

FMFS Access Agreement Side Deed

Rail Corporation New South Wales

ABN 59 325 778 353

RailCorp

Reliance Rail Pty Limited

as trustee of the Reliance Rail Trust

ABN 48 077 619 824

PPP Co

EDI Rail PPP Maintenance Pty Limited

ABN 97 122 730 116

TLS Contractor

Downer EDI Rail Pty Limited

ABN 92 000 002 031

DEDIR

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FMFS Access Agreement Side Deed made at Sydney on 19 JANUARY 2012

- Parties**
- Rail Corporation New South Wales ABN 59 325 778 353** of Level 22, 323 Castlereagh Street, Sydney, New South Wales ("**RailCorp**")
- Reliance Rail Pty Limited** as trustee of the **Reliance Rail Trust ABN 48 077 619 824** of Suite 2, Level 9, 333 George Street, Sydney, New South Wales ("**PPP Co**")
- EDI Rail PPP Maintenance Pty Limited** ABN 97 122 730 116 of 154 Manchester Road North, Auburn , New South Wales ("**TLS Contractor**")
- Downer EDI Rail Pty Limited ABN 92 000 002 031** of 2B Factory Street, Granville, New South Wales ("**DEDIR**")

Background

- A. Under the Project Contract, PPP Co is required to, amongst other things, provide Through Life Support for the Cars, the Simulators and the Maintenance Facility.
- B. PPP Co has subcontracted its obligations to provide Through Life Support for the Cars, the Simulators and the Maintenance Facility to the TLS Contractor pursuant to the TLS Contract.
- C. The TLS Contractor has contracted with DEDIR for DEDIR to provide it with access to DEDIR's FMFS pursuant to the FMFS Access Agreement to enable the TLS Contractor to perform some of its obligations under the TLS Contract.
- D. The TLS Contractor and DEDIR has agreed to grant RailCorp and PPP Co certain rights in relation to the FMFS Access Agreement.

Operative provisions

1. Definitions and interpretation

1.1 Project Contract definitions

Definitions in the TLS Contract apply in this deed unless the context requires otherwise or the relevant term is defined in this deed.

1.2 Definitions

In this deed:

"Approved Nominee" means a person nominated by PPP Co or RailCorp and approved by DEDIR (such approval not to be unreasonably withheld or delayed) as:

- (a) having legal capacity, power and authority to become a party to and perform the obligations of the TLS Contractor under the FMFS Access Agreement; and
- (b) employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it (including committed financial resources and sub contracts) which are sufficient to enable it to perform the obligations of the TLS Contractor under the FMFS Access Agreement.

"Assumption Notice" means the notice referred to in clause 4.1 or clause 5.1.

"Business Day" means a day which is not a Saturday, Sunday or public holiday in Sydney.

"Collateral Warranty Deed" means each collateral warranty deed required to be provided in accordance with clause 2 of Schedule 3 of the FMFS Access Agreement.

"Default Event" means:

- (a) any default (howsoever described) by the TLS Contractor under the FMFS Access Agreement; or
- (b) any other event or circumstance,

which alone or with the giving of notice or passage of time or both, would entitle DEDIR to terminate, rescind, accept the repudiation of, or suspend any or all of DEDIR's obligations under, the FMFS Access Agreement.

"Default Event Notice to PPP Co" has the meaning given to it in clause 2.2.

"Default Event Notice to RailCorp" has the meaning given to it in clause 3.2(a).

"FMFS" has the meaning given to it in clause 1.1 of the FMFS Access Agreement.

"FMFS Access Agreement" means the agreement entitled "Through Life Support (TLS) - Fleet Management Facility System Access Agreement" between the TLS Contractor and DEDIR dated on or about the date of this deed and, if PPP Co or RailCorp gives an Assumption Notice, any new contract entered into pursuant to clause 4.2(a) or clause 5.2(a).

"Project Contract" means the deed entitled "RailCorp Rolling Stock PPP Project Contract No. CO1645" between RailCorp and PPP Co dated 3 December 2006.

"RailCorp Cure Notice" has the meaning given to it in clause 3.2(c).

1.3 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

- (b) **"person"** includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee;
- (d) a reference to a document (including this deed) is to that document as updated, varied, novated, ratified or replaced from time to time;
- (e) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (f) a word importing the singular includes the plural (and vice versa), and a word importing a gender includes every other gender;
- (g) a reference to a party, clause, schedule, exhibit, annexure or attachment is a reference to party, clause, schedule, exhibit, annexure or attachment to or of this

deed, and a reference to this deed includes all schedules, exhibits, annexures and attachments to it;

- (h) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) **"includes"** in any form is not a word of limitation; and
- (j) a reference to "\$" or **"dollar"** is to Australian currency.

1.4 Replacement body interpretation

Where a reference is made to any body or authority which ceases to exist ("**Former Body**"), that reference will be to that body or authority ("**Replacement Body**") which then serves substantially the same functions as the Former Body. Any reference to the president or other senior officer of the Former Body will be to the president or senior officer of the Replacement Body.

1.5 No bias against drafting party

Each provision of this deed will be interpreted without disadvantage to the party who (or whose representative) drafted that provision.

1.6 Business Day

If the day on or by which any thing is to be done under this deed is not a Business Day, that thing must be done no later than the next Business Day.

1.7 Inconsistencies

To the extent of any inconsistency between the terms of this deed and the FMFS Access Agreement, this deed will prevail over the FMFS Access Agreement.

1.8 Project Contract and TLS Contract

Each party acknowledges that they have received a copy of the Project Contract and the TLS Contract.

1.9 Capacity

PPP Co enters into this deed as trustee of the Trust.

2. PPP Co's right to cure Default Event

2.1 PPP Co's cure rights

- (a) On becoming aware of any Default Event (and subject to clause 2.1(b)), PPP Co may (but is not obliged to) take steps to cure or remedy, or procure the cure or remedy of, that Default Event.
- (b) Clause 2.1(a) only applies if:
 - (i) the TLS Contractor has not, within a reasonable time of the Default Event occurring, taken steps to cure or remedy the Default Event;
 - (ii) the TLS Contractor, having taken such steps, has failed to cure or remedy the Default Event within a reasonable time; or

- (iii) DEDIR has issued a notice pursuant to clause 20.1 of the FMFS Access Agreement;

and PPP Co has then given written notice to each of RailCorp, the TLS Contractor and DEDIR of its intention to take steps to cure or remedy, or procure the cure or remedy of, the Default Event.

- (c) Upon PPP Co exercising any of its rights under this clause 2.1, the TLS Contractor's obligations under the FMFS Access Agreement are suspended to the extent and for such period as the TLS Contractor is prevented from performing such obligations by PPP Co's exercise of its step-in rights.
- (d) If PPP Co exercises its step-in rights, PPP Co may, after giving reasonable prior notice to the TLS Contractor, cease to exercise that right, and in any event, will cease to exercise its step-in rights once the relevant Default Event has been remedied.

2.2 Default Event Notice

Before DEDIR will become entitled to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under the FMFS Access Agreement, DEDIR must give to PPP Co a written notice ("**Default Event Notice to PPP Co**") setting out details of the Default Event giving rise to the right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the FMFS Access Agreement, together with the statements referred to in clause 2.3;

2.3 Statements concerning Default Event

As part of any Default Event Notice to PPP Co, DEDIR must submit to PPP Co statements of:

- (a) where the Default Event is a monetary default, the amount which must be paid to DEDIR to remedy the Default Event; and
- (b) where the Default Event is of a non-monetary nature:
 - (i) the provisions of the FMFS Access Agreement alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable PPP Co to identify the material facts;
 - (iii) the steps reasonably required to cure or remedy the specified breaches or conditions not fulfilled if reasonably capable of cure or remedy; and
 - (iv) the time within which the specified steps can reasonably be expected to be taken.

2.4 Warranty of accuracy

DEDIR warrants to PPP Co that statements submitted by it under clause 2.3 will be, so far as reasonably practicable, true, complete and accurate statements of the amounts to which DEDIR considers itself entitled.

2.5 Disputes as to statements

If PPP Co disputes the amount of any claim or the existence of any default referred to in a Default Event Notice to PPP Co:

- (a) PPP Co must pay the amount not in dispute;

- (b) upon resolution of the dispute in accordance with this deed, the parties must make payments as determined; and
- (c) during the period of dispute resolution, all parties must continue to perform their obligations under this deed and the FMFS Access Agreement.

2.6 Verification

PPP Co may appoint a firm of independent chartered accountants or a firm of technical advisers, in each case approved by the TLS Contractor and DEDIR (such approval not to be unreasonably withheld or delayed), to verify (at the cost of the TLS Contractor) statements submitted by DEDIR, and DEDIR must (subject to such firm(s) executing an appropriate confidentiality agreement as DEDIR may reasonably request) permit such firm to have access to and make copies of all records, documents, data and accounting and other information not subject to legal (including, without limitation, solicitor and own client) and other professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such statements.

2.7 No liability

The TLS Contractor and DEDIR acknowledge that, without limiting the liability of the TLS Contractor (which continues to be responsible for the performance of its obligations under the FMFS Access Agreement), and without limiting PPP Co's obligations under clause 4.2, PPP Co will not be liable for any obligation or liability of the TLS Contractor under the FMFS Access Agreement by reason only of PPP Co performing the TLS Contractor's obligations in accordance with the FMFS Access Agreement. The TLS Contractor and DEDIR each release PPP Co from any such liability.

2.8 TLS Contractor to compensate PPP Co

Any reasonable Loss suffered or incurred by PPP Co arising out of or in any way in connection with the exercise of its rights under this clause 2 will be a debt due from the TLS Contractor to PPP Co.

2.9 No limitation on other rights

The exercise (or failure to exercise) by PPP Co of its rights under this clause 2 will not limit PPP Co's rights against the TLS Contractor under the Project Agreements or otherwise according to law.

3. RailCorp's right to cure Default Event

3.1 RailCorp's cure rights

- (a) On becoming aware of any Default Event (and subject to clause 3.1(b)), RailCorp may (but is not obliged to) take steps to cure or remedy, or procure the cure or remedy of, that Default Event.
- (b) Clause 3.1(a) only applies if:
 - (i) the TLS Contractor:
 - A. has not, within a reasonable time of the Default Event occurring, taken steps to cure or remedy the Default Event; or
 - B. having taken such steps, has failed to cure or remedy the Default Event within a reasonable time; and

- (ii) DEDIR has issued a notice pursuant to clause 20.1 of the FMFS Access Agreement; and
- (iii) PPP Co:
 - A. has not, within 5 Business Days (or such longer time as agreed between the parties) of the Default Event occurring, taken steps to cure or remedy the Default Event; or
 - B. having taken such steps, has failed to cure or remedy the Default Event within a reasonable time,

and RailCorp has then given written notice to each of PPP Co, the TLS Contractor and DEDIR of its intention to take steps to cure or remedy, or procure the cure or remedy of, the Default Event.

- (c) Upon RailCorp exercising any of its rights under this clause 3.1, the TLS Contractor's obligations under the FMFS Access Agreement are suspended to the extent and for such period as the TLS Contractor is prevented from performing such obligations by RailCorp's exercise of its step-in rights.
- (d) If RailCorp exercises its step-in rights, RailCorp may, after giving reasonable prior notice to the TLS Contractor, cease to exercise that right, and in any event, will cease to exercise its step-in rights once the relevant Default Event has been remedied.

3.2 Restriction on right to terminate or suspend

DEDIR must not terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the FMFS Access Agreement unless each of the following conditions has been satisfied:

- (a) DEDIR has given to RailCorp prior written notice ("**Default Event Notice to RailCorp**") setting out details of the Default Event giving rise to the right to terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations under, the FMFS Access Agreement, together with the statements referred to in clause 3.3;
- (b) DEDIR has given written notice to RailCorp confirming that PPP Co has not, within 5 Business Days (or such longer time as agreed between the parties) of the Default Event occurring, taken steps to cure or remedy the Default Event, or having taken such steps, has failed to cure or remedy the Default Event within a reasonable time; and
- (c) DEDIR has given written notice to RailCorp ("**RailCorp Cure Notice**") confirming that, either:
 - (i) if the Default Event is capable of cure or remedy within 20 Business Days (or such longer period as is permitted under the FMFS Access Agreement or agreed to by DEDIR), that Default Event has not been cured or remedied within 20 Business Days (or such longer period as is permitted under the FMFS Access Agreement or agreed to by DEDIR) after the date on which the RailCorp Cure Notice is given to RailCorp;
 - (ii) if the Default Event is not one described in clause 3.2(c)(i) but is nevertheless reasonably capable of cure or remedy, RailCorp has not commenced curing or remedying the Default Event within 20 Business

Days after the date on which RailCorp Cure Notice is given and has not continued to diligently pursue that cure or remedy;

- (iii) if the Default Event is not reasonably capable of cure or remedy and the Default Event Notice contains a claim for reasonable compensation for the Default Event, the TLS Contractor, PPP Co or RailCorp (or another person on behalf of any of them) have not paid or otherwise provided that compensation within 20 Business Days (or such longer period as is permitted under the FMFS Access Agreement or agreed to by DEDIR) after the date on which RailCorp Cure Notice is given to RailCorp;
- (iv) if the Default Event is not reasonably capable of cure or remedy and the Default Event Notice does not contain a claim for reasonable compensation for the Default Event, RailCorp does not commence and continue to perform PPP Co's obligations under the FMFS Access Agreement within 20 Business Days (or such longer period as is permitted under the FMFS Access Agreement or agreed to by DEDIR) after the date on which the RailCorp Cure Notice is given to RailCorp; or
- (v) RailCorp notified DEDIR in writing after receipt of the RailCorp Cure Notice that it elects not to cure or remedy, or procure the cure or remedy of, the Default Event.

3.3 Statements concerning Default Event

As part of any Default Event Notice to RailCorp, DEDIR must submit to RailCorp statements of:

- (a) where the Default Event is a monetary default, the amount which must be paid to DEDIR to remedy the Default Event; and
- (b) where the Default Event is of a non-monetary nature:
 - (i) the provisions of the FMFS Access Agreement alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable RailCorp to identify the material facts;
 - (iii) the steps reasonably required to cure or remedy the specified breaches or conditions not fulfilled if reasonably capable of cure or remedy; and
 - (iv) the time within which the specified steps can reasonably be expected to be taken.

3.4 Warranty of accuracy

DEDIR warrants to RailCorp that statements submitted by it under clause 3.3 will be, so far as reasonably practicable, true, complete and accurate statements of the amounts to which DEDIR considers itself entitled.

3.5 Disputes as to statements

If RailCorp disputes the amount of any claim or the existence of any default referred to in a Default Event Notice to RailCorp:

- (a) RailCorp must pay the amount not in dispute;

- (b) upon resolution of the dispute in accordance with this deed, the parties must make payments as determined; and
- (c) during the period of dispute resolution, all parties must continue to perform their obligations under this deed and the FMFS Access Agreement.

3.6 Verification

RailCorp may appoint a firm of independent chartered accountants or a firm of technical advisers, in each case approved by the TLS Contractor and DEDIR (such approval not to be unreasonably withheld or delayed), to verify (at the cost of the TLS Contractor) statements submitted by DEDIR, and DEDIR must (subject to such firm(s) executing an appropriate confidentiality agreement as DEDIR may reasonably request) permit such firm to have access to and make copies of all records, documents, data and accounting and other information not subject to legal (including, without limitation, solicitor and own client) and other professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such statements.

3.7 No liability

The TLS Contractor and DEDIR acknowledge that, without limiting the liability of the TLS Contractor (which continues to be responsible for the performance of its obligations under the FMFS Access Agreement), and without limiting RailCorp's obligations under clause 5.2, RailCorp will not be liable for any obligation or liability of the TLS Contractor under the FMFS Access Agreement by reason only of RailCorp performing the TLS Contractor's obligations in accordance with the FMFS Access Agreement. The TLS Contractor and DEDIR each release RailCorp from any such liability.

3.8 PPP Co to compensate RailCorp

Any reasonable Loss suffered or incurred by RailCorp arising out of or in any way in connection with the exercise of its rights under this clause 3 will be a debt due from PPP Co to RailCorp.

3.9 No limitation on other rights

The exercise (or failure to exercise) by RailCorp of its rights under this clause 3 will not limit RailCorp's rights against PPP Co or the TLS Contractor under the RailCorp Project Agreements or otherwise according to law.

4. PPP Co's right to assume TLS Contractor's rights and obligations under FMFS Access Agreement

4.1 Option

If PPP Co terminates the TLS Contract then PPP Co may exercise its rights under this clause 4 by giving a notice ("**Assumption Notice**") to DEDIR.

4.2 FMFS Access Agreement

If PPP Co gives an Assumption Notice then, subject to clause 4.3:

- (a) (**New Contract**): as from the date of the Assumption Notice:
 - (i) the FMFS Access Agreement will be terminated;

- (ii) a new contract will be deemed to have been entered into, on the same terms as the FMFS Access Agreement, except that:
- A. the TLS Contractor will not be a party to the new contract;
 - B. PPP Co (or, subject to clause 4.2(b), the Approved Nominee) will be named as a party to the new contract in substitution for the TLS Contractor;
 - C. the terms of the new contract will be in the form of the FMFS Access Agreement which will be deemed to be amended as required to reflect the fact that the TLS Contract is at an end, and that the new contract (unlike the FMFS Access Agreement) must operate independently of the TLS Contract, on the basis that:
 - 1) the rights and obligations which PPP Co (or, subject to clause 4.2(b), the Approved Nominee) will assume under the new contract will be equivalent to those which TLS Contractor would have had under the FMFS Access Agreement had the TLS Contract not been terminated;
 - 2) the rights and obligations which DEDIR will assume under the new contract will be equivalent to those which DEDIR would have had under the original FMFS Access Agreement had the TLS Contract not been terminated;
 - 3) any provisions of the TLS Contract or the Project Contract incorporated by reference into the FMFS Access Agreement are incorporated in the new contract;
 - 4) clause 7.4(e)(iii) of the FMFS Access Agreement is replaced with: *"if the parties cannot agree upon the amount which PPP Co must pay for the upgrade or other variation, PPP Co must pay the reasonable costs incurred by DEDIR in implementing the upgrade or other variation, plus 15% of such costs on account of profit and contribution to overheads"*; and
 - 5) the baseline Access Fee in Item 2 of Schedule 1 of the FMFS Access Agreement is \$1,960,854 per annum payable monthly in arrears in equal instalments, adjusted for any annual adjustment in accordance with clause 10.5 of the FMFS Access Agreement;
- (iii) the new contract will thereafter be known as the FMFS Access Agreement;
- (iv) DEDIR must perform for PPP Co (or, subject to clause 4.2(b), the Approved Nominee) all of the obligations of DEDIR to the TLS Contractor under the new FMFS Access Agreement;

- (v) PPP Co (or, subject to clause 4.2(b), the Approved Nominee) will assume all the rights and undertake all the obligations of the TLS Contractor under the new FMFS Access Agreement;
- (vi) subject to clause 4.3, DEDIR will have the same rights against PPP Co (or, subject to clause 4.2(b), the Approved Nominee) as it would have had against the TLS Contractor under the FMFS Access Agreement; and
- (vii) for the avoidance of doubt, the TLS Contractor will not have any liability arising in connection with the new FMFS Access Agreement.

If after the date of the Assumption Notice given under this clause 4.2, there is a dispute between PPP Co and DEDIR as to how the terms of the new contract are deemed to have been amended pursuant to clause 4.2(a)(ii)C, then upon either party serving a written notice to this effect upon the other, the dispute will be determined by an expert as if clauses 53.4 - 53.8 of the TLS Contract were incorporated in this deed but as if:

- (viii) references in those clauses to "the TLS Contractor" were references to "DEDIR";
- (ix) references to "the parties" were references to "PPP Co and DEDIR";
- (x) references to a "party" were references to "PPP Co" or "DEDIR" (as appropriate);
- (xi) references in those clauses to "Dispute" were references to this dispute; and
- (xii) the dispute had been appropriately referred to expert determination.

(b) **(Approved Nominee):** PPP Co may request that an Approved Nominee be named as a party to the new contract in substitution for the TLS Contractor, in which event:

- (i) DEDIR must notify PPP Co as to whether any person nominated by PPP Co is an Approved Nominee, on or before the date falling 30 days after the date of receipt of all information reasonably required by DEDIR to decide whether the nominated person is an Approved Nominee;
- (ii) DEDIR must not unreasonably withhold or delay its decision on whether the nominated person is an Approved Nominee;
- (iii) DEDIR must enter into a side deed with PPP Co and the Approved Nominee on substantially the same terms as this deed; and
- (iv) for the avoidance of doubt, the TLS Contractor will not have any liability arising in connection with the new FMFS Access Agreement.

(c) **(Other documents under the FMFS Access Agreement):** If PPP Co gives an Assumption Notice then, as from the date of the Assumption Notice, the TLS Contractor must procure the novation or assignment to PPP Co (or, subject to clause 4.2(b), the Approved Nominee) of:

- (i) each Collateral Warranty Deed held by the TLS Contractor (but without prejudice to the rights of the TLS Contractor under the

Collateral Warranty Deed arising out of acts or omissions which occurred prior to the date of the Assumption Notice); and

- (ii) the Approved Escrow Deed entered into by the TLS Contractor and DEDIR pursuant to clause 17.5(a) of the FMFS Access Agreement.

4.3 Obligations prior to Assumption Notice

- (a) Clause 4.2 will not operate to require PPP Co (or, if applicable, the Approved Nominee) to assume any obligations or liabilities of the TLS Contractor under the FMFS Access Agreement which relate to or arise from the period prior to the date of the Assumption Notice.
- (b) PPP Co (or, if applicable, the Approved Nominee) will not be subject to any set-off or counterclaim by DEDIR which arises out of circumstances which relate to the period prior to the date of the Assumption Notice.
- (c) Nothing in this deed will affect the rights and obligations of the TLS Contractor and DEDIR under the FMFS Access Agreement which accrued prior to the date of the Assumption Notice.

5. RailCorp's right to assume TLS Contractor's rights and obligations under FMFS Access Agreement

5.1 Option

If RailCorp terminates the Project Contract then RailCorp may exercise its rights under this clause 5 by giving a notice ("**Assumption Notice**") to DEDIR.

5.2 FMFS Access Agreement

If RailCorp gives an Assumption Notice then, subject to clause 5.3:

- (a) (**New Contract**): as from the date of the Assumption Notice:
 - (i) the FMFS Access Agreement will be terminated;
 - (ii) a new contract will be deemed to have been entered into, on the same terms as the FMFS Access Agreement, except that:
 - A. the TLS Contractor will not be a party to the new contract;
 - B. RailCorp (or, subject to clause 5.2(b), the Approved Nominee) will be named as a party to the new contract in substitution for the TLS Contractor;
 - C. the terms of the new contract will be in the form of the FMFS Access Agreement which will be deemed to be amended as required to reflect the fact that the Project Contract is at an end, and that the new contract (unlike the FMFS Access Agreement) must operate independently of the TLS Contract, on the basis that:
 - 1) the rights and obligations which RailCorp (or, subject to clause 5.2(b), the Approved Nominee) will assume under the new contract will be equivalent to those which TLS Contractor would

have had under the FMFS Access Agreement had the Project Contract not been terminated;

- 2) the rights and obligations which DEDIR will assume under the new contract will be equivalent to those which DEDIR would have had under the original FMFS Access Agreement had the Project Contract not been terminated;
 - 3) any provisions of the TLS Contract or the Project Contract incorporated by reference into the FMFS Access Agreement are incorporated in the new contract;
 - 4) clause 7.4(e)(iii) of the FMFS Access Agreement is replaced with: "*if the parties cannot agree upon the amount which RailCorp must pay for the upgrade or other variation, RailCorp must pay the reasonable costs incurred by DEDIR in implementing the upgrade or other variation, plus 15% of such costs on account of profit and contribution to overheads*"; and
 - 5) if the Project Contract and TLS Contract are terminated, the baseline Access Fee in Item 2 of Schedule 1 of the FMFS Access Agreement is \$1,960,854 per annum payable monthly in arrears in equal instalments, adjusted for any annual adjustment in accordance with clause 10.5 of the FMFS Access Agreement;
- (iii) the new contract will thereafter be known as the FMFS Access Agreement;
 - (iv) DEDIR must perform for RailCorp (or, subject to clause 5.2(b), the Approved Nominee) all of the obligations of DEDIR to the TLS Contractor under the new FMFS Access Agreement;
 - (v) RailCorp (or, subject to clause 5.2(b), the Approved Nominee) will assume all the rights and undertake all the obligations of the TLS Contractor under the new FMFS Access Agreement;
 - (vi) subject to clause 5.3, DEDIR will have the same rights against RailCorp (or, subject to clause 5.2(b), the Approved Nominee) as it would have had against the TLS Contractor under the FMFS Access Agreement; and
 - (vii) for the avoidance of doubt, the TLS Contractor will not have any liability arising in connection with the new FMFS Access Agreement.

If after the date of the Assumption Notice given under this clause 5.2, there is a dispute between RailCorp and DEDIR as to how the terms of the new contract are deemed to have been amended pursuant to clause 5.2(a)(ii)C, then upon either party serving a written notice to this effect upon the other, the dispute will be determined by an expert as if clauses 53.4 - 53.8 of the Project Contract were incorporated in this deed but as if:

- (viii) references in those clauses to "PPP Co" were references to "DEDIR";

- (ix) references to "the parties" were references to "RailCorp and DEDIR";
 - (x) references to a "party" were references to "RailCorp" or "DEDIR" (as appropriate);
 - (xi) references in those clauses to "Dispute" were references to this dispute; and
 - (xii) the dispute had been appropriately referred to expert determination.
- (b) **(Approved Nominee):** RailCorp may request that an Approved Nominee be named as a party to the new contract in substitution for the TLS Contractor, in which event:
- (i) DEDIR must notify RailCorp as to whether any person nominated by RailCorp is an Approved Nominee, on or before the date falling 30 days after the date of receipt of all information reasonably required by DEDIR to decide whether the nominated person is an Approved Nominee;
 - (ii) DEDIR must not unreasonably withhold or delay its decision on whether the nominated person is an Approved Nominee;
 - (iii) DEDIR must enter into a side deed with RailCorp and the Approved Nominee on substantially the same terms as this deed; and
 - (iv) for the avoidance of doubt, the TLS Contractor will not have any liability arising in connection with the new FMFS Access Agreement.
- (c) **(Other documents under the FMFS Access Agreement):** If RailCorp gives an Assumption Notice then, as from the date of the Assumption Notice, the TLS Contractor must procure the novation or assignment to RailCorp (or, subject to clause 5.2(b), the Approved Nominee) of:
- (i) each Collateral Warranty Deed held by the TLS Contractor (but without prejudice to the rights of the TLS Contractor under the Collateral Warranty Deed arising out of acts or omissions which occurred prior to the date of the Assumption Notice); and
 - (ii) the Approved Escrow Deed entered into by the TLS Contractor and DEDIR pursuant to clause 17.5(a) of the FMFS Access Agreement.

5.3 Obligations prior to Assumption Notice

- (a) Clause 5.2 will not operate to require RailCorp (or, if applicable, the Approved Nominee) to assume any obligations or liabilities of the TLS Contractor under the FMFS Access Agreement which relate to or arise from the period prior to the date of the Assumption Notice.
- (b) RailCorp (or, if applicable, the Approved Nominee) will not be subject to any set-off or counterclaim by DEDIR which arises out of circumstances which relate to the period prior to the date of the Assumption Notice.

- (c) Nothing in this deed will affect the rights and obligations of the TLS Contractor and DEDIR under the FMFS Access Agreement which accrued prior to the date of the Assumption Notice.

6. Amendments to FMFS Access Agreement

The TLS Contractor and DEDIR agree that they will not agree to or permit any modification, variation, waiver or amendment to the terms of the FMFS Access Agreement or the Collateral Warranty Deed without the prior consent of RailCorp.

7. Restriction on dealings

The TLS Contractor and DEDIR agree that they will not after execution of the FMFS Access Agreement transfer, assign, mortgage, charge, encumber or otherwise deal with its interest in the FMFS Access Agreement or the Collateral Warranty Deed without the prior consent of RailCorp (such consent not to be unreasonably withheld or delayed), and without procuring that such transferee, assignee, mortgagee, chargee or other encumbrancee enters into a deed in which it agrees to be bound by the terms of this deed.

8. Acknowledgements by PPP Co and TLS Contractor

- (a) PPP Co and the TLS Contractor each consent to the terms of this deed and will co-operate in the implementation of this deed.
- (b) RailCorp, PPP Co and the TLS Contractor each acknowledge and agree that the obligations of PPP Co and the TLS Contractor under this deed and the Project Agreements are not lessened or otherwise affected by RailCorp's awareness of the terms of the FMFS Access Agreement.

9. GST

9.1 Construction

In this clause 9:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law except that:
- (i) GST also includes notional GST, being amounts payable as GST under an agreement between the Commonwealth and the State of New South Wales; and
 - (ii) input tax credit also includes a notional input tax credit corresponding to the payment of notional GST;
- (b) GST Law has the same meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999;
- (c) any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 9; and
- (d) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.

9.2 Consideration GST exclusive

All prices or other sums payable or consideration to be provided under this Agreement, other than this clause 9, are exclusive of GST.

9.3 Payment of GST

If GST is payable on any supply made by a party (or any entity through which that party acts) (**Supplier**) under or in connection with this Agreement, the recipient will pay to the Supplier an amount equal to the GST payable on the supply.

9.4 Timing of GST payment

The recipient will pay the amount referred to in clause 9.3 in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

9.5 Tax invoice

The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under clause 9.3.

9.6 Adjustment event

- (a) Subject to clause 9.6(b), if the GST payable in relation to a supply made under or in connection with this Agreement varies from the additional amount paid by the recipient under clause 9.3, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the recipient. Any payment, credit or refund under this clause 9.6 is deemed to be a payment, credit or refund of the additional amount payable under clause 9.3. Where there is an adjustment event, the Supplier must issue an adjustment note to the recipient as soon as the Supplier becomes aware of the adjustment event.
- (b) In relation to a taxable supply acquired by DEDIR, DEDIR is required to make a payment under clause 9.6(a) only to the extent to which it is entitled to claim a corresponding GST refund or input tax.

9.7 Reimbursements

Where a party is required under this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
- (b) if the payment or reimbursement is consideration for a taxable supply, an amount equal to that GST.

9.8 No Merger

This clause 9 does not merge in the completion or termination of this Agreement or on the transfer of the property supplied under this Agreement.

10. Notices

Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed:

- (a) must be in writing;

- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

RailCorp

Name: Rail Corporation New South Wales
Address: Level 22
323 Castlereagh Street
Sydney NSW 2000
Australia
Fax: 61 2 9379 4378
For the attention of: RailCorp's Representative (Rolling Stock PPP)

PPP Co

Name: Reliance Rail Pty Limited
Address: Suite 2, Level 9
333 George Street
Sydney NSW 2000
Australia
Fax: 61 2 9087 4000
For the attention of: PPP Co's Representative

TLS Contractor

Name: EDI Rail PPP Maintenance Pty Limited
Address: Auburn Maintenance Facility
154 Manchester Road
North Auburn NSW 2144
Australia
Fax: 61 29251 4845
For the attention of: Company Secretary

DEDIR

Name: Downer EDI Rail Pty Limited
Address: 2B Factory Street
Granville NSW 2142
Australia
Fax: 61 2 9637 6783
For the attention of: Project Manager Rolling Stock PPP

- (c) must be signed by the party making it (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
- (d) must be delivered or posted by prepaid post to the address, or sent by fax to the number, of the addressee, in accordance with clause 10(b); and
- (e) is taken to be received by the addressee:
- (i) (in the case of prepaid post) on the third working day after the date of posting to an address within Australia, and on the fifth working day after the date of posting by airmail to an address outside Australia;
 - (ii) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the machine from which it was sent; and
 - (iii) (in the case of delivery by hand) on delivery,

but if the communication is taken to be received on a day which is not a working day or after 5.00 pm, it is taken to be received at 9.00 am on the next working day, where "**working day**" means a day that:

- (iv) is not a Saturday, Sunday or public holiday and on which banks are open for business generally, in the place to which the communication is posted, sent or delivered; and
- (v) does not fall during the period commencing on the Monday before 24 December in any given year and ending on the Friday following 1 January of the following year.

11. Governing law and jurisdiction

11.1 Governing law

This deed is governed by and must be construed according to the laws of New South Wales.

11.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought within inconvenient forum, if that venue falls within clause 11.2(a).

12. Miscellaneous

12.1 Entire agreement

To the extent permitted by law, in relation to its subject matter, this deed:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties.

12.2 Further acts and documents

Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this deed.

12.3 Power of attorney

DEDIR irrevocably appoints:

- (a) with effect from the date PPP Co gives an Assumption Notice, PPP Co and such persons as are from time to time nominated by PPP Co, jointly and severally; and
- (b) with effect from the date RailCorp gives an Assumption Notice, RailCorp and such persons as are from time to time nominated by RailCorp, jointly and severally,

as its attorney with full power and authority to execute and deliver any document contemplated by clause 4.2 or clause 5.2 if DEDIR fails to execute such document within 5 Business Days of being requested in writing to do so by PPP Co or RailCorp respectively.

12.4 Waiver

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this deed by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement of, that or any other right, power or remedy provided by law or under this deed.
- (b) A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of any term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

12.5 Consents

A consent required under this deed from RailCorp may be given or withheld, or may be given subject to any conditions, as RailCorp (in its absolute discretion) thinks fit, unless this deed expressly provides otherwise.

12.6 Amendments

This deed may only be varied by a document signed by or on behalf of each party.

12.7 Expenses

Except as otherwise provided in this deed, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed.

12.8 Severance

If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
- (b) the legality, validity or unenforceability under the law of any other jurisdiction of that or any other provision of this deed.

12.9 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this deed, except for representations or inducements expressly set out in this deed.
- (b) Each party acknowledges and confirms that it does not enter into this deed in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this deed.

12.10 Counterparts

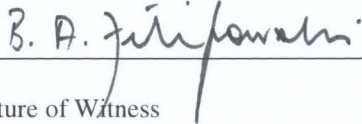
This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart.

12.11 Disputes

Except where the dispute resolution process is otherwise specified elsewhere in this deed for a particular dispute or where there is a like dispute under the FMFS Access Agreement, any other dispute between two or more parties to this deed arising out of or in connection with this deed will be resolved as if clause 53 of the Project Contract has been incorporated in this deed with the necessary consequential amendments to allow for the determination of disputes between the parties under this deed in dispute and consequential amendments of the nature contemplated in clause 5.2(a)(xi).

Executed as a deed.

Signed for and on behalf of **Rail Corporation New South Wales** in the presence of:

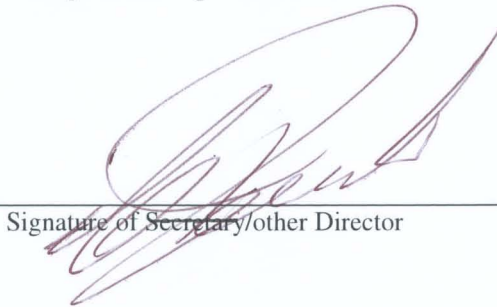


Signature of Witness

BARBARA ANN FILIPOWSKI

Name of Witness in full

Executed by **Reliance Rail Pty Limited** (in its capacity as trustee of the Reliance Rail Trust) in accordance with section 127 of the *Corporations Act* by or in the presence of:



Signature of Secretary/other Director

MERVYN PEACOCK

Name of Secretary/other Director in full



Signature

IRENE RUSAK



Signature of Director or Sole Director and Secretary

JOHN DAVENPORT

Name of Director or Sole Director and Secretary in full

Executed by EDI Rail PPP Maintenance Pty Limited in accordance with section 127 of the *Corporations Act* by or in the presence of:



Signature of Secretary/other Director

BRUCE CRANE

Name of Secretary/other Director in full



Signature of Director or Sole Director and Secretary

Kevin Fletcher

Name of Director or Sole Director and Secretary in full

Executed by Downer EDI Rail Pty Limited in accordance with section 127 of the *Corporations Act* by or in the presence of:



Signature of Secretary/other Director

BRUCE CRANE

Name of Secretary/other Director in full



Signature of Director or Sole Director and Secretary

Kevin Fletcher

Name of Director or Sole Director and Secretary in full