stock Manufacture Contract, through the RSM Set 7 Letter.

- Under this changed regime, practical completion of the seventh “set” was in fact achieved on 20 February 2012.
- More generally, RailCorp has not been (and, unless it agrees otherwise, is not) obliged to certify the practical completion of *any* train “set” before its targeted date for practical completion, within 15 business days of the practical completion of the previous “set” in the case of the first six “sets” or within ten business days in the case of all subsequent “sets”.

As discussed in more detail in section 3.2.11.1, under the RailCorp Set 7 Letter RailCorp and PPP Co have agreed that the reliability and performance of the first 17 train “sets” (“sets” 1 to 17) will be reviewed by the Director-General of Transport for NSW, with this review being able to commence after the practical completion of “set 13” and having to be completed no more than ten business days after the practical completion of “set 17”.

If the Director-General is not satisfied with the reliability and performance of these trains, train deliveries will continue only

after RailCorp and PPP Co have agreed on a corrective action plan, with the Director-General facilitating their consideration of opportunities and agreement on improvements to the train delivery program.

Provided PPP Co had been (or is) regularly and diligently progressing its design, manufacturing and commissioning activities and had used (or is using) its best endeavours to complete each train “set” and the simulators by their specified original (and still unchanged) “dates for practical completion”, RailCorp has not been (or is not) entitled to claim damages from PPP Co for any delays or disruptions. However, any delay in the completion of (say) a train “set” did (or will) defer PPP Co’s receipt of the final “milestone” payment for this train, under the arrangements described in section 3.4.2 below, and subsequent “availability payments” for the “set” in question, under the arrangements described in section 3.6.1.

RailCorp has been and is entitled to order PPP Co to suspend any of its train or simulator design, manufacturing or commissioning activities if (but only if) PPP Co was not (or is not) carrying out these activities in accordance with the Project Contract’s requirements, and could (or may) then instruct PPP Co to resume all or part of the suspended activities. PPP Co was not (and is not) entitled to make any claim against RailCorp in connection with such a suspension.

If PPP Co has been or is delayed in completing a train “set”, or has had to incur (or must incur) additional costs in avoiding or minimising such a delay, as a result of:

- A RailCorp breach of its obligations under the Project Contract (such as, for example, late completion of the RailCorp “enabling works” described in section 3.3.1.1 or a failure to give PPP Co agreed rights of access to the rail network to commission the trains, as described in section 3.2.9)
- A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, or
- Industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that has not been caused, directly or indirectly, by any action or inaction by PPP Co, its subcontractors or its other associates which was not required by the Project Contract,

RailCorp has been (or is) liable to pay PPP Co for all of the reasonable and reasonably foreseeable costs and losses it has incurred (or incurs), including any lost revenue, *other than* any costs or losses arising from any failure by PPP Co to take reasonable steps to mitigate its costs and losses.

3.2.6 Subcontracting

As already indicated in section 2.2.3, PPP Co has subcontracted its train and simulator design, manufacture and commissioning obligations to the Rolling Stock Manufacturers under the Rolling Stock Manufacture Contract, as amended by the Deed of Variation No 1 Rolling Stock Manufacture Contract,

the Deed of Variation No 2 Rolling Stock Manufacture Contract, the Deed of Variation No 4 Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Contract Deed of Variation No 5, the Rolling Stock Manufacture Contract Deed of Variation No 3, the RSM Set 1 Letter, the RSM Set 7 Letter and the RSM Contractor Undertakings Deed.

PPP Co has required and requires RailCorp’s consent before it could (or may) enter into any other subcontract concerning its “delivery phase” obligations under the Project Contract if this contract was (or is) for more than \$10 million (indexed in line with CPI movements since the June quarter of 2006), lasted (or lasts) for more than three years, including any options for extensions, or was (or is) for the design, manufacture, supply or installation of any of a specified series of train components. It has had to and must also ensure the Rolling Stock Manufacturers obtain RailCorp’s consent before they enter any such contracts themselves (the Project Contract calls these contracts, which include the Rolling Stock Manufacture Contract and the Rolling Stock Subcontract, “**significant contracts**”). RailCorp may not unreasonably delay or withhold its consent.

PPP Co has had to and must ensure any “significant contracts” entered into by itself or the Rolling Stock Manufacturers:

- Were (or are) on commercial terms negotiated on an “arms length” basis and approved by RailCorp
- Excluded (or exclude) the application of the proportionate liability provisions in the Civil Liability Act (NSW) (these provisions are also excluded under the Project Contract itself, and PPP Co had had to and must ensure the same exclusion is made in *all* of its subcontracts and sub-subcontracts, not just its “significant contracts”)
- Recognised (or recognise) RailCorp’s rights to “step in” to remedy PPP Co breaches of the Project Contract and other PPP Co defaults (see sections 3.8.3.2, 3.8.3.4, 3.8.3.5 and 3.8.3.6)
- Recognised (or recognise) RailCorp’s rights under the Project Contract’s arrangements for the end of the project (section 3.5.10)
- Required (or require) the contractor to provide all the information PPP Co needed (or needs) to comply with the Project Contract and, in particular, the *Contract Management Requirements* discussed in section 3.2.7
- Required (or require) the contractor to implement a contract management and quality assurance system which complied (or complies) with a *Compliance Management Plan* which PPP Co has had to prepare as part of its obligations under the *Contract Management Requirements*, and
- Allowed (or allow) PPP Co to novate the contract to RailCorp or its nominee if there were an early termination of the Project Contract (sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5).

In addition, PPP Co has had to and must:

- Give RailCorp written details about any proposed “significant contractor” and the proposed terms of its appointment, other than pricing information

- Use its best endeavours to ensure all its “significant contractors” were (or are) reputable, with sufficient experience and expertise, had (or have) arrangements for ensuring the availability of the necessary skills, resources and rail safety accreditations and had (or have) a suitably high financial and commercial standing
- If necessary, replace any contractors that do not meet these requirements
- If requested, give RailCorp copies of all proposed and executed “significant contracts” (and also, if requested, all other proposed and executed subcontracts)
- Refrain from terminating any “significant contract” unless a replacement contract had (or has) been established or RailCorp had (or has) otherwise given its consent
- Monitor the performance of each “significant contractor” and notify RailCorp of any defaults or terminations, and
- If requested by RailCorp, ensure each “significant contractor” entered (or enters) into agreements with RailCorp equivalent to the Rolling Stock Manufacture Contract Side Deed.

Notwithstanding these generally applicable requirements, if PPP Co, the debt financiers’ Security Trustee or any controller, agent, receiver, manager or similar “enforcing party” appointed by the Security Trustee were to seek RailCorp’s consent to the replacement of one or both of the Rolling Stock Manufacturers in order to remedy a PPP Co breach of any of the project’s contracts, RailCorp *must* give its consent, provided specified preconditions have been satisfied, under arrangements described in sections 3.8.3.1 and 3.8.3.3 of this report.

3.2.7 Management plans, records, reports, inspections and audits

PPP Co has had to and must establish, implement, comply with and, when necessary, update a comprehensive contract management system, documented in a specified series of “**Project Plans**”, for the performance all of its obligations to RailCorp under the Project Contract.

This system has had to and must satisfy a series of Australian Standards, including rail safety, occupational health and safety and quality, environmental and risk management standards, detailed *Contract Management Requirements* set out in an Exhibit to the Project Contract, and the requirements of all relevant government and other authorities, including reasonable requirements imposed by RailCorp from time to time.

The “Project Plans” specified in the *Contract Management Requirements*—including plans of relevance to the maintenance facility and/or “through life support” aspects of the project (see sections 3.3.9 and 3.5.6)—are:

- An over-arching *Contract Management Plan*, incorporating, among other things, a *Local Industry Participation Plan*
- A *Safety Management Plan*
- A *Systems Assurance Plan*
- A *Configuration Management Plan*

- A *Train and Simulator Delivery Plan*
- A *Maintenance Facility Works Delivery Plan*
- A *Transition Plan*
- A *Through Life Support Plan*, and
- Numerous subsidiary plans and “sub-plans” within each of these plans.*

PPP Co has warranted that its contract management system and “Project Plans” are and will always be fit for their intended purposes, as specified in the Project Contract and its *Contract Management Requirements*.

The Project Contract’s Exhibits include initial versions of several of PPP Co’s “Project Plans”. PPP Co has had to and must prepare the other plans and submit them to RailCorp in accordance with the *Contract Management Requirements*, and has had to and must review and update its contract management system and the “Project Plans” as specified in these *Requirements* and also whenever any event or circumstance—expressly including the exercise by RailCorp of its option to delete the guards’ cabs (section 3.2.1.1), any variations (section 3.7.14), any changes in law (section 3.7.13), the commencement of a new phase of design, manufacture or construction (as shown in PPP Co’s *Delivery Programme*, one of the subsidiary components of its *Programme Management Plan* within its *Contract Management Plan*) and anything making it possible the plans might not be fit for their intended purposes—could have affected (or might affect) the way PPP Co carried out (or carries out) its obligations under the Project Contract. PPP Co has then had to and must submit the updated plans, which could not and may not increase RailCorp’s obligations or liabilities, to RailCorp.

RailCorp was and is entitled to direct PPP Co to update any “Project Plan” not updated as required or not complying with the Project Contract, specifying a time within which the updated plan had to be (or must be) submitted to RailCorp.

RailCorp could and may review any submitted original or updated PPP Co “Project Plan”, but was and is not obliged to do so. If RailCorp indicated (or indicates) within 20 business days that a plan did not (or does not) comply with the requirements of the Project Contract, it had to (or must) provide reasons, and PPP Co had to (or must) then submit an amended plan for RailCorp’s review within 20 business days.

In addition to their specifications for the “Project Plans”, the *Contract Management Requirements* specify much (but not all) of the training PPP Co has had to and must provide, the individuals it has had to and must employ in key positions and a wide range of other procedures and processes PPP Co has had to and must follow.

Nominated representatives of PPP Co and RailCorp have had to and must participate in a joint Senior Project Group which has had to and must hold monthly meetings throughout the delivery phase of the project, until the last of the trains is completed, and then meet every three months. This group has had to and must monitor overall progress, assist in resolving any matters referred

to it by either party and review PPP Co's *Delivery Phase Progress Reports* (section 3.2.5) and its monthly *Performance Reports* during the "TLS phase" of the project (see sections 3.5.6 and 3.6). However, it has had and has no legal responsibilities or powers.

Subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp could and may enter PPP Co's manufacturing sites and other areas used by PPP Co and the Rolling Stock Manufacturers and other "significant contractors" (section 3.2.6) during business hours, or otherwise on 24 hours' notice unless there was (or is) an emergency, to observe, monitor, inspect and review PPP Co's performance of its obligations under the Project Contract, provided this was (or is) done in ways which did not (or do not) unreasonably interfere with PPP Co's performance of its obligations. PPP Co has been and is obliged to facilitate and assist these inspections.

PPP Co has had to and must allow RailCorp to access PPP Co's contract management system, and the contract management systems of PPP Co's subcontractors,

sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp has had to and must do this in ways which did not (or do not) unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

RailCorp could and may also conduct, or direct PPP Co to conduct, any reasonable tests concerning its train and simulator design, manufacture and commissioning obligations, in addition to the detailed *planned* testing program set out in PPP Co's *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (see section 3.2.10). RailCorp has had to and must give PPP Co at least 24 hours' notice of these tests, PPP Co has had to and must provide all reasonable assistance, and when the results were (or are) obtained they had to be (or must be) released to the other party within five business days. RailCorp has had to and must pay any reasonable costs incurred by PPP Co as a result of this testing, unless:

- The results disclosed (or disclose) a breach of the Project Contract

* (page 32) The "Project Plans" required under the *Contract Management Requirements*—including the plans of relevance to the maintenance facility and/or "through life support" aspects of the project—have been and are:

- An over-arching *Contract Management Plan*, setting out how PPP Co will manage all the other plans and including its own suite of subsidiary plans: a *Risk Management Plan*, a *Risk Register*, an *Occupational Health, Safety and Rehabilitation Plan* (see section 3.7.2), a *Human Resources Plan* (see section 3.7.3), a *Contractor's Work Breakdown Structure*, an *Organisational Accountabilities Plan*, an *Environmental Management Plan* (see section 3.7.5), a *Programme Management Plan* (incorporating the *Delivery Programmes* discussed in sections 3.2.5, 3.2.11.1 and 3.3.7.2), a *Compliance Management Plan*, a *Communications Management Plan*, an *Interface Management Plan*, a *Human Factors Integration Plan*, a *Local Industry Participation Plan* (see section 3.7.4) and a process for engaging independent verifiers of PPP Co's design, manufacturing, testing and project management processes
- A *Safety Management Plan* for the management of PPP Co's *Safety Management System*, as required by the Rail Safety Act (NSW) (see section 3.7.1), and incorporating a subsidiary *System Hazard Analysis*, an *Accreditation Plan*—with its own subsidiaries, a *Tender Safety Assurance Report*, a *System Definition Safety Assurance Report*, a *Critical Design Safety Assurance Report*, an *Implementation Safety Assurance Report (Testing and Commissioning)*, an *Implementation Safety Assurance Report (Interim)*, an *Implementation Safety Assurance Report (Revenue Operation)*, a *Construction Safety Assurance Report*, a *Maintenance Facility Works Safety Assurance Report* and a *Through Life Support Safety Assurance Report*—and *Safety Accountability Statements*
- A *Systems Assurance Plan* for the management of a *Systems Assurance Process* to be developed and implemented by PPP Co, including a subsidiary *Reliability, Availability, Maintainability and Safety (RAMS) Plan*, a variation management system, a *Design Management Plan* (with its own subsidiary *Design Verification Plan*, design review records, design validation plans, design output certifications and traceability records), *Software Detail Design Documents*, *Software Product Technical Specifications*, independent design verification reports and certificates, an exterior and interior design optimisation study report, a exterior and interior appearance trade-off study report, an *Accessibility Report*, a *Human Factors and Ergonomics Report*, a *Mock-Up Programme*, a *Technical Review* plan and programme (with its own *System Definition Review*, *Preliminary Design Review*, *Critical Design Review*, *System Verification Review* and *Physical Configuration Audit* components), *As-Built Design Documentation*, a *Reliability Programme* (including reliability modelling, documentation of PPP Co Failure Modes, Effects and Criticality Analyses and a *Reliability Demonstration Plan*), a *Maintainability Programme* (including maintainability estimates, a *Maintainability Demonstration Plan* and availability estimates), a *Technical Maintenance Plan* (including spares support plans and a *Wheels Management Plan*), an *Integrated Test Plan* based on detailed testing requirements (including a *Train Testing and Commissioning Network Access Plan*, *Test Specifications*, *Test Reports* and a *Test Report Summary*), a *Failure Reporting and Corrective Action System*, an *Information and Communications Technology (ICT) Capability Strategy*, an *Information and Communications Technology (ICT) Architecture Management Strategy*, an *Information and Communications Technology (ICT) Software Systems Management Plan* and *Fleet Management Systems*
- A *Configuration Management Plan* to ensure the trains, simulators and maintenance facility have accurate configuration records and are upgraded to their latest configuration status throughout the project, including a subsidiary *Master Configuration Status List*, a *Configuration Register*, the *Physical Configuration Audits* which also form part of the *Systems Assurance Plan*, and elements of the *Through Life Support Plan* described below
- A *Train and Simulator Delivery Plan*, including a subsidiary *Manufacturing Plan*
- A *Maintenance Facility Works Delivery Plan*, including a subsidiary *Maintenance Facility Commissioning Test Plan* in accordance with the *Integrated Test Plan* forming part of the *Systems Assurance Plan* and incorporating a series of other requirements
- A *Transition Plan*, including:
 - A subsidiary *Transition-In Plan* for the mobilisation of the maintenance facility and progressive introduction of the new trains, with its own subsidiary *Transition-In Support Sub-Plan*, *Operations Mobilisation Sub-Plan* (including an *Interface Coordination Plan*, a *Systems Commissioning and Data Population Plan*, *Out Depots Strategy* and other requirements), *Training Management Sub-Plan*, *Testing and Refinement of the Interface Protocols and Procedures Sub-Plan*, *Transition-In Stabling Sub-Plan* and *Transition-In Communications Sub-Plan*, and
 - A *Transition-Out Plan* for the eventual decommissioning or handover of the trains and return of the maintenance facility to RailCorp (see sections 3.5.8 and 3.5.10), with its own subsidiary *Transition-Out Support Sub-Plan*, *Staff Out-Placement Sub-Plan*, *Maintenance Facility Handover Sub-Plan*, *Decommissioning of the Sets Sub-Plan* and *Technical Support Continuity Sub-Plan*, and
- A *Through Life Support Plan*, including subsidiary *Interface Protocols* (including *Certificates of Readiness*, defect reporting systems, *Handover and Pick-Up Protocols* and an *Incident Response Plan*), a *Maintenance Facility Asset Management Plan* and, in response to the RailCorp Set 7 Letter's requirements, a *Waratah Train Project Through Life Support (Availability and Reliability) Management Plan*, Revision C, prepared by Downer on 8 February 2012.

- The work tested had (or has) been covered up or made inaccessible in breach of a direction by RailCorp that its prior written approval of this would be required, or
- The work tested was (or is) work to correct or overcome a defect in PPP Co's works,

in which case PPP Co has had to and must bear its own costs and pay RailCorp any reasonable costs incurred by RailCorp in connection with the testing.

3.2.8 Downer EDI Rail's Cardiff Maintenance Depot Lease and PPP Co's right to 'step in'

As already indicated in sections 2.2.3 and 2.2.12,

- RailCorp has continued and updated its lease of its Cardiff maintenance depot to one of the Rolling Stock Manufacturers, Downer EDI Rail Pty Ltd, thereby permitting these premises to be used for part of the manufacture of the new trains
- PPP Co has been and is entitled, under the Right of Entry Deed for Cardiff Maintenance Depot, to "step in" and effectively assume most of Downer EDI Rail's rights and obligations under this Cardiff Maintenance Depot Lease should Downer EDI Rail become insolvent, default on its obligations to RailCorp under the Cardiff Maintenance Depot Lease or default on its obligations to PPP Co under the Rolling Stock Manufacture Contract, and
- RailCorp has not been and is not entitled to terminate this lease during any such "step in" period.

If it chooses to exercise these "step in" rights, PPP Co must give RailCorp a notice to this effect, specifying a step-in date within the following 20 business days, and PPP Co and RailCorp must then consult on any necessary arrangements within five business days.

During any "step in" period PPP Co must give any other organisations for which Downer EDI Rail is or has been carrying out work at the Cardiff maintenance depot reasonable access to remove any of their property on the premises. It must also make any of the works being carried out for them safe for removal and/or, in specified circumstances, use Downer EDI Rail's plant and equipment to complete any works that do not form part of the Rolling Stock PPP project's works.

PPP Co may "step out" of its assumption of Downer EDI Rail's rights and obligations under the Cardiff Maintenance Depot Lease at any time, by giving RailCorp 20 business days' notice.

3.2.9 Network access for the testing and commissioning of the trains

PPP Co has been and is entitled to move, test and commission the new trains on:

- A dedicated "commissioning track", reserved for these purposes, adjacent to and northwest of the new Auburn train maintenance facility (see *Figure 3.1* in section 3.5.3), and

- The rest of RailCorp's metropolitan rail network, at times and locations approved in advance by RailCorp under complex "network access rights" arrangements set out in the Project Contract.

In return for a PPP Co payment of \$1, RailCorp has granted PPP Co a right to take "possession" of the parts of the "commissioning track" that are not within the areas PPP Co is able to use under the Maintenance Facility Licence described in section 3.5.3. This "possession" commenced on the date of practical completion of the maintenance facility, 18 June 2010, and will continue until a date, no later than 31 December 2015, that will be determined by RailCorp following the practical completion of the last of the trains. PPP Co, its subcontractors and its other associates may not make any claims against RailCorp associated with PPP Co's use of this track.

The Project Contract's arrangements for PPP Co's "network access rights"—again in return for a PPP Co payment of \$1 to RailCorp, and encompassing PPP Co's rights to run the trains and its rights to carry out work on sections of RailCorp's tracks—specify:

- Procedures and timeframes for RailCorp and PPP Co to develop "agreed" network access rights, based on "promised" network access rights, listed in an Exhibit to the Project Contract, and more detailed submissions made by PPP Co
- RailCorp's right to cancel or change any of these "agreed" network access rights at any time, without any liability to PPP Co if RailCorp provides equivalent network access rights as soon as reasonably practicable
- Procedures for PPP Co to request additional network access rights, beyond the "agreed" rights, RailCorp's undertaking to endeavour to grant the requested additional rights, without being under any obligation to do so, and RailCorp's right to cancel or change the additional rights at any time, without any liability to PPP Co
- Generally applicable PPP Co rail safety and coordination obligations associated with all of its network access rights (see also section 3.7.1)
- More specifically, the rail safety and other procedures PPP Co must follow each time one of the trains that is being moved or tested is operated on the wider RailCorp rail network in accordance with PPP Co's network access rights
- PPP Co's obligations if, during any of these train runs, a defect attributable to PPP Co or its subcontractors or other associates, or any other act or omission by PPP Co or its associates, causes an incident that affects, or might affect, the operation of other trains on the RailCorp network, including PPP Co's obligations to:
 - ♦ Promptly assist RailCorp in removing the train from its network, and
 - ♦ Pay RailCorp \$10,000 (indexed in line with movements in the CPI from the June quarter of 2006) if the incident

causes the cancellation of one or more RailCorp trains, as RailCorp's sole remedy in these circumstances

- PPP Co's liability, if it fails to use any authority it has been granted to work on a section of RailCorp's tracks without having requested the cancellation of this authority at least 14 weeks in advance, to reimburse RailCorp for all the reasonable costs RailCorp has incurred in connection with the authority, including the costs of providing alternative transport, *unless* the failure has been caused by a RailCorp act or omission (if RailCorp or another of its contractors carries out work on the same section of track during the "unused" track possession, this liability will be reduced on a *pro-rata* basis)
- Procedures to be followed if PPP Co cannot use an "agreed" network access right because its works have been delayed by a RailCorp breach of the Project Contract, a *force majeure* event (see section 3.7.18) or any other event for which PPP Co has not specifically accepted the risks, which is beyond PPP Co's control and which could not have been avoided by a prudent company in PPP Co's position (including RailCorp's obligations to provide, or in the last two cases reasonably endeavour to provide, equivalent network access rights), and
- PPP Co's obligations if it might be late in handing a section of the rail network back to RailCorp, including its liability to reimburse RailCorp for all the reasonable costs it incurs as a result, except to the extent that the late handover is caused by an act or omission by RailCorp, other RailCorp contractors or other parties associated with RailCorp.

3.2.10 Testing and commissioning

PPP Co has had to and must test and commission the new trains and simulators in accordance with its *Integrated Test Plan*—one of the plans it has had to and must develop as a subsidiary component of its *Systems Assurance Plan*—and the *Contract Management Requirements* (see section 3.2.7).

RailCorp's only obligations concerning this testing and commissioning have been and are to provide the necessary train crews and the network access rights discussed in section 3.2.9 above, including stabling (train parking) facilities for up to eight train "sets" at locations other than the Auburn train maintenance facility.

PPP Co has had to and must give RailCorp 180 days' notice of the date on which it expects to start the testing and commissioning of each of the train "sets", and has had to and must renew these notices 30 days before the expected dates.

PPP Co has had to and must give RailCorp the results of all of the tests, as specified in the *Contract Management Requirements*. If a train "set" failed (or fails) a test, PPP Co has had to (or must) report this to RailCorp, carry out the necessary rectification work, notify RailCorp and conduct the test again.

Had the new Auburn maintenance facility not been able to be used for the testing of the prototype train and the first train "set" in accordance with PPP Co's *Delivery Programme*, because of a

failure by PPP Co to complete the maintenance facility by its targeted date for practical completion (20 January 2010), RailCorp would have been obliged to reasonably endeavour to provide PPP Co with suitable alternative testing and commissioning facilities, but only for the prototype and the first "set", not for the subsequent train "sets". In practice, although practical completion of the maintenance facility was not achieved until 18 June 2010, this situation did not arise, because of the delays experienced in manufacturing the prototype and "set 1" trains.

3.2.11 Completion requirements and reliability testing of the trains

The Project Contract distinguishes between "practical" and "final" completion of the trains.

3.2.11.1 Practical completion

General requirements for all train 'sets'

Except in the case of requirements that have been set aside, amended or added by the RailCorp Set 1 Letter or the RailCorp Set 7 Letter, discussed below, "practical" completion of each train "set" is achieved by PPP Co when:

- The "set" has been completed and complies with all relevant requirements of the Project Contract, apart from minor defects which will not prevent it from satisfying specified minimum functional, presentational and performance operating standards
- It has passed all its commissioning tests (section 3.2.10) and the results of all of these tests have been provided to RailCorp
- It complies with a "configuration baseline" for the trains
- PPP Co has trained RailCorp employees who will operate and help to maintain the "set" in the operational and relevant maintenance aspects of the new trains
- PPP Co has provided RailCorp with specified documents, instruments, operational and maintenance manuals, spares, tools and training materials, and specified time periods for RailCorp to review these materials have expired
- PPP Co has given RailCorp copies of all relevant approvals which PPP Co has had to obtain (section 3.2.2), and
- PPP Co has complied with its relevant rail safety obligations, as described in section 3.7.1.

The Project Contract sets out procedures for PPP Co to notify RailCorp of the expected completion of each "set" and for RailCorp to inspect the set and either certify its practical completion, listing any minor defects, or notify PPP Co that practical completion has not been achieved, accompanied (if practicable) by a list of what still needs to be done.

PPP Co has had to and must expeditiously rectify all minor defects identified in RailCorp's certificates of practical completion.

As already indicated in section 3.2.5, unless RailCorp decides otherwise, "practical" completion of *any* train "set" may not

occur before its targeted date for practical completion, within 15 business days of the practical completion of the previous “set” in the case of the first six “sets” or within ten business days in the case of all subsequent “sets”.

Additional original requirements for the first train ‘set’

Under the Project Contract’s original (2006) provisions, practical completion of the *first* of the train “sets” to be completed:

- Could not occur (as already indicated in section 3.2.5) until at least six months after the practical completion of the simulators and at least three months after the practical completion of the maintenance facility, and
- Had to be preceded by PPP Co’s provision of specified design certificates and a satisfactory interim *Safety Assurance Report* to RailCorp and by its updating of the simulators so that they accurately reflected the configuration and characteristics of the trains.

Amended and additional requirements for the first train ‘set’ under the RailCorp Set 1 Letter

Under the RailCorp Set 1 Letter, RailCorp:

- Temporarily set aside, for “set 1” only, the Project Contract’s requirements to correct a series of defects, pass or perform a series of tests and satisfy other requirements, in each case as specified in a table in the RailCorp Set 1 Letter, prior to the practical completion of “set 1”, and
- Instead permitted each of these defects, unpassed and unperformed tests and other unsatisfied requirements to be treated as if it were merely a minor defect and corrected, after practical completion, within specified timeframes and in accordance with other requirements tabulated in the Set 1 Letter.

Additional requirements for ‘sets’ 2, 3, 4, 5, 7, 8, 11 and 15 under the RailCorp Set 1 Letter

Many of the timeframes specified for the correction of “set 1” defects etc in the RailCorp Set 1 Letter expressly required their correction by the date of practical completion of one of seven subsequent train “sets” (“sets” 2, 3, 4, 5, 7, 11 or 15). Under the RailCorp Set 1 Letter the correction of these “set 1” defects by these dates became additional preconditions for the achievement of practical completion of the relevant subsequent “set”.

(In the case of the corrections of defects in “set 1” to be made by the date of practical completion of “set 7”, six of these additional preconditions for the practical completion of “set 7” were themselves subsequently set aside by RailCorp in the RailCorp Set 7 Letter, as discussed below, and these six corrections must now be completed as further preconditions for the practical completion of “set 11” or a later “set” as determined by RailCorp.)

Additional original requirements for the seventh train ‘set’

Under the Project Contract’s original (2006) provisions, practical completion of the seventh of the train “sets” to be completed could not occur until:

- Specified requirements for the initial in-service reliability of the first six “sets” had been satisfied, as discussed below
- Agreement had been reached on the “deemed action times” to be assumed for the resolution of particular types of operational problems as part of these and other reliability tests and as part of the calculation of RailCorp’s “TLS phase” “availability payments” to PPP Co (see section 3.6.1.2)
- It had been demonstrated that the weight of each of the first six “sets” was no more than 10% above its originally predicted weight of 395.5 tonnes (this predicted weight was subsequently increased to 395.688 tonnes through a variation in June 2009), and
- RailCorp was satisfied with the *Safety Assurance Report* which PPP Co had to prepare for revenue operation of the trains (see sections 3.2.7 and 3.7.1).

The requirements concerning the initial in-service reliability of the first six “sets” imposed limits on the numbers of incidents involving:

- Late availability of the trains for CityRail services (by three minutes or more), and/or late CityRail services using the trains (again by three minutes or more), because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates
- Failures by PPP Co to meet its “availability” obligations (see section 3.5.1) because of a PPP Co decision to withhold or withdraw a “set” from service, and
- Cancellations of services by RailCorp because a “set”:
 - ♦ Failed to meet specified minimum operating standards
 - ♦ Had a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more
 - ♦ Was introduced into service ten or more minutes late, or was running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” had to be substituted under arrangements described in section 3.5.1.3, or
 - ♦ Was subject to a direction, by the Independent Transport Safety and Reliability Regulator (ITSRR), the Office of Transport Safety Investigations (OTSI) or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other

associates or because of any other act or omission by PPP Co or its associates.

(The Project Contract called these types of incidents “**PPP Co related incidents**”).

In order to satisfy the Project Contract’s original reliability precondition for the practical completion of “set 7”—which the Project Contract called “**the initial reliability requirement for practical completion of set 7**”—there could be no more than 12 of these “PPP Co related incidents” during the first 150,000 km of service operations by the first six “sets” or during their first 750 weekday morning, weekday afternoon and weekend day “availability periods” (see section 3.5.1), and there could be no more than nine of these incidents during any “rolling” period of 750 “availability periods” (in all cases these were collective totals for all six “sets”).

However, if:

- PPP Co satisfied all of the requirements for practical completion of the seventh train “set” except the “initial reliability requirement”, *and*
- The first six “sets” had travelled less than 150,000 km in total since their practical completion, *and*
- The average weekly distance travelled by the first six “sets” in the 21-week period following the practical completion of the first “set” had been less than 1,925 km, *and*
- The first six “sets” had been used by RailCorp for fewer than 75% of the “availability periods” during this 21-week period for which they were made available (treating “sets” which were withheld or withdrawn by PPP Co or failed to meet the specified minimum operating standards as having been used by RailCorp),

RailCorp would have had to pay PPP Co all of the reasonable costs and losses PPP Co incurred as a result of the delay in achieving practical completion of the seventh “set”—including PPP Co’s lost revenue from RailCorp’s “milestone” payments (section 3.4.2) and “availability payments” (section 3.6.1)—from the date 21 weeks after practical completion of the first “set” until the first date on which any of the factors listed above no longer applied.

PPP Co would have been obliged to take all reasonable steps to mitigate these costs and losses and ensure its subcontractors did likewise, and RailCorp would not have been liable for any costs or losses arising out of a failure to mitigate PPP Co’s costs and losses.

The Project Contract expressly permitted PPP Co to withdraw one of its first six “sets” and substitute another for the purpose of satisfying these initial reliability requirements.

Amended requirements for the first and seventh train ‘sets’ under the RailCorp Set 7 Letter

Under the RailCorp Set 7 Letter, RailCorp:

- Set aside the Project Contract’s original requirements, prior to practical completion of “set 7”, concerning the initial in-service reliability of “sets 1 to 6” (i.e. the “initial reliability

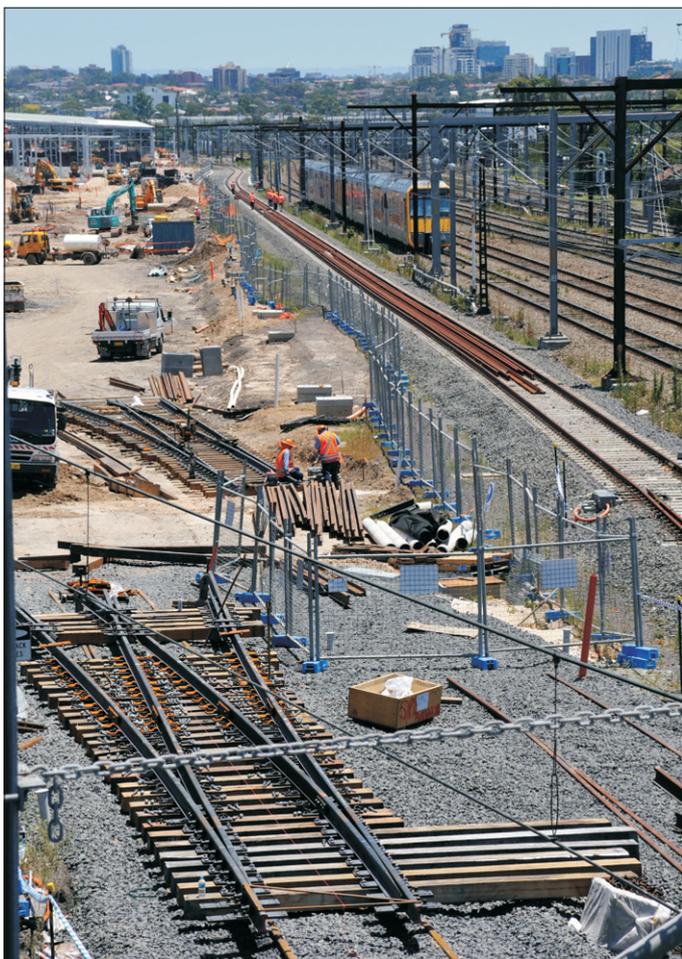
requirement for practical completion of set 7”) and the determination of the “deemed action times”, described above, and

- Set aside the requirements introduced by the RailCorp Set 1 Letter for the correction of six specified defects in “set 1” prior to the practical completion of “set 7”, instead permitting these six specified defects to be corrected as a precondition for the practical completion of “set 11” or a later “set” as determined by RailCorp.

Additional requirements for ‘sets’ 8 to 17, TLS reforms and a train reliability, performance and delivery review under the RailCorp Set 7 Letter

In addition to the new precondition for the practical completion of “set 11” (or a later “set”) just mentioned, the RailCorp Set 7 Letter:

- Introduced additional, new requirements for the reliability of “sets” 8 to 17 as preconditions for these trains’ practical completion, including the accumulation by each of these “sets” of at least 6,500 km of travel in the configuration in which they are presented for practical completion, with at least 1,500 km being free of any technical defects which, had they occurred in service, would have resulted in a cancellation or withdrawal of the “set” from service
- Included an acknowledgement by PPP Co that it may not make any claim against RailCorp caused solely by this variation, including any claim under the original Project Contract arrangements, described above, for losses incurred as a result of any delay in achieving practical completion of “sets” 8 to 17
- Required RailCorp to make ten payments to PPP Co, totalling \$3 million, within five business days of the practical completion of each of “sets” 8 to 17, in return for the variation described above, provided:
 - PPP Co submitted a plan for reforming its “through life support” (TLS) processes and management, to ensure the Project Contract’s train availability and reliability requirements are met, by 7 February 2012 (see section 3.5.2.1), and
 - At the time of each payment, PPP Co is materially complying with this plan (if it is not, the payment may be delayed)
- Required RailCorp to procure a review of the reliability and performance of “sets” 1 to 17 by the Director-General of Transport for NSW, with this review being able to commence after the practical completion of “set 13” and having to be completed no more than ten business days after the practical completion of “set 17”, and
- Included undertakings by RailCorp and PPP Co, if the Director-General is not satisfied with the reliability and performance of these trains, having regard to the original provisions of the Project Contract and the nature of any “PPP Co related incidents”, to continue train deliveries only after reaching agreement about a corrective action plan, with the



Some of RailCorp's "enabling works", showing the new "commissioning track" on the right and "Auburn entry/exit trackwork" in the foreground, in December 2008

Director-General facilitating their consideration of opportunities and agreement on improvements to the train *Delivery Programme* (see section 3.2.7).

3.2.11.2 Final completion

"Final" completion of each train "set" will be achieved by PPP Co when:

- The "set" has had no more than two "PPP Co related incidents", as described above, during any 180 consecutive days on which it has been available for services or for any 50,000 consecutive kilometres in service
- All of its minor defects identified by RailCorp have been corrected, and
- The "set" has no defects that would prevent its satisfying specified minimum functional, presentational and performance operating standards.

The Project Contract sets out procedures for PPP Co to notify RailCorp of the expected final completion of each "set" and for RailCorp to inspect the set and either certify its final completion or notify PPP Co that final completion has not been achieved, accompanied by a list of what still needs to be done.

To date (as at 2 March 2012) no "set" has achieved final completion.

3.2.12 Completion of the simulators

The Project Contract set out procedures for PPP Co to notify RailCorp of the expected practical completion of the simulators, as defined in the Project Contract, and for RailCorp to inspect the simulators and either certify their practical completion, listing any minor defects, or notify PPP Co that practical completion had not been achieved, accompanied (if practicable) by a list of what still needed to be done.

As already indicated in section 2.2.3, practical completion of the simulators was achieved on 31 August 2010.

Ownership of the simulators passed to RailCorp on this date of practical completion.

PPP Co was obliged to expeditiously rectify all minor defects identified in RailCorp's certificate of practical completion.

3.3 Design, construction and commissioning of the maintenance facility

3.3.1 Scope of works

As indicated in sections 2.2.4 and 3.1,

- PPP Co had to finance, design, construct and commission the new Auburn train maintenance facility:
 - ♦ Using its best endeavours to complete the maintenance facility by 20 January 2010, and
 - ♦ In accordance with detailed standards, specifications and other requirements set out in Schedules and Exhibits to the Project Contract, and
- RailCorp had to:
 - ♦ Design, construct and commission specified "enabling works" associated with the maintenance facility and the housing of the train simulators, and
 - ♦ Grant PPP Co licences to use the maintenance facility's construction site for preliminary site investigations and then for the design and construction of the facility.

3.3.1.1 RailCorp's 'enabling works'

RailCorp's "enabling works" comprised a series of defined work "packages" at different stages of PPP Co's construction of the maintenance facility, as set out in a Schedule to the Project Contract and described more generally in a *RailCorp Enabling Works Specification* exhibited to the Project Contract. They encompassed:

- Demolition and other works to allow PPP Co to take possession of the maintenance facility construction site
- The design, construction and commissioning of the "commissioning track" adjacent to and northwest of the new Auburn train maintenance facility (see section 3.2.9 and *Figure 3.1* in section 3.5.3)

- The design, construction and commissioning of trackwork connecting the maintenance centre's tracks to the RailCorp rail network, overhead wiring power supplies and signalling systems, and
- The design, construction and commissioning of accommodation and supports for the train simulators.

3.3.1.2 PPP Co's works

The scope of PPP Co's maintenance facility works was detailed in a *RailCorp Maintenance Facility Specification* and a *PPP Co Maintenance Facility Design Book* exhibited to the Project Contract.

These works encompassed both "site" works (earthworks, utility services, trackwork, power, signalling and yard control systems, roadways, walkways, car parking, fencing, security systems, landscaping, an underfloor wheel profiling plant, a washplant facility, a simulator area and a decanting area) and "building" works (the main maintenance building, maintenance roads, buildings for the underfloor wheel profiling plant and washplant facility, and associated office areas, training rooms, stores areas, amenities areas, train crew room and security and communications systems).

The new maintenance facility had to and must be able to cater for up to 1,000 train carriages.

3.3.2 Planning and other approvals

Planning approval for the maintenance facility, under Part 5 of the Environmental Planning and Assessment Act (NSW), was obtained by RailCorp on 30 November 2006. This approval, exhibited to the Project Contract, superseded earlier approvals granted on 2 September 2005, 1 February 2006 and 31 July 2006.

In carrying out its obligations to design, construct and commission the maintenance facility PPP Co had to:

- Comply with the conditions of this latest planning approval
- Obtain, maintain and comply with all other statutory and other approvals, licences and permits required for it to meet its obligations under the Project Contract, including (in particular) the rail safety requirements described in section 3.7.1 and the environmental requirements described in section 3.7.5, and ensure that its contractors (at any level), PPP Co Finance Co, PPP Co Holding Co and any other associates of PPP Co, and their officers, employees, agents, contractors, consultants, advisers, nominees and licensees, did likewise, and
- Ensure that PPP Co, its associates and the maintenance facility complied with all applicable laws.

Similarly, in carrying out its obligations to design, construct and commission the RailCorp "enabling works" RailCorp had to comply with the planning approval and all applicable laws and give PPP Co specified photographic records, drawings and statements to help PPP Co comply with the heritage-related conditions of the planning approval.



The maintenance facility under construction in December 2008

One of the conditions of the latest planning approval addressed the possibility that Tadgell's Bluebells (*Wahlenbergia multicaulis*) might be found on the site. They were not, but if they had been RailCorp and PPP Co would have been obliged to consult with qualified botanists to develop appropriate responses. If practical completion of the maintenance facility or any of the train "sets" had then been delayed because PPP Co and/or RailCorp had been forced to take conservation measures or obtain relevant approvals under the Threatened Species Conservation Act (NSW) or other legislation, RailCorp would have had to pay PPP Co all of the reasonable costs and losses PPP Co incurred as a result of the delay(s), including PPP Co's lost revenue from RailCorp's "milestone" payments (section 3.4.2) and "availability payments" (section 3.6.1). PPP Co would have had to take all reasonable steps to mitigate these costs and losses, and ensure its subcontractors did likewise, and RailCorp would not have been liable for any costs or losses arising out of a failure to mitigate PPP Co's costs and losses.

If the Project Contract's maintenance facility requirements had been varied at PPP Co's request (see section 3.7.14.2) and, as a result, RailCorp had decided that further environmental impact assessments were required, the planning approval was modified or a new planning approval was issued, PPP Co would have been responsible for all of the associated costs and risks, no matter who had carried out any additional assessments.

If there had been a legal challenge to the planning approval, PPP Co would have had to continue to perform its obligations under the Project Contract unless a court ordered it not to or ordered it to change the way it performed these obligations. If a court had issued such an order,

- PPP Co would have had to take all reasonable steps to mitigate the resultant costs, comply with all reasonable RailCorp directions concerning the legal challenge and ensure its subcontractors did likewise, and
- RailCorp would have had to pay PPP Co for any reasonable costs it incurred directly as a result of any delay in its performance of its obligations, and/or directly as a result of having to stop and/or resume its performance of its obligations, but *not* for:
 - ♦ Any delay costs if the court order had not prevented PPP Co from achieving practical completion of the maintenance facility by 20 January 2010
 - ♦ Any costs resulting from a failure by PPP Co to mitigate its costs or comply with RailCorp directions, or

- ◆ Any costs arising from the initiation or upholding of the legal challenge or the issuing of the court order—
 - Because of a PPP Co breach of its obligations under the Project Contract, or any other wrongful act or omission by PPP Co, its subcontractors or its other associates, or
 - Associated with the environmental impact assessment and/or planning approval consequences of a variation of the Project Contract’s maintenance facility requirements at PPP Co’s request (see section 3.7.14.2).

3.3.3 Design obligations

3.3.3.1 RailCorp’s design obligations

RailCorp had to design its “enabling works” in accordance with broad descriptions of these works in the Project Contract’s *RailCorp Enabling Works Specification*, all applicable laws and the maintenance facility’s planning approval, so that each completed “package” of these works was fit for its intended purpose.

It had to give PPP Co “as built” drawings for each “package”, as necessary for PPP Co to be able to meet its own design, construction and commissioning obligations.

3.3.3.2 PPP Co’s design obligations

PPP Co had to design the maintenance facility and prepare detailed design documentation in accordance with the Project Contract and, more specifically,

- The *RailCorp Maintenance Facility Specification* and PPP Co’s *Maintenance Facility Design Book*
- The detailed *RailCorp Contract Management Requirements* described in sections 3.2.7 and 3.3.9, and
- Any variations directed or approved by RailCorp under the Project Contract’s variation provisions (section 3.7.14).

PPP Co has warranted that all of its design documentation for the maintenance facility, including its *Maintenance Facility Design Book*, was, is and will be safe and fit for its intended purposes.

Intellectual property and moral rights in the designs are governed by the arrangements described in section 3.7.6.

RailCorp had prepared a “reference design” for the maintenance facility, but PPP Co was not obliged to follow this design, provided its own designs, as documented in the *Maintenance Facility Design Book*, contemplated design solutions of a higher standard, providing a greater scope or higher level of service or imposing more demanding requirements.

PPP Co had to conduct a series of five technical reviews of its designs with RailCorp, as specified in the *Contract Management Requirements*, so as to permit RailCorp to monitor its progress and provide feedback on its compliance with the requirements of the Project Contract. The Project Contract’s arrangements for these reviews, the development and finalisation of the designs and amendments to the *Maintenance Facility Design Book* were

directly analogous to those already described in section 3.2.3 for the trains’ and simulators’ designs.

3.3.4 Construction site access

In return for a payment of \$1, RailCorp granted PPP Co, its subcontractors and its other associates a non-exclusive licence to use a defined maintenance facility construction site for preliminary site investigations until RailCorp had completed the first “package” of its “enabling works” or until any earlier termination of the Project Contract.

Once RailCorp had completed this first “package” of its “enabling works”, it was obliged, in return for another payment of \$1, to grant PPP Co, its subcontractors and its other associates a non-exclusive licence to use this defined construction site, for the purpose of designing and constructing the maintenance facility, until the date of practical completion of this facility or until any earlier termination of the Project Contract.

This licence was subject to a series of “conditions of access”, mostly concerned with PPP Co’s construction methods, set out in a Schedule to the Project Contract, and a series of other conditions, including obligations on PPP Co to:

- Ensure RailCorp and its contractors etc had reasonable access to the site in order to carry out RailCorp’s remaining “enabling works”
- Refrain from using the site for any purpose other than the project without RailCorp’s consent
- Protect and repair a defined section of Manchester Road North, and
- Compensate RailCorp for any costs or losses it incurred if this road were damaged, other than any indirect, consequential or purely economic losses that were not recovered under the insurance policies specified in the Project Contract (see section 3.7.10.1) or that would have been recovered had PPP Co complied with its insurance obligations.

3.3.5 Site conditions, contamination and utilities

PPP Co accepted the construction site “as is”, in its current condition and state of repair and expressly including any latent conditions, contamination, heritage artefacts (see section 3.3.11), native title claims (see section 3.3.10) and/or any other existing or future third party claims or interests.

If contaminated material had been disturbed or had arisen from PPP Co’s activities, PPP Co would have had to dispose of the material or otherwise deal with it in accordance with the relevant laws, remediate the site and indemnify RailCorp against any claims or losses it incurred in connection with the contamination or any breach by PPP Co of these obligations, other than any indirect, consequential or purely economic losses that were not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

PPP Co similarly had to indemnify RailCorp against any claims or losses RailCorp incurred in connection with:

- Any disruption PPP Co caused to electricity, gas, water, sewerage, drainage, telephone, electronic communications or other utility services, or
- Any failure by PPP Co to comply with obligations to:
 - ♦ Protect, relocate, modify and provide all the utility services it needed in order to comply with its obligations under the RailCorp project agreements (other than traction power electricity for the trains), and
 - ♦ Obtain RailCorp’s consent before constructing any utility services infrastructure outside the site or identifying the exact locations of utility services within the site,

subject to the same exception.

PPP Co had to ensure that RailCorp was able to use any excess capacity in the maintenance facility’s utility services and associated utility service infrastructure constructed by PPP Co, once PPP Co’s maintenance facility works had reached practical completion (see also section 3.7.7).

3.3.6 General construction obligations

3.3.6.1 RailCorp’s ‘enabling works’

RailCorp had to construct and commission its “enabling works” in accordance with the broad descriptions of these works in the *RailCorp Enabling Works Specification*, all applicable laws and the maintenance facility’s planning approval, so that each completed “package” of these works was fit for its intended purpose and free of defects, other than any minor defects, identified by RailCorp, which:

- Did not prevent the “package” from being reasonably able to be safely used for its intended purpose
- Did not prevent a continuation of PPP Co’s maintenance facility works or RailCorp’s “enabling works”
- Were assessed by RailCorp, on reasonable grounds, as not requiring prompt rectification, but
- Subsequently had to be expeditiously rectified by RailCorp as described in section 3.3.13 below.

3.3.6.2 PPP Co’s works

PPP Co had to construct the maintenance facility in accordance with the Project Contract and, more specifically,

- The *RailCorp Maintenance Facility Specification* and PPP Co’s *Maintenance Facility Design Book*
- The detailed RailCorp *Contract Management Requirements* described in sections 3.2.7 and 3.3.9
- PPP Co’s “final” design documentation for the maintenance facility, after the “critical” design review (section 3.3.3.2), and
- Any variations directed or approved by RailCorp under the Project Contract’s variation provisions, described in section 3.7.14 below.

PPP Co warranted that the completed maintenance facility would be, and would remain, safe and fit for its intended purposes, and undertook that in constructing and commissioning the facility it would:

- Use workmanship which was fit for its purpose and of a standard prescribed in the specifications listed above or, in its absence, of a standard consistent with best industry standards, and
- Use parts, components, goods and materials which were of merchantable quality and fit for their intended purposes and which complied with the specifications listed above or, in their absence, were new and consistent with best industry standards.

3.3.6.3 Coordination

RailCorp and PPP Co expressly acknowledged a series of interfaces between RailCorp’s “enabling works”, PPP Co’s maintenance facility works and other activities under the Project Contract, and agreed to cooperate with each other to facilitate each others’ works, coordinate their activities, protect their works against accidental damage by the other party, minimise disruption to the other party’s works and resolve any interface problems that might have arisen.

3.3.7 Timeframes

3.3.7.1 RailCorp’s ‘enabling works’

In the case of some of the “packages” of works constituting RailCorp’s “enabling works”, RailCorp was not obliged to start the relevant works until PPP Co had given RailCorp a specified period of notice that it required RailCorp to carry out these works. In these cases,

- If PPP Co notified RailCorp before the end of this notice period that it had completed specified preconditions for the “package” of works, RailCorp had to complete the “package” of works—and issue a certificate that it complied with the Project Contract’s requirements, apart from minor defects as described in section 3.3.6.1, under arrangements described in section 3.3.13 below—within a period of time specified for each “package” in a Schedule to the Project Contract, and
- If PPP Co had not completed the preconditions for a works “package” by the end of the relevant notice period, the deadline for RailCorp to complete the “package” of works was to be extended by the length of PPP’s delay in satisfying the preconditions *plus* any further period RailCorp needed to undertake the works, taking account of the availability of track “possessions” and the need to remobilise contractors.

In the case of works “packages” for which PPP Co notice periods and preconditions were not specified, RailCorp had to simply complete the relevant works and issue their certificates of compliance within time periods specified for each of these “packages”, without any extensions of time.

RailCorp had to notify PPP Co, as soon as reasonably practicable, of any matter which would or could have delayed any of RailCorp’s “enabling works”.

3.3.7.2 PPP Co's works

PPP Co was obliged to regularly and diligently progress its design, construction and commissioning of the maintenance facility and use its best endeavours to complete the facility by 20 January 2010.

PPP Co had to develop and periodically update the maintenance facility aspects of its *Delivery Programme* in accordance with the *Contract Management Requirements* (sections 3.2.7 and 3.3.9) or any other reasonable RailCorp requirements, and had to give RailCorp copies of each updated *Delivery Programme* and monthly *Delivery Phase Progress Reports*, again as specified in the *Contract Management Requirements*.

If PPP Co became aware of any matter which might have delayed the completion of the maintenance facility, it had to notify RailCorp as soon as reasonably practicable, providing details and a *Corrective Action Plan*. Similarly, PPP Co had to submit a *Corrective Action Plan* if RailCorp reasonably believed PPP Co would be delayed in completing the facility and notified PPP Co of this belief.

PPP Co was then obliged to implement its *Corrective Action Plan*, unless RailCorp notified it within 15 business days that it did not believe the *Plan* would allow PPP Co to avoid, mitigate or minimise the consequences of the delay, in which case PPP Co had to amend and resubmit the *Corrective Action Plan*. RailCorp was not liable for any delays or losses incurred by PPP Co as a result of these processes.

PPP Co was free to accelerate the progress of its maintenance facility works, and RailCorp could assist in this, although it was not obliged to do so.

Provided PPP Co regularly and diligently progressed its design, construction and commissioning activities and used its best endeavours to complete the facility by 20 January 2010, RailCorp was not entitled to claim damages from PPP Co for any delays or disruptions. Any delay in the completion of the facility would, however, defer PPP Co's receipt of at least one of its "milestone" payments from RailCorp, under the arrangements described in section 3.4.2 below. In addition, because practical completion of the first train "set" could not be certified until at least three months after the practical completion of the maintenance facility, a delay in completing the facility might have deferred PPP Co's subsequent "availability payments" from RailCorp, under the arrangements described in section 3.6.1.

RailCorp could order PPP Co to suspend any of its maintenance facility design, construction or commissioning activities if (but only if) PPP Co were not carrying out these activities in accordance with the Project Contract's requirements, and could then instruct PPP Co to resume all or part of the suspended activities. PPP Co was not entitled to make any claim against RailCorp in connection with such a suspension.

If PPP Co had been delayed in completing the maintenance facility, or had had to incur additional costs in avoiding or minimising such a delay, as a result of:

- A RailCorp breach of its obligations under the Project Contract (such as, for example, late completion of any of RailCorp's "enabling works")
- A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, or
- Industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that had not been caused, directly or indirectly, by any action or inaction by PPP Co, its contractors or its other associates which was not required by the Project Contract,

RailCorp would have had to pay PPP Co for all of the reasonable, and reasonably foreseeable, costs and losses it incurred, including any lost revenue, other than any costs or losses arising from any failure by PPP Co to take reasonable steps to mitigate its costs and losses.

3.3.8 Subcontracting by PPP Co

As already indicated in section 2.2.4, PPP Co subcontracted its maintenance facility design, construction and commissioning obligations to the Maintenance Facility Contractor under the Maintenance Facility Construction Contract, as amended by the Deed of Variation No 1 Maintenance Facility Construction Contract, the Deed of Variation No 2 Maintenance Facility Construction Contract and the Deed of Variation No 3 Maintenance Facility Construction Contract.

PPP Co required RailCorp's consent before it could enter into any other "significant contracts" (see section 3.2.6) concerning the design, construction and commissioning of the maintenance facility, and had to ensure the Maintenance Facility Contractor obtained RailCorp's consent before it entered any such contracts. RailCorp could not unreasonably delay or withhold this consent.

The Project Contract imposed restrictions on these maintenance facility "significant contracts", and requirements for the procedures PPP Co had to follow, that were directly analogous to those already described in section 3.2.6 for "significant contracts" concerning the design, manufacture and commissioning of the trains and simulators.

3.3.9 PPP Co construction management plans, records, reports, inspections and audits

In designing, constructing and commissioning the maintenance facility PPP Co had to comply with the Project Contract's detailed requirements for PPP Co's contract management system, "Project Plans", training, "key personnel" and Senior Project Group participation, as already described in section 3.2.7.

Subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp could enter the maintenance facility construction site at any time to observe, monitor, inspect and review PPP Co's performance of its obligations under the Project Contract, provided this was done in ways which did not unreasonably interfere with PPP Co's performance of its obligations. PPP Co had to facilitate and assist these inspections.

PPP Co had to allow RailCorp to access PPP Co's contract management system, and the contract management systems of PPP Co's subcontractors, sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp had to do this in ways which did not unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

RailCorp could also conduct, or direct PPP Co to conduct, any reasonable tests concerning its maintenance facility design, construction and commissioning obligations, in addition to the detailed *planned* testing program that had to be set out in PPP Co's *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (section 3.2.7). If it did so, the Project Contract's procedural requirements and cost allocations were to be the same as those already described in section 3.2.7 for equivalent tests concerning the design, manufacture and commissioning of the trains and simulators.

3.3.10 Native title

If there had been a native title claim over any part of the maintenance facility or its construction site, PPP Co would have had to continue to perform its obligations under the Project Contract unless it was ordered not to, or was ordered to change the way it performed these obligations, by RailCorp or by a court, tribunal or any other legal requirement, in which case:

- PPP Co would have had to take all reasonable steps to mitigate the resultant costs, comply with all reasonable RailCorp directions concerning the native title claim and ensure its subcontractors did likewise
- RailCorp would have had to pay PPP Co for any reasonable costs it incurred directly as a result of any delay in its performance of its obligations, and/or directly as a result of having to stop and/or resume its performance of its obligations, but *not* for:
 - ♦ Any delay costs if the order by RailCorp or the court, tribunal or legal requirement did not prevent PPP Co from achieving practical completion of the maintenance facility by 20 January 2010 and did not prevent PPP Co from achieving the practical completion of any of the train "sets" by its specified date for practical completion (section 3.2.5), or
 - ♦ Any costs resulting from a failure by PPP Co to mitigate its costs or comply with RailCorp directions, and
- RailCorp would not otherwise have been liable for any losses PPP Co, its subcontractors or its other associates suffered as a result of the native title claim.

RailCorp, and not PPP Co, was liable to pay any compensation or other amounts that had to be paid to any native title holders.

3.3.11 Archæological and heritage artefacts

Any archæological or heritage artefacts discovered on or under the construction site would have been (as between RailCorp and PPP Co) the absolute property of RailCorp.

PPP Co was obliged to immediately notify RailCorp if any artefacts were discovered, protect them and comply with any RailCorp instructions, including any directions to suspend its work.

RailCorp would have had to reimburse PPP Co for any extra costs it reasonably incurred in complying with RailCorp's instructions, but would not otherwise have been liable to PPP Co, and any failure by PPP Co to perform its obligations under the Project Contract as a result of RailCorp's instructions would not have amounted to a breach of the contract.

3.3.12 Testing and commissioning of the maintenance facility

PPP Co had to test and commission the new maintenance facility in accordance with its *Integrated Test Plan*, one of the plans it had to develop as a subsidiary component of its *Systems Assurance Plan*, and the *Contract Management Requirements* (sections 3.2.7 and 3.3.9).

It had to give RailCorp the results of all of the tests, as specified in the *Contract Management Requirements*.

3.3.13 Completion

The Project Contract set out procedures for:

- RailCorp to notify PPP Co of the completion of each "package" of RailCorp's "enabling works", for RailCorp and PPP Co to jointly inspect these works and for RailCorp to certify the compliance of these works with the requirements of the Project Contract, apart from identified and listed minor defects, and
- PPP Co to notify RailCorp of the expected practical completion of the maintenance facility and for RailCorp to inspect the facility and either certify its practical completion, listing any minor defects, or notify PPP Co that practical completion had not been achieved, accompanied (if practicable) by a list of what still needs to be done.

RailCorp had to expeditiously rectify all minor defects identified in its certificates of compliance for the "enabling works", and PPP Co had to expeditiously rectify all minor defects identified in RailCorp's certificate of practical completion for the maintenance facility.

In practice, practical completion of the RailCorp "enabling works" "packages" was achieved progressively from 30 March 2007 to 10 June 2010 and practical completion of the maintenance facility was achieved on 18 June 2010.

3.3.14 The ‘return’ of certain facilities to RailCorp

Some of the facilities designed, constructed and commissioned under the arrangements summarised above were to be “returned” to RailCorp at specified times, and not subsequently be maintained by PPP Co as part of its “through life support” (“TLS”) obligations described in section 3.5.2 below.

The facilities to be “returned” to RailCorp were:

- From the date of practical completion of the maintenance facility, the parts of the construction site that were outside the areas to be leased or licensed to PPP Co, during the “TLS phase” of the project, under the Maintenance Facility Lease and the Maintenance Facility Licence (see section 3.5.3), *plus* specified rail infrastructure (tracks, overhead wiring, signalling, etc) within an “interconnection area” to be agreed between RailCorp and PPP Co under arrangements set out in the Call Option Deed (section 3.5.3)
- From the date (no later than 31 December 2015) on which PPP Co’s right of “possession” of the “commissioning track” is ended by RailCorp following the practical completion of the last of the trains (see section 3.2.9), or from any earlier date determined by RailCorp, defined “future RailCorp facilities areas” within the areas to be licensed to PPP Co under the Maintenance Facility Licence (see section 3.5.3), and
- From the date on which PPP Co’s right of “possession” of the “commissioning track” is ended, or from any earlier date determined by RailCorp, defined “maintenance facility access areas” within the areas to be licensed to PPP Co under the Maintenance Facility Licence.

PPP Co was obliged to correct all defects in these facilities, other than the “maintenance facility access areas”, during a 12-month defects liability period commencing on the date of practical completion of the maintenance facility. If a defect were corrected in any of the facilities, its defects liability period was to recommence on the date on which the defect was corrected.

The Project Contract set out procedures for RailCorp to notify PPP Co of a defect and direct PPP Co to correct the defect within a specified reasonable period of time.

If PPP Co had failed to comply with such a notice—following the application of dispute resolution procedures specified in the Project Contract if PPP Co had disputed the notice and it had been determined that the defect did exist (see section 3.7.17)—RailCorp could have, among other remedies, asked a court to order PPP Co to correct the defect, corrected the defect itself or engaged others to correct the defect. In either of the last two cases, PPP Co would have had to pay RailCorp for any losses it incurred, other than any indirect, consequential or purely economic losses that were not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

3.4 ‘Delivery phase’ security bonds and RailCorp payments

3.4.1 Security bonds

In addition to the securities granted to RailCorp under the RailCorp Deed of Charge (see section 4.1), PPP Co has, as already indicated in section 2.3.1, given RailCorp two unconditional bank bonds, for a total of \$50 million, to secure the performance of its “delivery phase” obligations under the Project Contract.

If they are not drawn upon, these bonds must be released by RailCorp on the date of final completion of the 78th train “set” (section 3.2.11.2).

3.4.2 ‘Milestone’ payments

RailCorp has had to and must make specified payments to PPP Co at specified “milestones” during the “delivery phase” of the project, as set out in a Schedule to the Project Contract, until “final” completion of the last of the trains.

These “milestone payments”, none of which has had to be or will be indexed for inflation, have been or will be:

- \$10 million on 27 June 2008, once PPP Co had given RailCorp all of the “Project Plans” it had to submit on or before 3 March 2007, *and* 20 business days had elapsed, since the last of these plans was submitted, without RailCorp’s notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.7 and 3.3.9)
- \$3 million on 27 June 2008, once:
 - PPP Co had given RailCorp all of the “Project Plans” it had to submit for or during the “system definition” review of PPP Co’s designs (sections 3.2.3 and 3.3.3.2), *and* 20 business days had elapsed, since the last of these plans was submitted, without RailCorp’s notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.7 and 3.3.9), *and*
 - PPP Co had submitted all the other documents required for this “system definition” review, and had done everything else the Project Contract required for this review, to RailCorp’s satisfaction, *and*
 - The “system definition” review had been completed, with 20 business days having elapsed, since the last of the relevant design documentation was submitted, without RailCorp’s notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.3 and 3.3.3.2)
- \$3 million on 29 December 2008, once analogous requirements had been satisfied for the “preliminary” design review (sections 3.2.3 and 3.3.3.2)
- \$10 million on 29 June 2009, once analogous requirements had been satisfied for the “critical” design review (sections 3.2.3 and 3.3.3.2)—including PPP Co’s provision of advice to

RailCorp about any changes to RailCorp’s specifications for “through life support” in the light of changes to or advances in the trains and their intended operations, under arrangements described in section 3.5.2.1 below—and PPP Co had satisfied RailCorp’s that:

- PPP Co had materially complied with its *Local Industry Participation Plan*, one of the subsidiary components of its *Contract Management Plan* (sections 3.2.7 and 3.3.9), and had ensured that the Rolling Stock Manufacturers and Maintenance Facility Contractor had done likewise (see section 3.7.4), and
- The Project Contract’s 20% local (Australian and New Zealand) content requirement was reasonably likely to be achieved (see section 3.7.4)
- \$5 million once RailCorp is satisfied “qualification” testing, as specified in the *Contract Management Requirements* and in PPP Co’s *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (sections 3.2.7, 3.2.10, 3.3.9 and 3.3.12), has been successfully completed (as at 2 March 2012, this series of tests is still underway)
- \$5 million on 27 June 2008, once PPP Co had completed mock-ups of the trains’ passenger saloons and crew cabins
- \$2 million on 23 December 2010, once RailCorp had certified practical completion of the train simulators and any listed minor defects in the simulators had been rectified (section 3.2.12)
- \$6 million on 23 December 2010, once RailCorp had certified practical completion of the maintenance facility and any listed minor defects in the maintenance facility had been rectified (section 3.3.13)
- \$4 million on 25 November 2010, once PPP Co had given RailCorp a specified series of operational and maintenance manuals, in a form that satisfied RailCorp, under arrangements described in section 3.5.2 below, and
- \$2 million each time RailCorp certifies “final” completion of a train “set” (section 3.2.11.2), *provided*:
 - RailCorp has already certified “practical” completion of the seventh “set” (section 3.2.11.1), as will now be the case because none of the “sets” in fact achieved final completion prior to the practical completion of “set 7” on 20 February 2012, and
 - The “set” in question weighs no more than 395.688 tonnes, with the payment for any set weighing more than 395.688 tonnes being reduced by \$35,000 multiplied by the percentage by which its actual weight exceeds this amount, to compensate RailCorp for its additional power consumption costs etc.

These RailCorp payments to PPP Co have had to be and must be paid into bank accounts specified in the Debt Finance Side Deed.

3.4.3 Payment of an adjustment for the cost of the trains’ earthing systems

The private sector parties’ “base case financial model” for the project, as agreed at “financial close” on 7 December 2006 (see section 2.3.1), included a provisional sum for the trains’ electrical earthing systems, incorporating an electrical protection system that has not previously been installed in RailCorp trains.

PPP Co had to give RailCorp a detailed cost estimate for this system by 7 March 2007, and RailCorp and PPP Co then had to use their best endeavours to agree on these costs before 1 May 2007.

If the agreed cost estimate were higher than the provisional sum, RailCorp had to pay the difference to PPP Co on or before 1 July 2007. If it were lower, PPP Co had to pay the difference to RailCorp on or before the same date.

If the parties could not agree, either of them could refer the matter for resolution under the Project Contract’s dispute resolution procedures, described in section 3.7.17.

In practice, because the design of the protection system is relatively novel RailCorp and PPP Co have taken substantially longer than originally planned to finalise the design, a prerequisite for the detailed cost estimate, and are still discussing the costs of maintaining the system and its potential impacts on the payment regime described in section 3.6 of this report.

However, with several of the trains now in service these matters are nearing a conclusion, allowing RailCorp and PPP Co to finalise the adjustment.

To date (as at 2 March 2012) no adjustment has been paid.

3.5 Train ‘availability’ and ‘through life support’ obligations

3.5.1 General ‘availability’ obligations

As already indicated in sections 2.2.6 and 3.1.1, from the date of “practical” completion of each of the train “sets” (section 3.2.11.1) PPP Co has had to and must make the “set” available to RailCorp in accordance with Project Contract requirements for specified numbers of the “sets” to be “available” for CityRail services.

In these requirements, “availability” is defined in terms of:

- Three types of “availability periods”:
 - Weekday morning periods, between the start of CityRail’s first timetabled service for the day and 12 midday on any weekday that is not a public holiday
 - Weekday afternoon periods, between noon and the completion of CityRail’s last timetabled service for the day on any weekday that is not a public holiday (the last service may not finish until after midnight), and
 - Weekend and public holiday periods, between the start of CityRail’s first timetabled service for the day and the

completion of CityRail’s last timetabled service for the day on any Saturday, Sunday or public holiday (again, the last service may not finish until after midnight)

- Three “phases” within the overall “through life support” (“TLS”) phase of the project:
 - ♦ A “transition-in” phase, while the trains are being progressively manufactured, commissioned and introduced into service, between the date of practical completion of the first train “set” (originally targeted for 20 April 2010 but in practice 30 June 2011) and the date of practical completion of the 78th (originally targeted for 5 September 2013)
 - ♦ A “steady state” phase, and
 - ♦ A “transition-out” phase, between:
 - The first PPP Co decommissioning or RailCorp acquisition of a train under arrangements described in section 3.5.8 below (originally targeted for 20 July 2040 but now set at the date 30 years after the actual date of practical completion of the first train “set”, or 30 June 2041, and potentially five or ten years later than this under the extension options described in section 3.5.7), and
 - The expiry of the Project Contract (originally targeted for 30 July 2043 but, if it is later, 30 years after the actual date of practical completion of the 69th train “set”, and again potentially five or ten years later than this) or any earlier termination of the Project Contract, and
- Conditions which must be satisfied before any train “set” is considered “available” for CityRail services during any “availability period”, including the set’s practical completion, its compliance with specified minimum operating standards, and its delivery to a specified pick-up point near the Auburn maintenance facility, its readiness at a RailCorp “stabling” depot or (if applicable) the fact that it is already providing a CityRail service.

In some circumstances, discussed in section 3.5.1.4 below, trains may be *deemed* to be “available” even if they are not *physically* available as described above.

3.5.1.1 Routine ‘availability’ requirements

The numbers of trains which PPP Co must routinely make available for CityRail services during each “availability period” are specified, for each of the three “phases”, in a Schedule to the Project Contract.

During the “transition-in” phase the number of trains routinely to be made available by PPP Co for each “availability period” has been gradually increasing (and will gradually increase) from one to 72 as each additional “set” reaches practical completion. It will then remain at 72 until the “transition-out” phase, during which it will progressively decrease as each “set” is decommissioned or acquired by RailCorp, with only ten still being required just before the expiry of the Project Contract.

PPP Co may only use the carriages and trains it manufactures as part of this project to provide the required “availability”, unless a carriage or train is lost, stolen or destroyed, fails or malfunctions during normal operations or is temporarily replaced during servicing, maintenance or repair.

3.5.1.2 Additional ‘availability’ requirements for special events and ad hoc needs

In addition to these routine “availability” requirements, during the “steady state” phase, but not before or after this phase, four additional train “sets” must be made available for all “availability periods” during Royal Easter Shows, all “availability periods” on 31 December and 1 January each year and up to four other “special events” each financial year, each lasting up to four consecutive “availability periods”, as notified by RailCorp at least one month in advance.

RailCorp may cancel the requirement for four extra trains during any of these additional “special events” by giving PPP Co at least 48 hours’ notice, and may then impose the requirement for a different additional “special event” if it chooses to do so.

These planned additional “availability” requirements for “special events” are supplemented by provisions in the Project Contract for *ad hoc* additional “availability” requirements during any of the three project phases described above, not just the “steady state” phase. Under these arrangements, RailCorp may at any time ask PPP Co how many additional “sets” it is willing to provide for any particular nominated “availability period(s)”, PPP Co must respond within five business days, and RailCorp may then direct PPP Co to provide some or all of this additional number of “sets”.

3.5.1.3 Train deliveries and substitutions

The Project Contract sets out detailed arrangements for PPP’s day-to-day provision of the required numbers of trains, including:

- Requirements for PPP Co to tell RailCorp, in accordance with *Interface Protocols* issued by RailCorp under arrangements described in section 3.5.2.1, which of PPP Co’s trains will *not* be made available for each “availability period”.
- The delivery of trains a specified period of time before the start of each “availability period”, so that RailCorp’s train crews may complete specified train preparation tasks before the “availability period” commences. The period of time specified for this preparation of the trains was to be, and was, determined by RailCorp prior to the practical completion of the first train “set”.
- PPP Co’s right to substitute a spare “set”, from the same location, for a “set” which, at the start of an “availability period”,
 - ♦ Does not satisfy the specified minimum operating standards
 - ♦ Has a defect, attributable to PPP Co, the TLS Contractor or PPP Co’s other subcontractors or associates, which RailCorp reasonably believes may delay its services by ten minutes or more, or

- ♦ Is subject to a direction, by the Independent Transport Safety and Reliability Regulator (ITSRR), the Office of Transport Safety Investigations (OTSI) or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

provided PPP Co notifies RailCorp of this substitution.

- In the same circumstances, PPP Co’s right to substitute a spare “set” from a different location, but only if RailCorp agrees.
- PPP Co’s right to provide a substitute for a “set” that has been cancelled by RailCorp, while in service, on the grounds that it:
 - ♦ Has failed to meet specified minimum operating standards
 - ♦ Has a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more
 - ♦ Has been introduced into service ten or more minutes late, or has been running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, or
 - ♦ Is subject to a direction, by ITSRR, OTSI or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

and PPP Co’s right to provide a substitute for a “set” that has incurred a defect, or is otherwise in a condition which would lead to its being taken out of service, provided it gives RailCorp at least three hours’ notice before the commencement of the “availability period” from which the substitution is to take effect. (If less than three hours’ notice is given, the substitution is permitted only if RailCorp agrees.)

3.5.1.4 Deemed ‘availability’

For the purposes of the Project Contract’s “availability” requirements and RailCorp’s associated “availability payments” to PPP Co, summarised in section 3.6.1 below, a train “set” that does not satisfy the Project Contract’s *physical* “availability”

criteria may nonetheless be *deemed* to be “available” if its failure to satisfy these criteria arises because:

- The “set” has been damaged by a collision with another train, a road vehicle or any other object, a derailment, vandalism or graffiti covering an area of more than 10 m², *unless*:
 - ♦ The event causing the damage occurred while the “set” was in PPP Co’s possession for maintenance or in the maintenance facility
 - ♦ The event causing the damage resulted from a defect attributable to PPP Co or its subcontractors or other associates, or from any other act or omission by PPP Co or its associates, or
 - ♦ RailCorp has directed PPP Co to repair the damage but PPP Co has not done this within the required time, in which case the “set” will *not* be deemed to be “available” beyond the time required for reinstatement, *or*
- The “set” or the maintenance facility has been damaged as a result of:
 - ♦ A RailCorp breach of the Project Contract
 - ♦ A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates
 - ♦ War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
 - ♦ Nuclear radioactivity,

unless RailCorp has directed PPP Co to repair the damage but PPP Co has not done this within the required time, in which case, again, the “set” will *not* be deemed to be “available” beyond the time required for reinstatement, *or*

- RailCorp has directed a variation under the arrangements described in section 3.7.14.1, *unless* PPP Co has not completed this variation within the required time, in which case the “set” will *not* be deemed to be “available” beyond the required time, *or*
- RailCorp has approved a variation, requested by PPP Co under the arrangements described in section 3.7.14.2, that is required to ensure PPP Co’s works, the train “sets”, the maintenance facility or the simulators comply with specified types of changes in law (see section 3.7.13), or to restore their functionality following a modification to RailCorp’s infrastructure, *unless* PPP Co has not completed this variation within the required time, in which case the “set” will *not* be deemed to be “available” beyond the required time, *or*

- The “set” has been damaged (other than by graffiti covering an area of 10 m² or less) or destroyed, *and* this:
 - ♦ Occurred while the “set” was in RailCorp’s possession, and was not caused by any act or omission by PPP Co or its associates or any event which occurred before the practical completion of the “set”, or
 - ♦ Resulted from:
 - A RailCorp breach of the Project Contract
 - A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates
 - War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
 - Nuclear radioactivity,

and PPP Co is obliged to repair or replace the “set”, within a reasonable period of time as specified by RailCorp, under arrangements described in section 3.7.10.3 below, *unless* PPP Co has not completed its repairs or replacement within the specified time, in which case the “set” will *not* be deemed to be “available” beyond the specified time, *or*

- RailCorp has breached the Project Contract, or there has been a negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates, *or*
- There is a defect in the “set”, the maintenance facility, PPP Co’s works or the simulators as a result of work by RailCorp or its contractors other than PPP Co and its associates, *or*
- ITSRR, OTSI or any other investigative authority has ordered RailCorp not to operate the “set” or not to use the maintenance facility, *unless*:
 - ♦ The order has resulted from a defect attributable to PPP Co or its subcontractors or other associates, or from any other act or omission by PPP Co or its associates, or
 - ♦ RailCorp has directed PPP Co to carry out rectification work to deal with the issue which led to the order, but PPP Co has not done this within the required time, in which case the “set” will *not* be deemed to be “available” beyond the time required for reinstatement, *or*
- There has been industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that was not caused, directly or indirectly, by any action or inaction by PPP Co, its contractors or its other associates which was not required by the Project Contract.

Arrangements for RailCorp to make monthly “availability payments” to PPP Co for making the “sets” available, and for these payments to be reduced if PPP Co fails to meet all its “availability” obligations, as RailCorp’s sole remedy in these circumstances, are described in section 3.6.1 below.

3.5.2 General TLS obligations

3.5.2.1 Existing PPP Co and RailCorp obligations

As already indicated in sections 2.2.6 and 3.1.1, PPP Co has had to and must provide specified “through life support” (“TLS”) services, in accordance with detailed standards, specifications and other requirements set out in the Project Contract, for:

- The trains
- The train simulators
- The maintenance facility (other than the associated facilities “returned” to RailCorp as described in section 3.3.14), and
- PPP Co’s maintenance plant, equipment, parts and spares throughout the “TLS phase” of the project, from the date of practical completion of the simulators, the maintenance facility or the first train “set” (whichever was the earliest)—in practice, from 18 June 2010—until the expiry or earlier termination of the Project Contract.

For its part, RailCorp has had to and must provide at least one train crew at the maintenance facility, at specified times before each “availability period” and during the morning and afternoon peak periods, for the preparation of trains stabled at the maintenance facility and trial runs of trains following major maintenance or intermittent failures, but not for routine movements of trains to and from the facility’s train maintenance building.

The TLS services to be provided by PPP Co are:

- Train maintenance and repair services, including incident response services and wheel profiling services
- Train presentation services, including internal train cleaning and exterior train washing services
- “Operations” services, including the updating of information in the trains’ operating systems and passenger information systems and the downloading of data from the trains’ operating and security systems
- “Technical” services, including assistance with the design of modifications, the updating of design documentation, training materials and PPP Co’s *Technical Maintenance Plan*, *Reliability Programme* and *Maintainability Programme* (subsidiary components of the PPP Co *Systems Assurance Plan* described in section 3.2.7), assistance with safety investigations and audits (see section 3.7.1), the redesign of obsolete, unreliable or otherwise deficient components, updating of the simulators’ systems data and equipment and maintenance and support services for the trains’ telemetry systems
- “Logistics support” services, including the maintenance of PPP Co’s configuration management system in accordance

with its *Configuration Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6), the training of RailCorp personnel, the provision of operating and maintenance manuals and support tools and equipment for RailCorp personnel, spares support services and the provision of a maintenance management information system

- Simulator maintenance, repair and support services
- Maintenance facility maintenance, repair and support services, and
- If directed by RailCorp, “reimbursable” repairs to the trains:
 - ♦ Following a collision with another train, a road vehicle or any other object, a derailment, vandalism or graffiti covering an area of more than 10 m², or
 - ♦ In response to an order by ITSRR, OTSI or any other investigative authority.

(If the event causing the damage occurred while the “set” in question was in PPP Co’s possession for maintenance or repairs or in the maintenance facility, or if the damage or ITSRR or OTSI order resulted from a defect attributable to PPP Co or its subcontractors or other associates or from any other act or omission by PPP Co or its associates, the repairs must be carried out as part of PPP Co’s routine train maintenance and repair services, and will not be “reimbursable”.)

PPP Co has had to and must provide these services in accordance with the Project Contract—including, more specifically, a *RailCorp Through Life Support Specification* and a *PPP Co Through Life Support Description* exhibited to the Project Contract—so that:

- PPP Co is able to meet the train “availability” requirements discussed in section 3.5.1
- The requirements of the project’s specifications and final design documentation are met throughout the “TLS phase” of the project
- All defects in the trains, simulators, maintenance facility and maintenance plant, equipment, parts and spares are rectified as required by the Project Contract, and
- The trains, simulators, maintenance facility and maintenance plant, equipment, parts and spares remain fit for their intended purposes throughout the “TLS phase” of the project.

PPP Co has accepted full responsibility for the methods and techniques it adopts in providing the services, and has warranted that:

- Its *Through Life Support Description* is and will be fit for its intended purpose
- Its workmanship will be fit for its purpose and of a standard prescribed in the project’s specifications or, in its absence, of a standard consistent with best industry standards
- It will use parts, components, goods and materials which are of merchantable quality and fit for their intended purposes

and which comply with the project’s specifications or, in their absence, are new and consistent with best industry standards

- Its design documentation for any manufacturing or construction works carried out as part of its “TLS phase” obligations will be, and will remain, safe and fit for its intended purposes, and
- Any manufacturing or construction works carried out as part of its “TLS phase” obligations will be, and will remain, safe and fit for their intended purposes, regardless of any variations directed or approved by RailCorp.

PPP Co may not amend its TLS services, as described in its *Through Life Support Description*, unless:

- It satisfies RailCorp that the change is necessary for it to comply with the *RailCorp Through Life Support Specification*, and that the latter imposes a higher standard, level of service, scope or requirement
- It satisfies RailCorp that the change complies with the *RailCorp Through Life Support Specification*, is consistent with the intent of the *Through Life Support Description* and will not lessen any standard, level of service or scope for any part of the TLS services, or
- The change is ordered or agreed to under the contractual variation arrangements described in section 3.7.14.

Throughout the “TLS phase” of the project both PPP Co and RailCorp must comply with *Interface Protocols* issued from time to time by RailCorp.

Draft *Interface Protocols* were attached to the *RailCorp Through Life Support Specification*. PPP Co had to develop these protocols and submit a more detailed draft to RailCorp before the expected or actual date of practical completion of the first train “set”, and the parties then had to meet to discuss this revised draft. RailCorp could then, if it chose, reissue the *Interface Protocols* with amendments as determined by RailCorp, and PPP Co was not and is not entitled to make any claim against RailCorp in connection with any such amendments.

In practice, RailCorp issued revised *Through Life Support Interface Protocols* on 17 August 2010.

In addition, either party may at any time request an update or other amendment of the *Interface Protocols*. If this occurs, the parties must discuss their requirements within ten business days. If the request is made by RailCorp, and PPP Co notifies RailCorp within ten business days of the meeting that it considers the proposed amendments will increase PPP Co’s costs or reduce PPP Co’s revenue, the proposal must be treated as a RailCorp-initiated variation and handled under the arrangements described in section 3.7.14.1. Otherwise, RailCorp may again, if it chooses, reissue the *Interface Protocols* with amendments as determined by RailCorp, and PPP Co will again not be entitled to make any claim against RailCorp in connection with the amendments.

As already indicated in section 3.2.11.1, the RailCorp Set 7 Letter dated 3 February 2012, which became effective on 20 February 2012, required PPP Co to:

- Submit a plan for “reforming” its TLS processes and management, to ensure the Project Contract’s train availability and reliability requirements are met, by 7 February 2012, and
- Comply with this plan as a precondition for payments by RailCorp associated with the reliability requirements for practical completion of train “sets” 8 to 17 introduced by the RailCorp Set 7 Letter.

3.5.2.2 Option for CityRail’s Millennium trains also to be maintained by PPP Co at the maintenance facility

RailCorp may, at any time, notify PPP Co that it requires PPP Co to negotiate with RailCorp, in good faith, for PPP Co—through a subcontract with the TLS Contractor or a related corporation—to provide maintenance and other “through life support” services at the Auburn maintenance facility for CityRail’s *Millennium* trains, which were designed and manufactured by Downer EDI Rail and are currently maintained by Downer EDI Rail at a maintenance depot in Eveleigh.

If this occurs, PPP Co must submit a detailed proposal to RailCorp as soon as practicable, and in any event within three months unless RailCorp grants an extension of time. This proposal must address a series of requirements and criteria set out in the Project Contract, including the likely costs, timeframes and effects on PPP Co’s performance of its existing obligations.

RailCorp will then have 60 business days, or longer if PPP Co grants an extension of time, to accept or reject PPP Co’s proposal or withdraw from the whole idea. If RailCorp accepts PPP Co’s proposal,

- PPP Co must proceed to implement the proposal and will be relieved of its obligations under the current Project Contract to the extent specified in PPP Co’s proposal, and
- The Project Contract will be amended as otherwise necessary to implement the scheme, including provisions for payments for the services now to be provided for the *Millennium* trains.

3.5.3 Leasing and licensing of the maintenance facility

Under the Call Option Deed, RailCorp, in return for a fee of \$1 paid by PPP Co on 3 December 2006, granted PPP Co an option to call for RailCorp to grant it:

- The Maintenance Facility Lease, in the form of a draft lease in a Schedule to the Call Option Deed, over a defined “lease area” within the maintenance facility, and
- The Maintenance Facility Licence, in the form of a draft licence in another Schedule to the Call Option Deed, over defined “licensed areas” at the maintenance facility.

PPP Co could exercise this call option within 14 days of the later of 1 January 2008 and the date of practical completion of the maintenance facility (originally targeted for 20 January 2010).

In practice, as already indicated in section 2.2.6, practical completion of the maintenance facility was achieved on 18 June 2010 and PPP Co exercised its call option on 1 July 2010.

The Call Option Deed sets out arrangements for the surveying and precise identification of the “lease area” and the “licensed areas”, the preparation of registrable plans of consolidation and subdivision etc and the identification and creation of easements. RailCorp and PPP Co have agreed, however, that the “lease area” and “licensed areas” will generally be as shown in plans and drawings in a further Schedule to the Call Option Deed, a simplified form of which is presented in **Figure 3.1**.

When PPP Co exercised its call option the surveys specified in the Call Option Deed had not been carried out and, as a result, registrable plans of subdivision had not been registered.

Although the specified surveys have now been completed, the Maintenance Facility Lease and Maintenance Facility Licence have still not yet been executed or registered. However, under the Call Option Deed RailCorp is deemed, in the meantime, to have granted PPP Co licences of the relevant areas.

In addition to permitting PPP Co and its subcontractors etc to use the “licensed areas” to carry out PPP Co’s obligations under the Project Contract, the Maintenance Facility Licence will give PPP Co and its subcontractors etc limited rights to use specified parts of the “licensed areas”, such as a defined carpark area, for other specified purposes.

PPP Co’s rent under the Maintenance Facility Lease will be \$1 per year, and its licence fee under the Maintenance Facility Licence will also be \$1 per year. In both cases these amounts will be payable only if they are demanded by RailCorp.

The Maintenance Facility Lease and the Maintenance Facility Licence will continue until the expiry of the Project Contract—or, if the term of the project is extended under the arrangements described in section 3.5.7, the date on which the Project Contract was otherwise to have expired (originally targeted for 30 July 2043 but, if it is later, 30 years after the actual date of practical completion of the 69th train “set”)—or until any earlier termination of the Project Contract.

However, under the Maintenance Facility Licence, PPP Co’s licences to use defined “access areas” and “future RailCorp facilities areas” within the “licensed areas” will end on the date (no later than 31 December 2015) on which PPP Co’s right of “possession” of the “commissioning track” is ended by RailCorp following the practical completion of the last of the trains (see section 3.2.9), or on any earlier date or dates determined by RailCorp, and these areas will then be “returned” to RailCorp, and no longer subject to any PPP Co “through life support” obligations, under the arrangements already described in section 3.3.14.

Unless RailCorp agrees otherwise, PPP Co may use the leased and licensed areas, and permit them to be used, only for the

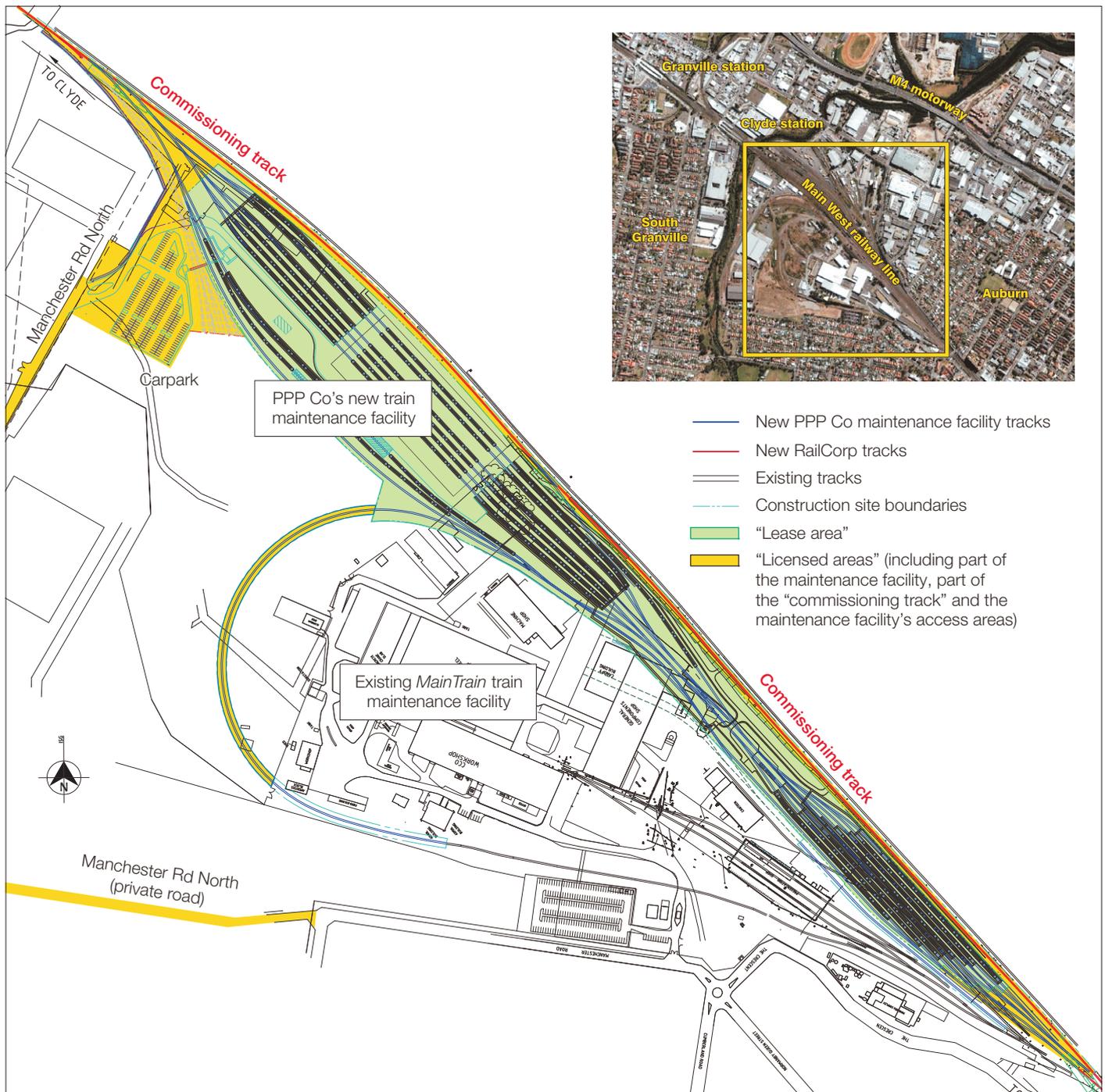


Figure 3.1. Indicative "lease area" and "licensed areas" at the Auburn maintenance facility.

purposes of the project or the provision of maintenance and other "through life support" services for other RailCorp trains.

3.5.4 Licence to access RailCorp's 'rail corridor' and 'out depots'

RailCorp has, in return for a payment of \$1, granted PPP Co and its subcontractors and other associates a non-exclusive licence, commencing on the date of practical completion of the first train "set" (30 June 2011), to use RailCorp's rail network land and train stabling depots to:

- Maintain and repair the trains while they are operating on RailCorp's rail network, and
- Recover any train "sets" which break down while in service.

In exercising these rights, PPP must comply with a specified series of RailCorp manuals, rules, procedures and protocols, including rail safety rules, procedures and protocols (section 3.7.1), the requirements of the Project Contract, including the *RailCorp Through Life Support Specification* and PPP Co's *Through Life Support Description* (section 3.5.2.1), and any other reasonable RailCorp requirements or directions.

3.5.5 Subcontracting

As already indicated in section 2.2.6, PPP Co has subcontracted its "through life support" obligations to the TLS Contractor under the TLS Contract, as amended by the Deed of Variation No 1 TLS Contract, the Deed of Variation No 2 TLS Contract and the Deed of Variation No 3 TLS Contract.

PPP Co requires RailCorp's consent before it may enter into any other "significant contracts" (see section 3.2.6) concerning its "through life support" services, and must ensure the TLS Contractor obtains RailCorp's consent before it enters any such contracts. RailCorp may not unreasonably delay or withhold this consent.

The Project Contract imposes restrictions on these TLS "significant contracts", and requirements for the procedures PPP Co must follow, that are directly analogous to those described in section 3.2.6 for "significant contracts" concerning the design, manufacture and commissioning of the trains and simulators and the equivalent provisions referred to in section 3.3.8 for "significant contracts" concerning the design, construction and commissioning of the maintenance facility.

3.5.6 Management plans, records, reports and RailCorp inspections and audits

In providing its "through life support" services PPP Co has had to and must comply with the Project Contract's detailed requirements for PPP Co's contract management system, "Project Plans", training, "key personnel" and Senior Project Group participation, as already described in section 3.2.7 and referred to in section 3.3.9.

Throughout the project's "TLS phase" PPP Co must also establish and maintain a performance monitoring system, as specified in a Schedule to the Project Contract, to monitor, analyse and report in detail on:

- The trains' availability and reliability (these data are to be used in calculating RailCorp's monthly performance-based "availability payments" to PPP Co, as described in section 3.6.1 below)
- PPP Co's provision of "reimbursable" repairs and its wheel profiling, train washing and "operations" services (section 3.5.2.1) (these data are to be used in calculating RailCorp's monthly "reimbursable TLS payments" to PPP Co, as described in section 3.6.2 below)
- PPP Co's performance against a series of "key performance indicators" ("KPIs") (these data are to be used in calculating RailCorp's monthly performance-based "KPI payments" to PPP Co, as described in section 3.6.3 below)
- The distances travelled by each train "set"
- RailCorp's "milestone" payments to PPP Co (section 3.4.2)
- The condition and reliability of the maintenance facility and the simulators
- Changes in the configurations of the trains and simulators
- The rail safety certification status of PPP Co and RailCorp personnel
- CPI indexations, to be applied in calculating some elements of the RailCorp payments to PPP Co described in section 3.6
- Interest rate and debt and interest payment data, to be applied in calculating "interest payment adjustments"

between RailCorp and PPP Co as described in section 3.6.4, and

- Data for reports which are required by the Project Contract but which are not able to be produced by PPP Co's maintenance management information system (section 3.5.2.1).

This performance monitoring system must be able to be electronically accessed by RailCorp, and it must be used by PPP Co to produce monthly *Performance Reports* to RailCorp, as specified in the same Schedule to the Project Contract, as one of the main inputs in calculating the payments described in section 3.6.

PPP Co has promised RailCorp that the data in its performance monitoring system will always be accurate and complete.

As already reported in section 2.2.6, PPP Co's subcontractor, the TLS Contractor, has, in turn, subcontracted some of these performance monitoring system obligations to the FMFS Subcontractor under the FMFS Access Agreement.

RailCorp may monitor and review PPP Co's performance of its "through life support" services and its performance monitoring system in any way RailCorp thinks fit, subject to particular arrangements for inspections of the maintenance facility described below. Among other things, it may conduct customer satisfaction surveys, undertake audits at any time during the "TLS phase" of the project and the following six months, conduct scheduled and unscheduled reviews and inspections of the trains, the maintenance facility, the simulators and PPP Co's activities, and obtain feedback from RailCorp's train crews.

In particular, and subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp may enter the maintenance facility, the trains in this facility and any other areas used by PPP Co, the TLS Contractor and other "significant contractors" (sections 3.2.6, 3.3.8 and 3.5.5) during business hours, or otherwise on 24 hours' notice unless there is an emergency, to observe, monitor, inspect, review and audit PPP Co's performance of its obligations under the Project Contract, provided this is done in ways which do not unreasonably interfere with PPP Co's performance of its obligations (including, in particular, PPP Co activities scheduled in its *Technical Maintenance Plan*, a subsidiary component of its *Systems Assurance Plan*). PPP Co must facilitate and assist these inspections and reasonably endeavour to coordinate its activities so that they do not interfere with RailCorp's inspections, reviews and audits.

PPP Co must also allow RailCorp to access PPP Co's contract management system and performance monitoring system, and the contract management systems of PPP Co's subcontractors, sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp must do this in ways which do not unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

If a RailCorp audit reveals an inaccuracy or incompleteness in PPP Co's performance monitoring system or its outputs, PPP Co must correct and reissue the affected report(s) or data,

remedy the fault(s) in its system and, if the error has affected any of the payments described in section 3.6 below, adjust its next payment claim. If an audit uncovers fraud or any intentionally false or misleading reporting, RailCorp may be entitled to terminate the Project Contract, under the arrangements described in sections 3.8.3.10, 3.8.3.12 and 3.8.4.

3.5.7 Extensions of the term of the project

As indicated in section 3.5.1, the first decommissioning or RailCorp acquisition of any of PPP Co's trains (under arrangements described in section 3.5.8 below) was originally targeted for 20 July 2040 but is now set at the date 30 years after the actual date of practical completion of the first train "set" (i.e. 30 June 2041), and the Project Contract is targeted to expire on 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train "set".

RailCorp may, however, extend these dates by five or ten years for some or all of the trains.

Under the arrangements for this set out in the Project Contract,

- PPP Co must give RailCorp an estimate of the "through life support" costs of its trains, in lots of five "sets" and in accordance with other requirements set out in the Project Contract, 18 months before the first scheduled decommissioning date
- RailCorp may then, if it chooses, extend the term of the Project Contract by five years, by giving PPP Co a notice to this effect within six months of receiving PPP Co's cost estimates, nominating how many of the train "sets" it wants PPP Co to continue to support
- If RailCorp does so,
 - ♦ PPP Co must continue to meet its "availability" obligations (section 3.5.1) on the basis that the nominated number of "sets" will continue to be operational, and continue to provide "through life support" services for these trains (section 3.5.2), until, in the case of each "set",
 - RailCorp instructs it to decommission the "set", giving it at least 20 business days' notice
 - RailCorp acquires the "set" (see section 3.5.8), or
 - If neither of these occurs, one of the extended scheduled dates for decommissioning of the nominated "sets" (each of these dates will be 35 years and three months after the targeted date for practical completion of one of the nominated "sets", or, if it is later, 35 years after the actual date of practical completion of that "set")
 - ♦ PPP Co must continue to use the maintenance facility to provide "through life support" services after the

original date for expiry of the Project Contract, but will not need to pay any rent and might not be the only user of the facility

- ♦ PPP Co and RailCorp must negotiate in good faith to determine the basis on which PPP Co will continue to occupy the maintenance facility, and until an agreement is reached this will be determined by RailCorp
- ♦ RailCorp must continue to meet its train crew and other obligations concerning the nominated trains, and must make monthly payments to PPP Co equal to 107.5% of the costs directly incurred by PPP Co in complying with its extended obligations, as revealed on an "open book" basis
- ♦ The monthly payments regime described in section 3.6 below will not apply for the nominated trains, but will continue to apply for the other trains (if any) until they are decommissioned or acquired by RailCorp or until the original expiry date of the Project Contract
- ♦ RailCorp may extend the term of the Project Contract by a *further* five years, by giving PPP Co a notice to this effect at least 12 months before the first extended scheduled date for decommissioning of a "set", nominating how many of the train "sets" it wants PPP Co to continue to support during this additional period, and
- ♦ The Project Contract will end on the earliest of:
 - Its extended expiry date
 - The date, if any, on which, as a result of any RailCorp directions to decommission the nominated train(s) or any RailCorp acquisitions of these trains, PPP Co is no longer providing "through life support" for any of the nominated trains, and
 - Any termination of the Project Contract on the grounds discussed in section 3.8.

3.5.8 Decommissioning and/or RailCorp acquisition of the trains

As already indicated, unless RailCorp extends the term of the Project Contract each of the train "sets" must either be:

- Decommissioned by PPP Co on one of 69 currently specified decommissioning dates,* with PPP Co notifying RailCorp of each decommissioning at least 60 days in advance, or
- Acquired by RailCorp on one of the currently scheduled decommissioning dates, at no cost to RailCorp, if RailCorp tells PPP Co that it wishes to do this within 30 days of receiving PPP Co's notice of the set to be decommissioned.

* Each of these currently specified decommissioning dates will be 30 years and three months after the targeted date for practical completion of one of the first 69 "sets" or, if the actual date of practical completion of any of these 69 "sets" is later than its targeted date, 30 years after its actual date of practical completion. The currently specified decommissioning dates for the last ten "sets" to be decommissioned by PPP Co or acquired by RailCorp will all be the same date, 30 years and three months after the targeted date for practical completion of the 69th "set" (i.e. 30 July 2043) or, if the actual date of practical completion of the 69th "set" is later than its targeted date, 30 years after its actual date of practical completion.

If RailCorp extends the term of the Project Contract, the revised arrangements and timeframes described in section 3.5.7 will apply.

In either case, if RailCorp exercises its option to acquire a train “set” PPP Co must:

- Ensure the train’s condition on its handover date complies with specified minimum operating conditions and other requirements of the Project Contract, and is consistent with all of its scheduled maintenance having been carried out
- Do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for the train, including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the train and advice from experienced, competent personnel
- Not do anything that materially prejudices or frustrates the handing over of the train, as a going concern, to RailCorp, and
- Do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the train.

3.5.9 Remediation of the maintenance facility over the last five years of the project

RailCorp and PPP Co must conduct a joint inspection of the maintenance facility and PPP Co’s maintenance plant, equipment, parts and materials, if this inspection is required by RailCorp, at least five years before the currently scheduled expiry of the Project Contract (i.e. before 30 July 2038 or, if it is later, before the date 25 years after the actual date of practical completion of the 69th train “set”).

Similar joint inspections must also be carried out, if required by RailCorp, at least three years and one year before the currently scheduled expiry of the Project Contract.

Following each of these inspections, RailCorp and PPP Co must reasonably endeavour to agree on:

- The rectification, maintenance and remediation works, if any, that PPP Co will need to carry out during the rest of the project in order to bring the maintenance facility and PPP Co’s maintenance plant, equipment, parts and materials to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, and ensure that at the end of the Project Contract they will comply with a series of “return conditions” specified in a Schedule to the Project Contract
- A program for PPP Co to carry out these works, and
- The estimated total cost of these works, including a contingency and risk allowance of at least 10%.

If they cannot agree within 20 business days of the relevant inspection, either party may refer the matter for determination under the Project Contract’s dispute resolution procedures, summarised in section 3.7.17.

PPP Co must carry out the agreed or determined works.

In addition, if requested by RailCorp, PPP Co must give RailCorp an unconditional bank bond, for an amount equal to the agreed or determined estimated cost of these works, as a security for PPP Co’s performance of the works. If PPP Co fails to provide this bond, RailCorp may deduct the required amount from its payments to PPP Co under the arrangements described in section 3.6, and retain this sum as a security for PPP Co’s performance of the works until PPP Co provides the requested bank bond.

3.5.10 Arrangements at the end of the project

Before the expiry of the Project Contract, or before its earlier termination under the provisions described in section 3.8, PPP Co must:

- Procure the novation to RailCorp or its nominee, from the end of the Project Contract or any other date agreed to by RailCorp, of any agreements, subleases or licences related to PPP Co’s activities, as nominated by RailCorp in its absolute discretion
- Do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for “through life support” of the maintenance facility and simulators to RailCorp or its nominee, including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the maintenance facility and simulators and advice from experienced, competent personnel
- Not do anything that materially prejudices or frustrates the handing over of the maintenance facility, as a going concern, to RailCorp, and
- Do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the maintenance facility.

Upon the expiry of the Project Contract, or its earlier termination under the provisions described in section 3.8, PPP Co must:

- Transfer the maintenance facility and its maintenance plant, equipment, parts and materials to RailCorp or its nominee, in conditions complying with the “return conditions” specified by the Project Contract (the Security Trustee for the project’s debt financiers has expressly agreed to this transfer)
- Ensure advice from experienced, competent personnel, about any aspect of “through life support” of the maintenance facility and the simulators, continues to be available to RailCorp or its nominee for another 12 months
- Pay RailCorp or its nominee any insurance proceeds it holds for the reinstatement of the maintenance facility, to the extent required for its reinstatement, and assign its rights under the relevant insurance policies to RailCorp or its nominee
- Continue not do anything that materially prejudices or frustrates the handing over of the maintenance facility, as a going concern, to RailCorp

- Continue to do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the maintenance facility
- Give RailCorp access to PPP Co's financial accounts and other financial records as necessary for the continued operation, maintenance and repair of the maintenance facility and, if RailCorp has acquired any of the trains, the continued operation and "through life support" of these trains, and
- Make redundancy payments to any of its employees who are made redundant, in accordance with all relevant agreements and laws and in line with general standards at the time.

In addition to these generally applicable arrangements, other, special arrangements will apply if the Project Contract is terminated early, as described in sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5 below.

3.6 'TLS phase' RailCorp and PPP Co payments

Throughout the "TLS phase" of the project, from 18 June 2010 until the expiry or earlier termination of the project's contracts, RailCorp has had to and must pay PPP Co:

- Monthly performance-based "availability payments", as described in section 3.6.1
- Monthly "reimbursable TLS payments" for any "reimbursable" repairs by PPP Co and PPP Co's wheel profiling, train washing and "operations" services (section 3.5.2.1), as described in section 3.6.2
- Monthly performance-based "key performance indicator payments", as described in section 3.6.3
- Quarterly "interest payment adjustments", if market interest rates exceed interest rates assumed in the private sector participants' "base case" financial model for the project, as described in section 3.6.4, and
- Miscellaneous other amounts for specific services provided by PPP Co, such as a fleet management data link and training services, in accordance with specified schedules of rates,

and PPP Co has had to and must pay RailCorp:

- Quarterly "interest payment adjustments", if market interest rates are less than the interest rates assumed in the private sector participants' "base case" financial model for the project, as described in section 3.6.4
- "Incident response payments" whenever RailCorp has provided resources or equipment, other than a train crew, in response to any incident involving one of PPP Co's trains that has affected, or might have affected, the operation of trains on RailCorp's rail network, as described in section 3.6.5, and
- Miscellaneous other amounts for specific services provided by RailCorp, such as assistance provided by RailCorp maintenance personnel, in accordance with a specified schedule of rates.

RailCorp's payments to PPP Co have had to and must be paid into specified bank accounts.

If there is a dispute about any of the payments, either party may refer the matter for determination under the Project Contract's dispute resolution procedures (section 3.7.17). However, if RailCorp notifies PPP Co that an amount RailCorp must pay PPP Co is less than an amount claimed by PPP Co, PPP Co may invoke these dispute resolution procedures only within 30 days of RailCorp's notification, and if it does not do so RailCorp will have no liability to PPP Co concerning the dispute.

The Project Contract sets out arrangements and preconditions for the lodgment and payment of payment claims and specifies timeframes for these payments. Overdue payments incur simple interest at an interest rate 3% pa above the BBSY bank bill rate.

RailCorp is entitled to set off its payment liabilities against any amounts it is due to receive from PPP Co, other than any "interest payment adjustment" (section 3.6.4) and specified types of payments to be made by PPP Co after any early termination of the Project Contract in specified circumstances (see sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5). PPP Co may not set off its payment liabilities.

3.6.1 Monthly 'availability payments' to PPP Co by RailCorp

RailCorp's "availability payments" to PPP Co depend on the extent to which PPP Co has fulfilled its train "availability" obligations to RailCorp (section 3.5.1), as documented in PPP Co's performance monitoring system and monthly *Performance Reports* to RailCorp (section 3.5.6).

3.6.1.1 Formulae for calculating the 'availability payments'

Each month's "availability payment" is initially calculated, in accordance with formulae set out in a "Payment Regime" Schedule to the Project Contract and *before* applying a "floor" limit which is also set out in this Schedule and is discussed in section 3.6.1.3 below, by:

- (1) Multiplying a "price per set availability unit" — the initial value of which was specified in the outputs of the private sector participants' "base case" financial model on the date of "financial close" (7 December 2006), and which is indexed in line with CPI increases (from the June quarter of 2006) until the practical completion of the 78th train "set", and then in line with progressively lower proportions of CPI increases in the periods to the end of 2035, the end of 2040 and the end of the project — by the total number of train "set availability units" which PPP Co is required to provide for all of the "availability periods" during the month (sections 3.5.1.1 and 3.5.1.2) (with one train's availability for one "availability period" constituting one "set availability unit"), *not counting*:
 - ♦ Any trains for which three months have not yet elapsed since the Project Contract's specified target dates for their practical completion (section 3.2.5), or

- The second, third and fourth “availability periods” during any planned additional “special event” requirements imposed by RailCorp under the arrangements described in section 3.5.1.2.
- (2) Multiplying a lower “price per set availability unit (additional special events)” —the initial value of which was again specified in the outputs of the private sector participants’ “base case” financial model on the date of “financial close” (7 December 2006), and which is again indexed in line with CPI increases (from the June quarter of 2006) until the practical completion of the 78th train “set”, and then in line with progressively lower proportions of CPI increases in the periods to the end of 2035, the end of 2040 and the end of the project—by the total number of train “set availability units” which PPP Co is required to provide during the month for the second, third and fourth “availability periods” in any planned additional “special event” requirements imposed by RailCorp under the arrangements described in section 3.5.1.2.
- (3) Calculating a “set availability allowance” for the month, equal to the product of:
- The “price per set availability unit” referred to above
 - The total distance, in kilometres, travelled by PPP Co’s operational train “sets” during the month, multiplied by 3.25 and then divided by 50,000, and
 - A “**transition-in adjustment**” factor, starting at 25% during the first six months after the practical completion of the first train “set” and progressively increasing to 100% after 30 months, with provisions for these timeframes to be extended in specified circumstances, including specified *force majeure* circumstances (section 3.7.18) and other circumstances in which 50% or more of PPP Co’s operational trains are not able to be made “available” or are only *deemed* to be “available” (section 3.5.1.4).
- (4) Calculating a “**volume adjustment**” for the month, using a formula which :
- Takes account of the average number of “available” train sets during the month’s “availability periods”, and
 - Incorporates a factor which produces a negative “volume adjustment” if the average distance travelled by PPP Co’s operational train “sets” during the month is less than 12,500 km per train and a positive “volume adjustment” if it is greater.
- (5) Calculating a “re-basing adjustment” for the month, reflecting changes in labour costs and changes in foreign exchange rates, in accordance with detailed provisions in an annexure to the “Payment Regime” Schedule to the Project Contract.
- (6) Adding the results of the calculations referred to in steps (1) to (5).

- (7) Subtracting, from this total, “**reliability and disruption adjustments**” for all of the train “sets” for the month, as described in section 3.6.1.2 below.

In addition to the “availability payments” calculated in this way, PPP Co is entitled to claim an additional “availability payment” in July each year if, in the previous financial year, RailCorp has *not* required it to provide four additional train “sets” during four additional “special events” under the arrangements described in section 3.5.1.2. These additional payments, if any, are to be calculated as if PPP Co had in fact been required to provide the extra “availability”, in June, for just one “availability period” for each “unused” special event.

3.6.1.2 ‘Reliability and disruption adjustments’

For each train “set”, its “reliability and disruption adjustment” (if any) for any given “availability period” is the highest of the following potentially applicable adjustments:

- A “late into service” or “late in service” adjustment if the “set” is introduced into service three or more minutes late, or is running three or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted under the arrangements described in section 3.5.1.3, equal to 50% of the “price per set availability unit” multiplied by the progressively increasing “transition-in adjustment” factor described in step (3) of section 3.6.1.1
- A “very late into service” or “very late in service” adjustment if the “set” is introduced into service ten or more minutes late, or is running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, equal to 75% of the “price per set availability unit” multiplied by the “transition-in adjustment” factor described in step (3) of section 3.6.1.1
- A “cancellation” adjustment if the “set” is cancelled by RailCorp while it is in service, or when it is due to enter service, because it:
 - Fails to meet specified minimum operating standards
 - Has a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more, or
 - Is introduced into service ten or more minutes late, or is running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, or

- ◆ Is subject to a direction, by ITSRR, OTSI or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

equal to ten times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor described in step (3) of section 3.6.1.1, and

- “Withholding or withdrawing” adjustments if PPP Co does not achieve the required total “availability” for the “availability period” in question because PPP Co has withheld or withdrawn the “set” from service, equal to:
 - ◆ Five times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor described in step (3) above, if PPP Co has given RailCorp 24 hours’ or less notice of the withholding or withdrawal, and
 - ◆ 1½ times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor, if PPP Co has given RailCorp more than 24 hours’ notice of the withholding or withdrawal.

In calculating these various “reliability and disruption adjustments”,

- If a train delay is partly caused by defects attributable to PPP Co or its subcontractors or other associates or by any other act or omission by PPP Co or its associates, and partly caused by other factors, only the part of the delay attributable to the PPP Co-related problem(s) is to be counted.
- However, any delay or failure by RailCorp to address or mitigate the effects of any such PPP Co-related problems are not to be regarded as a separate cause of the delay, even if RailCorp’s action or inaction extends the delay.
- If a delay is caused solely by a PPP Co-related problem, and this problem is one of 27 types of problems listed in a Schedule to the Project Contract as problems which RailCorp train crew members are expected to address or mitigate by taking particular types of action as specified in this Schedule, the delay time attributable to the PPP Co-related problem is *deemed* to be the lesser of:
 - ◆ The actual delay caused by the problem, and
 - ◆ A “**deemed action time**” for the problem, as originally to have been determined by RailCorp and PPP Co prior to the anticipated date of practical completion of the seventh train “set”—a deadline that was subsequently effectively set aside by RailCorp in the RailCorp Set 7 Letter, as described in section 3.2.11.1—and as then reviewed from time to time under arrangements set out in the same Schedule,

unless:

- ◆ A RailCorp crew member takes the specified action, but it does not have the expected effect, or
- ◆ The delay is caused by more than one of the 27 specified types of problems,

in which case the delay time attributable to the PPP Co-related problem(s) is simply the length of the actual delay.

PPP Co has expressly acknowledged and agreed that the “reliability and disruption adjustments” described above are genuine pre-estimates of the losses, costs and other detriments RailCorp will incur if these events occur.

Apart from the general PPP Co indemnities described in section 3.1.6, and “PPP Co termination event” arrangements (following multiple RailCorp notices of “unacceptable availability” or “unacceptable reliability”) described in sections 3.8.3.8, 3.8.3.12 and 3.8.4, the “reliability and disruption adjustments” are RailCorp’s only remedies for any PPP Co failures to provide the required train “availability”. Even if a “reliability and disruption adjustment” is held to be legally unenforceable, PPP Co is liable for any RailCorp losses only up to the amount it would have lost under the “reliability and disruption adjustment” had it applied.

3.6.1.3 Liabilities if a calculated ‘availability payment’ is negative

Under a strict application of the formulae for calculating each month’s “availability payment” described in section 3.6.1.1 above, it is possible for the result to be negative (i.e. less than \$0). In these circumstances,

- If the 78th train “set” has achieved practical completion (section 3.2.11.1), or if three or more months have elapsed since its target date for practical completion (5 September 2013), the “availability payment” for the month will be zero.
- If the 78th train “set” has not yet reached practical completion and three months have not yet elapsed since its target date for practical completion, *and* the “availability payment” for the month would still have been negative had the calculation in step (1) of section 3.6.1.1 counted the “availability” of trains for which three months have not yet elapsed since the target dates for their practical completion, PPP Co must pay RailCorp an amount equal to the absolute value of the difference between the two results.
- If the 78th train “set” has not yet reached practical completion and three months have not yet elapsed since its target date for practical completion, *and* the “availability payment” for the month would have been zero or positive had the calculation in step (1) of section 3.6.1.1 counted the “availability” of trains for which three months have not yet elapsed since the target dates for their practical completion, PPP Co must pay RailCorp an amount equal to the absolute value of the original result.

3.6.2 Monthly ‘reimbursable TLS payments’ to PPP Co by RailCorp

PPP Co is entitled to be reimbursed by RailCorp each month, on the basis of schedules of rates annexed to the “Payment Regime” Schedule to the Project Contract, for:

- Any “reimbursable” repairs by PPP Co, as described in section 3.5.2.1, to the extent that the costs of these repairs are not covered by the PPP Co insurance policies described in section 3.7.10.1, and
- PPP Co’s wheel profiling, train washing and “operations” services (section 3.5.2.1).

The prices in the schedules of rates increase in line with CPI movements since the June quarter of 2006.

A deduction is to be made from each of these monthly payments to PPP Co to take account of an amount which the private sector participants’ “base case” financial model for the project has already assumed to have been paid.

3.6.3 Monthly ‘key performance indicator payments’ to PPP Co by RailCorp

RailCorp must make monthly “key performance indicator payments” (“KPI payments”) to PPP Co, based on a specified series of measures of its performance in providing its “through life support” services.

The “key performance indicators” determining the size of these payments are:

- The Lost Time Injury Frequency Rate associated with the provision of PPP Co’s “through life support” services over the previous 12 months (10% weighting)
- The number of occurrences at the maintenance facility which PPP Co has had to report to the Office of Transport Safety Investigations (OTSI) under section 64 of the Rail Safety Act over the previous 12 months (5% weighting)
- The number of defects in 84 types of “passenger amenity KPI items” for the trains, as specified in *Performance Operating Standards* in a Schedule to the *RailCorp Through Life Support Specification* annexed to the Project Contract, which, at the end of the previous month, had not been corrected by PPP Co within “permitted” correction periods specified in these *Standards* (20% weighting)
- The number of defects in 50 other types of “KPI items” for the trains, as specified in *Performance Operating Standards* in a Schedule to the *RailCorp Through Life Support Specification* annexed to the Project Contract, which, at the end of the previous month, had not been corrected by PPP Co within “permitted” correction periods specified in these *Standards* (20% weighting)
- The number of defects in the trains not reported by PPP Co but uncovered in RailCorp audits of the trains, and reported to PPP Co by RailCorp, over the previous three months (20% weighting)

- The number of failures to conform with the currently required configuration for the trains uncovered in RailCorp audits of the trains, and reported to PPP Co by RailCorp, over the previous month (10% weighting), and
- The number of failures to comply with the requirements of RailCorp’s *Staff Cleaning Manual* uncovered in RailCorp audits of trains cleaned by PPP Co, and reported to PPP Co by RailCorp, over the previous month (15% weighting).

The maximum possible “KPI payment” in any month is \$700,000, indexed in line with CPI increases since the June quarter of 2006, and the minimum possible “KPI payment” is zero.

3.6.4 Quarterly ‘interest payment adjustment’ payments by RailCorp or PPP Co

From the date of practical completion of the 78th train “set”—or, if it is later, the date on which the private sector participants’ “delivery phase” interest rate hedging arrangements expire—RailCorp must make quarterly payments to PPP Co equal to the amount, if any, by which the interest payable that quarter for bank loans to PPP Co Finance Co under the Senior Bank Loan Note Subscription Agreement, junior bonds issued under the Junior Bond Trust Deed (see section 2.2.2) and any refinancings of these debts, calculated using specified market rates (the BBSY bank bill rate in the case of the bank loans and the BBSW rate in the case of the junior bonds), exceeds what these interest payments would be if the relevant interest rates were as projected in the private sector participants’ “base case” financial model for the project on 7 December 2006.

PPP Co must make equivalent payments to RailCorp if the market interest rate interest payments are less than the projected interest rate interest payments.

PPP Co must give RailCorp at least 20 business days’ notice of its calculations of the amounts to be paid under these arrangements, and RailCorp must notify its agreement, or otherwise, within ten business days.

As already indicated, neither party may set off any amounts it is owed against its “interest payment adjustment” payments.

3.6.5 ‘Incident response payments’ to RailCorp by PPP Co

If RailCorp provides resources or equipment, beyond a train crew, in response to any incident involving one of PPP Co’s trains that has affected, or might affect, the operation of trains on RailCorp’s rail network, PPP Co must pay RailCorp for the costs it incurs, in accordance with a schedule of rates annexed to the “Payment Regime” Schedule to the Project Contract.

3.7 Miscellaneous general provisions of the Project Contract and the other RailCorp project agreements

3.7.1 Rail safety

RailCorp has been obliged to obtain—and has obtained, subject to conditions—a variation to its existing accreditation under the Rail Safety Act (NSW) to cover the progressive introduction of the new *Waratah* trains and withdrawal of existing trains and the use of the new maintenance facility to maintain the new trains.

PPP Co was and is obliged to liaise and cooperate with RailCorp, and do everything reasonably necessary to assist RailCorp, in its applications to the Independent Transport Safety and Reliability Regulator (ITSRR) concerning this variation.

In particular, PPP Co has had to and must:

- Prepare draft and final versions of the necessary RailCorp reports, documentation and certificates, as detailed in the Project Contract (including the *Contract Management Requirements* described in section 3.2.7 and referred to in sections 3.3.9 and 3.5.6), the Rail Safety Act, a *National Rail Safety Accreditation Package* issued by ITSRR and RailCorp's *Safety Management System*
- Rectify any non-compliances with these requirements or any other ITSRR requirements identified in RailCorp reviews of the draft documents, and
- Amend the documents submitted by RailCorp to ITSRR, and/or provide further information, if RailCorp requested this in the light of ITSRR responses to its application.

In addition, PPP Co has had to and must, throughout the rest of the project, liaise and cooperate with RailCorp, and do everything reasonably necessary to assist RailCorp, in RailCorp's maintenance of its rail safety accreditation and compliance with its other rail safety obligations.

PPP Co must also:

- Obtain, maintain and comply with the conditions of its own accreditation under the Rail Safety Act, and ensure that its contractors (at all levels), PPP Co Finance Co, PPP Co Holding Co and all other associates of PPP Co do likewise if this is required under the Rail Safety Act
- Develop, maintain and submit (to RailCorp and in some cases also to ITSRR) its own *Safety Management System* and *Safety Assurance Reports*, as detailed in the Project Contract (including the *Contract Management Requirements*), the Rail Safety Act and the *National Rail Safety Accreditation Package* issued by ITSRR
- Enter into any rail safety interface agreements required by the Rail Safety Act, RailCorp or ITSRR
- Liaise and cooperate with RailCorp and ITSRR in performing these obligations

- Allow RailCorp to review and comment on its rail safety documentation
- Give RailCorp copies of all rail safety notices, reports and correspondence received by PPP Co or its major contractors in connection with the project or potentially affecting PPP's abilities to meet its obligations under the Project Contract
- Ensure all persons engaged in or connected with PPP Co's fulfilling of its obligations under the Project Contract hold Certificates of Competency if this is required under the Rail Safety Act and otherwise comply with the Rail Safety Act
- Participate in a joint RailCorp/PPP Co Safety Committee
- Ensure that any work carried out for PPP Co within a defined "danger zone" around railway tracks and on station platforms is carried out only in accordance with specified RailCorp "possession" authorities and other systems designed to ensure the safety of workers in these situations
- More generally, ensure that all of its activities within any "rail corridor" along or adjacent to railway tracks complies with a *Safety Protocol* set out in a Schedule to the Project Contract
- Immediately inform RailCorp about any actual or likely event or circumstance which might interfere with or threaten current or future rail safety, and assist RailCorp in its responses (see section 3.7.9), and
- Give ITSRR, the Office of Transport Safety Investigations (OTSI) and any other investigative authorities access to any premises or information they lawfully request, cooperate with their other lawful requests and refrain from hindering or delaying their investigations.

The Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor have all warranted to RailCorp that they have not had any criminal, civil or other proceedings brought against them anywhere in the world in connection with any rail safety incident, and that no such proceedings are pending or (to their knowledge) threatened.

As already indicated in sections 2.2.3, RailCorp has entered into three "interface agreements" related to train construction and commissioning rail safety issues with Downer EDI Rail Pty Ltd, the Rolling Stock Manufacturer occupying the Cardiff maintenance depot and commissioning the trains:

- The Interface Agreement Waratah Trains (PPTV Commissioning Activities), concerning the commissioning of the prototype train, variously known as the "pre-production tuning vehicle" or "pre-production test vehicle" ("PPTV")
- The more generally applicable Interface Agreement Waratah Train Commissioning (Including Testing) Activities, and
- The Interface Agreement Managing Risks to Safety Due to Rail Operations at Downer EDI's Cardiff Depot Facility, concerning the interfaces between RailCorp and Downer EDI Rail activities at this site.

Similarly, and as already indicated in section 2.2.6, RailCorp and PPP Co and the TLS Contractor have entered into the Maintenance Site Interface Agreement TLS Phase with the

operator of the *MainTrain* train maintenance facility adjacent to PPP Co's new Auburn maintenance facility, United Group Rail Services Ltd, establishing interface procedures and other rail safety requirements in this area during the "TLS phase" of the project, from the practical completion of the Auburn maintenance facility on 18 June 2010 until the expiry or earlier termination of the PPP project's contracts.

3.7.2 Occupational health and safety

PPP Co has had to and must perform all of its obligations to RailCorp safely and in a manner that protects both people and property.

If RailCorp believes people might be injured or property might be damaged as a result of PPP Co's activities, it may direct PPP Co to change the way it works or direct it to cease working. PPP Co must comply with any such direction at its own cost.

More specifically, PPP Co has had to and must:

- Ensure it complies with the Occupational Health and Safety Act (NSW), associated guidelines, all other laws related to occupational health, safety and rehabilitation and detailed, project-specific occupational health and safety requirements set out in a Schedule to the Project Contract
- Ensure its subcontractors and other associates do likewise, and
- Keep RailCorp promptly and fully informed of any serious occupational health and safety incidents or accidents.

3.7.3 Industrial relations

PPP Co has been and is solely responsible for all industrial relations matters associated with its activities, other than industrial relations between RailCorp and RailCorp's own employees.

It has had to and must comply with its *Human Resources Plan*, a subsidiary component of its *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6), consult with RailCorp before taking any action which might reasonably be expected to affect RailCorp's own industrial relations, and keep RailCorp informed about any industrial relations problems or issues which are likely to affect PPP Co's activities.

3.7.4 Local content and apprenticeship requirements and local industry participation

As already indicated in sections 3.2.7 and 3.4.2, PPP Co has had to and must implement and comply with its *Local Industry Participation Plan*, a subsidiary component of its *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6).

At least 20% of the cost of items listed in a cost schedule forming part of this *Local Industry Participation Plan* have had to be and must be attributable to items manufactured in Australia or New Zealand.

PPP Co must report to RailCorp on its compliance with its *Local Industry Participation Plan*, keep sufficient records for its

compliance with this plan and the project's local content requirement to be audited by RailCorp, allow RailCorp to conduct these audits and ensure the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor do likewise.

In addition to demonstrating that the local content requirement was reasonably likely to be achieved as a precondition for receiving RailCorp's "critical" design review "milestone payment" (section 3.4.2), PPP Co must demonstrate that it has in fact been achieved within 20 business days of the practical completion of the 78th train "set".

At any particular time throughout the project, PPP Co, the Rolling Stock Manufacturers and the TLS Contractor must employ one trades apprentice for every nine tradespersons employed in Australia or New Zealand in connection with the project.

3.7.5 Environment protection

In addition to the PPP Co environmental obligations already described in this report—including PPP Co's obligations to comply with the planning approval for the maintenance facility and all other statutory approvals and licences (sections 3.2.2 and 3.3.2), its obligations to remediate any contamination on the maintenance facility's construction site (section 3.3.5) and its obligations to prepare, implement and comply with an *Environmental Management Plan*, a subsidiary component of PPP Co's *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6)—PPP Co has had to and must:

- Prevent any nuisance or unreasonable noise, dust, vibration or disturbance from its activities, unless these impacts are not reasonably able to be avoided or are permitted by the law
- Carry out all its activities in an environmentally responsible manner, and ensure the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor do likewise
- Ensure industrial wastes and hazardous substances are not dumped at the maintenance facility or its surroundings or handled in a way likely to cause an environmental hazard
- Ensure no contaminants are released from the maintenance facility and its surroundings or from the trains
- Immediately notify RailCorp if there is a breach of any environmental requirement
- Indemnify RailCorp against any loss, expense, damage or liability arising out of any breach of these environmental obligations, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1), and
- Allow RailCorp to access the environmental management system it must establish under its *Environmental Management Plan*, and the environmental management

systems of the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor, for monitoring and auditing purposes.

3.7.6 Intellectual property and moral rights

PPP Co has made a series of promises to RailCorp that its activities, designs, works, facilities, trains, simulators and other “deliverables” do not and will not infringe intellectual property or moral rights, that it may lawfully assign specified intellectual property rights in its reports, design documentation and software to RailCorp and that it may lawfully grant RailCorp licences to use other specified intellectual property rights.

In line with these warranties and associated indemnities, PPP Co has:

- Assigned specified intellectual property rights in its reports, design documentation and software to RailCorp, and undertaken to procure the direct assignment of these rights to RailCorp in cases where the rights are owned by other parties
- Granted RailCorp and its related corporations an irrevocable, perpetual, royalty-free, transferable and non-exclusive licence to use, for the purposes of the project, all of the intellectual property rights in or used in the project’s “deliverables” and specified aspects of work methods that are owned by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their related corporations
- Granted RailCorp and its related corporations an irrevocable, perpetual, royalty-free, transferable and non-exclusive licence to use, for specified non-project purposes associated with the design, manufacture, commissioning, operation, maintenance, repair and alteration of *other* trains and train simulators, much more limited intellectual property rights associated with specific aspects of the trains and their “look and feel” that are owned by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their related corporations
- Undertaken to procure the granting by third parties of equivalent licences for equivalent intellectual property rights owned by them, or, if PPP Co cannot achieve this, procure an alternative licence or develop a reasonably acceptable design workaround at PPP Co’s own cost
- Undertaken to use all reasonable efforts, without any duress or misleading conduct, to procure the waiving of moral rights and the consent of relevant authors to RailCorp’s and PPP Co’s use of their works etc in whatever form RailCorp and PPP Co think fit, and
- Undertaken not to apply any advertising or identification of PPP Co or its associates to any parts of the trains which are visible to the public or RailCorp’s train crews, unless RailCorp consents.

For its part, RailCorp has granted PPP Co perpetual, royalty-free, transferable and non-exclusive licences to use, for the purposes of the project,

- The intellectual property rights PPP Co has assigned to RailCorp, and
- Other intellectual property rights owned by RailCorp, other than its trademarks, which may not be used by PPP Co or its associates without RailCorp’s consent or contrary to a series of conditions that will apply if RailCorp gives its consent.

The Project Contract sets out detailed arrangements for the handling of computer software and other source code consistently with these undertakings, including arrangements for source code to be deposited with and then held “in escrow” by approved escrow agents and accessed by the parties on terms set out in the Project Contract, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor) and any future escrow deeds in an approved form set out in a Schedule to the Project Contract.

As indicated in section 2.2.9, the original escrow deeds have now been supplemented by a series of 13 escrow deeds with specialist subcontractors of the Rolling Stock Manufacturers and the TLS Contractor: EKE-Electronics, Sydac, Sigma Coachair Group, Thales Australia, Austbreck, Knorr-Bremse, Voith Turbo, Faiveley Transport, Australian Rail Technology Projects and the FMFS Subcontractor.

3.7.7 Liabilities for taxes, rates, charges and stamp duty

PPP Co has had to and must pay all taxes, utility and other charges, levies, fees and workers’ compensation premiums incurred in the performance of the project’s contracts, other than RailCorp workers’ compensation premiums, but RailCorp has had to and must reimburse PPP Co for:

- Any NSW stamp duties it has paid for the execution of the project’s contracts
- Any NSW hire of goods duty payable for the hiring of the trains
- Any NSW transfer duty payable for any RailCorp acquisitions of the trains, and
- All municipal rates, water, sewerage and drainage rates (other than water use charges) and land taxes levied on PPP Co for the maintenance facility’s leased and licensed areas.

RailCorp must also supply the electricity for the overhead traction power system for the maintenance facility’s tracks and sidings at no cost to PPP Co.

If RailCorp uses any excess capacity in utility services at the maintenance facility for its own purposes, as it is entitled to do, it must reimburse PPP Co for the costs of any separate metering systems and pay the applicable usage charges, but is not liable for any other associated charges or rates.

3.7.8 Confidentiality

Under their own terms all of the project's major contracts ("project agreements") and associated documents — including the Project Contract and all the RailCorp project agreements (section 2.2.14) *other than* the RailCorp 2012 Restructure Deed of Settlement, the Deed of Release–CCTV Claim, the Deed of Release–Independent Verifier Claim, the Deed of Release–Roads 5 and 7A, the Deed of Release–Energy Australia Kiosk, the Deed of Release–Earthing & Bonding and the Deed of Release–Financial Close, whose terms are expressly confidential except in specified circumstances — may be publicly disclosed by RailCorp, subject only to:

- In all cases, a series of confidentiality restrictions set out in a Schedule to the Project Contract, and
- In the case of the February 2012 "restructure agreements" — including those discussed in section 6 of this report (the Restructure Co-ordination Deed, the Capital Commitment Deed, the RailCorp 2012 Restructure Consent Deed, the RailCorp Set 7 Letter, the RSM Set 7 Letter, the Reliance Rail Undertakings Deed and the Financial Guarantors' Undertakings Deed) but *not* including the confidential RailCorp 2012 Restructure Deed of Settlement — any agreement by all 23 parties to the Restructure Co-ordination Deed, acting reasonably, that any specific matter(s) should not be disclosed by RailCorp or the State, having regard to, among other things, the Project Contract's principles, which are described below.

Each of these sets of restrictions is summarised below.

3.7.8.1 The Project Contract's confidentiality restrictions

The Project Contract's confidentiality restrictions prohibit the release, except in specified circumstances, of information revealing:

- The private sector debt financiers' fees and margins
- The cost structures, profit margins and intellectual property of PPP Co or the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their related corporations, contractors, consultants, advisers, agents and other associates
- The private sector participants' "base case" financial model for the project
- The terms of equity investments in the project
- The private sector participants' directors' entitlements and voting rights and their director and shareholder simple and super majority resolution items and powers, or
- The terms of the projects' insurance policies (but not the requirements for these policies, as summarised in section 3.7.10.1).

These confidentiality restrictions in the Project Contract do not, however, apply to:

- Any disclosures of information by RailCorp, the State Government or any public authority as required under the Government Information (Public Access) Act (NSW) or as required to satisfy the requirements of the NSW Auditor-General or parliamentary accountability
- More specifically, any disclosures:
 - ♦ Required by a parliamentary house or committee for any legitimate government purpose or process, or
 - ♦ In this *Summary of Contracts*, which has been prepared in accordance with the NSW Government's December 2006 *Working with Government Guidelines for Privately Financed Projects*, as now incorporated within the *National Public Private Partnership Guidelines* adopted by the Council of Australia Governments on 29 November 2008
- Any disclosures required by law or the listing rules of any recognised stock exchange
- Any disclosures which RailCorp or PPP Co, as relevant, reasonably believes must be made to investors in PPP Co, to the project's current or future debt financiers or insurers, to any other party to the project's contracts which needs the information to comply with its contractual obligations or to any rating agency
- Any disclosures to a court, administrative tribunal, arbitrator or independent expert in proceedings (or, in the last case, in an expert determination) to which the person or organisation disclosing the information is a party, or
- Any disclosures of information that is already in the public domain.

3.7.8.2 Confidentiality restrictions for the 'restructure agreements'

As already indicated, in the absence of any confidentiality agreement between the parties to the Restructure Co-ordination Deed, the only express contractual confidentiality restriction on the public release of the "restructure agreements" by the State or RailCorp is the confidentiality restriction in the RailCorp 2012 Restructure Deed of Settlement.

However, in accordance with the requirement in the NSW Government's December 2006 *Working with Government Guidelines for Privately Financed Projects* that "commercial in confidence" provisions in the contracts should also not be revealed, even if they are not expressly confidential under the terms of the contracts, the summaries of the "restructure agreements" in this *Summary of Contracts*, especially in section 6, exclude information which the State, RailCorp and the relevant principal private sector parties have identified as falling within the *Guidelines'* definition of "commercial in confidence" matters (i.e. contract provisions revealing the private sector parties' financing arrangements, cost structures, profit margins, "base case" financial model(s), intellectual property or "any matter whose disclosure would place the contractors at a

substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future”).

The copies of the principal “restructure agreements” that have been publicly released by RailCorp have been similarly redacted by excluding “commercial in confidence” provisions.

3.7.8.3 Project Contract restrictions on public statements by the private sector parties

PPP Co may not make any public statements about the project, other than any disclosures it is required to make to a recognised stock exchange, without RailCorp’s prior consent, and must ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and all of its other “significant contractors” (sections 3.2.6, 3.3.8 and 3.5.5) also comply with this requirement.

3.7.9 Alerts and incident management

PPP Co must notify RailCorp immediately if it becomes aware of any event or circumstance, arising from PPP Co’s activities, which might interfere with the use of any RailCorp land for railway purposes, the operation of RailCorp’s railway infrastructure or the current or future safe operation or capacity or efficiency of RailCorp’s rail system.

It must then keep RailCorp informed, providing sufficient information for RailCorp to assess the event or circumstance and its likely effects.

If RailCorp believes the event or circumstance places RailCorp’s land, infrastructure or rail system at risk, or threatens the safety of passengers or RailCorp staff or the operation of the rail system, PPP Co must immediately cooperate with RailCorp—if necessary, by ceasing its activities and vacating the affected area(s)—and must, at its own cost, assist RailCorp in taking action to avert any danger and ameliorate the risk, as directed by RailCorp.

RailCorp and PPP Co have agreed they will cooperate openly and constructively—while still reasonably protecting their commercial and legal positions—in their responses to and management and investigation of any incidents involving PPP Co’s trains, while they are in service, which have, or might have, resulted in any deaths or serious injuries (see section 3.7.1).

3.7.10 Insurance and loss or damage

3.7.10.1 PPP Co’s insurance obligations

PPP Co and the Rolling Stock Manufacturers have had to and must take out and maintain the following “delivery phase” insurance policies for the trains and the simulators:

- Until 18 months after the date of practical completion of the 78th train “set”, contract works or construction risks insurance for at least \$300 million per occurrence, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to expedite repairs, replacements and reinstatements, with maximum deductibles

of \$3 million during commissioning and \$500,000 at other times

- Until the date of practical completion of the 78th train “set”, transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the date of practical completion of the 78th train “set”, public and products liability insurance for at least \$250 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$250 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and
- Until seven years after the date of practical completion of the 78th train “set”, professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total, with a maximum deductible of \$1 million.

Similarly, PPP Co and the Maintenance Facility Contractor have had to and must take out and maintain the following “delivery phase” insurance policies for the maintenance facility works:

- Until the date of practical completion of the maintenance facility (18 June 2010), contract works or construction risks insurance for at least \$300 million per occurrence, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to expedite repairs, replacements and reinstatements, with a maximum deductible of \$500,000
- Until the date of practical completion of the maintenance facility, transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the date of practical completion of the maintenance facility, public and products liability insurance for at least \$100 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$100 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and
- Until seven years after the date of practical completion of the maintenance facility (i.e. until 18 June 2017), professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total, with a maximum deductible of \$1 million.

Since the date of practical completion of the maintenance facility (18 June 2010) PPP Co and the TLS Contractor have had to and must take out and maintain the following “TLS phase” insurance policies:

- Until the expiry or earlier termination of the Project Contract, industrial special risks insurance, covering the maintenance facility and the trains during their maintenance periods, for at least \$650 million, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to

expedite repairs, replacements and reinstatements, with a maximum deductible of \$500,000

- Until the expiry or earlier termination of the Project Contract, transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the expiry or earlier termination of the Project Contract, public and products liability insurance for at least \$250 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$250 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and
- Until seven years after the expiry or earlier termination of the Project Contract, professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total until seven years after the date of practical completion of the 78th train “set”, and at least \$25 million per occurrence and \$50 million per year in total after this date, with a maximum deductible of \$1 million.

In addition, throughout the project PPP Co and its subcontractors, and all of their contractors, have had to and must take out and maintain:

- Employers’ liability, workers’ compensation and compulsory third party motor vehicle insurance, as required by law, and
- Third party property damage motor vehicle insurance for at least \$20 million per occurrence, with cover for an unlimited number of occurrences and with a maximum deductible of \$10,000.

The Project Contract sets out a series of requirements for these insurance policies, other than the employers’ liability, workers’ compensation, compulsory third party motor vehicle and third party property damage motor vehicle policies, including RailCorp approvals of their terms and the notification of RailCorp if a policy is cancelled or allowed to expire. As already indicated in section 2.3.1, some of the more detailed requirements for some of the “delivery phase” policies were waived by RailCorp on 6 December 2006.

The Project Contract also sets out procedural requirements for PPP Co, including requirements to provide evidence of its policies, notify RailCorp of specified changes in its insurance status and any events which might give rise to an insurance claim (other than under the employers’ liability, workers’ compensation and compulsory third party motor vehicle policies), diligently pursue any insurance claims, allow RailCorp to direct and/or take over its insurance claims in specified circumstances, and establish and use a specified insurance proceeds bank account.

If PPP Co fails to provide satisfactory evidence that a required insurance policy is in effect within ten business days of a RailCorp request for it to do so, RailCorp may take out and maintain the relevant insurance itself and recover its premium and other costs from PPP Co. The Security Trustee for the project’s debt financiers, which must be sent a copy of

RailCorp’s request, has expressly acknowledged RailCorp’s right to take this action.

The terms of PPP Co’s initial “delivery phase” insurance policies, as approved by RailCorp, are reproduced in an Exhibit to the Project Contract, but as indicated in section 3.7.8 these details are subject to confidentiality restrictions.

RailCorp may at any time reasonably direct PPP Co to insure against any risk that is not already covered or to increase or change the terms of an existing policy. If it does so, PPP Co must promptly advise RailCorp of the additional premium(s), and if RailCorp decides that PPP Co should proceed with the change RailCorp must reimburse PPP Co for the additional premium(s) and any associated brokerage charges and taxes.

3.7.10.2 Annual reviews and the sharing of changes in insurance costs

On each anniversary of the practical completion of the maintenance facility on 18 June 2010,

- RailCorp has had to and must review the minimum sums that must be insured under the “TLS phase” insurance policies, and their specified maximum deductibles, and decide, with advice from a reputable insurance broker, whether these amounts need to be increased or decreased, and
- Both parties have had to and must review the premiums and statutory charges paid for the “TLS phase” industrial special risks, public and products liability and professional indemnity policies in the previous year, and compare these actual costs with cost estimates set out in a Schedule to the Project Contract.

If the total cost of these three insurance policies—including any increases or decreases in costs that have arisen as a result of earlier changes in the policies’ minimum sums or maximum deductibles—has been less than 50% of the sum of their original cost estimates, as indexed in line with CPI movements since the June quarter of 2006, the overall cost saving must be shared equally between RailCorp and PPP Co.

If the total cost of the three insurance policies has been between 50% and 100% of the sum of their original cost estimates, as indexed, PPP Co will be entitled to retain the full cost saving.

If the total cost of the three insurance policies has been higher than the sum of their original cost estimates, as indexed, the additional cost must be shared by PPP Co and RailCorp as set out in **Table 3.1**, subject to RailCorp’s *not* being liable for any cost increases attributable to PPP Co, its subcontractor or its other associates, including their claims histories.

In addition, if the *individual* cost of any of the three insurance policies is 500% or more of its original cost estimate, as indexed, at any time, not limited to these annual reviews,

- RailCorp and PPP Co will each be liable for 73.75% and 26.25%, respectively, of the portion of the cost increase taking the cost of this policy to 500% of its estimate, and RailCorp will be liable for all of the remaining portion (if any) of the cost increase, although (again) RailCorp will not be liable

Table 3.1. Sharing of real increases in the total cost of PPP Co’s “TLS phase” industrial special risks, public and products liability and professional indemnity insurance policies

| Actual total cost as a percentage of the sum of the policies’ original cost estimates, as indexed for inflation | PPP Co’s share of the total real cost increase | RailCorp’s share of the total real cost increase |
|---|---|---|
| 100% to 150% | <ul style="list-style-type: none"> All | <ul style="list-style-type: none"> None |
| 150% to 200% | <ul style="list-style-type: none"> All of the portion of the cost increase taking the total cost from 100% to 150% of the sum of the original cost estimates (as indexed), <i>plus</i> Half of the rest of the real cost increase | <ul style="list-style-type: none"> None of the portion of the cost increase taking the total cost from 100% to 150% of the sum of the original cost estimates (as indexed) Half of the rest of the real cost increase |
| 200% to 500% | <ul style="list-style-type: none"> 75% of the portion of the cost increase taking the total cost from 100% to 200% of the sum of the original cost estimates (as indexed), <i>plus</i> 10% of the rest of the real cost increase | <ul style="list-style-type: none"> 25% of the portion of the cost increase taking the total cost from 100% to 200% of the sum of the original cost estimates (as indexed), <i>plus</i> 90% of the rest of the real cost increase |
| more than 500% | <ul style="list-style-type: none"> 26.25% of the portion of the cost increase taking the total cost from 100% to 500% of the sum of the original cost estimates (as indexed) None of the rest of the real cost increase | <ul style="list-style-type: none"> 73.75% of the portion of the cost increase taking the total cost from 100% to 500% of the sum of the original cost estimates (as indexed), <i>plus</i> All of the rest of the real cost increase |

for any cost increases attributable to PPP Co or its associates, *or*

- RailCorp may declare the risks covered by the policy to be “uninsurable”, and if it does so the arrangements described in section 3.7.10.4 will apply.

3.7.10.3 Liabilities for and responses to loss or damage

PPP Co and RailCorp have agreed to share the risks of damage to or loss or destruction of the trains, the simulators, the maintenance facility and third parties’ property as described below:

- (a) PPP Co has borne and bears all the risks of damage to the trains prior to their practical completion, provided the damage is *not* caused by:
- A RailCorp breach of the Project Contract
 - A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates
 - War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
 - Nuclear radioactivity.

(The Project Contract calls these “**excepted risks**”).

Among other things, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp and bear all the costs of these repairs or replacements, to the extent that any insurance proceeds are insufficient.

- (b) RailCorp has borne and bears all the risks of damage to the trains prior to their practical completion—other than

graffiti covering an area of 10 m² or less—if this damage is caused by an “excepted risk”.

In these circumstances, PPP Co must again repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, but RailCorp must pay PPP Co the reasonable costs of these repairs or replacements, to the extent any insurance proceeds are insufficient.

- (c) PPP Co bears all the risks of damage to the completed trains during their maintenance periods, provided the damage is *not* caused by an “excepted risk”.

Among other things,

- If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp and bear all the costs of these repairs or replacements, to the extent any insurance proceeds are insufficient.
- If the 78th train “set” *has* been completed, and RailCorp and PPP Co agree that it is economically practicable to repair or replace the damaged carriage(s) (or, if they cannot agree, if this is determined under the dispute resolution procedures described in section 3.7.17), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, again bearing all the costs of the repairs or replacements to the extent any insurance proceeds are insufficient.
- If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),

- PPP Co will not be obliged to repair or replace the carriages

- RailCorp and PPP Co must negotiate in good faith in an attempt to agree on ways—such as the rotation of spare carriages or the use of trains with fewer than eight carriages—by which (a) PPP Co will be able to continue to meet the current train “availability” requirements (section 3.5.1), or agreed lesser requirements, and (b) PPP Co will continue to be entitled to earn the same level of “availability payments” (section 3.6.1), or an appropriately adjusted level of “availability payments” if the “availability” requirements are reduced, and
- If RailCorp and PPP Co cannot reach a contractually binding agreement on these matters within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages but RailCorp will not be obliged to give PPP Co any other financial relief or compensation for any reduction in its “availability payments” as a result of the damage to its carriage(s).

(d) RailCorp has borne and bears all the risks of damage to the completed trains, other than graffiti covering an area of 10 m² or less,

- During the periods they are in RailCorp’s possession, provided the damage is not caused by an act or omission by PPP Co, its subcontractors or its other associates, or by an event prior to the train’s practical completion, and
- At any time, if the damage is caused by an “excepted risk”.

Among other things, in these circumstances:

- If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, and RailCorp must pay it the reasonable costs of these repairs or replacements, to the extent any insurance proceeds are insufficient. (This is a generally applicable obligation, not limited to the specific circumstances of the “reimbursable repairs” described in sections 3.5.2.1 and 3.6.2.)
- If the 78th train “set” has been completed, and RailCorp and PPP Co agree (or it is determined) that it is economically practicable to repair or replace the damaged carriage(s), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, with RailCorp again paying it the reasonable costs of these repairs or replacements to the extent any insurance proceeds are insufficient (again as a generally applicable obligation, not limited to the specific circumstances of the “reimbursable repairs” described in sections 3.5.2.1 and 3.6.2), *unless* RailCorp notifies PPP Co

that the carriage(s) need not be repaired or replaced, in which case:

- The renegotiation arrangements described in (c) above will apply, and
- If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages, and RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.
- If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),
 - PPP Co will not be obliged to repair or replace the carriages
 - The renegotiation arrangements described in (c) above will apply, and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must again be adjusted to reflect the decreased number of carriages, and RailCorp must again pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.

(e) RailCorp and PPP Co have shared and will share the risks of damage to the completed trains during the periods they are in RailCorp’s possession, if the damage is caused by an act or omission by PPP Co, its subcontractors or its other associates, or by an event prior to the train’s practical completion.

In these circumstances,

- If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, with PPP Co bearing the first \$500,000 (indexed in line with CPI movements since the June quarter of 2006) of the costs of these repairs or replacements, to the extent any insurance proceeds are insufficient, and RailCorp paying PPP Co for any reasonable costs of the repairs or replacements, to the extent any insurance proceeds are insufficient, beyond this \$500,000 (as indexed).
- If the 78th train “set” has been completed, and RailCorp and PPP Co agree (or it is determined) that it is economically practicable to repair or replace the damaged carriage(s), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, with the costs of these repairs or replacements again being shared as just

described, *unless* RailCorp notifies PPP Co that the carriage(s) need not be repaired or replaced, in which case:

- RailCorp and PPP Co must negotiate in good faith in an attempt to agree on ways by which (a) PPP Co will be able to continue to meet the current train “availability” requirements (section 3.5.1), or agreed lesser requirements, and (b) PPP Co will continue to be entitled to earn the same level of “availability payments” (section 3.6.1), *less* \$500,000 (indexed in line with CPI movements since the June quarter of 2006), and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages, RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position, and PPP Co must pay RailCorp \$500,000 (indexed in line with CPI movements since the June quarter of 2006).
- If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),
 - PPP Co will not be obliged to repair or replace the carriages
 - The renegotiation arrangements just described will apply, and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages, RailCorp must again pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position, and PPP Co must again pay RailCorp \$500,000 (indexed in line with CPI movements since the June quarter of 2006).
- (f) PPP Co bore all the risks of damage to the simulators prior to their practical completion, provided the damage was not caused by an “excepted risk”.
- Among other things, PPP Co had to repair or replace the damaged simulator(s), at its own cost, within a reasonable period specified by RailCorp.
- (g) If the simulator(s) had been damaged prior to their practical completion as a result of an “excepted risk”, PPP Co would have had to repair or replace the damaged simulator(s) within a reasonable period specified by RailCorp and RailCorp would have had to

pay PPP Co the reasonable costs of these repairs or replacements.

- (h) PPP Co bears all the risks of damage to the completed simulators that is caused by an act or omission by PPP Co, its subcontractors or its other associates or by an event prior to the simulators’ practical completion that was not an “excepted risk”.
- Among other things, PPP Co must repair or replace the damaged simulator(s), at its own cost, within a reasonable period specified by RailCorp.
- (i) If the completed simulators are damaged as a result of other causes, including an “excepted risk”, PPP Co must repair or replace the damaged simulator(s) within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.
- (j) PPP Co bore all the risks of damage to the maintenance facility works (excluding the RailCorp “enabling works” described in section 3.3.1.1) prior to the practical completion of the maintenance facility, provided the damage was not caused by an “excepted risk”.
- Among other things, PPP Co had to repair or replace any damaged works, at its own cost, within a reasonable period specified by RailCorp.
- (k) If the maintenance facility works (excluding the RailCorp “enabling works”) had been damaged prior to the practical completion of the maintenance facility as a result of an “excepted risk”, PPP Co would have had to repair or replace the damaged works within a reasonable period specified by RailCorp and RailCorp would have had to pay PPP Co the reasonable costs of these repairs or replacements.
- (l) PPP Co bears all the risks of damage to the completed maintenance facility, provided the damage is not caused by a breach by RailCorp of its “enabling works” obligations (sections 3.3.1.1, 3.3.3.1, 3.3.6.1, 3.3.7.1 and 3.3.13) or any other “excepted risk”.
- Among other things, PPP Co must repair or replace the maintenance facility, at its own cost, within a reasonable period specified by RailCorp.
- (m) If the completed maintenance facility is damaged as a result of an “excepted risk”, including any breach by RailCorp of its “enabling works” obligations, PPP Co must repair or replace the maintenance facility within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.
- (n) PPP Co bears all the risks of damage to its unfixed maintenance plant, equipment, parts and materials, provided the damage is not caused by an “excepted risk”.
- Among other things, PPP Co must repair or replace the damaged plant, equipment, parts and/or materials, at its

own cost, within a reasonable period specified by RailCorp.

- (o) If PPP Co's unfixed maintenance plant, equipment, parts and/or materials are damaged as a result of an "excepted risk", PPP Co must repair or replace the damaged plant, equipment, parts and/or materials within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.
- (p) If any property of a third party is damaged, lost or destroyed as a result of a PPP Co breach of the Project Contract, PPP Co must promptly repair or replace the damaged property at its own cost.

If it fails to do so, RailCorp may carry out these repairs or replacements, after giving PPP Co reasonable notice, and PPP Co will be liable for any costs and losses RailCorp incurs, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1).

- (q) If any property of a third party is damaged, lost or destroyed as a result of PPP Co's *performance* of its obligations under the Project Contract, PPP Co must, if it has a legal liability to do so and at its own cost, promptly repair or replace the damaged property or reasonably compensate the third party, in the latter case only if the third party agrees.

If PPP Co is legally obliged to take this action but fails to do so, RailCorp may carry out the repairs or replacements or pay reasonable compensation, after giving PPP Co and the Security Trustee reasonable notice, and PPP Co will again be liable for any costs and losses RailCorp incurs, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

These specific allocations of risks and liabilities for loss or damage are supplemented by PPP Co's general commitments to indemnify RailCorp against any claim or loss RailCorp suffers as a result of any deaths, injuries, property damage or loss of use of property, or any reasonably foreseeable economic losses directly arising from property damage or a loss of use of property, that is caused by, or contributed to by,

- Any PPP Co breach of any RailCorp project agreement, or
- Any negligent or other wrongful act or omission, concerning PPP Co's obligations under the Project Contract or the use

or occupation of the maintenance facility construction site or associated work sites, by PPP Co and its associates,

subject to the exceptions and limit on PPP Co's liability summarised in section 3.1.6.

Whenever PPP Co is obliged to undertake repairs or replacements under the arrangements described above, it must:

- Subject to inspections by its insurers, immediately begin clearing any debris and undertaking initial repair work
- Promptly consult with RailCorp
- Ensure the repairs or replacements comply with the Project Contract's relevant specifications and will be completed within the reasonable period specified by RailCorp
- Ensure, to the greatest extent possible, that it continues to comply with all its obligations under the RailCorp project agreements
- Minimise any impacts on railway operations
- Keep RailCorp informed of its progress, and
- Apply any insurance proceeds towards the cost of the repairs or replacements. (Any surplus proceeds may be treated by PPP Co as revenue from the project.)

If any of PPP Co's trains is damaged or destroyed but (under the arrangements described in (c), (d) and (e) above) PPP Co is *not* obliged to repair or replace the damaged carriage(s), PPP Co must apply any relevant insurance proceeds to reducing its debts to the project's private sector debt financiers, and *not* to any payments it must make to RailCorp.

3.7.10.4 'Uninsurable' risks

Notwithstanding the "TLS phase" insurance obligations described in section 3.7.10.1, PPP Co has not been and will not be required to insure against any risk normally covered by its "TLS phase" industrial special risks insurance or public and products liability insurance policies—or, in limited, specified circumstances, its "TLS phase" professional indemnity insurance policy—if:

- RailCorp and PPP Co agree, or it is determined under the Project Contract's dispute resolution procedures (section 3.7.17), that:
 - ♦ The risk has become "uninsurable", in the sense that it is impossible to obtain insurance for the risk from any insurance company with a Standard and Poor's financial security rating of at least A– or a Moody's financial security rating of at least A3, and
 - ♦ This "uninsurability" has not been caused by any act or omission by PPP Co, its subcontractors or its other associates, or
- As already described in section 3.7.10.2, RailCorp declares risk(s) covered by PPP Co's "TLS phase" industrial special risks, public and products liability or professional indemnity insurance to be "uninsurable" on the basis that the premium and associated costs of the relevant insurance policy are

500% or more of their original cost estimate, as indexed in line with CPI movements since the June quarter of 2006.

PPP Co must immediately notify RailCorp if it believes a risk that would otherwise have to be covered by its “TLS phase” industrial special risks policy or its public and products liability policy has become “uninsurable”.

If RailCorp and PPP Co agree that a risk is “uninsurable”, or it is determined that this is the case, RailCorp and PPP Co must then meet and attempt to agree on whether there should be any changes to PPP Co’s rights and obligations, including, in particular, changes to RailCorp’s monthly “availability payments” to PPP Co (section 3.6.1).

If they cannot agree on appropriate changes, the “availability payments” must be adjusted so as to deduct an amount equal to the premium last paid by PPP Co to insure the risk that has now become “uninsurable”.

PPP Co must approach the insurance market, on a regular basis, to establish whether the risk continues to be “uninsurable”, advising RailCorp of its findings. If a risk ceases to be “uninsurable”, PPP Co must take out insurance for it again and the “availability payments” must be readjusted.

If an “uninsurable risk” materialises, RailCorp must, at its option and within a reasonable period of time, *either*:

- (a) Pay PPP Co an amount equal to the insurance proceeds it would have received had the relevant insurance continued to be available.
- (b) If the risk has damaged or destroyed any of PPP Co’s trains, require PPP Co to negotiate in good faith in an attempt to agree on ways—such as the rotation of spare carriages or the use of trains with fewer than eight carriages—by which:
 - PPP Co will be able to continue to meet the current train “availability” requirements (section 3.5.1), or agreed lesser requirements, and
 - PPP Co will continue to be entitled to earn the same level of “availability payments” (section 3.6.1), or an appropriately adjusted level of “availability payments” if the “availability” requirements are reduced.

If RailCorp chooses this option and RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect any decrease in the number of carriages, and RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.

- (c) If the risk has damaged or destroyed the maintenance facility or other plant or equipment, but it is still practicable to continue the project without the affected part of the maintenance facility or the affected plant or equipment, direct PPP Co not to repair or replace the damaged facility, plant or equipment and require it to

negotiate in good faith in an attempt to agree on ways by which:

- PPP Co will be able to continue to meet the current train “availability” requirements, and
- PPP Co will continue to be entitled to earn the same level of “availability payments”.

If RailCorp chooses this option and RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, RailCorp must pay PPP Co an amount which will ensure PPP Co is left in no worse or better financial position.

- (d) If the risk has damaged or destroyed all or a substantial portion of the trains or the maintenance facility, terminate the Project Contract.

If RailCorp chooses this option, the arrangements summarised in section 3.8.1 will apply.

3.7.11 Updating of the project’s financial model

PPP Co must update the private sector participants’ “base case” financial model for the project whenever this is reasonably necessary, and at least once every 12 months.

It must obtain RailCorp’s approval of any changes before they are made, apart from:

- The incorporation of relevant and measurable historical data, and
- Any changes notified to PPP Co by a person nominated by RailCorp to check or audit the model.

PPP Co must promptly revise the financial model in accordance with any such notifications, unless it promptly disputes the reasonableness, accuracy or relevance of the specified revisions. If RailCorp and PPP Co cannot agree on any revisions in dispute, PPP Co may refer the matter for determination under the dispute resolution procedures described in section 3.7.17.

However, RailCorp may not agree to or permit any changes to the “base case” financial model, other than minor technical changes which could not reasonably affect the interests of the project’s debt financiers, without the Security Trustee’s consent, which may not be unreasonably withheld or delayed.

PPP Co must give RailCorp updated and certified copies of the “base case” financial model, including its projections for the rest of the project, by no later than 31 October each year. RailCorp may review this model, but is not obliged to do so.

The RailCorp 2012 Restructure Consent Deed makes it clear that an updated financial model provided by PPP Co under two of the February 2012 “restructure agreements”, the Restructure Co-ordination Deed and the Capital Commitment Deed, as one of the precondition to these contracts’ becoming effective (see section 2.3.3), did not and does not constitute a “base case financial model” or any other “financial model” under the Project Contract.

3.7.12 Financial reporting and audits

The Project Contract sets out requirements for PPP Co (and, through PPP Co, PPP Co Finance Co) to:

- Maintain accounts and other financial records, and have them audited annually
- Make these accounts and records available for RailCorp inspections and audits at all reasonable times throughout the project
- Give RailCorp the same information about the costs of its manufacturing and construction works as it is required to give to the project's debt financiers
- Give RailCorp any information it reasonably requires, from time to time, about the costs of maintaining and repairing the trains
- Give RailCorp certified quarterly cashflow and profit and loss statements
- Give RailCorp specified audited financial statements for each financial year by no later than the following 31 October
- Give RailCorp copies of all notices issued to or received from the Australian Securities and Investments Commission (ASIC) or the Australian Stock Exchange (ASX) by PPP Co, PPP Co Finance Co, PPP Co Holding Co, any of their subsidiaries and any other entities they control
- Give RailCorp copies of all relevant notices and other documents issued to or received from ASIC by the project's equity investors, and
- Promptly give RailCorp any other information about the project which RailCorp reasonably requests from time to time.

3.7.13 Changes in law

The Project Contract's definition of a "change in law" encompasses:

- The amendment, repeal or enactment of NSW or Commonwealth legislation (including subordinate legislation and documents and policies that are legally enforceable under NSW or Commonwealth legislation, such as the maintenance facility's planning approval), and
- A change in the interpretation or application of NSW or Commonwealth legislation as a result of the amendment or repeal of *other* legislation that was in effect on 3 December 2006 or the enactment of other new legislation.

The definition expressly includes all amendments, repeals or enactments of legislation directly in response to the recommendations of the Commission of Inquiry into the Waterfall rail accident, but it otherwise expressly excludes any legislative change whose substance had been publicly notified or was reasonably foreseeable on 3 December 2006.

PPP Co is not generally entitled to make any claim against RailCorp in connection with a "change in law".

However, if the cost of PPP Co's performance of its obligations increases as a result of:

- A "discriminatory change in law", applying to this project but not to other NSW rolling stock or rolling stock maintenance projects, or applying to PPP Co but not to others, or applying to the maintenance facility or its site but not to other facilities or land, or applying to privately financed "public private partnership" projects in NSW but not to other projects
- A "change in railway law", applying to the rail industry but not to other industries, or
- A "change in disability law", affecting the ability of people with disabilities to access and use PPP Co's trains,

RailCorp must compensate PPP Co, using payment mechanisms specified in the Project Contract, so that PPP Co is placed in the financial position it would have been in had the "change in law" not occurred, apart from any costs:

- Resulting from any failure by PPP Co to reasonably attempt to minimise the additional costs
- Incurred during or relating to the period of any delay by PPP Co in notifying RailCorp of any proposal for such a "change in law"
- Resulting from any failure by PPP Co to provide information to RailCorp or consult with it about the likely effects of a proposed "change in law" of these types, or
- Resulting from a new or modified planning approval for the maintenance facility in response to a variation requested by PPP Co (sections 3.3.2 and 3.7.14.2).

In addition, if any "change in law" *other than* a change in tax laws, a "discriminatory change in law", a "change in railway law" or a "change in disability law" forces PPP Co to incur additional capital expenditure in performing its "TLS phase" obligations,

- PPP Co must bear all of the additional capital expenditure it incurs, as a result of *all* such "changes in law", up to \$500,000 (indexed in line with CPI movements since the June quarter of 2006)
- RailCorp and PPP Co will each bear half of the portion (if any) of the additional capital expenditure PPP Co incurs, as a result of all such "changes in law", between \$500,000 and \$1 million (as similarly indexed), and
- RailCorp must bear all of the portion (if any) of the additional capital expenditure PPP Co incurs, as a result of all such "changes in law", above \$1 million (as indexed),

apart from any capital expenditure:

- Resulting from any failure by PPP Co to reasonably attempt to minimise the additional expenditure
- Incurred during or relating to the period of any delay by PPP Co in notifying RailCorp of any proposal for such a "change in law", or

- Resulting from any failure by PPP Co to provide information to RailCorp or consult with it about the likely effects of a proposed “change in law” of this type.

In some circumstances a “change in law” may also necessitate a contractual variation, so that the project’s works, trains, simulators and/or maintenance facility will continue to comply with the law, as discussed in section 3.7.14 below.

3.7.14 Variations

Apart from the Project Contract’s arrangements for the deletion of the requirement for a separate guards’ cab on the trains (section 3.2.1.1), the parties’ obligations under the Project Contract have been able to be varied, and may be varied, under the Project Contract’s variation provisions, only if:

- This is directed by RailCorp, as described in section 3.7.14.1 below, or
- The variation is requested by PPP Co and approved by RailCorp, as described in section 3.7.14.2.

3.7.14.1 RailCorp-initiated variations

RailCorp may at any time issue a proposal for a variation to PPP Co.

If it does so, PPP Co must respond, within 20 business days or any longer period requested by PPP Co and approved by RailCorp, with detailed advice, prepared in accordance with requirements set out in the Project Contract, on the proposed variation’s costs or savings and its impacts on various specified aspects of the project, including its funding and rail safety aspects.

If all 78 train “sets” have been completed and the value of the works required under the proposed variation is likely to exceed \$500,000 (indexed in line with CPI movements since the June quarter of 2006), RailCorp may require PPP Co to conduct a tender process before finalising its response to RailCorp’s proposal.

Within 40 business days of the finalisation of PPP Co’s response, RailCorp must either:

- Direct PPP Co to proceed with the proposed variation in accordance with its response or, if relevant, a nominated option presented by PPP Co within its response, in which case PPP Co must implement the variation and will be relieved of its other obligations under the Project Contract to the extent specified in its response, and agreed to by RailCorp, as necessary to ensure PPP Co will be no better or worse off as a result of the variation
- Reject PPP Co’s response, in which case RailCorp and PPP Co must consult with each other, in good faith, to attempt to agree on the matters in PPP Co’s response which are in dispute, and
 - ♦ If agreement is reached, PPP Co must implement the agreed variation and will be relieved of its other obligations under the Project Contract to the extent that this has been agreed, or

- ♦ If agreement is not reached within ten business days, RailCorp may refer the matter for determination under the dispute resolution procedures described in section 3.7.17, while retaining a right to direct PPP Co to implement the variation in the meantime, or

- Withdraw its proposed variation.

RailCorp may also bypass these proposal, response and negotiation processes at any time and simply direct PPP Co to implement a variation on terms set out in RailCorp’s direction. If PPP Co disagrees with any of these terms, it may refer the matter for dispute resolution under the procedures described in section 3.7.17, but in the meantime it must proceed with implementing the variation.

If RailCorp directs PPP Co to implement a variation under any of these processes and the variation increases the project’s net costs, RailCorp must make payments to PPP Co to cover an agreed or determined proportion of this increase in accordance with processes set out in the Project Contract, *unless* the variation is a change to the minimum operating standards for the trains, as specified in the Project Contract, or a change in any RailCorp policy, rule or procedure other than its timetable and its *Interface Protocols* (sections 3.2.7, 3.3.9, 3.5.1.3, 3.5.2.1 and 3.5.6), in which case PPP Co must bear the first \$100,000 of the cost increase from all such changes in each calendar year (indexed in line with CPI movements since the June quarter of 2006) and RailCorp will be liable for the rest.

Conversely, if RailCorp directs PPP Co to implement a variation under any of these processes and the variation decreases the project’s net costs, PPP Co must pay RailCorp 50% of the cost saving in accordance with other processes set out in the Project Contract.

3.7.14.2 PPP Co-initiated variations

PPP Co may propose a variation at any time by submitting a detailed proposal, in accordance with requirements set out in the Project Contract, describing, among other things, the proposed variation’s costs or savings and its impacts on various specified aspects of the project, including its train “availability” and rail safety aspects.

RailCorp must consider any such PPP Co proposal in good faith.

If the variation requested by PPP Co is required to ensure the project’s works, trains, simulators and/or maintenance facility will comply with a “change in law” (section 3.7.13), RailCorp must either:

- Approve the requested variation
- Direct PPP Co to carry out a variation with the same objective under the RailCorp-initiated variation provisions just discussed in section 3.7.14.1, or
- Take any other action RailCorp considers necessary to achieve the same objective, including modifications to RailCorp’s rail infrastructure.

Similarly, if the variation requested by PPP Co is required to ensure the project's works, trains, simulators and/or maintenance facility will retain the same functionality they had before a modification to RailCorp's rail infrastructure (RailCorp must try to warn PPP Co about any such modifications which might necessitate such a variation), RailCorp must either:

- Approve the requested variation
- Direct PPP Co to carry out a variation with the same objective under the RailCorp-initiated variation provisions discussed in section 3.7.14.1, or
- Take any other action RailCorp considers necessary to achieve the same objective, including further modifications to RailCorp's rail infrastructure.

In all other cases RailCorp may accept or reject PPP Co's proposed variation in its absolute discretion.

In the case of PPP Co-initiated and RailCorp-approved variations responding to "changes in law", the respective liabilities of RailCorp and PPP Co for any cost increases will be governed by:

- The arrangements described in section 3.7.13, and
- In the case of a "discriminatory change in law", a "change in railway law", a "change in disability law" or any change in law (other than a tax law) which forces PPP Co to incur additional capital expenditure in performing its "TLS phase" obligations, the "deemed availability" arrangements described in section 3.5.1.4.

In the case of PPP Co-initiated and RailCorp-approved variations responding to modifications to RailCorp's rail infrastructure, RailCorp must make payments to PPP Co to cover an agreed or determined proportion of any cost increase in accordance with processes set out in the Project Contract, and the "deemed availability" arrangements described in section 3.5.1.4 will again apply.

In all other cases PPP Co must bear all the risks and costs of proposing and implementing PPP Co-initiated and RailCorp-approved variations, including the costs reasonably incurred by RailCorp in assessing PPP Co's proposals.

If a PPP Co-initiated and RailCorp-approved variation results in cost savings, PPP Co must pay RailCorp 50% of these savings, in accordance with setting-off and payment processes and requirements set out in the Project Contract.

3.7.15 Amendments to and waivers of the project agreements

The Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed and the Call Option Deed all expressly state that they may be amended only by a document signed by representatives of RailCorp, PPP Co and, where relevant, their other parties.

PPP Co may not make or permit any amendment of the project's contracts, except in limited specified circumstances, without RailCorp's prior consent.

Similarly, the TLS Contractor and the FMFS Subcontractor may not amend the FMFS Access Agreement without RailCorp's prior consent, and the February 2012 "restructure agreements" may be amended only through deeds or other agreements (as applicable) between all of the relevant parties.

In the case of amendments of contracts to which RailCorp is not a party, RailCorp may not unreasonably withhold or delay its consent if PPP Co satisfies it that the amendments will not, among other things, adversely affect PPP Co's ability to perform its obligations under the Project Contract, RailCorp's or PPP Co's rail safety accreditations or RailCorp's ability to enforce its rights under the RailCorp project agreements.

Similarly, RailCorp:

- May not agree to any amendment of the Project Contract or any other RailCorp project agreement, other than a minor technical change which could not reasonably affect the interests of the project's debt financiers, without the Security Trustee's consent, which may not be unreasonably withheld or delayed
- Has expressly acknowledged provisions in the project's debt financing documents restricting PPP Co's rights to amend the project's contracts, including the RailCorp project agreements, and
- Has undertaken not to amend, replace or waive any of the provisions of the Cardiff Maintenance Depot Lease or the Right of Entry Deed for Cardiff Maintenance Depot.

Any failure to exercise or delay in exercising any right or power under the Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed or the Call Option Deed does not operate as a waiver or as a bar to future exercising of the same or any other right or power, and a waiver or consent given under any of the RailCorp project agreements is binding only if it is given or confirmed in writing. Equivalent provisions apply under the February 2012 "restructure agreements" to which RailCorp is not a party, including the Capital Commitment Deed and the other "restructure agreements" entered into by the NSW Treasurer for and on behalf of the State of NSW.

3.7.16 Restrictions on changes of ownership or control, assignments, encumbrances and refinancing

3.7.16.1 Changes of ownership or control

PPP Co has undertaken that throughout the project it will not carry out any share capital dealings, or allow PPP Co Holding Co to carry out any share capital dealings, other than dealings which are either:

- Expressly permitted by the Project Contract, as specified in a Schedule to the Project Contract, or

- Consented to by RailCorp in advance.

The Project Contract specifies a series of criteria and circumstances determining RailCorp's powers to withhold its consent, both generally and, in the case of Downer EDI, during different phases of the project.

Less limiting criteria apply, however, if the debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) has sought RailCorp's consent to a change of ownership of PPP Co in order to remedy a PPP Co breach of any of the project's contracts, under arrangements described in section 3.8.3.3.

3.7.16.2 Transfers and encumbrances

RailCorp may transfer its interests in and obligations under the RailCorp project agreements without PPP Co's prior approval, provided:

- The transferee is responsible for Sydney metropolitan passenger rail services and is supported by a NSW Government guarantee on terms no less favourable than the PAFA Act Guarantee (see section 5)
- The transferee agrees to execute a deed in favour of the debt financiers' Security Trustee, in a form reasonably required by the Security Trustee, placing the transferee in the same position as RailCorp under the Debt Finance Side Deed, and
- In the case of RailCorp's interest in the maintenance facility,
 - ♦ If the Maintenance Facility Lease has not yet been granted, the transferee grants an option to lease in the same form as the Call Option Deed, and
 - ♦ Consequential amendments are made to the RailCorp project agreements, as reasonably required by PPP Co, to ensure PPP Co will be no worse off.

Any other transfers of RailCorp's rights and obligations under any of the RailCorp project agreements require the prior consents of PPP Co, PPP Co Finance Co and the Security Trustee. These consents may not be unreasonably withheld.

In addition, if RailCorp transfers its rights and obligations under the Cardiff Maintenance Depot Lease or the Right of Entry Deed for Cardiff Maintenance Depot, or creates a security interest over these rights and obligations, it must ensure the transferee executes deeds on the same terms as these documents, or on terms agreed between the transferee and the Security Trustee, and also executes a tripartite deed with PPP Co and the Security Trustee on terms similar to the relevant parts of the Debt Finance Side Deed.

Similarly,

- PPP Co may not transfer its interests in or obligations under any of the project's contracts without RailCorp's prior consent and, in the case of the RailCorp project agreements, the prior consents of PPP Co Finance Co and the Security Trustee as well (again, these consents may not be unreasonably withheld)

Provided specified preconditions are satisfied, RailCorp *must* give its consent to the transfer if it has been sought by the

debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) in order to remedy a PPP Co breach of any of the project's contracts, under arrangements described in section 3.8.3.3.

- PPP Co may not create a security interest over, or otherwise deal with, the trains, the maintenance facility or the maintenance facility's site, except as expressly permitted under the RailCorp project agreements, the project's debt financing documents or the Debt Finance Side Deed, or otherwise as approved by RailCorp, and
- The Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor may transfer their rights and obligations under the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract and the TLS Contract, or create a security interest or other encumbrance over these rights and obligations, only with RailCorp's prior consent, which may not be unreasonably withheld or delayed, and only if the transferee or encumbrancee agrees to enter into an equivalent of the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed or the TLS Contract Side Deed (as relevant).

In accordance with these requirements, RailCorp has expressly consented, in the RailCorp 2012 Restructure Consent Deed, to the potential future transfer of equity in the project to the State and related arrangements set out in the February 2012 "restructure agreements", as described in section 6 of this report.

Provisions governing assignments or other transfers of the State's rights and obligations under two of these "restructure agreements" to which the State is a party, the Capital Commitment Deed and the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, are summarised later in this report, in sections 6.1.3 and 6.2.2.

3.7.16.3 Refinancing

PPP Co may not refinance the project in a way likely to produce a refinancing gain or adversely affect any RailCorp rights or obligations under the RailCorp project agreements, and must ensure PPP Co Finance Co does not refinance the project in such a way, *unless*:

- (a) The proposed refinancing is an "**assumed refinancing**" — *meaning* a refinancing to replace debt which is due or about to fall due for repayment under the project's existing debt financing documents, or which otherwise complies with "refinancing assumptions" specified in a Schedule to the Project Contract — *and*
 - ♦ The terms of the refinancing—other than any terms that are the same as those in the current debt financing documents and any terms providing for the "refinancing assumptions"—will not materially worsen RailCorp's position

- The incoming financiers, or their agent or trustee, will execute a deed substantially in the form of the Debt Finance Side Deed
- The incoming financiers will have no greater security than the existing debt financiers
- To the extent that they have future or undrawn commitments to the project, the incoming financiers have a Standard and Poor's credit rating of at least A– or a Moody's credit rating of at least A3, and
- PPP Co has complied with notification and information requirements set out in the Project Contract, *or*

(b) RailCorp nonetheless consents to the refinancing.

In the latter case RailCorp may not unreasonably withhold or delay its consent if it is reasonably satisfied that:

- The refinancing is to cure a default or potential default under the existing debt financing documents, or to enable the Security Trustee to exercise its rights under the Debt Finance Side Deed, or to permit the current debt financiers to waive a cash lock-up or funding restrictions under the existing debt financing documents when PPP Co has to make payments to RailCorp, the Rolling Stock Manufacturers, the Maintenance Facility Contractor and/or the TLS Contractor, *or*
- A series of other requirements specified in the Project Contract have been met:
 - The incoming financiers, or their agent or trustee, will execute a deed substantially in the form of the Debt Finance Side Deed
 - The incoming financiers will have no greater security than the existing debt financiers
 - To the extent that they have future or undrawn commitments to the project, the incoming financiers have a Standard and Poor's credit rating of at least A– or a Moody's credit rating of at least A3
 - The refinancing will be on an "arms length" basis
 - PPP Co has complied with notification and information requirements set out in the Project Contract
 - The refinancing will not reduce PPP Co's credit rating (if any) below investment grading
 - The refinancing will not worsen RailCorp's position under the RailCorp project agreements, and
 - If there will be a refinancing gain, this gain has been calculated and the basis for sharing the gain between RailCorp and PPP Co has been agreed or determined under arrangements described below.

More narrowly, if the proposed refinancing is simply a transfer of a current debt financier's rights and obligations under the

existing debt financing documents to another financier, RailCorp *must* give its consent if:

- The proposed transferee is a bank or financial institution with a Standard and Poor's credit rating of at least A– or a Moody's credit rating of at least A3, or
- Its rights and obligations are guaranteed, on terms acceptable to RailCorp, by a financial institution with at least this required credit rating.

The RailCorp 2012 Restructure Consent Deed specifies that RailCorp's consent to the potential future \$175 million capital contribution by the State and related arrangements set out in the February 2012 "restructure agreements", as described in section 6 of this report, does not affect the Project Contract's requirements for PPP Co to obtain RailCorp's consent prior to any future refinancing of the project, expressly including the refinancing of the project's current senior bank debt (under the Senior Bank Loan Note Subscription Agreement and related senior bank financing documents) and the refinancing of two specified tranches of senior bonds issued by PPP Co Finance Co (under the Senior Bond Trust Deed and associated senior bond documents), currently due in 2018 and 2019.

However, if the State of NSW notifies RailCorp that the Capital Commitment Deed's preconditions for the State to make its \$175 million capital contribution to the project have been satisfied or waived, or will be satisfied or waived upon any refinancing of the project, and that the State will in fact be making its capital contribution, this refinancing is to be deemed to be an "assumed refinancing", and therefore will not require RailCorp's prior consent if it will not materially worsen RailCorp's position and the other criteria listed in (a) above are also satisfied.

If a permitted or otherwise approved refinancing is an "assumed refinancing" *other than* a deemed "assumed refinancing" associated with a State capital contribution to the project under the February 2012 "restructure agreements", RailCorp will not be entitled to any portion of any associated refinancing gain.

Otherwise, any refinancing gain must be shared between RailCorp and PPP Co, which must again reasonably attempt to agree on the amount of this gain and the manner and timing payment of RailCorp's share. If they cannot agree,

- Either party may refer the matter for determination under the Project Contract's dispute resolution procedures, as described in section 3.7.17, although any such referral must be on the basis that RailCorp is to receive 50% of the refinancing gain and is to be paid no later than any of the project's equity investors, and
- If the refinancing is an "assumed refinancing" associated with a State capital contribution to the project under the February 2012 "restructure agreements", RailCorp *must* receive 50% of the refinancing gain.

PPP Co must meet RailCorp's reasonable costs of reviewing and approving any refinancing proposal, including its legal and financial advisers' fees.

If a refinancing is permitted or consented to under these arrangements, the incoming financiers (or their agent or trustee), PPP Co and RailCorp must execute a deed substantially in the form of the Debt Finance Side Deed, and PPP Co must give RailCorp certified copies of the new financing agreements and the revised “base case” financial model for the project.

3.7.17 Dispute resolution

All disputes between RailCorp and PPP Co arising out of the Project Contract and the Call Option Deed have had to be and must be resolved in accordance with detailed procedures set out in the Project Contract, and all disputes under the Maintenance Facility Lease, the Maintenance Facility Licence, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed and the FMFS Side Deed must be resolved in accordance with procedures that are precisely analogous to the Project Contract’s procedures.

The Project Contract’s dispute resolution procedures essentially involve three sequential phases: negotiation, expert determination (for many but not all disputes which are not able to be resolved through negotiation*) and arbitration.

Throughout these processes both parties must continue to perform all their obligations under the Project Contract.

At the outset, any dispute may be referred for resolution by negotiation between RailCorp’s and PPP Co’s chief executive officers, or their nominees, simply by one party’s giving the other party a notice to this effect, with reasonable particulars about the subject matters of the dispute.

The CEOs or their nominees must then meet—physically, or by a video conference or telephone link-up if they agree—and reasonably endeavour, in good faith, to resolve the dispute within 15 business days of its referral for negotiation. If they succeed in resolving part or all of the dispute, their decision

must be executed in a written form that will contractually bind both parties.

If the dispute is not fully resolved within the 15 business days,

- It may be referred for determination by an Independent Expert if it falls into one or more of 32 categories of disputes listed in the Project Contract as eligible for expert determination,* and
- It may be referred directly to arbitration if it does not fall within any of these “expert determination” categories.

A referral to expert determination may be made by either party, again simply by notifying the other party, within 60 business days of the end of the initial 15 business days period for negotiations.

The Independent Expert appointed to determine the dispute is to be selected from a panel of three experts whose initial membership had to be agreed upon by RailCorp and PPP Co by 31 January 2007 or, if they could not agree on all the panel’s members, expert(s) nominated by the Australian Centre for International Commercial Arbitration (ACICA).

The terms of the Independent Experts’ appointments by RailCorp and PPP Co, and the rules and processes they must follow in making their determinations, have been and must be set out in Expert Determination Agreements, which for the initially appointed panel had to take the form of a draft agreement set out in a Schedule to the Project Contract and for any later replacement expert must either take this form or be on other reasonable terms agreed to by RailCorp, PPP Co and the replacement expert.

As indicated in section 2.2.10, the first-appointed independent expert under these arrangements is Mr John Tyrill, the second is Mr Steven Goldstein and the third is Mr Malcolm Holmes QC.

The selection of the particular expert who is to determine a particular dispute must be on a rotational basis, in the order in which the experts were appointed, unless both parties agree

* The types of disputes eligible for expert determination are disputes about whether PPP Co’s designs comply with the requirements of the Project Contract (sections 3.2.3 and 3.3.3.2), whether the trains, simulators, RailCorp “enabling works” or PPP Co’s maintenance facility works are being or have been manufactured or constructed in accordance with the requirements of the Project Contract (sections 3.2.1, 3.2.4, 3.3.1 and 3.3.6), the preconditions for and delivery of RailCorp’s “enabling works” “packages” (section 3.3.1.1), whether PPP Co’s “Project Plans” and *Integrated Test Plan* comply with the requirements of the Project Contract (sections 3.2.7, 3.3.9 and 3.5.6), a change to or cancellation of PPP Co’s delivery-phase “network access rights” (section 3.2.9), the reasonableness or results of RailCorp-ordered testing of PPP Co’s compliance with its delivery-phase obligations (sections 3.2.7 and 3.3.9), whether RailCorp is entitled to order PPP Co to suspend its delivery-phase activities for non-compliance (sections 3.2.5 and 3.3.7.2), whether “practical completion” of a train “set”, the simulators, a RailCorp “enabling works” “package” or the maintenance facility has been achieved (sections 3.2.11.1, 3.2.12 and 3.3.13), whether “final” completion of a train “set” has been achieved (section 3.2.11.2), whether there is a defect in any of the facilities to be “returned” to RailCorp (section 3.3.14), the cost adjustment to be made for the trains’ earthing systems (section 3.4.3), PPP Co’s “TLS phase” performance monitoring system or its outputs, including PPP Co’s monthly *Performance Reports* (section 3.5.6), the scope, timing and costs of any remediation works on the maintenance facility over the last five years of the project (section 3.5.9), the calculation of the “re-basing adjustment” component of a RailCorp “availability payment” to PPP Co (step (5) in section 3.6.1.1), the determination or review of the “deemed action times” to be assumed in some of the calculations determining any “reliability and disruption adjustments” to be deducted from RailCorp’s “availability payments” to PPP Co (section 3.6.1.2), the calculation of an “interest payment adjustment” payment (section 3.6.4), whether the documents PPP Co prepares for the variation to RailCorp’s rail safety accreditation comply with the requirements of the Project Contract and the Independent Transport Safety and Reliability Regulator (section 3.7.1), the costs RailCorp must pay to PPP Co if RailCorp extends the term of the project (section 3.5.7), changes in insurance costs (section 3.7.10.2), whether it is economically practicable to repair or replace a damaged train carriage (section 3.7.10.3 (c), (d) and (e)), whether a risk has become “uninsurable” (section 3.7.10.4), any matter connected with a “change in law” (sections 3.7.13 and 3.7.14.2), revisions to the “base case” financial model for the project in response to RailCorp checking or auditing of the model (section 3.7.11), any matter set out in a PPP Co response to a RailCorp proposal for a variation (section 3.7.14.1), a RailCorp direction to proceed with a variation if this direction bypasses the normal proposal, response and negotiation processes for RailCorp-initiated variations or if the terms of the variation are still in dispute (section 3.7.14.1), any increases in PPP Co’s costs arising from a RailCorp change to the minimum operating standards for the trains or any RailCorp policy, rule or procedure other than its timetable and its *Interface Protocols* (section 3.7.14.1), the sharing of any cost savings resulting from a variation (sections 3.7.14.1 and 3.7.14.2), the amount and sharing of any refinancing gain (section 3.7.16.3), revisions to the “base case” financial model following a refinancing (section 3.7.16.3) and “termination payments” or sale prices for the trains following an early termination of the Project Contract (see sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5).

otherwise. RailCorp and PPP Co have agreed, in the Expert Panel Letter, that if the expert whose turn it is under this formula is not available to determine the dispute within 60 business days, or any other period agreed by the parties, the next-appointed expert is to be selected instead, and if none of the three experts is available either party may refer the dispute to arbitration.

The Rolling Stock Manufacturers, the Maintenance Facility Construction Contractor, the TLS Contractor, the Security Trustee and their advisers and representatives may attend expert determination proceedings as observers, with RailCorp's prior consent, which may not be unreasonably withheld or delayed.

RailCorp and PPP Co must each bear their own costs in connection with the expert determination proceedings, and must equally share the costs of the expert.

When the expert makes his or her determination there is a period of five business days during which either party may request amendments, and if such a request is made the expert has five business days to either amend the determination or advise the parties that no amendment is required.

The determination then becomes final and binding *unless* one of the parties, within ten business days of the initial determination or five business days of an amended determination or a notice that no amendment is necessary, notifies the other party that it is dissatisfied and intends to refer the matter to arbitration, in which case the determination is binding unless and until it is overturned or varied by the arbitrator.

As already indicated, an unresolved dispute *must* be referred to arbitration after the failure of the "negotiation" phase if it does not fall within any of the "expert determination" categories. In addition, an unresolved dispute that *has* been referred to expert determination *must* be referred to arbitration if the expert has not made a determination within 60 days of his or her appointment, or within any other period agreed by the parties, and *may* be referred to arbitration if no expert is available to make a determination within 60 business days.

Arbitrations must be conducted by single arbitrators agreed by the parties or, if they cannot agree within 20 business days, an arbitrator nominated by the ACICA. They are generally governed by the ACICA's contemporary Arbitration Rules, and the arbitrator has the power to grant any legal, equitable or statutory remedy. The Security Trustee may attend the arbitration hearings with RailCorp's prior consent, which may not be unreasonably withheld or delayed.

If the dispute has already been subject to expert determination proceedings, the arbitrator must hand down his or her final award within three months of his or her appointment, unless the parties agree the dispute is complex, in which case the deadline is to be extended to six months. There are no equivalent deadlines for disputes which have not previously been referred to expert determination.

3.7.18 Force majeure

"**Force majeure events**" are defined in the Project Contract as any:

- Lightning, earthquake, cyclone, natural disaster, mudslide, fire or explosion
- Flood with an expected return frequency of once every 50 or more years
- "Terrorist act", as defined in the Terrorism Insurance Act (Cth) as at 3 December 2006
- War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority
- Nuclear radioactivity
- Failure of supply of any of the maintenance facility's utility services other than electricity
- Industrial action within Australia which affects the project and which has been caused by the party to the Project Contract that is *not* the affected party, or
- Statewide or industry-wide industrial action within Australia which is *not* caused by the affected party or its contractors or other associates

which:

- Is beyond the reasonable control of the affected party and its associates, and
- Is preventing or delaying the affected party from performing any of its non-financial obligations under the Project Contract,

provided:

- This situation has not resulted from a breach of any of the project's contracts by the affected party, and
- If PPP Co is the affected party, this situation could not have been prevented, avoided or remedied by taking the steps which a prudent, experienced and competent designer, builder and maintainer of rolling stock and rolling stock maintenance facilities would have taken.

If RailCorp or PPP Co alleges a "*force majeure event*" has occurred, it must immediately notify the other party and, in RailCorp's case, the Security Trustee. If PPP Co is the affected party, it must then, as soon as reasonably practicable, provide details about the event, its affected obligations, the actions it has taken or proposes to take to remedy or mitigate 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.

RailCorp and PPP Co must then meet within five business days to determine the extent of insurance coverage and how long the "*force majeure event*" is likely to continue.

The affected party must use its best endeavours to overcome or mitigate the effects of the "*force majeure event*".

If PPP Co is the affected party, the debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) may "step in" and assume some or all of PPP Co's rights and obligations under the project's contracts in order to remedy the "*force majeure* event". If the Security Trustee or an "enforcing party" does "step in" in this way, RailCorp must, if requested, give them access to the maintenance facility and surrounding areas and any information RailCorp has about the "*force majeure* event", including details on any steps RailCorp thinks should be taken to remedy this event.

While the "*force majeure* event" continues the affected party's affected obligation are suspended, but only to the extent and for so long as the "*force majeure* event" continues to prevent or delay their performance. RailCorp may make alternative arrangements for the performance of the suspended obligations.

Subject to:

- The "deemed availability" arrangements described in section 3.5.1.4
- The possible application of the "delay damages" provisions described at the end of section 3.2.5 and the end of section 3.3.7.2, and
- The possible application of "suspension of termination" provisions described below,

RailCorp is not liable to:

- Make any "availability payments" (section 3.6.1) to PPP Co for any train "sets" which are not "available" as a result of the "*force majeure* event", or
- Provide any other financial relief to PPP Co during the period of suspension of its affected obligations,

and PPP Co is not liable to compensate RailCorp for any costs or losses RailCorp incurs during the period of suspension.

If the affected party becomes able to recommence the performance of its affected obligations, it must immediately notify the other party and resume the suspended activities, subject to a reasonable remobilisation period.

If a "*force majeure* event" prevents PPP Co from performing material non-financial obligations for a continuous period of 180 days or more, either party may give the other party 20 business days' notice that it intends to terminate the Project Contract for *force majeure*.

However, if the notice of termination is issued by PPP Co, RailCorp may suspend PPP Co's right to terminate the Project Contract by giving PPP Co a notice to this effect within the following 20 business days.

If RailCorp issues such a suspension notice,

- During the suspension period RailCorp must pay PPP Co:
 - ♦ "Availability payments" (section 3.6.1) and "key performance indicator payments" (section 3.6.3) based on PPP Co's average performance over the six months immediately before the "*force majeure* event", less

- ♦ The costs which PPP Co is no longer incurring because of the suspension of its obligations, after deducting any reasonable demobilisation costs

- If PPP Co becomes able to recommence its performance of the relevant obligations, it must do so and its notice of termination will cease to have any effect, and
- Otherwise, the Project Contract will not terminate unless and until RailCorp notifies PPP Co that it is ending its suspension of PPP Co's right to terminate for *force majeure* or the Project Contract is terminated on another basis, as described in sections 3.8.2, 3.8.3.12, 3.8.4 and 3.8.5.

If the Project Contract is terminated for *force majeure*, the arrangements described in section 3.8.1 will apply.

3.8 Defaults and termination of the Project Contract

The following sections of this *Summary of Contracts* describe the main provisions of the Project Contract, the Debt Finance Side Deed, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed and the FMFS Side Deed for:

- Termination of the project's contracts for the occurrence of an "uninsurable" risk (section 3.7.10.4) or for *force majeure* (section 3.7.18)
- "Voluntary" termination of the project's contracts by RailCorp
- The handling of various types of breaches of the project's contracts, and
- Termination of the project's contracts for various types of serious defaults.

The Project Contract may not be terminated on any basis other than under the arrangements summarised below.

3.8.1 Termination for an 'uninsurable' risk or *force majeure*

If RailCorp terminates the Project Contract following the occurrence of an "uninsurable risk", under the arrangements described in section 3.7.10.4, or if RailCorp or PPP Co terminates the Project Contract following a "*force majeure* event" under the arrangements described in section 3.7.18,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train "sets", specifying the particular carriages it wishes to buy, in which case:
 - ♦ PPP Co must give RailCorp or its nominee possession of the nominated carriages as soon as practicable.

- ◆ Regardless of any extensions of the project under the arrangements described in section 3.5.7, if the Project Contract has been terminated before its original expiry date (targeted for 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train “set”), RailCorp must pay PPP Co a sale price for these carriages equal to a “**termination payment**” that is specified in a “Termination Payments” Schedule to the Project Contract for terminations for “uninsurable risks” or *force majeure*, taking account of (among other things) the condition of the carriages.

This payment must be made within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17, and ownership of the carriages will pass to RailCorp or its nominee, free of any encumbrances, on the date the payment is made.

- ◆ If the Project Contract has been terminated after its original expiry date, the sale price will be nil, and ownership of the carriages will pass to RailCorp or its nominee, free of any encumbrances, immediately upon RailCorp’s notifying PPP Co of the acquisition.
- ◆ PPP Co must do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for the acquired train(s), including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the train(s) and advice from experienced, competent personnel.
- ◆ PPP Co must not do anything that materially prejudices or frustrates the handing over of the acquired train(s) as a going concern.
- ◆ PPP Co must do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the acquired train(s).
- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” that is similarly specified in the “Termination Payments” Schedule to the Project Contract for terminations for “uninsurable risks” or *force majeure*.

Again, this payment must be made within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of

the 78th train “set”, RailCorp may require PPP Co to do any or all of the following:

- ◆ Procure the novation (transfer) of the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract, the TLS Contract and/or any of PPP Co’s other “significant contracts” (sections 3.2.6, 3.3.8 and 3.5.5) to RailCorp or its nominee, with RailCorp or its nominee effectively stepping into the shoes of PPP Co under these subcontracts.

Procedures for any such novations of the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract and the TLS Contract—together with consequential novations of their associated Independent Certifier Deeds and (in the case of the Rolling Stock Manufacture Contract) an associated Independent Verifier Deed and consequential novations of the Rolling Stock Manufacture Guarantees, the Maintenance Facility Construction Guarantee and the TLS Guarantee (section 2.2)—are set out in the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed.

- ◆ Give RailCorp or its nominee possession of PPP Co’s plant, equipment, materials, temporary works and tools that have been used for PPP Co’s works, as reasonably required to facilitate the completion of these works, and ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor do likewise for their own plant etc.

If this action is taken, RailCorp must reasonably endeavour to ensure that the plant etc are properly used and maintained and that any plant, equipment, materials, temporary works and tools which are not consumed or incorporated into the works and are not required for future operation or maintenance of the trains, the simulators or the maintenance facility are handed back when all the works have been completed.

- ◆ Give RailCorp or its nominee copies of its accounts and all other records and documents related to the project, and ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor do likewise.
- ◆ Do everything else reasonably required for RailCorp or its nominee to undertake the project, including the granting of intellectual property licences.

- RailCorp may require the FMFS Subcontractor to novate the FMFS Access Agreement to RailCorp or its nominee, with RailCorp or its nominee effectively stepping into the shoes of the TLS Contractor under this subcontract, which would have to be amended to operate independently of the TLS Contract. Procedures and other requirements for such a novation are set out in the FMFS Side Deed.

- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

If the Project Contract has been terminated before its original expiry date, the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be equal to:

- The debts (if any) of PPP Co and PPP Co Finance Co under the project’s debt financing documents on the date RailCorp’s payment is made, not counting any PPP Co debt to PPP Co Finance Co under the Facilitation Loan Agreement, *plus* any amounts PPP Co and PPP Co Finance Co must pay to the project’s debt financiers as a result of the early termination of the debt financing arrangements, *less* the sum (without double counting) of:
 - ♦ Any credit balances in PPP Co’s bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled
 - ♦ Any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements, and
 - ♦ Any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract, *plus*
- 50% of the lesser of the net present value of all equity distributions over the rest of the project, as projected in the original “base case” financial model for the project on 7 December 2006, and the net present value of projected equity distributions in the most recently revised version of the “base case” financial model (see section 3.7.11), calculated in both cases using a discount rate equal to the after-tax return for notional equity investors predicted in the original “base case” financial model, *plus*
- Any redundancy payments to PPP Co employees which PPP Co has reasonably incurred, or will reasonably incur, as a direct result of the termination of the Project Contract, *plus*
- For each of PPP Co’s subcontracts, the lesser of the amount PPP Co must reasonably and properly pay under the subcontract as a direct result of the termination of the Project Contract and the sum of a series of specified subcontract breakage costs, including specified demobilisation and redundancy payment costs, *less*
- Any insurance proceeds which are owing to PPP Co and which PPP Co is entitled to retain, and any insurance proceeds which would have been paid or payable to PPP Co had it complied with its insurance obligations (section 3.7.10.1), *less*

- Any amounts RailCorp was entitled to set off or deduct under the Project Contract when it was terminated, expressly including (but without double counting) the costs of bringing any train carriages RailCorp has elected to acquire to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*
- Any amounts third parties are obliged to pay to PPP Co, as at the date of the payment of the sale price or “termination payment”, except in cases where PPP Co is obliged to assign its rights to these payments to RailCorp, *less*
- Any gains PPP Co has made or will make as a result of the termination of the Project Contract and any of the other project contracts, to the extent they are not already included in these calculations,

with adjustments, if necessary, to avoid any double counting.

The payment of the sale price or the “termination payment” will be a full and final settlement of PPP Co’s rights against RailCorp for the termination of the Project Contract and the other project contracts. Once the Project Contract has been terminated, the only claims PPP Co may make against RailCorp are for the payment of the sale price or “termination payment” itself and for any liabilities which arose before the termination and which are not taken into account in calculating the sale price or “termination payment”.

3.8.2 ‘Voluntary’ termination by RailCorp

RailCorp may terminate the Project Contract at any time—for its sole convenience, without giving reasons, even if there have been no defaults by PPP Co, no occurrences of “uninsurable risks” and no “*force majeure* events”, and even if there have been no potentially contract-ending RailCorp directions to decommission trains or RailCorp acquisitions of trains following any extension of the term of the project under the arrangements described in section 3.5.7—simply by giving PPP Co and the Security Trustee a written notice to this effect, nominating the date on which the Project Contract will terminate.

If RailCorp terminates the Project Contract in this way,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the arrangements for this situation described in section 3.8.1 will apply, apart from a difference in the calculation of the sale price if the Project Contract has been terminated before its original expiry date. (This sale price must be equal to a “termination payment” specified in different, “voluntary

termination” provisions of the “Termination Payments” Schedule to the Project Contract, as described below.)

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” that is similarly specified in the “Termination Payments” Schedule to the Project Contract for “voluntary terminations”.

This payment must be made within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of the 78th train “set”, the arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

If the Project Contract has been “voluntarily” terminated by RailCorp before its original expiry date, the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be equal to:

- The debts (if any) of PPP Co and PPP Co Finance Co under the project’s debt financing documents on the date RailCorp’s payment is made, not counting any PPP Co debt to PPP Co Finance Co under the Facilitation Loan Agreement, *plus* any amounts PPP Co and PPP Co Finance Co must pay to the project’s debt financiers as a result of the early termination of the debt financing arrangements, *less* the sum (without double counting) of:
 - ♦ Any credit balances in PPP Co’s bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled
 - ♦ Any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements, and
 - ♦ Any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract, *plus*
- An amount which, in combination with distributions paid to the project’s equity investors on or before the termination of

the Project Contract (and taking account of the timing of these distributions), will give these equity investors a real after-tax rate of return equal to the return predicted in the project’s original (7 December 2006) “base case” financial model, *plus*

- Any redundancy payments to PPP Co employees which PPP Co has reasonably incurred, or will reasonably incur, as a direct result of the termination of the Project Contract, *plus*
- For each of PPP Co’s subcontracts, the lesser of the amount PPP Co must reasonably and properly pay under the subcontract as a direct result of the termination of the Project Contract and the sum of a series of specified subcontract breakage costs, including specified demobilisation and redundancy payment costs, *less*
- Any insurance proceeds which are owing to PPP Co and which PPP Co is entitled to retain, and any insurance proceeds which would have been paid or payable to PPP Co had it complied with its insurance obligations (section 3.7.10.1), *less*
- Any amounts RailCorp was entitled to set off or deduct under the Project Contract when it was terminated, expressly including (but without double counting) the costs of bringing any train carriages RailCorp has elected to acquire to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*
- Any amounts third parties are obliged to pay to PPP Co, as at the date of the payment of the sale price or “termination payment”, except in cases where PPP Co is obliged to assign its rights to these payments to RailCorp, *less*
- Any gains PPP Co has made or will make as a result of the termination of the Project Contract and any of the other project contracts, to the extent they are not already included in these calculations,

with adjustments, if necessary, to avoid any double counting.

The payment of the sale price or the “termination payment” will be a full and final settlement of PPP Co’s rights against RailCorp for the termination of the Project Contract and the other project contracts. Once the Project Contract has been terminated, the only claims PPP Co may make against RailCorp are for the payment of the sale price or “termination payment” itself and for any liabilities which arose before the termination and which are not taken into account in calculating the sale price or “termination payment”.

3.8.3 Actions to remedy PPP Co breaches, TLS Contractor FMFS breaches, ‘events of default’ and ‘termination events’

3.8.3.1 Appointment by PPP Co of replacement subcontractor(s)

PPP Co may remedy a breach of its obligations under the project’s contracts by replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor only if it obtains RailCorp’s consent.

RailCorp may not unreasonably withhold or delay its consent. Regardless of whether the “normal” requirements for any replacement subcontracts described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5 are satisfied, RailCorp *must* consent to the appointment of a new subcontractor or the novation (transfer) of the existing subcontract to PPP Co’s new subcontractor if:

- RailCorp has been given details of the proposed replacement subcontractor and the terms and conditions of the proposed appointment or novation
- RailCorp reasonably believes the proposed replacement subcontractor is reputable, has sufficient experience and expertise, can arrange the availability of the necessary skills, resources and rail safety accreditations and has a sufficiently high financial and commercial standing
- The terms and conditions of the proposed appointment or novation are acceptable to RailCorp, acting reasonably
- The proposed replacement subcontractor has agreed to be bound by the relevant project contracts or other terms agreed with RailCorp, and
- RailCorp is not liable for any reasonable costs, including legal costs, associated with its enquiries, the procurement of the replacement subcontractor or the preparation, negotiation and execution of associated documents.

3.8.3.2 *RailCorp’s general power to ‘step in’ following any unremedied PPP Co breach of any RailCorp project agreement*

If PPP Co breaches any of its obligations under the Project Contract or any of the other RailCorp project agreements (section 2.2.14), RailCorp may issue a notice to PPP Co and the Security Trustee requiring PPP Co to remedy the breach.

RailCorp may then “step in”—taking any action necessary to remedy the breach, other than the initiation or implementation of a variation (section 3.7.14)—if PPP Co fails to remedy the breach within a reasonable time.

If RailCorp does “step in”,

- Any PPP Co obligations under the Project Contract which cannot be performed because of the “stepping in” will be suspended
- PPP Co must assist RailCorp in every possible way, including the provision of access, to ensure RailCorp may “step in” effectively and expeditiously
- RailCorp will not have any obligation to PPP Co to remedy PPP Co’s breach or to overcome any risks (or mitigate the effects of any risks) arising from its “stepping in”
- PPP Co must compensate RailCorp for any costs or losses it incurs as a result of the “stepping in”, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (section 3.7.10.1)

- RailCorp’s only liability to PPP Co as a result of the “stepping in” will be to pay PPP Co, if the “stepping in” prevents it from fulfilling its train “availability” obligations (section 3.5.1), an amount equal to:

- The “availability payment(s)” (section 3.6.1) and “key performance indicator payment(s)” (section 3.6.3) PPP Co would have received during the “stepping in” period, for the aspects of PPP Co’s “availability” and TLS services associated with PPP Co’s inability to meet its “availability” obligations, had RailCorp not “stepped in”, based on PPP Co’s average performance over the six months immediately before the “stepping in” and assuming that the average distance travelled by PPP Co’s train “sets” is only 8,333 km per month (making the “volume adjustment” amount in each “availability payment” a negative amount), *plus*
- Any “interest payment adjustment” payments during the “stepping in” period (section 3.6.4), treated as a negative amount if the relevant payment(s) are to be made by PPP Co to RailCorp rather than *vice versa*, *less*
- Any reasonable costs incurred by RailCorp in remedying PPP Co’s breach and otherwise procuring the performance of PPP Co’s suspended obligations.

- The “stepping in” will end once RailCorp has remedied PPP Co’s breach, or earlier if RailCorp chooses to “step out” without remedying the breach, after giving PPP Co and the Security Trustee reasonable notice.

3.8.3.3 *The Security Trustee’s general powers to ‘step in’ and take other actions to remedy any PPP Co breach of any project contract*

In addition to RailCorp’s general “step in” rights, described above, the Security Trustee (or any controller, agent, receiver, manager or similar “enforcing party” appointed by the Security Trustee) may “step in” and assume some or all of PPP Co’s rights and obligations under the project’s contracts, including the RailCorp project agreements (section 2.2.14), in order to remedy any unremedied PPP Co breach of the contracts, regardless of whether RailCorp has issued any notice to PPP Co requiring it to remedy the breach.

If the Security Trustee or an “enforcing party” does “step in” in this way, RailCorp must, if requested, give them access to the maintenance facility and surrounding areas and any information RailCorp has about PPP Co’s breach, including details on any steps RailCorp thinks should be taken to remedy the breach.

If this “stepping in” remedies the breach, RailCorp must treat the remedy as if it were achieved by PPP Co itself.

During any such “stepping in”, the Security Trustee or an “enforcing party” may not unreasonably interfere with the performance by the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor of their obligations to PPP Co, unless this is necessary to remedy PPP

Co's breach or unless RailCorp has granted its consent, which it may not unreasonably withhold or delay.

In addition, the Security Trustee or an "enforcing party" may remedy any PPP Co breach:

- By replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, provided it obtains RailCorp's consent, which may not be unreasonably withheld or delayed and which *must* be granted in the circumstances listed in section 3.8.3.1, or
- By selling or otherwise disposing of PPP Co's interests in and obligations under the project's contracts, or by selling or otherwise dealing with the capital and equity in PPP Co as permitted under the project's debt financing agreements, again provided it obtains RailCorp's consent, which may not be unreasonably withheld or delayed.

Regardless of whether the "normal" requirements for such transfers of the contracts or changes in ownership described in sections 3.7.16.1 and 3.7.16.2 are satisfied, RailCorp *must* give its consent if:

- ♦ RailCorp has been given details of the proposed purchaser and the terms and conditions of the proposed disposal
- ♦ In the case of a transfer of PPP Co's interests in the project, RailCorp reasonably believes the proposed purchaser is reputable, has sufficient experience and expertise, can arrange the availability of the necessary skills, resources and rail safety accreditations and has a sufficiently high financial and commercial standing
- ♦ The terms and conditions of the proposed disposal are acceptable to RailCorp, acting reasonably
- ♦ In the case of a transfer of PPP Co's interests in the project, the proposed purchaser has agreed to be bound by the relevant project contracts or other terms agreed with RailCorp, and
- ♦ RailCorp is not liable for any reasonable costs, including legal costs, associated with its enquiries, the procurement of the purchaser or the preparation, negotiation and execution of associated documents.

If PPP Co's interests in the project are transferred under these arrangements, the RailCorp Deed of Charge (see section 4) must be released and the purchaser must enter into equivalents of the RailCorp Deed of Charge and the Debt Finance Side Deed.

3.8.3.4 RailCorp's 'step in' rights under the Rolling Stock Manufacture Contract Side Deed

Under the Rolling Stock Manufacture Contract Side Deed, if PPP Co breaches the Rolling Stock Manufacture Contract RailCorp may "step in" and take steps to remedy the default if, but only if,

- PPP Co and the project's debt financiers have not taken steps to remedy PPP Co's default within a reasonable time, or have failed to remedy the default within a reasonable time

- RailCorp has given PPP Co and the Rolling Stock Manufacturers five business days' notice of its intention to "step in", and
- The Security Trustee has not exercised its own "step in" rights under the arrangements described in section 3.8.3.3.

If RailCorp does "step in",

- Any PPP Co obligations under the Rolling Stock Manufacture Contract which cannot be performed because of the "stepping in" will be suspended
- PPP Co must compensate RailCorp for any reasonable costs or losses it incurs as a result of the "stepping in", other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (section 3.7.10.1), and
- The "stepping in" will end once RailCorp has remedied PPP Co's breach, or earlier if RailCorp chooses to "step out" without remedying the breach, after giving PPP Co reasonable notice.

The Rolling Stock Manufacturers may not terminate the Rolling Stock Manufacture Contract in response to a PPP Co breach, or suspend the performance of their obligations under that contract, unless:

- They have notified RailCorp of PPP Co's default, providing specified details, *and*
- They have also given RailCorp a "cure notice" that the period within which the debt financiers are entitled to remedy the default has expired without a remedy's having been effected, or that the debt financiers have no such rights to remedy the default, *and*

(a) If PPP Co's default can be remedied within 20 business days of the "cure notice" to RailCorp, or any longer period permitted under the Rolling Stock Manufacture Contract or agreed to by the Rolling Stock Manufacturers, the default has not been remedied by the end of this period, *or*

(b) Either:

- ♦ RailCorp has notified them that it does not intend to "step in", *or*
- ♦ If the default can reasonably be remedied but not within 20 business days of their "cure notice" to RailCorp or within any longer permitted or agreed period, RailCorp has not "stepped in" within 20 business days of the "cure notice", *or*
- ♦ If the default cannot reasonably be remedied, and the Rolling Stock Manufacturers have claimed compensation for the default, compensation has not been paid, either by PPP Co or by RailCorp after "stepping in", within 20 business days of the "cure notice" or within any longer permitted or agreed period, *or*

- If the default cannot reasonably be remedied, and the Rolling Stock Manufacturers have not claimed compensation for the default, RailCorp has not “stepped in” within 20 business days of the “cure notice” or any longer permitted or agreed period.

3.8.3.5 RailCorp’s ‘step in’ rights under the Maintenance Facility Construction Contract Side Deed

Under the Maintenance Facility Construction Contract Side Deed, if PPP Co had breached the Maintenance Facility Construction Contract,

- RailCorp could have “stepped in” and taken steps to remedy the default under arrangements that were precisely analogous to those described in section 3.8.3.4 for “stepping in” under the Rolling Stock Manufacture Contract Side Deed, and
- The Maintenance Facility Contractor’s rights to terminate the Maintenance Facility Construction Contract in response to PPP Co’s breach would have been restricted in ways precisely analogous to those described in section 3.8.3.4 for PPP Co breaches of the Rolling Stock Manufacture Contract.

3.8.3.6 RailCorp’s ‘step in’ rights under the TLS Contract Side Deed

Similarly, under the TLS Contract Side Deed, if PPP Co breaches the TLS Contract,

- RailCorp may “step in” and take steps to remedy the default under arrangements that are precisely analogous to those described in section 3.8.3.4 for “stepping in” under the Rolling Stock Manufacture Contract Side Deed and referred to in section 3.8.3.5 for “stepping in” under the Maintenance Facility Construction Contract Side Deed, and
- The TLS Contractor’s rights to terminate the TLS Contract in response to PPP Co’s breach are restricted in ways precisely analogous to those described in section 3.8.3.4 for PPP Co breaches of the Rolling Stock Manufacture Contract and referred to in section 3.8.3.5 for PPP Co breaches of the Maintenance Facility Construction Contract.

3.8.3.7 RailCorp’s ‘step in’ rights under the FMFS Side Deed

Again, under the FMFS Side Deed, if the TLS Contractor breaches the FMFS Access Agreement, or if the FMFS Subcontractor otherwise becomes entitled to terminate or rescind the FMFS Access Agreement or suspend the performance of its obligations under that agreement, RailCorp may “step in” and take steps to remedy the default, but only if:

- The FMFS Subcontractor has notified RailCorp and PPP Co of the default
- The TLS Contractor has not taken steps to remedy its default within a reasonable time of the default, or has failed to remedy the default within a reasonable time
- PPP Co has not taken steps to remedy the TLS Contractor’s default within five business days of the default or within any

longer period of time agreed between the parties, or has failed to remedy the default within a reasonable time

- RailCorp has then notified PPP Co, the TLS Contractor and the FMFS Subcontractor of its intention to “step in”, and
- The Security Trustee has not exercised its own “step in” rights under the arrangements described in section 3.8.3.3.

If RailCorp does “step in”,

- Any TLS Contractor obligations under the FMFS Access Agreement which cannot be performed because of the “stepping in” will be suspended
- PPP Co must compensate RailCorp for any reasonable costs or losses it incurs as a result of the “stepping in”, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (section 3.7.10.1), and
- The “stepping in” will end once RailCorp has remedied the TLS Contractor’s breach, or earlier if RailCorp chooses to “step out” without remedying the breach, after giving the TLS Contractor reasonable notice.

The FMFS Subcontractor may not terminate the FMFS Access Agreement in response to the TLS Contractor’s breach, or suspend the performance of their obligations under that contract, unless:

- It has notified RailCorp of the default, providing specified details
- It has confirmed to RailCorp that PPP Co has not taken steps to remedy the TLS Contractor’s default within five business days of the default or within any longer period of time agreed between the parties, or has failed to remedy the default within a reasonable time, and
- It has also given RailCorp a “cure notice” confirming either that—
 - (a) If the TLS Contractor’s default can be remedied within 20 business days of the “cure notice” to RailCorp, or any longer period permitted under the FMFS Access Agreement or agreed to by the FMFS Subcontractor, the default has not been remedied by the end of this period, or
 - (b) Either:
 - RailCorp has notified the FMFS Subcontractor that it does not intend to “step in”, or
 - If the default can reasonably be remedied but not within 20 business days of their “cure notice” to RailCorp or within any longer permitted or agreed period, RailCorp has not “stepped in” within 20 business days of the “cure notice”, or
 - If the default cannot reasonably be remedied, and the FMFS Subcontractor has claimed compensation for the default, compensation has not been paid, either

by PPP Co or by RailCorp after “stepping in”, within 20 business days of the “cure notice” or within any longer permitted or agreed period, or

- If the default cannot reasonably be remedied, and the FMFS Subcontractor has not claimed compensation for the default, RailCorp has not “stepped in” within 20 business days of the “cure notice” or any longer permitted or agreed period.

3.8.3.8 Notices about ‘unacceptable’ train availability or reliability

RailCorp may issue an “**unacceptable availability notice**” to PPP Co and the Security Trustee, at any time more than 30 months after the practical completion of the first train “set” (i.e. at any time after 30 December 2013), or a later date if specified events have occurred, if PPP Co provides:

- Fewer than 80% of the number of trains the Project Contract requires it to make “available” in any one “availability period” (section 3.5.1.1)
- Fewer than 90% of the number of trains it is required to make “available” in any 12 consecutive “availability periods”, or
- Fewer than 95% of the number of trains it is required to make “available” in any 20 “availability periods” in any calendar year,

not counting the four additional trains PPP Co is required to make “available” during each Royal Easter Show and New Year’s Eve/New Year’s Day “availability period” (section 3.5.1.2).

If six or more of these notices are issued in any rolling two-year period, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying this situation described in section 3.8.3.12.

RailCorp may issue an “**unacceptable reliability notice**” to PPP Co and the Security Trustee if:

- During any calendar month after the practical completion of the seventh train “set” on 20 February 2012, the total number of “PPP Co related incidents”—as described in section 3.2.11.1, but ignoring any failures by PPP Co to meet its “availability” obligations caused by a PPP Co decision to withhold or withdraw a train from service—involving train “sets” for which more than six months have elapsed since their “final” completion (section 3.2.11.2) or more than 24 months (or more in specified circumstances) have elapsed since their “practical” completion (section 3.2.11.1) exceeds one for every 10,000 “set kilometres”, and
- The total distance travelled by these trains during the month is more than 75,000 km, or would have been had it not been for specified cancellations and withholdings or withdrawals from service.

If four or more of these notices are issued in any rolling two-year period, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to

arrangements for remedying the situation described in section 3.8.3.12.

3.8.3.9 Notices about persistent or frequent PPP Co breaches of any RailCorp project agreement

RailCorp may issue an initial “**persistent breach notice**” to PPP Co and the Security Trustee if PPP Co breaches the same PPP Co obligation under the Project Contract or any other RailCorp project agreement (section 2.2.14) more than twice in any two-year period (not counting breaches of PPP Co’s “availability” obligations (section 3.5.1) or “PPP Co related incidents” (section 3.2.11.1)).

If the breach in question then continues for more than 30 days or any longer period reasonably determined by RailCorp, or if it recurs within 12 months and 30 days of the date on which the initial “persistent breach notice” was issued, RailCorp may issue a “**final persistent breach notice**”.

If the breach in question then continues for a further period of more than 30 days or any longer period reasonably determined by RailCorp, or if it recurs three or more times in the six months following the issuing of the “final persistent breach notice”, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.12.

Similarly, RailCorp may issue an initial “**frequent breaches notice**” to PPP Co and the Security Trustee if PPP Co commits frequent breaches of the Project Contract—regardless of whether these breaches are of the same type or class, but again not counting breaches of PPP Co’s “availability” obligations (section 3.5.1) or “PPP Co related incidents” (section 3.2.11.1)—and these breaches, in aggregate,

- Substantially frustrate the project’s objectives
- Significantly impair RailCorp’s ability to fulfil its objectives under the Transport Administration Act (section 2.1)
- Otherwise have a material adverse effect on RailCorp, RailCorp’s passengers or the use of RailCorp’s rail network by other rail operators, or
- Indicate PPP Co does not intend to be bound by the Project Contract.

If breaches having these effects continue to frequently occur during the following 12 months and 30 days, RailCorp may issue a “**final frequent breaches notice**” to PPP Co and the Security Trustee, and if breaches having these effects then continue to frequently occur at any time in the succeeding six months RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.12.

3.8.3.10 Procedures for PPP Co to remedy a ‘PPP Co event of default’

“PPP Co events of default”, which include but are not limited to PPP Co breaches of the Project Contract, are defined in the Project Contract as:

- Any complete or substantial abandonment of the project by PPP Co
- Any failure by PPP Co to start performing its “delivery phase” Project Contract obligations concerning the trains, the simulators and the maintenance facility within 20 business days of “financial close” (i.e. by 25 January 2007)
- Any failure by PPP Co to regularly and diligently progress these “delivery phase” obligations, *unless*:
 - ♦ This failure arises from the insolvency of either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor, either of the Rolling Stock Manufacturer Guarantors or the Maintenance Facility Contractor Guarantor
 - ♦ PPP Co is diligently pursuing a replacement which satisfies the requirements described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5 or which is otherwise acceptable to RailCorp, and
 - ♦ Fewer than 30 business days have elapsed since the insolvency, or PPP Co has been diligently pursuing a replacement at all times if between 30 and 120 business days have elapsed
- Any fraudulent or false, misleading or deceptive conduct by PPP Co, either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor in the performance of any of PPP Co’s obligations under the Project Contract
- Any insolvency (of specified types) of either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor, either of the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor Guarantor or the TLS Guarantor, if the insolvent organisation has an actual or contingent obligation to PPP Co at the time of the insolvency and either:
 - ♦ A replacement by an organisation which satisfies the requirements described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5, or which is otherwise acceptable to RailCorp, has not been made within 30 business days (or within 120 business days if PPP Co has been diligently pursuing a replacement at all times), or
 - ♦ In the case of an insolvency of the TLS Contractor, PPP Co has failed to appoint a receiver within 30 business days, or an appointed receiver has failed to perform (or procure the performance of) the TLS Contractor’s material obligations under the project’s contracts
- Any invalidity or unenforceability of the parent company guarantees provided to PPP Co under the Rolling Stock Manufacture Guarantees, the Maintenance Facility Construction Guarantee or the TLS Guarantee is or becomes invalid or unenforceable, if this is not rectified within 30 business days
- Any cancellation or suspension of funding for the project as a result of a default under the project’s debt financing and equity agreements
- Any failure by any of the project’s debt financiers and equity investors to provide all of the funding contemplated in the project’s “base case” financial model, as revised from time to time (section 3.7.11)
- Any breach by PPP Co of its subcontracting obligations to RailCorp, as described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5
- Any failure by PPP Co to provide a “delivery phase” security bond (sections 2.3 and 3.4.1) or, if required by RailCorp, a security bond for any maintenance facility remediation works during the last five years of the project (section 3.5.9)
- Any failure by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor to hold the rail safety accreditations required for their work on this project, and any failures to comply with the terms of their rail safety accreditations while undertaking this work (section 3.7.1)
- Any act or omission by PPP Co, its subcontractors or any of its other associates, while performing PPP Co’s obligations under the Project Contract, which leads the Independent Transport Safety and Reliability Regulator (ITSRR) to notify RailCorp that it proposes to suspend or cancel RailCorp’s rail safety accreditation
- Any ITSRR suspension of PPP Co’s rail safety accreditation under section 29 of the Rail Safety Act, or any ITSRR suspension of the project-related rail safety accreditations of the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor
- Any failure by PPP Co to take out and maintain insurance policies as required by the Project Contract (section 3.7.10.1), except in the case of any “uninsurable risk” (section 3.7.10.4)
- Any failure by PPP Co to make repairs or replacements, as required by the Project Contract, following damage to its works, the trains, the simulators or the maintenance facility (section 3.7.10.3)
- Any failure by PPP Co to make a payment by its due date under any of the RailCorp project agreements (section 2.2.14), if this failure is not remedied within 20 business days of a written demand from RailCorp
- Any breach of PPP Co’s reporting obligations under the Project Contract, including any breach of the routine reporting obligations described or referred to in sections

3.2.7, 3.3.9, 3.5.6 and 3.7.12 and any material inaccuracy in any PPP Co report

- Any breach by PPP Co of the Project Contract's restrictions on changes in ownership (section 3.7.16.1)
- Any breaches by PPP Co of the Project Contract's restrictions on transfers of its contractual rights and obligations and the creation of security interests etc (section 3.7.16.2)
- Any breach by PPP Co of the Project Contract's restrictions on refinancing (section 3.7.16.3)
- Any false or misleading representation or warranty by PPP Co in the Project Contract or any other RailCorp project agreement (section 2.2.14), and any other PPP Co breach of the Project Contract or any other RailCorp project agreement, if this misrepresentation, warranty or breach:
 - ♦ Substantially frustrates the project's objectives
 - ♦ Significantly impairs RailCorp's ability to fulfil its objectives under the Transport Administration Act (section 2.1), or
 - ♦ Otherwise has a material adverse effect on RailCorp, RailCorp's passengers or the use of RailCorp's rail network by other rail operators.

If any of these "PPP Co events of default" occurs, RailCorp may issue a formal notice to PPP Co and the Security Trustee, specifying the nature of the event.

If the "PPP Co event of default" can be remedied, PPP Co must either remedy the event within ten business days of RailCorp's notice or prepare and submit a draft *Cure Plan* to RailCorp by the same deadline, describing what PPP Co will do to remedy the event and proposing a "cure period".

RailCorp will then have ten business days to accept or reject the draft *Cure Plan*. If it rejects it, PPP Co must consult with RailCorp in good faith and submit an amended draft *Cure Plan* which meets RailCorp's reasonable requirements.

Once RailCorp accepts a PPP Co *Cure Plan*, PPP Co must implement the *Cure Plan* or diligently pursue the remediation of the "PPP Co event of default" in other ways, and must remedy the event within the "cure period" specified in this *Plan*.

RailCorp may not issue an "unacceptable reliability notice" (section 3.8.3.8) or a "frequent breaches notice" (section 3.8.3.9) arising from circumstances that are being diligently remedied by PPP Co in accordance with an approved *Cure Plan*.

Provided PPP Co is diligently pursuing a remedy, the "cure period" specified in a *Cure Plan* may be extended by RailCorp if necessary. RailCorp may not unreasonably refuse PPP Co's first application for such an extension, but may refuse to consider any subsequent applications in its absolute discretion.

If RailCorp notifies PPP Co and the Security Trustee of a "PPP Co event of default" but the event cannot be remedied, PPP Co must submit a draft *Prevention Plan* to RailCorp within ten business days, describing what PPP Co will do to prevent any

recurrence of the event. If RailCorp rejects the draft, PPP Co must submit an amended draft *Prevention Plan* which meets RailCorp's reasonable requirements. Once a PPP Co *Prevention Plan* has been approved by RailCorp, it must be implemented by PPP Co.

RailCorp may not issue a "frequent breaches notice" (section 3.8.3.9) if any of the breaches involved is a "PPP Co event of default" and is now subject to an approved *Prevention Plan* which is being diligently implemented by PPP Co.

If PPP Co fails to comply with any of its obligations following a RailCorp notification of a "PPP Co event of default", as summarised above, RailCorp may:

- Require PPP Co to replace the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, as relevant, at PPP Co's cost (any replacement subcontractor must satisfy the requirements for "significant contractors" described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5, or must otherwise be acceptable to RailCorp)
- If the "PPP Co event of default" is a breach of a RailCorp project agreement, "step in" to remedy the default itself, as described in section 3.8.3.2
- If relevant, exercise its rights under any bank securities it holds under the arrangements described in sections 3.4.1 and 3.5.9, and/or its rights under the RailCorp Deed of Charge (section 4), or
- Issue a formal notice to PPP Co, specifying PPP Co's failure to comply and requiring it to rectify this failure within a specified period of time.

If PPP Co does not comply with such a notice, or (even if RailCorp has not issued such a notice) if PPP Co has failed to remedy a "PPP Co event of default" that can be remedied within its "cure period" or failed to prevent the recurrence of a "PPP Co event of default" addressed by a PPP Co *Prevention Plan*, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.12.

3.8.3.11 RailCorp's rights to sue PPP Co for breaches of any RailCorp project agreement or rely on its securities

If PPP Co breaches any of the RailCorp project agreements in any way, RailCorp may, in addition to or as an alternative to the responses described in sections 3.8.3.2, 3.8.3.8, 3.8.3.9 and 3.8.3.10, sue PPP Co or exercise any other contractual or other legal or equitable rights it holds against PPP Co, including (if relevant and available) its rights under any bank securities (sections 3.4.1 and 3.5.9) and/or its rights under the RailCorp Deed of Charge (section 4).

However, as already indicated, it may not terminate the Project Contract on any basis other than under the arrangements summarised in sections 3.8.1, 3.8.2, 3.8.3.12 and 3.8.4.

3.8.3.12 *RailCorp's termination rights and the Security Trustee's 'step in' and transfer rights following a 'PPP Co termination event'*

"PPP Co termination events" are defined in the Project Contract as:

- The issuing of six or more "unacceptable unavailability notices" to PPP Co in any rolling two-year period (section 3.8.3.8)
- The issuing of four or more "unacceptable reliability notices" to PPP Co in any rolling two-year period (section 3.8.3.8)
- The continuation of a persistent PPP Co breach of the Project Contract for more than 30 days (or any longer period reasonably determined by RailCorp) after the issuing of a "final persistent breach notice" for the breach, or the recurrence of a persistent breach three or more times in the six months following the issuing of a "final persistent breach notice" to PPP Co for the breach (section 3.8.3.9)
- The continued frequent occurrence of breaches which, in aggregate,
 - ♦ Substantially frustrate the project's objectives
 - ♦ Significantly impair RailCorp's ability to fulfil its objectives under the Transport Administration Act
 - ♦ Otherwise have a material adverse effect on RailCorp, RailCorp's passengers or the use of RailCorp's rail network by other rail operators, or
 - ♦ Indicate PPP Co does not intend to be bound by the Project Contract

at any time in the six months following the issuing of a "final frequent breaches notice" to PPP Co (section 3.8.3.9)

- Any failure by PPP Co to remedy a "PPP Co event of default" that can be remedied within its "cure period" as specified in PPP Co's *Cure Plan* (section 3.8.3.10)
- Any failure by PPP Co to prevent the recurrence of a "PPP Co event of default" addressed by a PPP Co *Prevention Plan* (section 3.8.3.10)
- Any failure by PPP Co to respond to a "PPP Co event of default" by taking the required actions described in section 3.8.3.10, followed by a failure to rectify this failure within the time period specified in a formal RailCorp notice requiring it to do so, as described at the end of section 3.8.3.10
- Any insolvency (of specified types) of PPP Co
- Any act or omission by PPP Co, its subcontractors or any of its other associates, while performing PPP Co's obligations under the Project Contract, which leads the Independent Transport Safety and Reliability Regulator (ITSRR) to suspend or cancel RailCorp's rail safety accreditation
- Any ITSRR suspension or cancellation of PPP Co's rail safety accreditation, or the project-related rail safety accreditations of the Rolling Stock Manufacturers, the Maintenance Facility

Contractor or the TLS Contractor, other than a suspension of 28 days or less under section 29 of the Rail Safety Act, and

- Any fatal collision or derailment of any of PPP Co's trains, while it is in service, if the death(s) are found to be principally attributable to negligence by PPP Co or its subcontractors (the Project Contract calls this a "**major safety breach**").

If a "PPP Co termination event" occurs, both RailCorp and the Security Trustee will continue to be able to exercise their rights (if any) to remedy the causes under the arrangements described in sections 3.8.3.2 to 3.8.3.6 and 3.8.3.10.

In addition,

- Under the Project Contract RailCorp may terminate the Project Contract for a subsisting "PPP Co termination event" simply by giving PPP Co and the Security Trustee up to 90 days' notice (see section 3.8.4), but
- Under the Debt Finance Side Deed, RailCorp may not do so unless:
 - ♦ The "PPP Co termination event" involved is a "major safety breach", or, in all other cases,
 - ♦ RailCorp gives the Security Trustee at least 14 days' notice of its intention to terminate the Project Contract *and* the Security Trustee does *not*, within the following 14 days, notify RailCorp that it intends to "step in" to remedy the "PPP Co termination event".

If the Security Trustee does notify RailCorp that it intends to "step in", and the Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) does "step in", the Security Trustee or its "enforcing party" must promptly submit a *Step-In Report* to RailCorp, outlining:

- PPP Co's outstanding obligations to RailCorp during the "step in" period
- A program to remedy the "PPP Co termination event" and any "PPP Co events of default", or prevent their recurrence if they cannot be remedied
- Details on the proposed performance of PPP Co's obligations under the Project Contract during the "step in" period
- Any events or circumstances it knows of which might become a "PPP Co event of default" (section 3.8.3.10) or a "PPP Co termination event"
- Actions to be taken during the "step in" period
- Details on insurance arrangements during the "step in" period, and
- Any other information RailCorp reasonably requires.

RailCorp and the Security Trustee must consult in good faith to develop and agree on this *Step-In Report*, RailCorp may use auditors and technical advisers to verify the information in the *Report*, and PPP Co must reimburse both of them for the costs they incur in producing and verifying the *Report*.

The *Step-In Report* must be updated at least once a month during the “step in” period”.

The initial “step in” period will be any reasonable period agreed between RailCorp and the Security Trustee, but no less than the “cure period” for any “PPP Co event of default” involved in the “PPP Co termination event”.

The “step in” period may then be extended, by a reasonable period of up to 180 days, if this is requested by the Security Trustee and:

- The Security Trustee or its “enforcing party” is diligently remedying the “PPP Co termination event”, and
- An updated *Step-In Report* is submitted, detailing the actions to be taken during the proposed extension of the “step in” period, and
 - (a) RailCorp is reasonably satisfied the Security Trustee or its “enforcing party” will complete the remedy within the extended period, or
 - (b) A “*force majeure* event” (section 3.7.18) has occurred during the initial “step in” period, preventing the completion of the remedy and necessitating the extension, or
 - (c) RailCorp has itself “stepped in” during the initial “step in” period, under the arrangements described in section 3.8.3.2, and this has prevented the completion of the remedy.

Only one extension may be granted.

If the Security Trustee or its “enforcing party” decides to remedy the “PPP Co termination event” by replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, or by selling or otherwise disposing of PPP Co’s interests in and obligations under the project’s contracts, or by selling or otherwise dealing with the capital and equity in PPP Co as permitted under the project’s debt financing agreements, the relevant arrangements described in section 3.8.3.3 will apply.

During the Security Trustee’s “step in” period RailCorp may terminate the Project Contract only if:

- The Security Trustee or its “enforcing party” notifies RailCorp that it does not intend to remedy the “PPP Co termination event”
- Prior to the preparation of the initial *Step-In Report*, the Security Trustee or its “enforcing party” has not started or diligently continued to perform PPP Co’s obligations under the Project Contract, or has not started or diligently continued to remedy the “PPP Co termination event”
- After the preparation of the initial *Step-In Report* or any update of this *Report*, the Security Trustee or its “enforcing party” is not diligently remedying the “PPP Co termination event” in accordance with the *Step-In Report* or is not otherwise implementing the *Step-In Report*, or
- A new “PPP Co termination event” occurs and has a material adverse effect on RailCorp or its ability to provide passenger

rail services, provided this new “PPP Co termination event” has *not* arisen, wholly or partly, as a result of circumstances identified in the *Step-In Report* or circumstances which occurred before the preparation of the current *Step-In Report* but were not apparent to the Security Trustee at the time.

If a new “PPP Co termination event” which does not entitle RailCorp to terminate the Project Contract occurs during the Security Trustee’s “step in” period, PPP Co must update the *Step-In Report*.

The Security Trustee or its “enforcing party” may terminate the “step in” at any time, by giving RailCorp ten business days’ notice.

If the “PPP Co termination event” has not been remedied when the Security Trustee’s “step in” ends, RailCorp will again be entitled to terminate the Project Contract in accordance with its rights under the Project Contract, and the arrangements described in section 3.8.4 will apply.

3.8.3.13 PPP Co finance defaults

If PPP Co breaches its obligations under the project’s debt financing agreements, the Security Trustee must:

- Notify RailCorp of the default at the same time as it notifies PPP Co, providing reasonable details on the default and, if it has decided to exercise its powers under the debt financing documents, its proposed date and methods of doing so
- Subject to specified exceptions, give RailCorp at least ten days’ notice of any actions to enforce the debt financiers’ securities or recover any money secured by these securities, or at least 24 hours’ notice in the case of an urgent appointment of an “enforcing party” (see also section 4.2), and
- While the finance default continues, give RailCorp copies of all material correspondence and documents, unless they are privileged, and advise RailCorp when specified types of events occur.

3.8.4 Termination by RailCorp for a ‘PPP Co termination event’

3.8.4.1 General termination arrangements

If RailCorp terminates the Project Contract for a subsisting “PPP Co termination event” under the arrangements described in section 3.8.3.12,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the

arrangements for this situation described in section 3.8.1 will apply, apart from differences in the calculation of the sale price if the Project Contract has been terminated before its original expiry date. (Depending on the type of “PPP Co termination event” involved, this sale price must be equal to different “termination payments” specified in different sections of the “Termination Payments” Schedule to the Project Contract, as described below.)

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” that is similarly specified in the “Termination Payments” Schedule to the Project Contract.

This payment must be made within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If the Project Contract has been terminated after its original expiry date (targeted for 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train “set”), RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of the 78th train “set”, the subcontract novation and other arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

3.8.4.2 Overview of train sale prices or ‘termination payments’ for ‘PPP Co termination event’ terminations before the original expiry date

If the Project Contract has been terminated by RailCorp before its original expiry date for a failure to remedy a complete or substantial abandonment of the project by PPP Co (section 3.8.3.10), RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.

If the Project Contract has been terminated by RailCorp before its original expiry date for a “major safety breach” (section 3.8.3.12), the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be calculated on the same basis as for terminations for “uninsurable risks” or “*force majeure* events”, already described in section 3.8.1.

If the Project Contract has been terminated by RailCorp before its original expiry date for any “PPP Co termination event” *other*

than a failure to remedy a complete or substantial abandonment of the project by PPP Co or a “major safety breach” (section 3.8.3.12), the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be:

- Calculated on the same basis as for terminations for “uninsurable risks” or “*force majeure* events” (section 3.8.1) if the “PPP Co termination event” occurred during a suspension, by RailCorp, of PPP Co’s right to terminate the Project Contract following a “*force majeure* event”, under the arrangements described in section 3.7.18, and
- Calculated on the same basis as for “voluntary” terminations by RailCorp (section 3.8.2) if the “PPP Co termination event” occurred during a suspension, by RailCorp, of PPP Co’s right to terminate the Project Contract for a “RailCorp termination event”, under arrangements described in section 3.8.5 below

but will otherwise be calculated as described in section 3.8.4.3, if there is a “liquid” market and the project is retendered, or as described in section 3.8.4.4 if there is no retendering of the project or if retendering proves to be unsuccessful.

3.8.4.3 Train sale prices or ‘termination payments’ if new tenders are called

RailCorp must call new tenders for the performance of the same obligations as PPP Co has had under the Project Contract if:

- There is a “liquid” market—with at least two suitable, independent, new-to-the-project and willing bidders for “public private partnership” or similar contracts for works and services similar to those in the Project Contract—that is sufficient for the price likely to be achieved through a tender to be a reliable indicator of “fair value”, and
- There is a reasonable prospect of a successful tender process, attracting at least two compliant tenders, with the highest bid being at least as high as a “debt termination amount” described below.

The “Termination Payments” Schedule to the Project Contract sets out procedures for any tendering process and specifies the assumptions to be made about future insurance proceeds.

Until these procedures are completed and RailCorp pays PPP Co its train sale price or “termination payment”, RailCorp must pay PPP Co monthly (or part-monthly) “**post-termination TLS payments**”, equal in each month or part of a month to:

- The “availability payment” and “key performance indicator payment” which would have been payable had the Project Contract not been terminated, based on PPP Co’s average performance in the six months immediately before the termination and assuming that the average distance travelled by PPP Co’s train “sets” is only 8,333 km per month (making the “volume adjustment” amount in each “availability payment” a negative amount), *plus*
- Any “interest payment adjustment” payments, treated as a negative amount if the relevant payment(s) are to be made by PPP Co to RailCorp rather than *vice versa*, *less*

- Any reasonable costs incurred by RailCorp during the month or part of a month in remedying PPP Co defaults, ensuring the required numbers of trains are made “available” and otherwise procuring the performance of PPP Co’s obligations, and *less*
- The absolute value of any negative “post-termination TLS payment” carried forward from the previous month.

The tender process will be considered “successful” if there are at least two compliant tenders by tenderers regarded by RailCorp as suitable substitutes for PPP Co *and* the highest bid is at least as high as a “**debt termination amount**” which, in these circumstances, is to be calculated, on the date RailCorp pays PPP Co its train sale price or “termination payment” under arrangements described below, as:

- The lesser of (1) all principal and interest amounts outstanding under the project’s debt financing agreements when the Project Contract was terminated and (2) what the project’s latest revised “base case” financial model forecast these amounts to be, *plus*
- Any amounts PPP Co and PPP Co Finance Co must pay to the project’s debt financiers as a result of the early termination of the debt financing arrangements, *less*
- The sum (without double counting) of (1) any credit balances in PPP Co’s bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled; (2) any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements; and (3) any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract.

If the tender process is “successful”, RailCorp may either enter into new contracts with the successful tenderer or elect not to enter into new contracts, in which case it must notify PPP Co of this decision.

In either case it must pay PPP Co a train sale price or “termination payment”—on the date of execution of the new contracts, or within 20 business days of notifying PPP Co that it will not be entering into new contracts, as relevant—equal to the higher of:

- (a) The “debt termination amount”, calculated on the payment date, and
- (b) The highest tender price offered in any compliant tender by any tenderer regarded by RailCorp as a suitable substitute for PPP Co, even if they are not the successful tenderer, *plus*
 - To the extent they have not been taken into account in the compliant tender with the highest tender price, and also to the extent that they have been received or

retained by RailCorp in accordance with the Project Contract,

- Any insurance proceeds which are owing to PPP Co and which PPP Co would otherwise be entitled to retain under the Project Contract, *plus*
 - Any negative “post-termination TLS payment” that has not yet been set off against the following month’s “post-termination TLS payment”, *plus*
 - Any amounts third parties owe PPP Co on the date of the payment of execution of the new contracts, *less*
- The costs reasonably incurred by RailCorp in carrying out the tender process, *less*
 - The reasonable “out of pocket” expenses (including legal and consultancy costs) incurred by RailCorp in terminating the Project Contract, *less*
 - Any part of RailCorp’s “post-termination TLS payments” to PPP Co which has been used by PPP Co to reduce principal under the project’s debt financing agreements, *less*
 - If RailCorp has elected to acquire any of the trains, any costs of bringing the trains to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, and *less*
 - Any other “RailCorp priority moneys”, as defined in the Debt Finance Side Deed and discussed in section 4.2 below.

If PPP Co disputes the success of the tender process or part or all of the calculations described above under the project’s dispute resolution procedures (section 3.7.17), RailCorp will retain the right to enter into new contracts. If it is agreed or determined that the tender process has indeed been successful, RailCorp must pay PPP Co its train sale price or “termination payment” (or the disputed portion), as described above, within 20 business days of the resolution of the dispute.

If it is agreed or determined that the tender process is *not* successful, RailCorp must pay PPP Co a train sale price or “termination payment” calculated in accordance with the arrangements in section 3.8.4.4 below.

3.8.4.4 Train sale prices or “termination payments” if the project is not retendered or if retendering is not successful

If RailCorp is not required to retender the project, or if a tender process proves to be unsuccessful, RailCorp must pay PPP Co a train sale price or “termination payment” equal to:

- A “debt termination amount” calculated in accordance with the description of this amount in section 3.8.4.3, *less*
- If RailCorp has elected to acquire any of the trains, any costs of bringing the trains to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*

- Any other “RailCorp priority moneys”, as defined in the Debt Finance Side Deed and discussed in section 4.2 below, and less
- Any reasonable “out of pocket” expenses (including legal and consultancy costs) incurred by RailCorp in terminating the Project Contract.

This payment must be made within 30 days of any agreement by RailCorp and PPP Co about the amount or any determination of the amount under the project’s dispute resolution procedures (section 3.7.17).

3.8.5 Termination by PPP Co for a ‘RailCorp termination event’

“RailCorp termination events” are defined in the Project Contract as:

- Any failure by RailCorp to comply with its payment obligations under the Project Contract that is not remedied by RailCorp within 20 business days of a written demand from PPP Co (RailCorp will not be liable for any claims by PPP Co that are not made strictly in accordance with notice processes and timeframes set out in the Project Contract)
- Any final court decision, not subject to appeal, which makes it impossible for PPP Co to construct the maintenance facility for a continuous period of two months, *provided* this court decision has not resulted from a breach or other wrongful act or omission by PPP Co, its subcontractors or its other associates
- Any change in NSW law which makes it impossible for PPP Co to construct the maintenance facility or maintain its trains at the maintenance facility for a continuous period of two months, again provided this change in the law has not resulted from a breach or other wrongful act or omission by PPP Co, its subcontractors or its other associates
- Any resumption of any part of the maintenance facility site by a NSW Government authority which makes it impossible for PPP Co to construct the maintenance facility on the rest of the site or maintain its trains at the maintenance facility for a continuous period of two months
- Any failure by RailCorp to give PPP Co access to the maintenance facility site, as required under the Project Contract, if this makes it impossible for PPP Co to construct the maintenance facility for a continuous period of two months, and
- Any other RailCorp breach of its obligations under any RailCorp project agreement (section 2.2.14) which prevents PPP Co from performing all or a substantial portion of its obligations under the Project Contract for a continuous period of two months after PPP Co has notified RailCorp of its breach.

If a “RailCorp termination event” occurs, PPP Co may give RailCorp 30 business days’ notice that it intends to terminate the Project Contract.

RailCorp may suspend PPP Co’s right to terminate the Project Contract for the “RailCorp termination event”—*unless* it is a “failure to pay” “RailCorp termination event”—by giving PPP Co and the Security Trustee a notice to this effect within 30 business days of receiving PPP Co’s termination notice.

If RailCorp takes this action,

- PPP Co must continue to perform its obligations under the Project Contract during the suspension, to the extent it is lawful and practicable to do so
- RailCorp must, throughout the suspension, make monthly payments to PPP Co that will place PPP Co in the same net after-tax position it would have been in if the “RailCorp termination event” had not occurred
- RailCorp may not issue an “unacceptable availability notice” or an “unacceptable reliability notice” to PPP Co (section 3.8.3.8) if the circumstances that would otherwise permit it to do so have resulted from the “RailCorp termination event”
- The suspension of PPP Co’s right to terminate the Project Contract will continue, unless it is lifted by RailCorp, until:
 - The “RailCorp termination event” has been remedied or its effects have been overcome, in which case the Project Contract will continue in force, or
 - If this has not happened in the meantime, 24 months after PPP Co’s termination notice.

If a suspension ends for any reason other than the remedying of the “RailCorp termination event” or its effects, or if RailCorp never imposes a suspension and the initial 30 business days’ notice period has expired, PPP Co may immediately terminate the Project Contract by giving RailCorp a notice to this effect.

If the Project Contract is terminated by PPP Co for a subsisting “RailCorp termination event”,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the arrangements for this situation described in section 3.8.1 will apply, apart from a difference in the calculation of the sale price if the Project Contract has been terminated before its original expiry date (see below).
- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” within 30 days of the parties’ agreeing on the

amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If the Project Contract has been terminated before its original expiry date, the train sale price or “termination payment” must be calculated on the same basis as for “voluntary” terminations by RailCorp (section 3.8.2).
- If the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of the 78th train “set”, the arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

4 The RailCorp Deed of Charge and interactions between RailCorp’s securities and the debt financiers’ securities

4.1 The RailCorp Deed of Charge

Under the RailCorp Deed of Charge PPP Co and PPP Co Finance Co have granted RailCorp fixed and floating charges over all of the present and future real and personal property assets, undertakings and rights of PPP Co, PPP Co Finance Co and the Reliance Rail Trust (the trust of which PPP Co is the trustee)—excluding a specified hedge collateral account established as part of the project’s debt financing arrangements—as security for the performance of PPP Co and PPP Co Finance Co of all of their obligations under the Project Contract and the other RailCorp project agreements (section 2.2.14), including their payment obligations.

The Security Trustee, the Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor, the TLS Contractor and the TLS Contractor Guarantor have expressly acknowledged and consented to the creation of these charges.

PPP Co and PPP Co Finance Co have warranted that there are and will be no encumbrances over the charged property other than those created under the project’s debt financing agreements and the other project contracts, arising in the ordinary course of business (including security interests for obligations that are not yet due) or expressly approved by RailCorp, in advance.

They have also promised RailCorp that they will not dispose of, permit the creation of an interest in or part with possession of any of the charged property in any way other than with RailCorp’s consent or in the ordinary course of business, or permit anything that might render the charged property liable to surrender or forfeiture or that otherwise prejudices the property in any way.

The relative priorities of RailCorp’s charges and the debt financiers’ securities are specified in both the RailCorp Deed of Charge and the Debt Finance Side Deed, and are discussed in section 4.2 below. In general terms, though, RailCorp’s charges rank behind the debt financiers’ securities but ahead of all other securities affecting the charged property.

To ensure RailCorp’s charges have priority over any subsequently registered charges, unless RailCorp agrees otherwise, the maximum prospective liability secured by

RailCorp’s charges has been set, for the purpose of determining priorities between the charges under section 282(3) of the Corporations Act (Cth), at \$10 billion. The RailCorp Deed of Charge makes it clear that this does *not* limit the amount of money secured by RailCorp’s charges.

Subject to the priorities between securities and enforcement rights specified in the Debt Finance Side Deed, RailCorp may immediately enforce its charges if:

- There is a “PPP Co termination event” (section 3.8.3.12)
- PPP Co fails to comply with its obligations following any early termination of the Project Contract (sections 3.8.1, 3.8.2, 3.8.4.1 and 3.8.5), or
- There are changes to specified aspects of arrangements associated with the Reliance Rail Trust, except as permitted under the Project Contract or otherwise approved by RailCorp.

In these circumstances, and again subject to the Debt Finance Side Deed, RailCorp may appoint receiver(s) or receiver(s)/manager(s) of the charged property, exercising powers set out in the RailCorp Deed of Charge, and RailCorp and its authorised representatives may exercise specified powers of attorney granted in the RailCorp Deed of Charge.

4.2 Consents to and priorities between RailCorp’s charges and the debt financiers’ securities

The Debt Finance Side Deed, which will remain in force until the Security Trustee is satisfied that all debts under the project’s debt financing documents have been fully and finally repaid, formally records:

- RailCorp’s consent to the debt financiers’ securities under the project’s private sector debt financing agreements, and
- As already indicated in section 4.1, the Security Trustee’s consent to the charges created by the RailCorp Deed of Charge.

With the exception of “**RailCorp priority moneys**”, described below, each of the debt financiers’ securities has priority over RailCorp’s charges.

In line with these priorities, any money received in enforcing the debt financiers' securities or RailCorp's charges must be applied, subject to specified arrangements for handling contingent liabilities,

- First, to meet the reasonable costs incurred by the Security Trustee (or its "enforcing party") and/or RailCorp (or its receiver/manager) in enforcing their securities
- Second, to remunerate the Security Trustee or its "enforcing party" and any RailCorp receiver or receiver/manager
- Third, to pay any "RailCorp priority moneys"
- Fourth, to pay the sums secured by the debt financiers' securities, and
- Fifth, to pay any other sums of money secured by RailCorp's charges,

with any surplus funds being paid into a nominated PPP Co bank account.

"RailCorp priority moneys" are defined in the Debt Finance Side Deed as any amounts PPP Co owes to RailCorp, or RailCorp is entitled to deduct from a RailCorp payment to PPP Co, for:

- RailCorp repairs of damage to third parties' property (sections 3.7.10.3(p) and (q))
- Costs incurred by RailCorp in taking out and maintaining insurance that should have been taken out and maintained by PPP Co (section 3.7.10.1)
- Costs or losses incurred by RailCorp in "stepping in" to remedy a PPP Co breach of any RailCorp project agreement (section 3.8.3.2), but only if:
 - ♦ RailCorp notified PPP Co of its intention to incur these types of costs at least 21 days before the first costs were incurred
 - ♦ The Security Trustee gave RailCorp a draft *Car Remedy Plan* before this 21-day notice period expired, describing actions the Security Trustee or an "enforcing party" proposed to take under their own "step in" (section 3.8.3.3) to remedy PPP Co's breach, and
 - ♦ RailCorp approved this draft *Car Remedy Plan*, or an amended version of it resubmitted to RailCorp under arrangements directly analogous to those described in

section 3.8.3.10 for the development of PPP Co *Cure Plans* and *Prevention Plans*, but

- ♦ The Security Trustee or its "enforcing party" failed to procure the completion of the works set out in the approved *Car Remedy Plan* within the "cure period" specified in this *Plan*, as extended (if at all) under extension arrangements directly analogous to those described in section 3.8.3.10 for the extension of "cure periods" specified in PPP Co *Cure Plans*, and
- The costs of bringing any train carriages acquired by RailCorp after termination of the Project Contract up to the condition they would have been in had PPP Co complied with its obligations under the Project Contract (sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5), but again only if:
 - ♦ RailCorp gave PPP Co at least 21 days' notice of its intention to deduct these types of costs from its "termination payment"
 - ♦ The Security Trustee gave RailCorp a draft *Car Remedy Plan* before this 21-day notice period expired, describing actions the Security Trustee or an "enforcing party" proposed to take to remedy the trains' condition, and
 - ♦ RailCorp approved this draft *Car Remedy Plan*, or an amended version of it, but
 - ♦ The Security Trustee or its "enforcing party" failed to procure the completion of the works set out in the approved *Car Remedy Plan*.

RailCorp may not take any action to enforce the RailCorp charges, or take any action concerning the solvency or insolvency of PPP Co, without the Security Trustee's consent, and any action by the Security Trustee or an "enforcing party" appointed by the Security Trustee will have priority over any approved RailCorp enforcement action.

Similarly, and notwithstanding the terms of the RailCorp Deed of Charge, RailCorp's charge must operate only as a floating charge unless the Security Trustee consents, and even with this consent it may operate as a fixed charge only to the extent that the charged assets are also subject to a fixed charge under the debt financing securities.

5 The NSW Government's guarantee of RailCorp's performance

The **Deed of Guarantee** (“**the PAFA Act Guarantee**”) between the NSW Treasurer (on behalf of the State of NSW), RailCorp, PPP Co and the Security Trustee, dated 3 December 2006, provides a guarantee by the State of NSW to PPP Co and the Security Trustee, in accordance with section 22B of the Public Authorities (Financial Arrangements) Act (NSW), of RailCorp's performance of its obligations under the Project Contract, any “maintenance site safety interface agreement” required under rail safety arrangements described in section 3.7.1 (including the Maintenance Site Interface Agreement TLS Phase), the three Expert Determination Agreements, the Call Option Deed, the Maintenance Facility Lease, the Maintenance Facility Licence, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Approved Escrow Deed (EKE-Electronics), the Approved Escrow Deed (Sydac), the Approved Escrow Deed (Sigma Coach Air Group), the Approved Escrow Deed (Thales Australia), the Approved Escrow Deed (Austbreck), the two Approved Escrow Deeds (Knorr-Bremse), the Approved Escrow Deed (Voith Turbo), the Approved Escrow Deed (Faiveley Transport), the Approved Escrow Deed (Australian Rail Technology Projects), the two Approved Escrow Deeds (Knorr-

Bremse TLS), the Approved Escrow Deed (FMFS), the Rolling Stock Manufacture Contract Side Deed, the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity and any other documents approved, in writing, by the NSW Treasurer in the future.

This guarantee is irrevocable and a continuing obligation. It will remain in force until seven months after the date on which RailCorp has fully discharged all of its obligations under the last of these contracts to remain in force, regardless of any settlements, intervening payments or anything else which might otherwise affect the State's liability as a guarantor at law or in equity.

The State must satisfy its obligations under its guarantee within 21 days of any demand made on it by PPP Co or the Security Trustee. Such a demand may be made only if any period of time allowed in the contracts for RailCorp to remedy its relevant defaults has already expired.

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

6 The State's potential capital contribution and other aspects of the February 2012 'restructure agreements'

This concluding section of this report summarises the following aspects of the February 2012 "restructure agreements" introduced in sections 2.2.2, 2.2.3, 2.2.11 and 2.3.3:

- The possible future \$175 million capital contribution to the project by the State of NSW if specified preconditions are met, under arrangements set out in the Capital Commitment Deed (section 6.1)
- Other financing changes that will apply if the State in fact makes this contribution, under arrangements set out in the Restructure Co-ordination Deed, the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, the Deed of Amendment (Unitholders Agreement), the Amending Deed (Operating) in respect of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust), the Amending Deed (Holding) in respect of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust), the Reliance Rail Undertakings Deed, the Financial Guarantors' Undertakings Deed, the Deed of Assignment in relation to the Financial Guarantors' Undertakings Deed and the RSM Contractor Undertakings Deed (sections 6.2, 6.3 and 6.4), and
- RailCorp's consents for these and other restructuring arrangements in the RailCorp 2012 Restructure Consent Deed and the Deed of Assignment Consent Letter (section 6.5).

Two other "restructure agreements", the RailCorp Set 7 Letter and the associated RSM Set 7 Letter, have already been summarised in sections 2.2.3, 3.2.5, 3.2.11.1 and 3.5.2.1 of this report.

As already indicated in sections 2.2.2 and 3.7.8, in line with the *Working with Government Guidelines for Privately Financed Projects* (see page 1 of this report) and the express confidentiality provisions of the project's contracts,

- Other aspects of the "restructure agreements" are generally beyond the scope of this report, and
- The summaries presented below exclude any reporting of "commercial in confidence" contract provisions, as defined in the *Guidelines* (i.e. any provisions revealing the private sector parties' financing arrangements, cost structures, profit margins, "base case" financial model(s), intellectual property or "any matter whose disclosure would place the contractors

at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future").

6.1 The State's capital commitment

6.1.1 Conditions precedent to the State's capital commitment

Under the Capital Commitment Deed the State of NSW must make its \$175 million capital contribution to the project, as described in section 6.1.2 below, if but only if the following conditions precedent are satisfied or are waived by the State in its absolute discretion:

- (a) All 78 train "sets" have achieved practical completion (section 3.2.11.1)
- (b) The four existing senior bank lenders have fully discharged their obligations to issue loans to PPP Co Finance Co under the Senior Bank Loan Note Subscription Agreement (section 2.2.2(b))
- (c) PPP Co Finance Co has entered into a binding agreement for loan(s) to refinance the project's current senior bank debt (under the Senior Bank Loan Note Subscription Agreement and related senior bank financing documents) and two specified tranches of senior bonds issued by PPP Co Finance Co (under the Senior Bond Trust Deed and associated senior bond documents), and:
 - ♦ The annual total cost of this "new debt", calculated in a manner specified in the Capital Commitment Deed, is not more than a figure specified in the Capital Commitment Deed
 - ♦ The terms of this "new debt" are agreed with the State, subject to requirements specified in the Capital Commitment Deed
 - ♦ Under the terms of the "new debt" agreement, the refinancing will take effect as soon as the State makes its capital contribution
- (d) PPP Co has provided an updated and independently audited financial model of the forecast financial performance of the "Reliance Rail group" (meaning PPP Co in its own right and as trustee of the Reliance Rail Trust, PPP Co Holding Co in its own right and as trustee

of the Reliance Rail Holding Trust, PPP Co Finance Co and any subsidiaries or other entities controlled by any of them)

- (e) All the members “Reliance Rail group” are solvent and none of them has any subsisting default which is likely to give rise to a future insolvency, and
- (f) All the “restructure agreements” remain in full force and effect.

The members of the Reliance Rail group must use “all their best endeavours” to ensure these conditions precedent are satisfied, and must comply with all reasonable requests by the State for this purpose, but in doing so they are not obliged to act to their commercial detriment or “substantially” beyond the restructuring of the project’s finances envisaged by the “restructure agreements”.

They must inform the State if they become aware of any circumstance that might result in any of the conditions precedents’ not being satisfied. If PPP Co, PPP Co Holding Co and PPP Co Finance Co reasonably believe, 12 months before the anticipated date of the State’s capital contribution (see section 6.1.2), that any of the conditions precedent will not be satisfied by the anticipated date, they may, if they choose, enter into discussions with the State concerning the possible termination of the Capital Commitment Deed or possible waiver(s) by the State of any of the conditions precedent and the terms of any such waiver(s). The State has agreed to engage in any such discussions.

Any of the parties to the Capital Commitment Deed (the State, PPP Co, PPP Co Holding Co and PPP Co Finance Co) may terminate the Capital Commitment Deed if any of the conditions precedent is not satisfied or waived by a date specified in the Capital Commitment Deed, or by any later date agreed between the parties, provided the failure to satisfy the condition precedent has not been directly caused by a failure by the terminating party to comply with the Reliance Rail parties’ “all their best endeavours” obligations.

In addition, the State may terminate the Capital Commitment Deed, at any time before the State’s capital contribution is made, if condition precedent (b) or (f), as listed above, cannot be satisfied and has not been waived by the State within 60 business days of the occurrence of the circumstance(s) rendering the condition incapable of satisfaction. However, the State will lose this termination right, for the relevant circumstances, if it does not exercise it within 60 business days after the end of the initial 60-day waiver period.

If certain parties specified in the Capital Commitment Deed reasonably believe condition precedent (c) cannot be satisfied by a date specified in the Capital Commitment Deed without the provision of additional funds, the members of the Reliance Rail group may procure additional “**top up**” funds from any of their creditors, or from others, to facilitate the satisfaction of this condition precedent.

Any such “top up” funding must comply with a series of requirements specified in the Capital Commitment Deed. Among

other things, it may be used only to repay the project’s existing senior debt so that the condition precedent may be satisfied, and in terms of its payment priority it may not rank ahead of the State’s potential capital contribution (section 6.1.2) or the associated purchase by the State of shares, units and notes under the Existing Investors Side Deed (section 6.2.1). In some circumstances, described in section 6.3, the State may later have to reimburse the provider(s) of any such “top-up” funding for some or all of the “top up” funding amount, up to an absolute cap specified in the Capital Commitment Deed.

6.1.2 The State’s capital contribution

Provided the conditions precedent described in section 6.1.1 have all been satisfied or waived, on the earliest of:

- A date specified in the Capital Commitment Deed
- The date, on or after another date specified in the Capital Commitment Deed, on which the Reliance Rail group has refinanced all of the project’s current senior bank debt (under the Senior Bank Loan Note Subscription Agreement and related senior bank financing documents) and two specified tranches of senior bonds issued by PPP Co Finance Co (under the Senior Bond Trust Deed and associated senior bond documents) (the Capital Commitment Deed calls this “**the first refinancing date**”), and
- Any other date specified by the State in a notice to PPP Co Holding Co and consented to by PPP Co Holding Co, which may not unreasonably withhold its consent,

or on any other date agreed to by the State and PPP Co Holding Co in writing,

- The State must pay \$175 million to PPP Co Holding Co
- PPP Co Holding Co must:
 - ♦ Issue and register 175 million new “B Class” notes to the State, free from any encumbrances and each with a face value of \$1, subject to the terms of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust), as amended by the Amending Deed (Holding) in respect of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust), and
 - ♦ Pay the \$175 million to PPP Co
- PPP Co must:
 - ♦ Issue and register 175 million new “B Class” notes to PPP Co Holding Co, each with a face value of \$1, subject to the terms of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust), as amended by the Amending Deed (Holding) in respect of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust), and
 - ♦ Subject to the requirements of other specified debt financing documents, apply the \$175 million to repay the loans PPP Co has received from PPP Co Finance Co under the Facilitation Loan Agreement, and

- PPP Co Finance Co must apply the funds it receives from PPP Co to repay the project's current senior debt.

These obligations must be carried out, as nearly as possible, simultaneously with the share, unit and note sales and purchases described in section 6.2.1 below. If they are not carried out on or before the same date as these transactions, the State's new notes will be deemed not to have been issued by PPP Co Holding Co and the State's payment must be returned promptly and in any event within two business days.

6.1.3 Assignments of the State's rights and obligations under the Capital Commitment Deed

6.1.3.1 *Assignments without consent to 'permitted' State transferees*

At any time prior to the payments etc described in section 6.1.2 the State may assign or otherwise transfer part or all of its rights and obligations under the Capital Commitment Deed, without the consent of any other party, to any "permitted" State transferee (*meaning* any State-owned corporation, statutory body or State Government body, statutory authority, department, minister, agency, commission or similar entity that is either an agency of the Crown or is otherwise guaranteed by the State on terms agreed between the State and PPP Co Holding Co, both acting reasonably).

If it does so, the State must give PPP Co Holding Co a legally binding guarantee by the State of the obligations of the transferee under the "restructure agreements", including the payment of the \$175 million capital contribution, on terms agreed between the State and PPP Co Holding Co, again both acting reasonably, and approved by the Intercreditor Agent. The State must also procure the entry by the "permitted" State transferee into a deed of novation substantially in a form set out in an Annexure to the Capital Commitment Deed, with the transferee effectively stepping into the shoes of the State.

6.1.3.2 *Assignments without consent to any new party after a specified date*

At any time after a date specified in the Capital Commitment Deed the State (or any "permitted" State transferee under the arrangements described above) may assign or otherwise transfer part or all of its rights and obligations under the Capital Commitment Deed to *any* new party, without the consent of PPP Co, PPP Co Holding Co or PPP Co Finance Co unless the new party is, at the time of the transfer, a "direct competitor" of a specified entity, as defined in the Restructure Co-ordination Deed, in which case the prior consent of PPP Co, PPP Co Holding Co and PPP Co Finance Co will be required.

The identity of the specified entity and the precise definition of "direct competitors" of this entity are "commercial in confidence" matters under the *Working with Government Guidelines for Privately Financed Projects*. In general terms, however, the

"direct competitors" of the specified entity are defined in the Restructure Co-ordination Deed as:

- Any of a current list of "agreed" competitors of that entity, subject to specified annual procedures under which the State and the specified entity may agree to add to and/or subtract from this list
- Any other entity in any of a specified list of types of businesses
- Any entity controlled by an entity falling within either of these two categories, and
- Any entity which two or more entities falling within the three categories above have the capacity to control.

If the State (or a "permitted" State transferee) does make such a transfer to a new party, the State must give PPP Co Holding Co a legally binding guarantee by the State of the obligations of the transferee under the "restructure agreements", including the payment of the \$175 million capital contribution, on terms agreed between the State and PPP Co Holding Co, both acting reasonably, and approved by the Intercreditor Agent. The State must also procure the entry by the new party into a deed of novation substantially in the form set out in the Annexure to the Capital Commitment Deed, with the transferee effectively stepping into the shoes of the State.

6.1.3.3 *Other assignments with consent*

Apart from the two sets of arrangements for transfers without consent described above, the parties to the Capital Commitment Deed may assign or otherwise transfer their rights and obligations under the Capital Commitment Deed to a new party only with the prior consent of all the other parties.

6.2 The State's purchase of the existing investors' shares, units and notes

6.2.1 *Share, unit and note purchases*

Under the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, provided the Capital Commitment Deed's conditions precedent described in section 6.1.1 have all been satisfied or waived, on the same date that the State makes its \$175 million capital contribution (as described in section 6.1.2):

- Each of the existing shareholders in PPP Co Holding Co and unitholders in the Reliance Rail Holding Trust (as listed in section 2.1.2 of this report) must sell their shares and units to the State, free from all encumbrances
- The State must pay each of these shareholders/unitholders \$1
- Each of the existing holders of notes issued by PPP Co Holding Co (also as listed in section 2.1.2 of this report) must sell these notes to the State, and
- The State must pay each of these noteholders \$1.

These obligations must be carried out, as nearly as possible, simultaneously with the capital contributions and issues of new notes described in section 6.1.2 above. If they are not carried out on or before the same date as these transactions, the State's purchases of shares, units and notes will be deemed not to have occurred and the payments made by the State for these shares, units and notes must be returned promptly and in any event within two business days.

As already indicated in section 2.2.2, the Unitholders Agreement has been amended by the Deed of Amendment (Unitholders Agreement) so as to facilitate the sale of shares, units and notes as envisaged by the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust. The Existing Investors Side Deed sets out other arrangements to facilitate the sales, including waivers of provisions in the Unitholders Agreement, amendments to trust deeds and constitutions and deemed approvals of resolutions by the investors.

6.2.2 Assignments of the State's rights under the Existing Investors Side Deed

6.2.2.1 Assignments without consent to 'permitted' State transferees

The State may at any time assign or otherwise transfer any of its rights under the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust to a "permitted" State transferee (see section 6.1.3) without the consent of the other parties to the Existing Investors Side Deed, provided the State also assigns or otherwise transfers its rights under the Capital Commitment Deed to the same person or organisation in accordance with the Capital Commitment Deed requirements described in section 6.1.3.

The State must, prior to or on the date of the transfer, give the existing shareholders/unitholders and noteholders a legally binding guarantee by the State of the State's performance of its obligations under the Existing Investors Side Deed, on terms agreed between the State, the shareholders/unitholders and the noteholders, acting reasonably, and approved by the Intercreditor Agent.

6.2.2.2 Assignments without consent to any new party after a specified date

Similarly, at any time after a date specified in the Existing Investors Side Deed the State (or any "permitted" State transferee) may assign or otherwise transfer any of its rights under the Existing Investors Side Deed to any new party, without the consent of the other parties to the Existing Investors Side Deed, provided:

- The new party is not, at the time of the transfer, a "direct competitor" of a specified entity, as defined in the Restructure Co-ordination Deed and described in section 6.1.3.2 above, and
- The State or "permitted" State transferee also assigns or otherwise transfers its rights under the Capital Commitment Deed to the same person or organisation, in accordance with

the Capital Commitment Deed requirements described in section 6.1.3.

Again, the State must, prior to or on the date of the transfer, give the existing shareholders/unitholders and noteholders a legally binding guarantee by the State of the State's performance of its obligations under the Existing Investors Side Deed, on terms agreed between the State, the shareholders/unitholders and the noteholders, acting reasonably, and approved by the Intercreditor Agent.

6.2.2.3 Other assignments with consent

Apart from the two sets of arrangements for transfers without consent described above, the parties to the Existing Investors Side Deed may assign or otherwise transfer their rights under that deed to a new party only with the prior consent of all the other parties.

6.3 'Equity upside' arrangements

Under "equity upside" arrangements set out in the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust, if the State (or a "permitted" State transferee as described in section 6.1.3):

- Proposes, at any time prior to a date specified in the Existing Investors Side Deed, to assign or otherwise transfer part or all of its rights and obligations under the Capital Commitment Deed (as described in section 6.1.3) and its rights under the Existing Investors Side Deed share, unit and note sale arrangements (as described in section 6.2.2) to a third party *other than* a "permitted" State transferee, or
- Proposes, at any time after the State has paid its \$175 million capital contribution but prior to the specified date referred to above, to dispose of part or all of the shares, units and notes it holds, *other than* to a "permitted" State transferee, or
- Still holds any of the shares, units and notes on the specified date,

the State must:

- In either of the first two cases, reasonably endeavour to conduct a competitive process to identify a transferee, in order to maximise the value of the proposed transfer
- In the third case, within 20 business days of the date specified in the Existing Investors Side Deed, instruct an independent valuer, from one of five accountancy firms listed in the Existing Investors Side Deed, to make a final, binding determination of the fair market value of the shares, units and notes in accordance with requirements, procedures, assumptions and information specified in the Existing Investors Side Deed, with the costs of the independent valuer being payable by the State
- Calculate a "**profit amount**", and from this "**profit amount**" an "**upside payment amount**" for the transfer, using formulae specified in the Existing Investors Side Deed, and
- If the calculated "**upside payment amount**" is positive, pay this amount to the project's existing shareholders/unitholders

and noteholders, in accordance with other formulae set out in the Existing Investors Side Deed, within 20 business days of the State's being paid for the transfer (in either of the first two cases) or within 20 business days of the independent valuer's determination of the fair market value (in the third case).

If the calculated "profit amount" is a positive number and the members of the Reliance Rail group obtained "top up" funding, complying with the requirements of the Capital Commitment Deed, in order to be able to satisfy the "available refinancing" condition precedent to the State's capital commitment (as described in section 6.1.1), the State must reimburse the provider(s) of this "top-up" funding for some or all of the "top up" funding amount, up to the lesser of the calculated "profit amount" and a cumulative reimbursement cap specified in the Capital Commitment Deed. If the calculated "profit amount" is a negative number no reimbursement is required.

For the purposes of the calculation of the "upside payment amount" by the State, the calculated "profit amount" is to be reduced by deducting any amounts payable by the State to any "top up" funder(s) under these arrangements.

As already indicated, if the calculated "upside payment amount" is a positive number, the State must pay the "upside payment amount" to the existing shareholders/unitholders and existing noteholders, as listed in section 2.1.2 of this report.

The Existing Investors Side Deed specifies exactly to whom these payments are to be made, with the order of priority between the various private sector investors for any particular payment under these "equity upside" arrangements depending on (among other things) the face values of the notes on specified dates, the aggregate total of all past and present "upside payment amounts" under these arrangements and whether PPP Co has applied certain "delay account" funds retained by it under the RSM Contractors Undertakings Deed in accordance with the requirements of that deed (see sections 2.2.3 and 6.4.4).

6.4 Other associated 'restructure' commitments

6.4.1 State 'fee' payments to and from the Financial Guarantors and enforcement waivers by the Financial Guarantors

As already indicated in section 2.2.2, the Financial Guarantors' Undertakings Deed sets out revised fee arrangements for the Financial Guarantors, including new fees now payable to the Financial Guarantors by the State of NSW, and waives the Financial Guarantors' rights, including their rights to take enforcement action, following some types of financing defaults, until the bank debts are fully funded or, if it is earlier, the State of NSW has made its \$175 million capital contribution under the Capital Commitment Deed.

Among other things,

- (a) The State has had to, and has, paid each of the Financial Guarantors an amount specified in the Financial Guarantors' Undertakings Deed (and called a "**restructure fee**") by 23 February 2012.
- (b) The Financial Guarantors have irrevocably assigned to the State all of their interests in fees payable to them by PPP Co between 20 February 2012 and the State's payment of its \$175 million capital contribution. The Financial Guarantors' Undertakings Deed calls these fees "**the assigned fees**".

However, if there is a successful claim against either of the Financial Guarantors concerning the period from 20 February 2012 to the date of the State's payment of its \$175 million capital contribution, the State must repay the relevant Financial Guarantor the lesser of:

- ♦ The claim paid by the Financial Guarantor, and
 - ♦ The aggregate of the "assigned fees" assigned to the State by the Financial Guarantor, *less*:
 - The "restructure fee" already paid by the State to the Financial Guarantor as described in (a) above
 - Any "accrued fees" already paid by the State to the Financial Guarantor under arrangements described in (c) below, and
 - Any amount "reimbursed" by the State to PPP Co under arrangements described in (d) below.
- (c) During the period from 20 February 2012 to the date of the State's payment of its \$175 million capital contribution, but *not* after a date specified in the Financial Guarantors' Undertakings Deed, the State must pay each of the Financial Guarantors, within 30 business days of each of three specified "milestone dates" (the dates of satisfaction or waiver of the first two condition precedent to the State's capital commitment listed in section 6.1.1 above, and the date of the State's payment of its capital contribution), an "**accrued fee**" equivalent to a specified amount per annum, calculated on a daily basis, *less*:

- ♦ The "restructure fee" already paid to each Financial Guarantor
- ♦ Any "accrued fee(s)" already paid to each Financial Guarantor, and
- ♦ Any repayments made by the State to the Financial Guarantor in question, following a successful claim against that Financial Guarantor, under the arrangements described in (b) above

provided:

- ♦ The State has received all of the fees assigned to it by the Financial Guarantor in question and payable by the relevant date under the arrangements in (b) above, and

- There is no subsisting default by the Financial Guarantor in question.

Any “accrued fees” that have not become payable by a date specified in the Financial Guarantors’ Undertakings Deed, for any reason, will not become payable and will be forfeited by the Financial Guarantors.

- (d) If the State does not pay its \$175 million capital contribution on the basis that the conditions precedent for it to have to do so have not all been satisfied or waived by a date specified in the Capital Commitment Deed (see section 6.1.1) and the Financial Guarantors’ Undertakings Deed,
- The State must, on the tenth business day after another date specified in the Financial Guarantors’ Undertakings Deed, pay PPP Co a specified proportion of any “assigned fees” it has received, less any amounts paid or payable by the State to either of the Financial Guarantors, following a successful claim against that Financial Guarantor, under the arrangements described in (b) above, and
 - PPP Co must ensure this payment by the State is applied to the repayment of the project’s senior debt, to the extent that this is permitted under the project’s debt financing documents.

6.4.2 Assignments of the State’s rights and obligations under the Financial Guarantors’ Undertakings Deed

6.4.2.1 Assignments without consent to ‘permitted’ State transferees

The State may at any time assign or otherwise transfer any of its rights and obligations under the Financial Guarantors’ Undertakings Deed, summarised above, to a “permitted” State transferee (see section 6.1.3) without the consent of the other parties to the Financial Guarantors’ Undertakings Deed, provided the State also assigns or otherwise transfers its rights under the Capital Commitment Deed to the same person or organisation in accordance with the Capital Commitment Deed requirements described in section 6.1.3.

The State must, prior to or on the date of the transfer, give PPP Co Holding Co and the Financial Guarantors a legally binding guarantee by the State of the transferee’s performance of its obligations under the Financial Guarantors’ Undertakings Deed, on terms agreed between the State, PPP Co Holding Co and the Financial Guarantors.

6.4.2.2 Assignments without consent to any new party after a specified date

Similarly, at any time after a date specified in the Financial Guarantors’ Undertakings Deed the State (or any “permitted” State transferee) may assign or otherwise transfer any of its rights under the Financial Guarantors’ Undertakings Deed to any

new party, without the consent of the other parties to that deed, provided:

- The new party is not, at the time of the transfer, a “direct competitor” of a specified entity, as defined in the Restructure Co-ordination Deed and described in section 6.1.3.2 above, and
- The State or “permitted” State transferee also assigns or otherwise transfers its rights under the Capital Commitment Deed to the same person or organisation, in accordance with the Capital Commitment Deed requirements described in section 6.1.3.

Again, the State must, prior to or on the date of the transfer, give PPP Co Holding Co and the Financial Guarantors a legally binding guarantee by the State of the transferee’s performance of its obligations under the Financial Guarantors’ Undertakings Deed, on terms agreed between the State, PPP Co Holding Co and the Financial Guarantors.

6.4.2.3 Other assignments with consent

Apart from the two sets of arrangements for transfers without consent described above, the parties to the Financial Guarantors’ Undertakings Deed may assign or otherwise transfer their rights under that deed to a new party only with the prior consent of all the other parties.

6.4.3 ‘Commitment fee’ payments to the State

Under the Capital Commitment Deed, if one or both of the Financial Guarantors default on their obligations under the project’s debt funding arrangements and the State has not yet paid its \$175 million capital contribution, PPP Co, PPP Co Holding Co and PPP Co Finance Co must pay the State a quarterly “**commitment fee**” based on specified annual percentages of \$175 million, provided there are sufficient funds in a specified equity distribution account.

If there are insufficient funds, the fees will remain payable to the State and must be paid as soon as there are sufficient funds on the day before a quarterly payment date, along with interest on the outstanding amount at 8% per annum.

6.4.4 The Reliance Rail Undertakings Deed

As already indicated in section 2.2.2(b), the Reliance Rail Undertakings Deed:

- Reinforces the “top up” funding arrangements described in section 6.1.1 in the case of any “top up” funding by the Financial Guarantors
- Commits PPP Co Finance Co to drawing down its bank debts under the Senior Loan Note Subscription Agreement, subject to specified conditions
- Specifies how PPP Co, PPP Co Finance Co and PPP Co Holding Co must apply any excess funds, and
- Commits them to applying any capital contribution from the State, and other specified funds, to the repayment of the project’s senior debts, to an extent specified in the Capital Commitment Deed.

PPP Co, PPP Co Holding Co and PPP Co Finance Co expressly confirmed in the Reliance Rail Undertakings Deed that their own boards of directors, and the boards of directors of all other members of the “Reliance Rail group” (section 6.1.1), were satisfied on 3 February 2012, on the basis of financial and legal advice they had received, current circumstances and prevailing market conditions, that, provided the “restructure agreements” were all executed and became effective, as they now are, PPP Co Finance Co would issue the necessary drawdown notices under the Senior Bank Loan Note Subscription Agreement.

PPP Co Finance Co also promised the State and the other parties to the Reliance Rail Undertakings Deed that it would inform them immediately if market conditions changed or if other events prevented PPP Co Finance Co from issuing these drawdown notices.

In practice, the first drawdown notice was issued by PPP Co Finance Co prior to the date of this *Summary of Contracts*, 2 March 2012.

6.4.5 Other facilitation of the ‘restructure’

The “restructure” arrangements described above are supported and reinforced by numerous related arrangements between the various private sector parties to the “restructure agreements”.

For example, as already indicated in section 2.2.3, the RSM Contractor Undertakings Deed has amended the payment provisions of the Rolling Stock Manufacture Contract by permitting PPP Co to retain a specified sum in a specified “delay account” until the first refinancing of the project’s debts in 2018 and permitting PPP Co to retain this amount absolutely if it is required for the refinancing of the project in a form acceptable to the State of NSW, one of the preconditions for the State’s \$175

million capital contribution under the Capital Commitment Deed (section 6.1.1).

However, as also already indicated, in line with the *Working with Government Guidelines for Privately Financed Projects* (see page 1) and the express confidentiality provisions of the project’s contracts (see section 3.7.8), these other aspects of the “restructure agreements” are generally beyond the scope of this report.

6.5 RailCorp’s consents

Under the RailCorp 2012 Restructure Consent Deed RailCorp has expressly consented to the “restructure agreements” and the transactions they contemplate.

This statement of consent has taken effect as a deed poll for the benefit of PPP Co, the Security Trustee, the Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors, the Rolling Stock Manufacture Independent Certifier and all of the parties to the “restructure agreements”.

It expressly includes, but is not limited to, consents required under specified provisions of the Project Contract, the Debt Finance Side Deed and the Rolling Stock Manufacture Contract Side Deed.

In addition, as already indicated section 2.2.2, RailCorp has expressly consented, in its Deed of Assignment Consent Letter dated 2 March 2012, to PPP Co Finance Co’s irrevocably assignment to PPP Co, under the Deed of Assignment in relation to the Financial Guarantors’ Undertakings Deed, of PPP Co Finance Co’s rights to and interests in specified fees and other amounts payable to it by the Financial Guarantors under the Financial Guarantors’ Undertakings Deed.

Index

2012 Restructure Consent Deed
See RailCorp 2012 Restructure Consent Deed

A

ABN AMRO Investments Australia Ltd 9
ABN AMRO Rail Holdings Pty Ltd 9
ABN AMRO Rail Investment Trust 9
Accessibility Report 33
Accreditation Plan 33
 Construction Safety Assurance Report 33
 Critical Design Safety Assurance Report 33
 Implementation Safety Assurance Report (Interim) 33, 36
 Implementation Safety Assurance Report (Revenue Operation) 30, 33, 36
 Implementation Safety Assurance Report (Testing and Commissioning) 33
 Maintenance Facility Works Safety Assurance Report 33
 Safety Assurance Reports 33, 59
 System Definition Safety Assurance Report 33
 Tender Safety Assurance Report 33
 Through Life Support Safety Assurance Report 33
Acquisition of trains by RailCorp 14, 19, 46, 53–55, 61, 77–80, 88–92, 94
Additional trains
 Option to order 28
ADI Ltd
 See Thales Australia Ltd
“Agreed competitors” 98
“Agreed” network access rights 34
Alerts 63
Amber Infrastructure Group Ltd 9
Amending Deed (Holding) in respect of the Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust) 14, 24, 96–97
Amending Deed (Operating) in respect of the Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust) 14, 24, 96
Amendments to the project’s contracts
 Restrictions on 72
AMP Capital Global Infrastructure Fund No 2 9
AMP Investment Services Pty Ltd 9
AMP Investments Infrastructure Equity Fund 9
Apprenticeships requirement 60
Approvals 28, 39
Approved Escrow Deed (Austbreck) 20, 22, 95
Approved Escrow Deed (Australian Rail Technology Projects) 20, 22, 95
Approved Escrow Deed (EKE-Electronics) 20, 22, 95

Approved Escrow Deed (Faiveley Transport) 20, 22, 95
Approved Escrow Deed (FMFS) 20, 22, 95
Approved Escrow Deed (Maintenance Facility Contractor) 19, 22–23, 61, 95
 Parties to 19
Approved Escrow Deed (Rolling Stock Manufacturers) 19, 22–23, 61, 95
 Parties to 19
Approved Escrow Deed (Sigma Coachair Group) 20, 22, 95
Approved Escrow Deed (Sydac) 20, 22, 95
Approved Escrow Deed (Thales Australia) 20, 22, 95
Approved Escrow Deed (TLS Contractor) 20, 22–23, 61, 95
 Parties to 20
Approved Escrow Deed (Voith Turbo) 20, 22, 95
Approved Escrow Deeds (Knorr-Bremse TLS) 20, 22, 95
Approved Escrow Deeds (Knorr-Bremse) 20, 22, 95
Approved Escrow Deeds (Subcontractors) 20, 22, 61, 95
Arbitration of disputes 76
Archaeological and heritage artefacts 43
Artefacts 43
As-Built Design Documentation 33
Assignments
 Restrictions on 73
“Assumed refinancing”
 Definition of 73
Assurex Escrow Pty Ltd 12
 See Escrow Agent
Auditing by RailCorp 33, 43, 52, 58, 60–61, 69–70, 87
Auditor-General, NSW 1, 62
Austbreck Pty Ltd 13, 20, 22, 61, 95
Australian Rail Technology Projects Pty Ltd 13, 20, 22, 95
Australian Rail Training Facility, Petersham 29
Australian Securities and Investments Commission (ASIC) 70
Australian Stock Exchange (ASX) 70
Australian Taxation Office 23
“Availability payments” to PPP Co by RailCorp 37, 52, 55–57, 66–67, 69, 77, 81, 89
 Calculation of 55–57
 “Re-basing adjustments” 56
 “Reliability and disruption adjustments” 56
 Apportionment of causes of delays and failures 57
 “Cancellation” adjustments 56
 “Deemed action times” 57

“Late into service” and “late in service” adjustments 56
“Very late into service” and “very late in service” adjustments 56
“Withholding or withdrawing” adjustments 57
“Set availability allowances” 56
“Transition-in adjustment” factors 56–57
“Volume adjustments” 56, 81, 89
“Availability periods”
 Definitions of 45
“Availability”
 Deemed “availability” 47, 72
 Definition of 46–47
“Availability” obligations 45–46
 Routine obligations 46
 Special events 46
 Train deliveries 46
 Train substitutions 46
“Unacceptable availability notices” 84, 86

B

Babcock & Brown International Holdings Pty Ltd 9
Babcock & Brown Public Partnerships GP Ltd 9
Babcock & Brown Public Partnerships Limited Partnership 9
Bank of New York Mellon Corporation 12
“Base case” financial model 23, 45, 55–56, 58, 62, 69, 75, 79–80, 85, 90
 Updating of 69, 75
BNY Holdings (Australia) Pty Ltd 12
BNY International Financing Corporation 12
BNY Mellon Australia Pty Ltd 12
BNY Trust (Australia) Registry Ltd 9
 See Security Trustee
Breaches
 by PPP Co 80–88
 “Final frequent breaches notices” 84, 87
 “Final persistent breach notices” 84, 87
 “Frequent breaches notices” 84, 86
 “Persistent breach notices” 84
 “PPP Co events of default” 85–86
 PPP Co finance defaults 88
 “PPP Co termination events” 87
 RailCorp’s general legal and equitable remedies 86
 Replacement of subcontractor(s) to remedy 80
 “Stepping in” by RailCorp to remedy 81–83, 86–87

- “Stepping in” by Security Trustee to remedy 81–82, 87–88
 - “Unacceptable availability notices” 84, 86
 - “Unacceptable reliability notices” 84, 87
- C**
- Call Option Deed 19–20, 22–23, 44, 50, 72–73, 75, 77, 79, 88, 91, 95
 - Parties to 19
 - Capital Commitment Deed 14–17, 24, 62, 69, 72–74, 96–102
 - Assignments of the State’s rights and obligations 98
 - Capital Commitment Deed in respect of the Reliance Rail Holding Trust
 - See Capital Commitment Deed
 - Capital contribution by the State of NSW 7–8, 14–17, 24, 74, 96–97, 99–100
 - Conditions precedent to 96
 - Car Remedy Plans 94
 - Cardiff maintenance depot 17–18, 21–23, 34, 59, 72–73, 95
 - Cardiff Maintenance Depot Lease 17, 21, 34, 72–73
 - Certificates of Readiness 33
 - Changchun Railway Vehicles Co Ltd 17
 - “Change in disability law”
 - Definition of 70
 - “Change in railway law”
 - Definition of 70
 - Changes in law 32, 70–72
 - Changes of ownership or control
 - Restrictions on 72
 - Civil Liability Act (NSW) 31
 - Cleaning services 48
 - “Commercial in confidence” provisions
 - Working with Government Guidelines*’ definition of 1
 - “Commissioning track” 34, 38, 44, 50
 - “Possession” rights 34, 44, 50
 - Rights under Maintenance Facility Licence 34, 50
 - Common Terms Deed 15
 - Communications Management Plan* 33
 - Completion of the maintenance facility 18–19, 25, 34–36, 39, 42–45, 50, 63–64, 67
 - Completion of the simulators 18, 30, 36, 38, 48
 - Completion of the trains
 - “Final” completion 38
 - “Practical” completion 13, 16–19, 28, 30–31, 34–37, 39, 42–43, 45–46, 48–51, 53–58, 60, 63–66, 78, 80, 84, 89, 92, 96
 - Compliance Management Plan* 31, 33
 - Conditions precedent
 - to the February 2012 “restructure agreements” 24
 - to the original (2006) contracts 22–23
 - to the State’s capital contribution commitment 96–97
 - Confidentiality 1, 5–6, 15–16, 20, 62, 64, 96, 102
 - Configuration Management Plan* 32–33, 49
 - Configuration Register* 33
 - Master Configuration Status List* 33
 - Physical Configuration Audits 33
 - Configuration Register* 33
 - Consent to debt financiers’ securities 93
 - Consents to RailCorp’s securities 93
 - Construction Safety Assurance Report* 33
 - Construction site access for maintenance facility 40
 - Contamination 40, 60
 - Contract Management Plan* 32–33
 - Communications Management Plan* 33
 - Compliance Management Plan* 33
 - Contractor’s Work Breakdown Structure* 33
 - Delivery Programmes* 33
 - Environmental Management Plan* 33, 60
 - Human Factors Integration Plan* 33
 - Human Resources Plan* 33, 60
 - Interface Management Plan* 33
 - Local Industry Participation Plan* 33, 45, 60
 - Occupational Health, Safety and Rehabilitation Plan* 33
 - Organisational Accountabilities Plan* 33
 - Programme Management Plan* 32–33
 - Risk Management Plan* 33
 - Risk Register* 33
 - Contract Management Requirements* 29–33, 35, 40–43, 45, 59
 - Contract management system 32–33, 42–43, 52
 - Contractor’s Work Breakdown Structure* 33
 - Corporations Act (Cth) 93
 - Corrective Action Plans* 30, 42
 - Critical Design Safety Assurance Report* 33
 - “Critical” design review 29, 41, 44, 60
 - Cross Guarantee and Indemnity 22–23, 26–27, 95
 - Parties to 22
 - Cure Plans* 86–87
 - Currie & Brown (Australia) Pty Ltd
 - See Maintenance Facility Construction Independent Certifier
- D**
- Damage
 - Liabilities for and responses to 65–68
 - Dates for “practical completion”
 - Maintenance facility 30, 35–36, 42–43
 - Simulators 30, 36
 - Trains 30, 36, 43, 53, 57
 - Debt Finance Side Deed 21–23, 45, 72–75, 77, 82, 87, 90–91, 93–95
 - Parties to 21
 - Decommissioning of the Sets Sub-Plan* 33
 - Decommissioning of trains 14, 19, 46, 53–54, 79
 - Deed of Amendment (Unitholders Agreement) 14, 24, 96, 99
 - Deed of Assignment Consent Letter 16, 96
 - Deed of Assignment in relation to the Financial Guarantors’ Undertakings Deed 16, 96, 111
 - Deed of Release—CCTV Claim 20, 22, 62
 - Deed of Release—Earthing & Bonding 20, 22, 62
 - Deed of Release—Energy Australia Kiosk 20, 22, 62
 - Deed of Release—Financial Close 20, 22, 62
 - Deed of Release—Independent Verifier Claim 20, 22, 62
 - Deed of Release—Roads 5 and 7A 20, 22, 62
 - Deed of Settlement
 - See RailCorp 2012 Restructure Deed of Settlement
 - Deed of Variation No 1 Maintenance Facility Construction Contract 18, 42
 - Deed of Variation No 1 Project Contract 13
 - Deed of Variation No 1 RailCorp Rolling Stock PPP Project Contract No C01645
 - See Deed of Variation No 1 Project Contract
 - Deed of Variation No 1 RailCorp Rolling Stock PPP Rolling Stock Maintenance Facility Design and Construct Contract
 - See Deed of Variation No 1 Maintenance Facility Construction Contract
 - Deed of Variation No 1 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract
 - Deed of Variation No 1 Rolling Stock Manufacture Contract 16
 - Deed of Variation No 1 RailCorp Rolling Stock PPP Through Life Support (TLS) Contract
 - See Deed of Variation No 1 TLS Contract
 - Deed of Variation No 1 Rolling Stock Manufacture Contract 16, 31
 - Deed of Variation No 1 TLS Contract 18, 51
 - Deed of Variation No 2 Maintenance Facility Construction Contract 18, 42
 - Deed of Variation No 2 Project Contract 13
 - Deed of Variation No 2 RailCorp Rolling Stock PPP Maintenance Facility Contract
 - See Deed of Variation No 2 Maintenance Facility Construction Contract
 - Deed of Variation No 2 RailCorp Rolling Stock PPP Project Contract No C01645
 - See Deed of Variation No 2 Project Contract
 - Deed of Variation No 2 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract
 - See Deed of Variation No 2 Rolling Stock Manufacture Contract
 - Deed of Variation No 2 RailCorp Rolling Stock PPP Through Life Support (TLS) Contract
 - See Deed of Variation No 2 TLS Contract
 - Deed of Variation No 2 Rolling Stock Manufacture Contract 16, 31
 - Deed of Variation No 2 TLS Contract 19, 51
 - Deed of Variation No 3 Maintenance Facility Construction Contract 18, 42
 - Deed of Variation No 3 Project Contract 13
 - Deed of Variation No 3 RailCorp Rolling Stock PPP Maintenance Facility Contract
 - See Deed of Variation No 3 Maintenance Facility Construction Contract
 - Deed of Variation No 3 RailCorp Rolling Stock PPP Project Contract No C01645
 - See Deed of Variation No 3 Project Contract
 - Deed of Variation No 3 TLS Contract 19, 51
 - Deed of Variation No 4 RailCorp Rolling Stock PPP Rolling Stock Manufacture Contract
 - See Deed of Variation No 4 Rolling Stock Manufacture Contract
 - Deed of Variation No 4 Rolling Stock Manufacture Contract 16, 31
 - Deed Poll (Holding) Constituting A1 Class and B Class Notes (Reliance Rail Holding Trust) 14, 97
 - Deed Poll (Operating) Constituting A1 Class and B Class Notes (Reliance Rail Trust) 14, 97
 - “Deemed action times” 30, 36–37, 57
 - Deemed train “availability” 47, 72
 - Defects in “returned” facilities 44
 - Delivery of trains 46
 - Delivery Phase Progress Reports* 30, 33, 42
 - “Delivery phase”
 - Definition of 14, 18, 25
 - Delivery Programme* 29–30, 32–33, 35, 42

- Design and construction of maintenance facility
 - Acceleration of works 42
 - Access 40
 - Approvals 39
 - Artefacts 43
 - Commissioning 43
 - Construction obligations generally 41
 - Construction site access 40
 - Contamination 40
 - Contract Management Requirements* 33, 40–43, 45, 59
 - Contract management system 42–43
 - Coordination of RailCorp and PPP Co works 41
 - Corrective Action Plans* 42
 - “Critical” design review 41, 44, 60
 - Date for practical completion 30, 35–36, 42–43
 - Defects in “returned” facilities 44
 - Delays 42
 - Delivery Programme* 42
 - Design documentation 40–41, 44, 49, 61
 - Design obligations 40
 - Design reviews 40
 - “Enabling works” by RailCorp 38–43, 67
 - Fitness for intended purposes 40–41
 - Inspections by RailCorp 43
 - Intellectual property 40
 - Interfaces 41
 - “Key personnel” 42
 - Maintenance Facility Design Book* 39–41
 - Moral rights 40
 - Native title claims 43
 - Planning approval 39–40
 - Practical completion 30, 42–43, 45
 - “Preliminary” design review 44
 - “Project Plans” 33, 42, 44
 - RailCorp Enabling Works Specification* 38, 40–41
 - RailCorp Maintenance Facility Specification* 39–41
 - RailCorp’s “enabling works” 38–43, 67
 - “Reference design” 40
 - “Returned” facilities 44, 50
 - Scope of works 38
 - for PPP Co’s works 39
 - for RailCorp’s “enabling works” 38
 - Site access 40
 - Site conditions 40
 - Subcontracting 42, 78, 86
 - Suspension of works 42
 - “System definition” design review 44
 - Technical specifications 40–41
 - Testing and commissioning 43
 - Testing by RailCorp 43
 - Timeframes 30, 35, 41–43
 - Utility services 41
 - Variations 32, 40–41, 47, 49, 70–72
 - Design and manufacture of trains and simulators
 - Acceleration of works 30
 - Approvals 28
 - Commissioning 35
 - Compliance Management Plan* 31
 - Contract Management Requirements* 29–33, 35, 59
 - Contract management system 32–33
 - Corrective Action Plans* 30
 - “Critical” design review 29, 44, 60
 - Dates for practical completion 30, 36, 43, 53, 57
 - Delays 31
 - Delivery Programme* 30
 - Design documentation 29, 44, 49, 61
 - Design obligations 29
 - Design reviews 29
 - “Final” completion of simulators 45
 - “Final” completion of trains 38
 - Fitness for intended purposes 29, 32
 - Inspections by RailCorp 33
 - Intellectual property 29
 - Moral rights 29
 - “Network access rights” for testing and commissioning of trains 34
 - Number of trains 28
 - Option to delete separate guards’ cabs 28, 32
 - Option to order additional trains 28
 - “Practical” completion of simulators 30, 38, 45
 - “Practical” completion of trains 30, 35, 45
 - “Preliminary” design review 29, 44
 - “Project Plans” 32–33, 44
 - Rail safety 28
 - RailCorp Simulator Specification* 28–29
 - RailCorp Train Performance Specification* 28–29
 - Scope of works 28
 - Simulator Design Book* 28–29
 - Subcontracting 31–32, 78, 86
 - Suspension of works 31
 - “System definition” design review 29, 44
 - Technical specifications 28
 - Testing and commissioning 35
 - Testing by RailCorp 33
 - Timeframes 30
 - Train Design Book* 28–29
 - Variations 28–29, 32, 47, 49, 70–72
 - Design documentation 29, 40–41, 44, 48–49, 61
 - Reviews of 29, 41, 44
 - Updating of 48
 - Design Management Plan* 33
 - Design Verification Plan* 33
 - “Direct competitor” 98–99, 101
 - “Discriminatory change in law”
 - Definition of 70
 - Dispute resolution procedures 75–76
 - Arbitration 76
 - Expert determination 75
 - Downer EDI Ltd 9, 12, 17, 98
 - See also Rolling Stock Manufacturer Guarantors, Maintenance Facility Contractor Guarantor and TLS Guarantor
 - Downer EDI Rail Pty Ltd 12, 17, 21, 34, 50, 59
 - See also FMFS Subcontractor
 - See Rolling Stock Manufacturers 12
 - Downer EDI Rolling Stock Manufacture Guarantee 17
 - Downer PPP Investments Pty Ltd 9
 - Earthing systems of trains
 - Payment of cost adjustment for 45
 - EDI Rail PPP Maintenance Pty Ltd 12
 - See TLS Contractor
 - EDI Rail Pty Ltd
 - See Downer EDI Rail Pty Ltd
 - EKE-Electronics Ltd 13, 20, 22, 61, 95
 - Electrical earthing systems of trains
 - Payment of cost adjustment for 45
 - “Enabling works” by RailCorp 38–43, 67
 - Encumbrances
 - Restrictions on 73
 - Environment protection 60
 - Environmental Management Plan* 33, 60
 - Environmental management system 60
 - Environmental Planning and Assessment Act (NSW) 39
 - Equity investors, identities of 9
 - Equity Subscription Agreement (Holding) in respect of the Reliance Rail Holding Trust 14
 - Equity Subscription Agreement (Operating) in respect of the Reliance Rail Trust 14
 - Escrow Agent 12, 19–20
 - Identity of 12
 - Escrow arrangements for computer software and other source code 61
 - Eveleigh maintenance depot 50
 - “Excepted risks”
 - Definition of 65
 - Existing Investors Side Deed in respect of the Reliance Rail Holding Trust 14, 24, 73, 96–99
 - Assignments of the State’s rights 99
 - State purchases of shares, units and notes 98
 - Expert Determination Agreements 20, 22, 75, 95
 - Expert determination of disputes 75
 - Appointment of panel of experts 20, 75
 - Expert Panel Letter 13, 75
 - Expiry date
 - Extensions of expiry date 53
 - Original expiry date 53
 - Extensions of the term of the project 53
 - Exterior train washing services 48, 52, 55, 58
- F**
- Facilitation Loan Agreement 15, 79–80, 97
 - Full name of 15
 - Parties to 15
 - Failure Modes, Effects and Criticality Analyses* 33
 - Failure Reporting and Corrective Action System* 33
 - Faiveley Transport Australia Ltd 13, 20, 22, 61, 95
 - February 2012 “restructure agreements” 7–9, 14–17, 20, 22, 24, 62, 69, 72–74, 96–102
 - “Equity upside” arrangements 99–100
 - Fees 100
 - State purchases of shares, units and notes 98
 - FGIC Corporation 12
 - FGIC UK Ltd 12, 15, 24
 - Financial Guarantors 12
 - “Final frequent breaches notices” 84, 87
 - “Final persistent breach notices” 84, 87
 - “Final” completion of the trains 38, 45
 - Finance Guarantees 15
- E**
- “Early payment option” 23

Financial Guarantors 12, 15–16, 24, 100–101, 111
Identities of 12
Ownership of 12
Financial Guarantors' Undertakings Deed 16, 24, 62, 96, 100–101, 111
Financial Guaranty Insurance Company 12
Financial Guaranty No CA03416A 15
Financial reporting and audits 70
Fleet Management Systems 33
FMFS Access Agreement 19, 21, 52, 72, 78, 83
RailCorp consent to 19
FMFS Access Agreement Side Deed
See FMFS Side Deed
FMFS Side Deed 21–22, 75, 77–78, 83–84
FMFS Subcontractor 12–13, 19–21, 52, 61, 72, 78, 83–84
"Force majeure events" 76–79
Responses to 76–77
Termination for 77–79
"Frequent breaches notices" 84, 86
Future RailCorp facilities areas 44, 50

G

GHD Pty Ltd
See Rolling Stock Manufacture Independent Certifier and TLS Independent Certifier
GIF Reliance Rail Pty Ltd 9
Global Deed of Security 15
Goldstein, Mr Steven 13, 20, 75
Guarantee by NSW Government of RailCorp's performance 95
RailCorp indemnity against liabilities incurred by NSW Government under this guarantee 95
Guards' cabs
Option to delete 28, 32

H

Handover and Pick-Up Protocols 33
Handover at end of project 54
Hire of goods duty 61
Hitachi Australia Pty Ltd 12
See Rolling Stock Manufacturers
Hitachi Ltd 12
See also Rolling Stock Manufacturer Guarantors
Hitachi Rolling Stock Manufacture Guarantee 17
Holmes, Mr Malcolm, QC 13, 20, 75
Human Factors and Ergonomics Report 33
Human Factors Integration Plan 33
Human Resources Plan 33, 60

I

IEF Reliance Rail Pty Ltd 9
Implementation Safety Assurance Report (Interim) 33, 36
Implementation Safety Assurance Report (Revenue Operation) 30, 33, 36
Implementation Safety Assurance Report (Testing and Commissioning) 33
Incident management 63
"Incident response payments" to RailCorp by PPP Co 55, 58
Incident Response Plan 33

Incident response services 48
Income Tax Assessment Act (Cth) 23
Indemnities
General indemnity by PPP Co 26, 68
Independent Experts 13, 20, 75
Independent Transport Safety and Reliability Regulator (ITSRR) 36, 47–49, 57, 59, 85, 87
Industrial relations 60
Information and Communications Technology (ICT) Architecture Management Strategy 33
Information and Communications Technology (ICT) Capability Strategy 33
Information and Communications Technology (ICT) Software Systems Management Plan 33
Information documents 26
Infrastructure Equity Fund 9
Initial reliability requirements for the first six train "sets" 36
In-service reliability of the first six train "sets" 36
Inspections by RailCorp 33, 43, 52, 54
Insurance
Application of proceeds 27, 54, 64–69, 76, 79–80, 89–90
PPP Co's insurance policy obligation 63–64
Sharing of increased or reduced insurance costs 64
"Uninsurable risks" 65, 68, 77–79
Integrated Test Plan 33, 35, 43, 45
Test Report Summary 33
Test Reports 33
Test Specifications 33
Train Testing and Commissioning Network Access Plan 33
Intellectual property 29, 40, 61
Escrow arrangements for computer software and other source code 61
Intercreditor Agent 9, 12–13, 15–16, 18–19, 24, 98–99
"Interest payment adjustment" payments between RailCorp and PPP Co 52, 55, 58, 81, 89
Interface Agreement Managing Risks to Safety Due to Rail Operations at Downer EDI's Cardiff Depot Facility 17–18, 59
Interface Agreement Waratah Train Commissioning (Including Testing) Activities 17–18, 59
Interface Agreement Waratah Trains (PPTV Commissioning Activities) 17–18, 59
Interface Coordination Plan 33
Interface Management Plan 33
Interface Protocols 33, 46, 49, 71
Certificates of Readiness 33
Defect reporting systems 33
Handover and Pick-Up Protocols 33
Incident Response Plan 33
Updating of 49
Interfaces between RailCorp's "enabling works" and PPP Co's maintenance facility works 41
Interior train cleaning services 48
International Public Partnerships GP Ltd 9
International Public Partnerships Limited Partnership 9

J

John Holland Pty Ltd 18
John Tyrriil, Mr 13, 20, 75
John Tyrriil + Associates Pty Ltd 13, 20

Junior Bond Trust Deed 15, 58
Full name of 15
Parties to 15

K

"Key performance indicator payments" ("KPI payments") 52, 55, 58, 77, 81, 89
"Key performance indicators" 52, 58
"Key personnel" 32, 42, 52
Knorr-Bremse Australia Pty Ltd 13, 20, 22, 61, 95

L

Licence fee under Maintenance Facility Licence 50
Licence to access RailCorp's "rail corridor" and "out depots" 51
Local content requirement 45, 60
Local Industry Participation Plan 33, 45, 60
Local content requirement 45, 60
"Logistics support" services 48
Loss or damage
Liabilities for and responses to 65–68

M

Maintainability Demonstration Plan 33
Maintainability Programme 33, 48
Maintenance facility access areas 44, 50
Maintenance Facility Asset Management Plan 33
Maintenance Facility Commissioning Test Plan 33
Maintenance Facility Construction Contract 18, 21–23, 42, 73, 78, 83
Full name of 18
Parties to 18
Maintenance Facility Construction Contract Side Deed 21–23, 72–73, 75, 77–78, 83, 95
Parties to 21
Maintenance Facility Construction Contractor 76
Maintenance Facility Construction Guarantee 18, 21–23, 78, 85
Parties to 18
Maintenance Facility Construction Independent Certifier 12, 21
Identity of 12
Maintenance Facility Construction Independent Certifier Deed 21, 23, 78
Maintenance Facility Contractor 12–13, 18–19, 21, 42, 45, 59–63, 73–74, 78, 80–83, 85–88, 93
Maintenance Facility Contractor Guarantor 12, 18, 21, 85, 93
Identity of 12
Maintenance Facility Design Book 39–41
Maintenance Facility Handover Sub-Plan 33
Maintenance Facility Lease 19, 22, 25, 44, 50, 73, 75, 77, 79, 88, 91, 95
Maintenance Facility Licence 19, 22, 25, 34, 44, 50, 75, 77, 79, 88, 91, 95
Maintenance facility maintenance, repair and support services 49
Maintenance Facility Subcontract 18, 22–23
Full name of 18
Parties to 18
Maintenance Facility Works Delivery Plan 32–33
Maintenance Facility Commissioning Test Plan 33

Maintenance Facility Works Safety Assurance Report 33

Maintenance Site Interface Agreement TLS Phase 19, 22, 59, 95

Maintenance Site Safety Interface Agreement 22

Main Train 12, 19, 60

"Major safety breaches" 87, 89

Definition of 87

Malcolm Holmes QC 13, 20, 75

Manchester Road North

Conditions of site access licence concerning 40

Manufacturing Plan 33

Mass of trains 45

Master Configuration Status List 33

"Milestone" payments to PPP Co by RailCorp 37, 44–45, 52

Millennium trains

Option for PPP Co maintenance of 50

Mizuho Corporate Bank, Ltd 9, 15

Mock-Up Programme 33

Monitoring of TLS services by RailCorp 52

Moral rights 29, 40, 61

N

National Australia Bank Ltd 9, 15

National Public Private Partnership Guidelines 1, 62

National Rail Safety Accreditation Package 59

Native title claims 43

"Network access rights" for testing and commissioning of trains 34

"Agreed" network access rights 34

"Promised" network access rights 34

New Year's Eve

"Availability" obligations for 46

Noteholders, identities of 9

NSW Auditor-General 1, 62

NSW Rolling Stock PPP Common Terms Deed

See Common Terms Deed

NSW Rolling Stock PPP Facilitation Loan Agreement

See Facilitation Loan Agreement

NSW Rolling Stock PPP FGIC Junior Financial Guarantee – Junior Bonds 15

NSW Rolling Stock PPP Global Deed of Security 15

NSW Rolling Stock PPP Junior Bond Trust Deed

See Junior Bond Trust Deed

NSW Rolling Stock PPP Security Trust Deed 9

NSW Rolling Stock PPP Senior Bank Loan Note Subscription Agreement

See Senior Bank Loan Note Subscription Agreement

NSW Rolling Stock PPP Senior Bond Trust Deed

See Senior Bond Trust Deed

NSW Rolling Stock PPP Senior Guarantee and Reimbursement Deeds 15

NSW Rolling Stock PPP Senior Intercreditor Deed

Senior Intercreditor Deed 15

NSW Treasurer 7–9, 14–16, 22–24, 72, 95

O

Occupational health and safety 60

Occupational Health and Safety Act (NSW) 60

Occupational Health, Safety and Rehabilitation Plan 33

Office of Transport Safety Investigations (OTSI) 36, 47–49, 57–59

Operations Mobilisation Sub-Plan 33

"Operations" services 48, 52, 55, 58

Organisational Accountabilities Plan 33

Original Source Code Escrow Agreement

See Source Code Escrow Agreement

Out Depots Strategy 33

Overdue payments 55

Ownership or control

Restrictions on changes to 72

P

PAFA Act Guarantee 22–23, 73, 95

Parties to 22

Parties to the contracts 8

"Payment Regime" Schedule to the Project Contract 55–56, 58

Payments by PPP Co, PPP Co Holding Co and PPP Co Finance Co

to the State, under the Capital Commitment Deed 101

Payments by the Financial Guarantors

to the State, under the Financial Guarantors' Undertakings Deed 100

Payments by the State

to "top up" funder(s), under the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust 100

to PPP Co, under the Financial Guarantors' Undertakings Deed 101

to the existing investors, under the Existing Investors Side Deed in respect of the Reliance Rail Holding Trust 98–99

to the Financial Guarantors, under the Financial Guarantors' Undertakings Deed 100

Payments to PPP Co by RailCorp

Adjustment for cost of trains' earthing systems 45

"Availability payments" 37, 52, 55–57, 66–67, 69, 77, 81, 89

Calculation of 57

Treatment of negative payment amounts 57

for increased costs resulting from a RailCorp-initiated variation 71

for increased PPP Co costs following some "changes in law" 70, 72

for increased PPP Co costs following variations responding to changes to RailCorp's infrastructure 72

"Interest payment adjustment" payments 52, 55, 58, 81, 89

"Key performance indicator payments" ("KPI payments") 52, 55, 58, 77, 81, 89

"Milestone" payments 37, 44–45, 52

No PPP Co rights to set off 55

Overdue payments 55

RailCorp's rights to set off 55

"Reimbursable TLS payments" 52, 55, 58

Sale price of any trains acquired by RailCorp following an early termination of the Project Contract 79–80, 89–90, 92

Sharing of increased insurance costs 64

"Termination payments" following an early termination of the Project Contract 79–80, 89–90, 92

Payments to RailCorp by PPP Co

Adjustment for cost of trains' earthing systems 45

for "network access rights" for testing and commissioning of trains 34

for "possession" of "commissioning track" 34

for Call Option Deed options for the Maintenance Facility Lease and the Maintenance Facility Licence 50

for licence to access maintenance facility construction site for construction purposes 40

for licence to access maintenance facility construction site for preliminary site investigations 40

for reduced costs resulting from a RailCorp-initiated variation 71

for TLS-phase licence to access "rail corridor" and "out depots" 51

for train commissioning incidents causing cancellations of CityRail services 34

"Incident response payments" 55, 58

"Interest payment adjustment" payments 52, 55, 58, 81, 89

Licence fee under Maintenance Facility Licence 50

No PPP Co rights to set off 55

Overdue payments 55

RailCorp's rights to set off 55

Rent under Maintenance Facility Lease 50

Sharing of savings from reduced insurance costs 64

Performance monitoring system 52, 55

Accuracy and completeness of 52

Performance Reports 33, 52, 55

Permanent Custodians Ltd 12, 15

See Intercreditor Agent

Permanent Registry Ltd

See BNY Trust (Australia) Registry Ltd

"Persistent breach notices" 84

Physical Configuration Audits 33

Planning approval for maintenance facility 39–40, 60

Changes resulting from variations 39

Legal challenges to 39

"Possession" of "commissioning track" 34, 44, 50

"Post-termination TLS payments"

during retendering following a termination for a "PPP Co termination event" 89–90

PPP Co

Identity of 8

Ownership of 8

PPP Co breaches 80–88

"Final frequent breaches notices" 84, 87

"Final persistent breach notices" 84, 87

"Frequent breaches notices" 84, 86

"Persistent breach notices" 84

"PPP Co events of default" 85–86

PPP Co finance defaults 88

"PPP Co termination events" 87

RailCorp's general legal and equitable remedies 86

Replacement of subcontractor(s) to remedy 80

"Stepping in" by RailCorp to remedy 81–83, 86–87

"Stepping in" by Security Trustee to remedy 81–82, 87–88

- “Unacceptable availability notices” 84, 86
- “Unacceptable reliability notices” 84, 87
- “PPP Co events of default”
 - Cure Plans* 86–87
 - Definition of 85
 - Prevention Plans* 86–87
 - Responses to 86–87
- PPP Co Finance Co 9, 15, 21–22, 26–27, 29, 39, 58–59, 70, 73–74, 79–80, 90, 93, 96–98, 101–102
 - Cross-guarantee by 22
 - Identity of 9
 - Ownership of 9
- PPP Co Holding Co 9, 12, 14–16, 26–27, 29, 39, 59, 70, 72, 96–98, 101–102
 - Identity of 9
 - Ownership of 9
- “PPP Co related incidents” 37–38, 84
 - Definition of 37
- “PPP Co termination events”
 - Definition of 87
 - “Stepping in” by Security Trustee to remedy 87
 - Step-In Reports* 87–88
- Practical completion
 - of the maintenance facility 18–19, 25, 30, 34–36, 39, 42–45, 50, 63–64, 67
 - of the simulators 18, 30, 36, 38, 45, 48
 - of the trains 13, 16–19, 28, 30–31, 34–37, 39, 42–43, 45–46, 48–51, 53–58, 60, 63–66, 78, 80, 84, 89, 92, 96
 - General preconditions 30, 35
 - Original preconditions for the first “set” 30, 36
 - Original preconditions for the seventh “set” 30, 36–37
 - RailCorp Set 1 Letter 13, 16–17, 22, 30, 35–37
 - RailCorp Set 7 Letter 17, 19, 22, 24, 30, 35–37, 50, 57, 62, 96
- “Preliminary” design review 29, 44
- Prevention Plans* 86–87
- Priorities between RailCorp’s securities and the debt financiers’ securities 93
- Programme Management Plan* 32–33
- Project Contract
 - Components of 13
 - Full name of 13
 - Parties to 13
- “Project Plans” 32–33, 42, 44, 52
 - Configuration Management Plan* 32–33, 49
 - Contract Management Plan* 32–33
 - Maintenance Facility Works Delivery Plan* 32–33
 - Safety Management Plan* 32–33
 - Systems Assurance Plan* 32–33, 48
 - Through Life Support Plan* 32–33
 - Train and Simulator Delivery Plan* 32–33
 - Transition Plan* 32–33
- “Promised” network access rights 34
- Public Authorities (Financial Arrangements) Act (NSW) 7–8, 22–23, 95
- Public Authorities (Financial Arrangements) Amendment (Reliance Rail) Regulation 2012 (NSW) 8
- Public Authorities (Financial Arrangements) Regulation 2005 (NSW) 8
- Public sector comparator (PSC) 3
- R**
 - Rail safety 12, 17–19, 22, 28, 33–36, 48, 52, 58–59, 63, 87, 95
 - Accreditation Plan* 33
 - Construction Safety Assurance Report* 33
 - Critical Design Safety Assurance Report* 33
 - Implementation Safety Assurance Report (Interim)* 33, 36
 - Implementation Safety Assurance Report (Revenue Operation)* 30, 33, 36
 - Implementation Safety Assurance Report (Testing and Commissioning)* 33
 - Maintenance Facility Works Safety Assurance Report* 33
 - Safety Assurance Reports* 33, 59
 - System Definition Safety Assurance Report* 33
 - Tender Safety Assurance Report* 33
 - Through Life Support Safety Assurance Report* 33
 - Interface agreements 12, 17–19, 22, 59, 95
 - “Major safety breaches” 87, 89
 - Safety Committee 59
 - Safety Protocol* 59
 - Variation to RailCorp’s rail safety accreditation 59
 - Rail Safety Act (NSW) 33, 58–59, 85, 87
 - RailCorp 2012 Restructure Consent Deed 13, 15, 22, 24, 62, 69, 73–74, 96, 102
 - RailCorp 2012 Restructure Deed of Settlement 20, 22, 24, 62
 - RailCorp acquisition of trains 14, 19, 46, 53–55, 61, 77–80, 88–92, 94
 - RailCorp Deed of Charge 21–23, 44, 79–80, 82, 86, 89, 92–95
 - Parties to 21
 - RailCorp Enabling Works Specification* 38, 40–41
 - RailCorp Maintenance Facility Specification* 39–41
 - “RailCorp priority moneys” 90–91, 94
 - Definition of 94
 - “RailCorp project agreements”
 - Definition of 22
 - RailCorp Rolling Stock PPP Double Deck Trains Deed of Agreement and General Conditions of Contract
 - See Rolling Stock Subcontract
 - RailCorp Rolling Stock PPP Project Contract No C01645
 - See Project Contract
 - RailCorp Set 1 Letter 13, 16–17, 22, 30, 35–37
 - RailCorp Set 7 Letter 17, 19, 22, 24, 30, 33, 35–37, 50, 57, 62, 96
 - RailCorp Set 1 Waiver Letter
 - See RailCorp Set 1 Letter
 - RailCorp Set 7 Waiver Letter
 - See RailCorp Set 7 Letter
 - RailCorp Simulator Specification* 28–29
 - “RailCorp termination events”
 - Definition of 91
 - RailCorp Through Life Support Specification* 49, 51, 58
 - RailCorp Train Performance Specification* 28–29
 - Rates, liabilities for 61
 - RBS Funds Management (Australia) Ltd 9
 - RBS Rail Holdings (Australia) Pty Ltd 9
 - RBS Rail Investment (Australia) Trust 9
- “Re-basing adjustments” in calculating “availability payments” 56
- Redundancy payments at end of project 55
- Refinancing
 - Restrictions on 73–74
- “Refinancing assumptions” 73
- “Reimbursable TLS payments” to PPP Co by RailCorp 52, 55, 58
- “Reimbursable” repairs to the trains 49, 52, 55, 58
- Releases of claims 20, 22, 62
- “Reliability and disruption adjustments” 56–57
- Reliability Demonstration Plan* 33
- Reliability of the first six train “sets” 36
- Reliability of train “sets” 8 to 17 30, 37
- Reliability Programme* 33, 48
- Reliability, Availability, Maintainability and Safety (RAMS) Plan* 33
- Reliance Rail Finance Pty Ltd
 - See PPP Co Finance Co
- “Reliance Rail group”
 - Definition of 96
- Reliance Rail Holding Trust 9, 97
 - Ownership of 9
- Reliance Rail Holdings Pty Ltd
 - See PPP Co Holding Co
- Reliance Rail Pty Ltd
 - See PPP Co
- Reliance Rail Trust 8–9, 21, 26, 93, 96
 - Ownership of 9
- Reliance Rail Undertakings Deed 16, 24, 62, 96, 101–102
- Remediation of maintenance facility over last five years of the project 54
 - Security bond for 54
- Rent under Maintenance Facility Lease 50
- Requests for Technical Amendment
 - See Variations
- REST Infrastructure Trust 9
- REST Reliance Rail Pty Ltd 9
- “Restructure agreements” 7–9, 14–17, 20, 22, 24, 62, 69, 72–74, 96–102
 - Capital contribution by the State 96
 - Equity upside” arrangements 99–100
 - Fees 100
 - State purchases of shares, units and notes 98
- Restructure Co-ordination Deed 15, 22, 24, 62, 69, 96, 98–99, 101
- Retendering of the project
 - following a termination for a “PPP Co termination event” 89
- “Return conditions” 54
- “Returned” facilities 44, 50
 - Defects in 44
- Right of Entry Deed for Cardiff Maintenance Depot 21–23, 34, 72–73, 95
 - Parties to 21
- Risk Management Plan* 33
- Risk Register* 33
- Rolling Stock Maintenance Facility Design and Construct Subcontract
 - See Maintenance Facility Subcontract
- Rolling Stock Manufacture and TLS Independent Certifier Deed 21, 23, 78

- Rolling Stock Manufacture Contract 16–17, 21–23, 30–31, 34, 73, 78, 82–83
- Full name of 16
 - Parties to 16
- Rolling Stock Manufacture Contract Deed of Variation No 3 16, 31
- Rolling Stock Manufacture Contract Deed of Variation No 5 16, 31
- Rolling Stock Manufacture Contract RailCorp Rolling Stock PPP Deed of Variation No 3
- See Rolling Stock Manufacture Contract Deed of Variation No 3
- Rolling Stock Manufacture Contract RailCorp Rolling Stock PPP Deed of Variation No 5
- See Rolling Stock Manufacture Contract Deed of Variation No 5
- Rolling Stock Manufacture Contract Side Deed 21–23, 32, 72–73, 75, 77–78, 82–83, 95
- Parties to 21
- Rolling Stock Manufacture Guarantees 17, 21–23, 78, 85
- Parties to 17
- Rolling Stock Manufacture Independent Certifier 12, 21, 102
- Identity of 12
- Rolling Stock Manufacture Independent Verifier Deed 78
- Rolling Stock Manufacturer Guarantors 12, 17, 21, 85, 93, 102
- Identities of 12
- Rolling Stock Manufacturers 12–13, 15–17, 19–23, 28, 30–34, 45, 59–63, 73–74, 76, 78, 80–83, 85–88, 93, 95, 102
- Identity of 12
 - Ownership of 12
- Rolling Stock PPP Parent Company Guarantees
- See Rolling Stock Manufacture Guarantees
- Rolling Stock PPP Rolling Stock Maintenance Facility Design and Construct Contract
- See Maintenance Facility Construction Contract
- Rolling Stock PPP Rolling Stock Manufacture Contract
- See Rolling Stock Manufacture Contract
- Rolling Stock PPP Through Life Support (TLS) Contract
- See TLS Contract
- Rolling Stock Subcontract 17, 22–23
- Full name of 17
 - Parties to 17
- Royal Easter Shows
- “Availability” obligations for 46
- RSM Contractor Undertakings Deed 17, 24, 31, 96, 102
- RSM Set 1 Letter 16–17, 30–31
- RSM Set 7 Letter 16, 18–19, 24, 30–31, 62, 96
- RSM Set 1 Waiver Letter
- See RMS Set 1 Letter
- RSM Set 7 Waiver Letter
- See RMS Set 7 Letter
- S**
- Safety Accountability Statements* 33
- Safety Assurance Reports* 33, 59
- Safety Committee 59
- Safety interface agreements 12, 17, 19, 22, 59, 95
- Safety Management Plan* 32–33
- Accreditation Plan* 33
- Construction Safety Assurance Report* 33
 - Critical Design Safety Assurance Report* 33
 - Implementation Safety Assurance Report (Interim)* 33, 36
 - Implementation Safety Assurance Report (Revenue Operation)* 30, 33, 36
 - Implementation Safety Assurance Report (Testing and Commissioning)* 33
 - Maintenance Facility Works Safety Assurance Report* 33
 - Safety Assurance Reports* 33, 59
 - System Definition Safety Assurance Report* 33
 - Tender Safety Assurance Report* 33
 - Through Life Support Safety Assurance Report* 33
- Safety Accountability Statements* 33
- Safety Management System* 33, 59
- System Hazard Analysis* 33
- Safety Management System* 33, 59
- Safety Protocol* 59
- Sale price if RailCorp acquires any trains following an early termination of the Project Contract 79–80, 89–90, 92
- Security bonds 44
- “Delivery phase” 44
 - Remediation of maintenance facility over last five years of the project 54
- Security interests
- Restrictions on granting of 73
- Security Trustee 9, 13, 15–16, 18–19, 21–22, 32, 54, 64, 68–69, 72–74, 76–77, 79–84, 86–88, 90–91, 93–95, 102
- Identity of 9
 - Ownership of 9
- Senior bank lenders 15, 96
- Identities of 15
- Senior Bank Loan Note Subscription Agreement 15, 58, 74, 96–97, 102
- Full name of 15
 - Parties to 15
- Senior Bond Trust Deed 15, 74, 96–97
- Senior Intercreditor Deed 12, 15
- Senior Project Group 32, 42, 52
- Set
- Definition of 28
- Setting off 55
- Settlements 20, 22, 62
- Shareholders and unitholders, identities of 9
- Sigma Coachair Group Pty Ltd 13, 20, 22, 61, 95
- “Significant contracts” 31–32, 42, 52, 63, 78, 86
- Simulator Design Book* 28–29
- Simulator maintenance, repair and support services 49
- Software Detail Design Documents* 33
- Software Product Technical Specifications* 33
- Source Code Escrow Agreement 19, 22–23, 61, 95
- Full name 19
 - Parties to 19
- Special events
- “Availability payments” for 56
 - “Availability” obligations for 46
- Staff Cleaning Manual* 58
- Staff Out-Placement Sub-Plan* 33
- Stamp duties 61
- State Owned Corporations Act (NSW) 8
- “Steady state” phase
- Definition of 46
- Step-In Reports* 87–88
- “Stepping in” by Security Trustee to remedy a “force majeure event” 77
- “Stepping in” by PPP Co
- under Right of Entry Deed for Cardiff Maintenance Depot 34
- “Stepping in” by RailCorp to remedy a PPP Co breach 81–83, 86–87
- “Stepping in” by RailCorp to remedy a TLS Contractor breach of the FMFS Access Agreement 83
- “Stepping in” by Security Trustee to remedy a “PPP Co termination event” 87–88
- Step-In Reports* 87–88
- “Stepping in” by Security Trustee to remedy a PPP Co breach 81–82, 87–88
- Steven Goldstein, Mr 13, 20, 75
- Subcontracting by PPP Co 31–32, 42, 51–52, 63, 78, 86
- “Significant contracts” 31–32, 42, 52, 63, 78, 86
- Substitution of trains 46
- Sumitomo Mitsui Banking Corporation, Sydney Branch 9, 15
- Suspension of a termination for a “RailCorp termination event” 91
- Sydac Pty Ltd 13, 20, 22, 61, 95
- Syncora Guarantee Inc 12, 15
- See Financial Guarantors
- Syncora Holdings Ltd 12
- System Definition Safety Assurance Report* 33
- “System definition” design review 29, 44
- System Hazard Analysis* 33
- Systems Assurance Plan* 32–33, 35, 43, 45, 48
- Accessibility Report* 33
 - As-Built Design Documentation* 33
 - Design Management Plan* 33
 - Exterior and interior design optimisation study reports 33
 - Failure Reporting and Corrective Action System* 33
 - Fleet Management Systems* 33
 - Human Factors and Ergonomics Report* 33
 - ICT Architecture Management Strategy* 33
 - ICT Capability Strategy* 33
 - ICT Software Systems Management Plan* 33
 - Independent design verification reports and certificates 33
 - Integrated Test Plan* 33, 35, 43, 45
 - Test Report Summary* 33
 - Test Reports* 33
 - Test Specifications* 33
 - Train Testing and Commissioning Network Access Plan* 33
- Interior appearance trade-off study report 33
- Maintainability Programme* 33, 48
- Mock-Up Programme* 33
- Reliability Programme* 33, 48
- Reliability, Availability, Maintainability and Safety (RAMS) Plan* 33
- Software Detail Design Documents* 33

Software Product Technical Specifications 33
Technical Maintenance Plan 33, 48
Technical Review Plan and Programme 33
Variation management system 33
Systems Assurance Process 33
Systems Commissioning and Data Population Plan 33

T

Tadgell's Bluebells (*Wahlenbergia multicaulis*) 39
Taxes, liabilities for 61
Technical Maintenance Plan 33, 48
Technical Review Plan and Programme 33
Technical Support Continuity Sub-Plan 33
"Technical" services 48
Tender Safety Assurance Report 33
Termination of the Project Contract
for a "PPP Co termination event" 87–91
Retendering of the project 89
for a "RailCorp termination event" 91
RailCorp's rights to suspend termination 91
for an "uninsurable risk" 77–79
for *force majeure* 77–79
Limited grounds for 77
"Post-termination TLS payments" during retendering of the project 89–90
Sale price for any trains acquired by RailCorp after an early termination 79–80, 89–90, 92
"Termination payments" 79–80, 89–90, 92
"Voluntary" termination by RailCorp 79–80
"Termination payments" 79–80, 89–90, 92
Terrorism Insurance Act (Cth) 76
Test Report Summary 33
Test Reports 33
Test Specifications 33
Testing and Refinement of the Interface Protocols and Procedures Sub-Plan 33
Testing by RailCorp 33, 43
Thales Australia Ltd 13, 20, 22, 61, 95
The Bank of New York Mellon Corporation 12
Threatened Species Conservation Act (NSW) 39
Through Life Support (Availability and Reliability) Management Plan 33
Through Life Support (TLS)—Fleet Management System Access Agreement
See FMFS Access Agreement
Through Life Support Description 49, 51
Through Life Support Plan 32–33
Interface Protocols 33, 46, 49
Certificates of Readiness 33
Defect reporting systems 33
Handover and Pick-Up Protocols 33
Incident Response Plan 33
Maintenance Facility Asset Management Plan 33
Through Life Support (Availability and Reliability) Management Plan 33
Through Life Support Safety Assurance Report 33
"Through life support" ("TLS") phase
Definition of 48
"Through life support" ("TLS") services
Auditing by RailCorp 52
"Availability payments" 37, 52, 55–57, 66–67, 69, 77, 81, 89

Contract Management Requirements 33
Contract management system 52
Extensions of expiry date 53
Extensions of the term of the project 53
Fitness for intended purposes 49
Handover at end of project 54
Inspections by RailCorp 52, 54
Interface Protocols 49
"Key performance indicator payments" ("KPI payments") 52, 55, 58, 77, 81, 89
"Key performance indicators" 52, 58
"Key personnel" 52
Licence to access RailCorp's "rail corridor" and "out depots" 51
"Logistics support" services 48
Maintenance Facility Lease 50
Maintenance Facility Licence 50
Maintenance facility maintenance, repair and support services 49
Millennium trains (option for PPP Co maintenance of) 50
Monitoring by RailCorp 52
"Operations" services 48, 52, 55, 58
Original expiry date 53
Performance monitoring system 52, 55
Accuracy and completeness of 52
Performance Reports 33, 52, 55
PPP Co's general obligations 48–49
"Project Plans" 33, 52
RailCorp Through Life Support Specification 49, 51, 58
RailCorp train crews 48
RailCorp's general obligations 48
Reform plan under the RailCorp Set 7 Letter 37, 50
"Reimbursable TLS payments" 52, 55, 58
"Reimbursable" repairs to the trains 49, 52, 55, 58
"Reliability and disruption adjustments" 56–57
Remediation of maintenance facility over last five years of the project 54
Scope of services 48–49
Simulator maintenance, repair and support services 49
Subcontracting 52, 63, 78, 86
"Technical" services 48
Through Life Support Description 49, 51
Train maintenance and repair services 48
Incident response services 48
Wheel profiling services 48, 52, 55, 58
Train presentation services 48
External train washing services 48, 52, 55, 58
Internal train cleaning services 48
Variations 32, 49, 70–72
TLS Contract 18–19, 21–23, 51, 73, 78, 83
Full name of 18
Parties to 18
TLS Contract Side Deed 21–23, 72–73, 75, 77–78, 83, 95
Parties to 21
TLS Contractor 12–13, 18–22, 28, 46, 50–52, 59–63, 72–74, 76, 78, 80–83, 85–88, 93, 95
Identity of 12

TLS Guarantee 19, 21–23, 78, 85
Parties to 19
TLS Guarantor 12, 19, 21, 85
Identity of 12
TLS Independent Certifier 12, 21
Identity of 12
TLS Independent Certifier Deed
See Rolling Stock Manufacture and TLS Independent Certifier Deed
"Top up" funding 15–16, 97, 100–101
Reimbursement by the State 100
Trade apprenticeships requirement 60
Trade Practices Act (Cth) 26
Train "availability"
Deemed "availability" 47, 72
Definition of 46–47
Train "availability" obligations 45–46
Routine obligations 46
Special events 46
Train deliveries 46
Train substitutions 46
"Unacceptable availability notices" 84, 86
Train and Simulator Delivery Plan 32–33
Manufacturing Plan 33
Train cleaning services 48
Train deliveries 46
Train Design Book 28–29
Train maintenance and repair services 48
Incident response services 48
Wheel profiling services 48, 52, 55, 58
Train presentation services 48
External train washing services 48, 52, 55, 58
Internal train cleaning services 48
Train repair services 48
Train substitutions 46
Train Testing and Commissioning Network Access Plan 33
Train washing services 48, 52, 55, 58
Training Management Sub-Plan 33
Training materials
Updating of 48
Transfer duty 61
Transfers and encumbrances
Restrictions on 73
Transfers at end of project 54
Transition Plan 32–33
Transition-In Plan 33
Transition-Out Plan 33
"Transition-in adjustments" in calculating "availability payments" 56–57
Transition-In Communications Sub-Plan 33
Transition-In Plan 33
Operations Mobilisation Sub-Plan 33
Interface Coordination Plan 33
Out Depots Strategy 33
Systems Commissioning and Data Population Plan 33
Testing and Refinement of the Interface Protocols and Procedures Sub-Plan 33
Training Management Sub-Plan 33
Transition-In Communications Sub-Plan 33
Transition-In Stabling Sub-Plan 33
Transition-In Support Sub-Plan 33

Transition-In Stabling Sub-Plan 33
Transition-In Support Sub-Plan 33
"Transition-in" phase
 Definition of 46
Transition-Out Plan 33
 Decommissioning of the Sets Sub-Plan 33
 Maintenance Facility Handover Sub-Plan 33
 Staff Out-Placement Sub-Plan 33
 Technical Support Continuity Sub-Plan 33
 Transition-Out Support Sub-Plan 33
Transition-Out Support Sub-Plan 33
"Transition-out" phase
 Definition of 46
Transport Administration Act (NSW) 8, 84, 86–87
Transport for NSW 8, 30, 37
Treasurer (NSW) 7–9, 14–16, 22–24, 72, 95
Trust Deed (Holding)—Reliance Rail Holding Trust 9
Trust Deed (Operating)—Reliance Rail Trust 8
Tyrril, Mr John 13, 20, 75

U

"Unacceptable availability notices" 84, 86
"Unacceptable reliability notices" 84, 87
"Uninsurable risks" 65, 68–69, 77–79
 Responses to 69
 Termination for 69, 77–79
United Group Rail Services Ltd 12, 19, 60
Unitholders Agreement 14, 99
Unitholders and shareholders, identities of 9
Utility service charges, liabilities for 61
Utility services 41, 61, 76

V

Variations 14, 28–29, 32, 40–41, 47, 49, 70–72
Voith Turbo Pty Ltd 13, 20, 22, 61, 95
"Volume adjustments" in calculating "availability payments" 56, 81, 89
"Voluntary" termination of the Project Contract by RailCorp 79–80

W

Wahlenbergia multicaulis 39
Waiver of Preconditions to PC of Set 7
 See RailCorp Set 7 Letter
Waivers
 Restrictions on 72
Weight of trains 45
Westpac Banking Corporation 9, 15
Wheel profiling services 48, 52, 55, 58
Wheels Management Plan 33
Working with Government: Guidelines for Privately Financed Projects 1, 15–16, 62, 96, 98, 102, 112

X

XL Capital Assurance Inc
 See Syncora Guarantee Inc



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