



RailCorp Rolling Stock PPP Project Contract No C01645

Rail Corporation New South Wales
ABN 59 325 778 353

RailCorp

Reliance Rail Pty Limited
ABN 18 111 280 427

PPP Co

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Explanatory notes on amendments to Project Contract

1. The Project Contract was effectively amended by RailCorp letter RC00145 dated 30 March 2007, signed and returned by Reliance Rail on 4 April 2007. This letter acts to modify the operation of clause 53 of the Conditions of Contract (CC) forming part of the Project Contract.
2. RailCorp's updated address for service pursuant to clause 54.1(b) was notified to Reliance Rail by letter referenced RC00616 and dated 14 November 2007.
3. The Project Contract has been amended by the following instruments:
 - (a) Deed of Variation No. 1 dated 15 February 2008;
 - (b) Deed of Variation No. 2 dated 15 February 2008; and
 - (c) Deed of Variation No. 3 dated 15 February 2008.
4. From time to time RailCorp and PPP Co agree to Requests for Technical Amendment (RFTAs) to implement Variations under clauses 30 and 31. Most RFTAs vary the Specifications under the Project Contract. Some have varied the Conditions of Contract. They are typically countersigned by the Security Trustee and Intercreditor Agent.
5. The parties have settled and/or given releases in respect of various claims arising under the Project Contract. The relevant Deeds of Release/Settlement are referred to in the definition of Project Agreements. In addition, there is a settlement agreement titled "Settlement of RFTA Claims" dated 14 September 2010 relating to the settlement of RailCorp's claims for Variation Savings in respect of the Variations documented in RFTAs 3, 40, 56, 87, 260 and 327.
6. The Project Contract has been amended by the Set 1 Waiver Letter (RC07549) dated 9 June 2011, which conditionally waives in respect of:
 - (a) specified Defects, the requirement to correct the Defect before Practical Completion of the Set;
 - (b) specified Tests which have not been passed or performed, the requirement for Practical Completion that the Set has passed such Tests and the results provided to RailCorp's Representative;
 - (c) specified other requirements for Practical Completion which have not been satisfied, the requirement to satisfy such requirements before Practical Completion, and treats each such Defect, Test or unsatisfied requirement as if it were a Minor Defect for Set 1.
7. On 19 January 2012, RailCorp executed the FMFS Side Deed which provides RailCorp with cure rights and step in rights in connection with the FMFS Access Agreement by which the TLS Contractor subcontracts its obligations in relation to the FMFS and data relevant to clause 26 of the Project Contract to DEDIR. The FMFS Access Agreement is a Significant Contract for the purposes of clause 43.2.
8. On 19 January 2012, RailCorp executed Approved Escrow Deeds (Subcontractor) for the purposes of clause 37.5 in respect of the following:
 - (a) ADI Limited (trading as Thales Australia)(Communications and Surveillance);
 - (b) Austbreck Pty Limited (Pantographs)
 - (c) Knorr Bremse Australia Pty Limited (Brakes);

- (d) Knorr Bremse Australia Pty Limited (Brakes TLS);
- (e) Knorr Bremse Australia Pty Limited (Doors);
- (f) Knorr Bremse Australia Pty Limited (Doors TLS);
- (g) Voith Turbo Pty Limited (Couplers); and
- (h) Faiveley Transport Australia Limited (Vigilence Systems, Brakes).

Some of these are yet to be fully executed by the other parties to them.

RailCorp has also executed the FMFS Escrow Deed on 19 January 2012 which is a more tailored form of Escrow Deed.

9. In February 2012, the Project underwent a financial restructure, which was documented in various documents (the Restructure Agreements). The following Restructure Agreements amend the Project Contract:

- (a) the 2012 Restructure Consent Deed (also known as the RailCorp Consent Deed) dated 3 February 2012 amends clause 1.1 and schedule 17. It also affects the operation of clause 44; and
- (b) the Set 7 Waiver Letter (RC08847) dated 3 February 2012 provides a conditional waiver by RailCorp of certain preconditions to Practical Completion of Set 7 including:
 - (i) the Initial Reliability Requirement described in clause 19.2;
 - (ii) the agreement to or determination of Deemed Action Times pursuant to clause 18.1(e)(ii) (this is an unconditional waiver); and
 - (iii) the condition, agreed to in RC07549, to correct, pass or satisfy specified Defects, Tests and unpassed requirements which were treated as if Minor Defects as a precondition to Practical Completion of Set 7.

Deed of Agreement made at Sydney on

Parties **Rail Corporation New South Wales ABN 59 325 778 353** of Level 6, 18 Lee Street, Chippendale, New South Wales

("RailCorp")

Reliance Rail Pty Limited ABN 18 111 280 427 as trustee of the Reliance Rail Trust, of Level 6, ABN AMRO Tower, 88 Phillip Street, Sydney, New South Wales

("PPP Co")

Background

- A. In August 2004, RailCorp called for expressions of interest for the delivery of the Project.
- B. On or about 8 November 2006, following the completion of a public tender process, RailCorp selected PPP Co as the successful proponent for this Contract.
- C. RailCorp and PPP Co now wish to enter into this Contract and, as applicable, the other Project Agreements, to record the terms on which the Project will be delivered.

Operative provisions

- 1. RailCorp and PPP Co promise to carry out, comply with and complete their respective obligations in accordance with:
 - (a) the attached Conditions of Contract; and
 - (b) the other documents referred to in the definition of "Contract" in clause 1.1 of the Conditions of Contract.
- 2. For the purpose of the obligations referred to in clause 1, RailCorp and PPP Co acknowledge and agree that:
 - (a) RailCorp:
 - (i) is a statutory State owned corporation under the Transport Administration Act;
 - (ii) under the Transport Administration Act must operate railway passenger services in New South Wales;
 - (iii) has the following principal objectives under the Transport Administration Act:
 - A. to deliver safe and reliable railway passenger services in New South Wales in an efficient, effective and financially responsible manner; and
 - B. to ensure that the RailCorp Network enables safe and reliable railway passenger and freight services to be provided in an efficient, effective and financially responsible manner; and
 - (iv) has a number of other objectives under the Transport Administration Act, including the following (each of which is of equal importance):

- A. to maintain reasonable priority and certainty of access for railway passenger services;
 - B. to promote and facilitate access to the RailCorp Network;
 - C. to be a successful business and, to that end:
 - 1) to operate at least as efficiently as any comparable business; and
 - 2) to maximise the net worth of the State's investment in RailCorp;
 - D. to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates;
 - E. where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6(2) of the *Protection of the Environment Administration Act 1991* (NSW); and
 - F. to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates;
- (b) this Contract constitutes a vital factor in and for the improvement of:
- (i) the efficiency, effectiveness and reliability of railway passenger services in New South Wales; and
 - (ii) certainty of access for railway passenger services and freight services in New South Wales;
- (c) the due and proper performance of PPP Co's Activities will significantly enhance RailCorp's business and its value and will significantly assist in maximising the net worth of the investment in and by RailCorp;
- (d) part of RailCorp's business is providing railway passenger services in and servicing the Sydney area during the periods of 3.40 am to 9.00 am and 2.00 pm to 7.00 pm each Business Day and that disruption and delay to these services inevitably:
- (i) causes serious inconvenience to the many thousands of commuters who rely on these peak period services to transport them efficiently, effectively, reliably and safely to and from their places of employment;
 - (ii) impedes the efficiency and effectiveness of railway passenger services;
 - (iii) tarnishes RailCorp's business reputation as a provider of efficient, effective, safe and reliable railway passenger services;
 - (iv) undermines public confidence in and use by the travelling public of railway passenger services;
 - (v) has the potential for impeding access to railway passenger services and freight services; and
 - (vi) damages RailCorp's business and its value as an enterprise and the net worth of the State's investment in RailCorp;

- (e) the basis on which PPP Co is to be remunerated under this Contract is a performance based payment regime which reflects:
- (i) the statutory requirements included in the principal and other objectives of RailCorp;
 - (ii) RailCorp's need to avoid disruption and delay to railway passenger services at all times including the peak periods referred to in clause 2(d); and
 - (iii) the losses, costs, expenses and detriments which RailCorp will incur (including diminution in the value of RailCorp's business as an enterprise and the net worth of the State's investment in RailCorp) should PPP Co fail to discharge its performance obligations under this Contract; and
- (f) the consideration for carrying out PPP Co's Activities under this Contract, including carrying out of any construction work or supply of related goods and services as defined under the *Building and Construction Industry Security of Payment Act 1999* (NSW), is payment by RailCorp to PPP Co of:
- (i) the Milestone Payments;
 - (ii) the TLS Payments; and
 - (iii) any other amounts which are payable by RailCorp to PPP Co under this Contract,

in accordance with clause 27 of the Conditions of Contract.

Executed as a deed.

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

Signature

Signature of Witness

Name of Witness in full

Signed sealed and delivered for and on behalf of **Reliance Rail Pty Limited** in its capacity as trustee of the Reliance Rail Trust by

its Attorney under a Power of Attorney dated

and the Attorney declares that the Attorney has not received any notice of the revocation of such Power of Attorney, in the presence of:

Signature of Attorney

Signature of Witness

Name of Attorney in full

Name of Witness in full

Conditions of Contract

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Conditions of Contract

1. Definitions and interpretation

1.1 Definitions

In this Contract:

"ABN AMRO" means:

- (a) ABN AMRO Australia Pty Limited ACN 000 862 797 (or a fund managed by ABN AMRO Australia Pty Limited or a Related Body Corporate) and, in each case, its custodian (if any); and
- (b) for the purposes of schedule 20 (Permitted Share Capital Dealings), ABN AMRO Australia Pty Limited ACN 000 862 797 or a Related Body Corporate.

"Accreditation" means accreditation (including provisional accreditation) under Division 1 of Part 2 of the Rail Safety Act (or an exemption from same).

"Accreditation Variation Documents" means all documentation required to be prepared and submitted to ITSRR to support RailCorp's application for RailCorp's Accreditation Variation, including the RailCorp Safety Assurance Reports.

"Actual Debt" means the indebtedness of PPP Co Finance Co and PPP Co under the Debt Financing Documents, excluding any indebtedness resulting from loans from PPP Co Finance Co to PPP Co under the Facilitation Loan Agreement (as defined in the Common Terms Deed).

"Actual Delivery Time" means, in respect of a Set, the actual time at which the Set is made ready by PPP Co for Train Preparation in relation to the applicable Availability Period.

"Actual Mass" means, in respect of a Set, the mass of that Set in kilograms.

"Additional Network Access Rights" means a Network Access Right which is additional to the Agreed Network Access Rights or any Network Access Right provided under clause 11.5(c) (Cancellations or changes to Agreed Network Access Rights).

"Additional Required Availability" means:

- (a) in respect of the Royal Easter Show, 4 additional Available Sets each Availability Period during the Royal Easter Show;
- (b) in respect of New Year's Eve, 4 additional Available Sets for each Availability Period during New Year's Eve;
- (c) in respect of an Additional Special Event, 4 additional Available Sets for each Availability Period during an Additional Special Event; and
- (d) in respect of an Availability Period for which PPP Co must provide Additional Required Availability under clause 22.9(b), the number of additional Available Sets which PPP Co must provide during that Availability Period.

"Additional Special Event" means an event comprising up to 4 consecutive Availability Periods nominated by RailCorp under clause 22.8(b).

"Additional Trains Proposal" has the meaning given in clause 58.3.

"Affected Party" means a party affected, or which alleges that it is affected, by a Force Majeure Event.

"Agreed Network Access Rights" has the meaning given in clause 11.5(b)(v).

"Alert Event" means an actual or likely event or circumstance which arises or could arise because of PPP Co's Activities and which may interfere with or threaten:

- (a) the use of RailCorp Land for railway purposes or the operation of RailCorp's Facilities;
- (b) the safe operation of the Railway;
- (c) the operational capacity or efficiency of the Railway; or
- (d) the future safe operation of the Railway or the future operational capacity or efficiency of the Railway,

including any event or circumstance which has or is likely to have a material detrimental effect on:

- (e) the Railway, RailCorp's Facilities or any RailCorp Land;
- (f) the safety of Railway passengers, station patrons or representatives of RailCorp; or
- (g) the operation of the Railway.

"AMP Capital" means:

- (a) AMP Investment Services Pty Limited ACN 063 986 989 as trustee of the Infrastructure Equity Fund (and its custodian, if any);
- (b) AMP Investment Services Pty Limited ACN 063 986 989 as trustee of the AMP Capital Global Infrastructure Fund No. 2 (and its custodian, if any); and
- (c) AMP Capital Investors Limited ACN 001 777 591 as trustee of the REST Infrastructure Trust (and its custodian, if any),

and for the purposes of schedule 20 (Permitted Share Capital Dealings) means AMP Capital Investors Limited ACN 001 777 591 or a Related Body Corporate.

"Applicable Cure Period" has the meaning given in clause 49.7(c), as extended in accordance with clause 49.8.

"Apprenticeship Requirement" has the meaning given in clause 29.7.

"Approval" means any licence, permit, consent, approval, determination, certificate or exemption from or by any Authority, and includes any Accreditation or Certificate of Competency.

"Approved Cure Plan" has the meaning given in clause 49.7(c).

"Approved Escrow Agent" means any of:

- (a) the Original Source Code Escrow Agent; and
- (b) any other escrow agent of equivalent or higher standing and market reputation approved by RailCorp in writing (which approval will not be unreasonably withheld).

"Approved Escrow Deed" means:

- (a) an Approved Escrow Deed (Core Contractors); or
- (b) an Approved Escrow Deed (Sub-contractors).

"Approved Escrow Deed (Core Contractors)" means:

- (a) the deed entitled "Approved Escrow Deed (Core Contractors)" between PPP Co, an Approved Escrow Agent, RailCorp and the Original Rolling Stock Manufacturer dated on or about the date of this Contract;
- (b) the deed entitled "Approved Escrow Deed (Core Contractors)" between PPP Co, an Approved Escrow Agent, RailCorp and the Original Maintenance Facility Contractor dated on or about the date of this Contract; or
- (c) the deed entitled "Approved Escrow Deed (Core Contractors)" between PPP Co, an Approved Escrow Agent, RailCorp and the Original TLS Contractor dated on or about the date of this Contract.

"Approved Escrow Deed (Sub-contractors)" means a deed between PPP Co, an Approved Escrow Agent, RailCorp and:

- (a) a Sub-contractor and a Core Contractor; or
- (b) two or more Sub-contractors,

which complies with clause 37.5(k).

"Approved Prevention Plan" has the meaning given in clause 49.9(c).

"Approved Third Party Software" means all:

- (a) open source software; and
- (b) other software which is so designated by RailCorp acting reasonably in writing from time to time after RailCorp reasonably ascertains that the Object Code of that software is generally commercially available to RailCorp from a source other than PPP Co, the Core Contractors, or their respective Associates.

"Artefacts" means any fossils, bones, artefacts, coins, articles of antiquity, structures or other remains or things of scientific, geological, historical or archaeological interest.

"Assessable Content" has the meaning given in clause 29.3(b).

"Assigned Intellectual Property Rights" means all Intellectual Property Rights:

- (a) in, subsisting in or used in any reporting templates used by PPP Co or its Associates for reporting to RailCorp during the course of the Project;
- (b) in or subsisting in the reports and other documents which PPP Co or any other person creates or is required to create as part of, or for the purposes of, performing PPP Co's Activities and which are given by PPP Co to RailCorp pursuant to this Contract from time to time;
- (c) in or subsisting in any Design Documentation containing a requirement, performance or interface specification; and

(d) in or subsisting in the software modules (including the Relevant Source Code and related documentation) which PPP Co or any other person creates or is required to create as part of, or for the purpose of, the electronic interfaces required under this Contract and used to pass and process information and requests between:

(i) the Train Operating System and RailCorp systems; or

(ii) the Maintenance Facility and RailCorp systems,

other than Approved Third Party Software. A reference to RailCorp systems in this paragraph (d) is a reference to systems which are controlled, operated, hosted or managed by RailCorp for use in connection with the Project.

"Associate" means, in relation to a person, any Related Body Corporate of that person and any officer, employee, agent, contractor, consultant, nominee, licensee or advisor of that person or that Related Body Corporate and:

(a) in the case of PPP Co includes the PPP Co Group, PPP Co's Contractors, the Equity Investors, and their respective Associates (but does not include RailCorp or any of its Associates); and

(b) in the case of RailCorp does not include PPP Co or its Associates.

"Associated Work Sites" means the Construction Site but excluding the Maintenance Site.

"Assumed Refinancing" means a Refinancing which complies with or does not contravene the relevant Refinancing Assumptions and includes a Refinancing which replaces debt which is due or about to fall due for repayment under the Debt Financing Documents.

"Auburn Masterplan" means the diagram contained in attachment 1 of the RailCorp Maintenance Facility Specification.

"Authority" means:

(a) any government or any governmental, semi-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality; or

(b) any other person having jurisdiction over, or ownership of, any Utility Services.

"Availability Payment" means, in respect of a month, the availability payment for that month calculated in accordance with clause 3.1 of schedule 7 (Payment regime), as adjusted in accordance with this Contract.

"Availability Period" means:

(a) a Weekday AM Availability Period;

(b) a Weekday PM Availability Period; or

(c) a Weekend Availability Period.

"Available" has the meaning given in clause 22.3.

"Available Set" means a Set which is Available.

"Babcock & Brown" means:

- (a) Babcock & Brown Public Partnerships GP Limited acting in its capacity as general partner of Babcock & Brown Public Partnerships L.P.; and/or
- (b) Babcock & Brown Australia Pty Limited ACN 002 348 521 (or a fund managed by Babcock & Brown Australia Pty Limited ACN 002 348 521 or a Related Body Corporate) and, in each case, its custodian (if any); and/or
- (c) Babcock & Brown Public Partnerships Limited, incorporated in Guernsey with registered number 45241,

and for the purposes of schedule 20 (Permitted Share Capital Dealings) means Babcock & Brown Australia Pty Limited ACN 002 348 521 or a Related Body Corporate.

"Bank Bill" means a bill of exchange (as defined in the *Bills of Exchange Act 1909 (Cth)*) that has been accepted by a bank authorised under a law of the Commonwealth of Australia or any state to carry on banking business.

"Bank Bill Rate" means, in respect of a period, the rate, expressed as a yield per cent per annum (rounded up, if necessary, to 4 decimal places) that is quoted as the average bid rate on the Reuters monitor system page "BBSY" (or any page that replaces that page) at about 10.10 am (Sydney time) on the first day of the relevant period for which the rate is sought, for Bank Bills that have a tenor in months which is closest to the period, provided that if there is a manifest error in the calculation of that average bid rate or if no average bid rate is so published for Bank Bills of that tenor by about 10.30 am, then the Bank Bill Rate will be the bid rate specified by the non-defaulting party reasonably, acting in good faith, having regard to the rates otherwise bid for Bank Bills having a tenor as described above at or around that time.

"Bank Debt Facilities" has the meaning given in the Common Terms Deed.

"Base Case Equity Return" means the Equity Return as stated in Worksheet "Output", cell reference "K35" the Base Case Financial Model.

"Base Case Financial Model" means the financial model and assumptions prepared by or for PPP Co and accepted by RailCorp pursuant to item 7 of schedule 1 (as amended and approved by RailCorp from time to time in accordance with this Contract to take account of Refinancings, RailCorp initiated Variations and other circumstances approved by RailCorp).¹

"Bond" means:

- (a) the Delivery Phase Bond;
- (b) the Return Condition Bond; and
- (c) any replacement bond provided under clause 5.4 or clause 5.6.

"Business Day" means a day in New South Wales that:

- (a) is not a Saturday, Sunday or Public Holiday and on which banks are open for business generally; and
- (b) does not fall during the period:
 - (i) commencing on the Monday before 24 December in any given year; and
 - (ii) ending on the Friday following 1 January of the following year.

¹ [See footnote 31 at clause 45.](#)

"Business Hours" means between 9.00 am and 5.00 pm on a Business Day.

"Call Option Deed" means the document so entitled dated on or about the date of this Contract between RailCorp and PPP Co.

"Capital Commitment Deed" has the meaning given in the Restructure Co-Ordination Deed.²

"Capital Expenditure" means, at any time, expenditure which would be classified as capital expenditure in accordance with the then current Australian accounting standards issued by the Australian Accounting Research Foundation, or any successor or replacement of such body, on behalf of the professional accounting bodies.

"Cars" means the railway cars to be designed, manufactured, commissioned, maintained and supported by PPP Co under this Contract (including all fitted equipment such as train radios, vigilance and the like). Where relevant, it includes the Project Works in respect of the Cars.

"Certificate of Competency" means a certification of competency issued under Division 3 of Part 2 of the Rail Safety Act.

"Certificate of Compliance" means:

- (a) in respect of a RailCorp Enabling Works Package, a certificate of the kind referred to in clause 14A.5; and
- (b) in respect of the Preconditions applicable to a RailCorp Enabling Works Package, a certificate of the kind referred to in clause 14A.2(a)(i).

"Certificate of Final Completion" means a certificate of the kind referred to in clause 20.3(a).

"Certificate of Practical Completion" means:

- (a) in respect of the Simulators, a certificate of the kind referred to in clause 17.3(a);
- (b) in respect of the Maintenance Facility Works, a certificate of the kind referred to in clause 17A.3(a); or
- (c) in respect of a Set, a certificate of the kind referred to in clause 18.3(c).

"Change in Disability Law" means a Change in Law the terms of which relate to the ability of disabled persons to access and use the Sets.

"Change in Law" means:

- (a) the amendment, repeal or change of a Law existing at the date of this Contract (or the modification of the Planning Approval under the EP&A Act, the issue of a new Approval under the EP&A Act in respect of the Maintenance Facility in substitution for or replacement of the Planning Approval or the modification of any such new Approval under the EP&A Act);
- (b) the enactment of a new Law; or
- (c) a change in the interpretation or application of a Law brought about by:

² [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

- (i) the amendment, repeal or change of another Law existing at the date of this Contract; or
- (ii) the enactment of a new Law,

which directly affects the interpretation or application of the first mentioned Law,

but excluding any such amendment, repeal, change or enactment of a Law (other than any such amendment, repeal, change or enactment of a Law which is implemented as a direct result of the recommendations made in the Final Report of the Special Commission of Inquiry into the Waterfall Rail Accident and which requires PPP Co to modify or alter the Sets or the Simulators) which, as at the date of this Contract:

- (d) was published or of which public notice had been given (even as a possible amendment, repeal, change or enactment); or
- (e) a party experienced and competent in the delivery of works and services similar to the Delivery Phase Activities and the TLS Phase Activities (as applicable) would have reasonably foreseen or anticipated,

in substantially the same form as the amendment, repeal, change or enactment eventuating after the date of this Contract.

"Change in Railway Law" means a Change in Law the terms of which apply to the rail industry, and not to any other industry.

"Claim" includes any claim, action, demand or proceeding including any claim, action, demand or proceeding:

- (a) under, arising out of, or in any way in connection with, a Project Agreement;
- (b) arising out of, or in any way in connection with, the Project, PPP Co's Activities or either party's conduct prior to the date of this Contract; or
- (c) otherwise at law or in equity including:
 - (i) by statute;
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
 - (iii) for restitution, including restitution based on unjust enrichment.

"Closing Protocol" means exhibit 13.

"Commissioning" means the carrying out of those Tests in respect of a Set which require access to the RailCorp Network or the Commissioning Track and the provision of a Driver.

"Commissioning Track" means the track at Auburn described in clause 2.5 of the RailCorp Enabling Works Specification.

"Commissioning Track Possession" has the meaning given in clause 11.5(a).

"Common Terms Deed" means the document entitled "NSW Rolling Stock PPP Common Terms Deed" to be entered into between the Security Trustee, PPP Co, PPP Co Finance Co, PPP Co Holding Co and others on or about the date of this Contract.

"Condition Precedent" means a condition precedent set out in schedule 1.

"Condition Precedent Deadline Date" means, in respect of a Condition Precedent, the date specified next to that Condition Precedent in schedule 1, or such other date as the parties may agree.

"Conditions of Contract" means these conditions of contract.

"Configuration Management Plan" means the plan of that name referred to in clause 5 of the Contract Management Requirements including all plans, supporting documents and information subsidiary to it.

"Construction Site" means the land shaded green in the diagram in exhibit 14.

"Contamination" means the presence on, in, over, or under land (including both surface and ground water) of a substance at a concentration above the concentration at which the substance is normally or naturally present on, in, over, or under that land (including both surface and ground water) or land or waters in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the Environment.

"Contract" means the contract between RailCorp and PPP Co constituted by:

- (a) the Deed of Agreement to which these Conditions of Contract are attached;
- (b) these Conditions of Contract;
- (c) the Contract Schedules; and
- (d) the Contract Exhibits.

"Contract Documentation" means all documentation in computer readable or other written forms brought (whether before or after the date of this Contract) or required to be brought into existence as part of, or for the purpose of, performing PPP Co's Activities including:

- (a) the Project Plans;
- (b) the Design Documentation;
- (c) those documents specified in attachment 1 to the Contract Management Requirements; and
- (d) the TLS Documentation,

and all related and other computer programs (including both Relevant Source Code and Object Code versions) either specifically created for or to the extent specifically modified as part of, or for the purposes of, performing PPP Co's Activities.

"Contract Exhibits" means the exhibits to this Contract, namely:

- (a) Exhibit 1 - Dictionary of Technical Definitions and Abbreviations;
- (b) Exhibit 2 - Contract Management Requirements;
- (c) Exhibit 3 - RailCorp Train Performance Specification;
- (d) Exhibit 4 - Train Design Book;
- (e) Exhibit 5 - RailCorp Through Life Support Specification;
- (f) Exhibit 6 - Through Life Support Description;

- (g) Exhibit 7 - RailCorp Maintenance Facility Specification;
- (h) Exhibit 8 - Maintenance Facility Design Book;
- (i) Exhibit 9 - RailCorp Simulator Specification;
- (j) Exhibit 10 - Simulator Design Book;
- (k) Exhibit 11 - RailCorp Enabling Works Specification;
- (l) Exhibit 12 - Proposed Delivery Phase Insurances;
- (m) Exhibit 13 - Closing Protocol;
- (n) Exhibit 14 - Construction Site;
- (o) Exhibit 15 - Planning Approval and REF;
- (p) Exhibit 16 - Promised Network Access Rights;
- (q) Exhibit 17 - Project Plans; and
- (r) Exhibit 18 - MainTrain Site.

"Contract Management Plan" means the plan of that name referred to in clause 2 of the Contract Management Requirements, including all plans, supporting documents and information subsidiary to it.

"Contract Management Requirements" means exhibit 2.

"Contract Management System" means the contract management system referred to in clause 9.1.

"Contract Schedules" means the schedules to this Contract, namely:

- (a) Schedule 1 - Conditions Precedent;
- (b) Schedule 2 - Form of Bond;
- (c) Schedule 2A - Form of Return Condition Bond;
- (d) Schedule 3 - Occupational health and safety requirements;
- (e) Schedule 4 - Conditions of access to the Maintenance Site and Associated Work Sites during Delivery Phase;
- (f) Schedule 5 - Safety Protocol;
- (g) Schedule 6 - Dates for Practical Completion of Sets;
- (h) Schedule 7 - Payment regime;
- (i) Schedule 8 - Required Availability;
- (j) Schedule 9 - Insurances - Sums insured and deductibles;
- (k) Schedule 10 - Original estimated cost of relevant TLS Phase Insurances;
- (l) Schedule 11 - Approved Escrow Deed (Sub-contractors);

- (m) Schedule 12 - Pre-Agreed Variation;
- (n) Schedule 13 - Confidential information;
- (o) Schedule 14 - Termination Payments
- (p) Schedule 15 - Return Conditions;
- (q) Schedule 16 - Expert Determination Agreement;
- (r) Schedule 17 - Equity Documents;
- (s) Schedule 18 - Request for Certificate of Practical Completion;
- (t) Schedule 19 - Staging of the RailCorp Enabling Works;
- (u) Schedule 20 - Permitted Share Capital Dealings;
- (v) Schedule 21 - Deemed Actions and Deemed Action Problems; and
- (w) Schedule 22 - Refinancing Assumptions.

"Contract Term" means the period:

- (a) commencing on the date of Financial Close; and
- (b) ending on the earlier of:
 - (i) the Expiry Date;
 - (ii) the date on which this Contract is terminated; or
 - (iii) if RailCorp exercises its right to extend the Contract Term under clause 24.2 or clause 24.4 and subsequently exercises its rights under clause 24.3(a)(iii) and/or clause 24.3(a)(iv) such that PPP Co is no longer providing Through Life Support to any Extended TLS Sets, the date on which PPP Co decommissions or transfers title in (as the case may be) the last Extended TLS Set.

"Contractual Close" occurs when this Contract has been executed by the last party to execute it. The date of Contractual Close is the same as the date of this Contract.

"Controlled Signal Blocking" or **"CSB"** means an authorisation by a Signaller, at the request of a Protection Officer, to carry out work on track using controlled signals set and kept at "STOP".

"Core Contract" means:

- (a) the Rolling Stock Manufacture Contract;
- (b) the Maintenance Facility Construction Contract;
- (c) the TLS Contract; and
- (d) any other contract which the parties agree is a Core Contract.

"Core Contractor" means:

- (a) the Rolling Stock Manufacturer;

- (b) the Maintenance Facility Contractor;
- (c) the TLS Contractor; or
- (d) any other person agreed by the parties.

"Core Contractor Guarantor" means:

- (a) the Rolling Stock Manufacturer Guarantor;
- (b) the Maintenance Facility Contractor Guarantor;
- (c) the TLS Guarantor; or
- (d) any other person agreed by the parties.

"Core Contractor Source Code" means all Relevant Source Code of a Core Contractor and, without limiting the foregoing, includes all Sub-contractor Source Code released to a Core Contractor pursuant to an Approved Escrow Deed.

"Corporate Tax Rate" means the rate of tax declared by the *Income Tax Rates Act 1986* (Cth) (or equivalent Commonwealth legislation declaring the rates of income tax) in respect of taxable income derived by companies in the relevant year of income. The Corporate Tax Rate as at the date of this Contract is 30%.

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

"Counterparty Details" means, in respect of each person other than RailCorp who is a party to a RailCorp Project Agreement:

- (a) a certified copy of its constitution (or other constituent documents);
- (b) in the case of a trustee, a certified copy of the trust deed of the trust it enters into the RailCorp Project Agreement as trustee for;
- (c) a certified copy of any powers of attorney under which the person executed each RailCorp Project Agreement to which it is a party; and
- (d) a certified copy of the extract of minutes evidencing the resolutions of its board of directors, authorising the entry into, delivery and observance of obligations under each RailCorp Project Agreement to which it is a party.

"Critical Design Review" or **"CDR"** means, in respect of a System, Subsystem or Configuration Item, the technical review of that System, Subsystem or Configuration Item carried out, or to be carried out, in accordance with clause 4.6.5 of the Contract Management Requirements.

"Cross Guarantee and Indemnity" means the deed so entitled dated on or about the date of this Contract between RailCorp, PPP Co and PPP Co Finance Co.

"Danger Zone" means the danger zone as defined by the Network Rules, at the date of this Contract being:

- (a) along rail tracks - everywhere within 3.0 metres horizontally from the nearest rail and any distance above or below this 3.0 metres, unless a Safe Place exists or has been created; and

- (b) at station platforms - the space within the yellow safety line and the platform edge or where there is no yellow safety line, then the space within 0.5 metres from the platform edge.

"Date for Practical Completion":

- (a) in respect of the Simulators, means 6 months prior to the date on which PPP Co expects Practical Completion of Set 1 to be achieved;
- (b) in respect of the Maintenance Facility Works, means 20 January 2010; and
- (c) in respect of a Set, means the Date for Practical Completion of that Set stated in schedule 6.

"Date of Final Completion" means, with respect to a Set:

- (a) the date stated by RailCorp's Representative in the Certificate of Final Completion for that Set; or
- (b) where another date is determined under clause 53 (Dispute resolution) as the date on which Final Completion was achieved, that other date.

"Date of Practical Completion" means:

- (a) with respect to a Set, the Maintenance Facility Works or the Simulators, the date on which Practical Completion was achieved being the date stated by RailCorp's Representative in the Certificate of Practical Completion for that Set, the Maintenance Facility Works or the Simulators (as the case may be); and
- (b) where another date is determined under clause 53 (Dispute resolution) as the date on which Practical Completion was achieved, that other date.

"Day 1 Clause" has the meaning given in clause 2.1 (Conditions Precedent).

"Debt Finance Side Deed" means the deed so entitled dated on or about the date of this Contract between RailCorp, PPP Co, PPP Co Finance Co and the Security Trustee on behalf of the Debt Financiers.

"Debt Financiers" means the providers of any facilities, financial arrangements or accommodation provided from time to time, in accordance with the Debt Financing Documents, to PPP Co or PPP Co Finance Co for the purposes of carrying out the Project and may, where the context permits, include any agent or trustee of such Debt Financiers.

"Debt Financing Documents" has the meaning given in the Common Terms Deed.

"Decommissioning Date" means:

- (a) the 30th anniversary of each SAU Start Date;
- (b) if RailCorp exercises its option under clause 24.2 to extend the Contract Term then the Decommissioning Dates in paragraph (a) will be adjusted as follows:
 - (i) if RailCorp gives a notice in respect of 1 Set only, the first Decommissioning Date under paragraph (a) will be extended by 5 years;
 - (ii) if RailCorp gives a notice in respect of 2 Sets, the first 2 Decommissioning Dates under paragraph (a) will be extended by 5 years; and

- (iii) if RailCorp gives a notice in respect of 3 Sets, the first 3 Decommissioning Dates under paragraph (a) will be extended by 5 years,

and so on for the number of Sets the subject of RailCorp's exercise of its option under clause 24.2; and

- (c) if RailCorp extends the Contract Term a second time under clause 24.4 then the Decommissioning Dates in paragraph (b) will be adjusted as follows:
 - (i) if RailCorp gives a notice in respect of 1 Set only, the first Decommissioning Date under paragraph (b) will be extended by another 5 years;
 - (ii) if RailCorp gives a notice in respect of 2 Sets, the first 2 Decommissioning Dates under paragraph (b) will be extended by another 5 years; and
 - (iii) if RailCorp gives a notice in respect of 3 Sets, the first 3 Decommissioning Dates under paragraph (b) will be extended by another 5 years,

and so on for the number of Sets the subject of RailCorp's exercise of its option under clause 24.4,

provided that if RailCorp does not exercise its option under clause 24.2 to extend the Contract Term, the Decommissioning Date for the last 10 Sets to be decommissioned will be the 30th anniversary of the SAU Start Date of Set 69 (notwithstanding paragraph (a)).

"Deed of Agreement" means the deed of agreement to which these Conditions of Contract are attached.

"Deed of Release - CCTV Claim" means the deed so titled between RailCorp and PPP Co dated on or about 17 May 2010.³

"Deed of Release - Earthing & Bonding" means the deed so titled between RailCorp and PPP Co dated 19 January 2012.⁴

"Deed of Release - Energy Australia Kiosk" means the deed so titled between RailCorp and PPP Co dated on or about 19 January 2012.⁵

"Deed of Release - Financial Close" means the deed so titled between RailCorp and PPP Co dated on or about 19 January 2012.⁶

"Deed of Release - Independent Verifier Claim" means the deed so titled between RailCorp and PPP Co dated on or about 17 May 2010.⁷

"Deed of Release - Roads 5 and 7" means the deed so titled between RailCorp and PPP Co dated on or about 19 January 2012.⁸

"Deed of Settlement" has the meaning given in the Restructure Co-Ordination Deed.⁹

³ Inserted by RailCorp Consent Deed, 3 February 2012.

⁴ Inserted by RailCorp Consent Deed, 3 February 2012.

⁵ Inserted by RailCorp Consent Deed, 3 February 2012.

⁶ Inserted by RailCorp Consent Deed, 3 February 2012.

⁷ Inserted by RailCorp Consent Deed, 3 February 2012.

⁸ Inserted by RailCorp Consent Deed, 3 February 2012.

"Deeds of Disclaimer and Confidentiality" means:

- (a) the deed poll so titled given by Downer EDI and ABN AMRO Australia Limited ABN 78 000 862 797 in favour of RailCorp dated 27 April 2005;
- (b) the deed poll so titled given by PPP Co in favour of RailCorp dated 10 October 2005; and
- (c) the deed poll so titled given by PPP Co in favour of RailCorp dated 10 August 2006.

"Deemed Action" means, in respect of a Deemed Action Problem, the action which a Crew member is expected to take to address or mitigate the effects of that Deemed Action Problem.

"Deemed Action Problem" means a PPP Co Related Problem which a Crew member is expected to address or to mitigate the effects of by taking a Deemed Action, as set out in clause 3 of schedule 21.

"Deemed Action Time" means, in respect of a Deemed Action, the period of time for that Deemed Action, as agreed or determined in accordance with clause 1 of schedule 21, and as reviewed in accordance with clause 2 of schedule 21.

"Default Rate" means, in respect of a period, a rate equivalent to 3% per annum above the Bank Bill Rate for that period.

"Defect" means:

- (a) any defect, deficiency, shrinkage, fault or omission in the Project Works, a Car, the Maintenance Facility or the Simulators, whether in respect of, or arising from, design, materials or workmanship;
- (b) any other aspect of the Project Works, a Car, the Maintenance Facility or the Simulators which is not in accordance with the requirements of the Contract; or
- (c) any physical damage to the Project Works, a Car, the Maintenance Facility or the Simulators resulting from any such defect, deficiency, shrinkage, fault, omission or non-compliance.

"Defects Liability Period" means a period referred to in clause 17B.2.

"Deliverable Recipient" means in respect of a Deliverable, the person to whom a Sub-contractor is bound to design, manufacture, deliver or supply the Deliverable.

"Deliverables" means the Project Works, the Cars, the Maintenance Facility Works, the Simulators, the Maintenance Parts and Materials, the Unfixed Maintenance Plant and Equipment, the Through Life Support, the Contract Documentation, the Performance Monitoring System, the Train Operation Data, the Train Operating System screens and interfaces and any other deliverable required to be delivered or goods or services required to be provided by or for PPP Co to RailCorp under this Contract (or any part of any of them), including the Relevant Source Code of any computer program forming part of the Deliverables unless the context does not so allow.

"Delivery Phase" means the period commencing on the date of Financial Close and ending on the Date of Practical Completion of Set 78.

⁹ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

"Delivery Phase Activities" means all things that PPP Co is, or may be, required to carry out or do:

- (a) in connection with:
 - (i) the design, manufacture and commissioning of the Cars and the Simulators; and
 - (ii) the design, construction and commissioning of the Maintenance Facility Works; or
- (b) otherwise to comply with its obligations under this Contract with respect to the Project Works.

"Delivery Phase Bond" means the bond referred to in clause 5.1(a).

"Delivery Phase Insurances" means the Insurances referred to in clause 36.1.

"Delivery Phase Progress Report" means the progress report to be submitted by PPP Co under clause 15.8 each month during the Delivery Phase.

"Delivery Programme" means the programme of the Delivery Phase Activities which forms part of the Contract Management Plan, as updated from time to time in accordance with clause 15.3 and the Contract Management Requirements.

"Design Books" means:

- (a) the Maintenance Facility Design Book;
- (b) the Simulator Design Book; and
- (c) the Train Design Book.

"Design Documentation" means all design documentation (including all draft and final drawings, specifications, manuals, designs, models, samples, patterns, calculations, independent verification reports, test reports, translations and any other supporting documentation required under the Contract Management Requirements) in computer readable and other written forms which PPP Co or any other person creates or is required to create as part of, or for the purposes of, performing PPP Co's Activities. It includes the Final Design Documentation and the Design Books.

"Dictionary of Technical Definitions and Abbreviations" means exhibit 1.

"Discriminatory Change in Law" means a Change in Law the terms of which apply to:

- (a) the Project, and not to other rolling stock or rolling stock maintenance projects procured by the State;
- (b) PPP Co, and not to other persons;
- (c) the Maintenance Site or the Maintenance Facility, and not to other land or facilities; or
- (d) projects procured or established under the Working with Government Guidelines for Privately Financed Projects or other policies of the State in respect of privately financed projects, and not to other projects.

"Dispute" has the meaning given in clause 53.1.

"Distribution" means any:

- (a) dividend, return of capital or other distribution or payment (in cash or in kind), in respect of:
 - (i) the units of the Holding Trust;
 - (ii) the shares in the Holding Trustee; or
 - (iii) unitholder or shareholder loans (or other loans in the nature of equity funding) to, or for the benefit of, the Holding Trust;
- (b) release by PPP Co Holding Co of any actual or contingent liability of any Equity Investor (or any Related Body Corporate of an Equity Investor) which is not on arms length commercial terms;
- (c) payment, loan or transfer of any assets by PPP Co Holding Co to any Equity Investor (or any Related Body Corporate of any Equity Investor) which is not on arms length commercial terms; or
- (d) surrender by PPP Co Holding Co of losses or other amounts available for group relief unless full payment of an amount equal to the amount surrendered multiplied by the Corporate Tax Rate is made at the date of the surrender.

"Downer EDI" means Downer EDI Limited ABN 97 003 872 848.

"Downer EDI Holding Trust Equity Investor" means Downer PPP Investments Pty Ltd ACN 122 730 152.

"EDI Rail" means EDI Rail Pty Limited ABN 92 000 002 031.

"Environment" includes all aspects of the surroundings of human beings including:

- (a) the physical characteristics of those surroundings such as the land, the waters and the atmosphere;
- (b) the biological characteristics of those surroundings such as the animals, plants and other forms of life; and
- (c) the aesthetic characteristics of those surroundings such as their appearance, sounds, smells, tastes and textures.

"Environmental Hazard" means a state of danger to human beings or the Environment whether imminent or otherwise resulting from the location, storage, handling or release of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics.

"EP&A Act" means the *Environmental Planning and Assessment Act 1979* (NSW).

"Equity Documents" means the documents described in schedule 17.

"Equity Investor" means a person who:

- (a) holds units in the Holding Trust (including by way of a custodian);
- (b) holds shares in the Holding Trustee (including by way of a custodian); or

- (c) provides unitholder or shareholder loans (or other loans in the nature of equity funding) to or for the benefit of PPP Co Holding Co.

"Equity Return" means, at any time, the nominal after tax internal rate of return per annum which a Notional Initial Equity Investor is projected to receive (which, for the avoidance of doubt, is after tax paid or payable on project cash flows, and is before any tax paid or payable by the Notional Initial Equity Investor) during the Contract Term (assuming no circumstance of early termination or extension) based on:

- (a) where there is insufficient historical information to reasonably forecast Distributions, the Distributions to Notional Initial Equity Investors in the Base Case Financial Model; and
- (b) in all other cases, a reasonable forecast of Distributions to the Notional Initial Equity Investors based on historical performance of the Project and current projected growth,

and in each case having regard to amounts actually Distributed, or accrued but not Distributed, prior to that time.

"Event of Insolvency" means:

- (a) a "controller" (as defined in section 9 of the Corporations Act), manager, trustee, receiver, receiver and manager, administrator or similar officer is appointed in respect of a person or any asset of a person;
- (b) a liquidator or provisional liquidator is appointed in respect of a corporation;
- (c) any application (not being an application withdrawn or dismissed within 21 days) is made to a court for an order, or an order is made, or a meeting is convened, or a resolution is passed, for the purpose of:
 - (i) appointing a person referred to in paragraphs (a) or (b);
 - (ii) winding up or deregistering a corporation; or
 - (iii) proposing or implementing a scheme of arrangement;
- (d) a moratorium of any debts of a person, a personal insolvency agreement or any other assignment, composition or arrangement (formal or informal) with a person's creditors or any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee, is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 21 days;
- (e) a person becomes, or admits in writing that it is, is declared to be, or is deemed under any applicable law to be, insolvent or unable to pay its debts;
- (f) any writ of execution, garnishee order, attachment, distress or other process is made, levied or issued against or in relation to any asset of a person, unless the person is able to satisfy RailCorp that there is no substantial basis for the order or process; or
- (g) any act is done or event occurs which under the laws from time to time of a country other than Australia has an analogous or similar effect to any of the events in paragraphs (a) - (f),

in respect of paragraphs (a), (b) and (c) of this definition, other than for the purpose of solvent reconstruction, amalgamation, merger or consolidation approved by RailCorp.

"Excepted Risk" means:

- (a) any default under this Contract by RailCorp or any fraudulent, illegal, reckless or negligent act or omission of RailCorp or its Associates;
- (b) war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection or military or usurped powers, martial law or confiscation by order of any government or public authority; and
- (c) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by PPP Co or its Associates.

"Existing Information Documents" means the category of documents referred to in paragraph (a) of the definition of Information Documents.

"Expert Determination Agreements" means the Original Expert Determination Agreements and any other agreement appointing an Expert to the Expert Panel.

"Expert Panel" means the panel of 3 Experts referred to in clause 53.4(a) (Expert Panel).

"Experts" means the persons appointed pursuant to clause 53.4 (Expert Panel) including any replacement experts appointed pursuant to clause 53.4.

"Expiry Date" means:

- (a) the Original Expiry Date; or
- (b) if RailCorp has exercised its right to extend the Contract Term under clause 3.3, the Extended Expiry Date.

"Extended Expiry Date" means the Original Expiry Date as extended by RailCorp in accordance with clause 3.3.

"Extended TLS Set" means a Set which PPP Co is continuing to provide Through Life Support for under clause 24.3.

"Failed Set", being one of the Sets, has:

- (a) in clause 22.5(a), the meaning given in clause 22.5(a)(i);
- (b) in clause 22.5(b), the meaning given in clause 22.5(b)(i);
- (c) in clause 22.5(c), the meaning given in clause 22.5(c)(i);
- (d) in clause 22.5(d), the meaning given in clause 22.5(d)(i); and
- (e) elsewhere in this Contract, each of the meanings given in clause 22.5 (as applicable).

"Final Completion" has the meaning given in clause 20.1.

"Final Court Decision" means a decision of a court:

- (a) from which no appeal can be taken and in respect of which no application for special leave to appeal can be made; or

- (b) in respect of which the relevant appeal or special leave application period has expired without an appeal being taken or an application for special leave to appeal being made.

"Final Design Documentation" means any Design Documentation which:

- (a) has been submitted to RailCorp's Representative as part of the Critical Design Review and Not Rejected (NR) or Not Rejected Subject to Comments (SC) within 20 Business Days of submission; or
- (b) has been amended in accordance with clause 13.6.

"Final Frequent Breaches Notice" means a notice issued under clause 49.4(c) which complies with the requirement of clause 49.4(d).

"Final Maturity Date" has the meaning given in the Common Terms Deed.

"Final Persistent Breach Notice" means a notice issued under clause 49.3(c) which complies with the requirements of clause 49.3(d).

"Financial Close" occurs when the last Condition Precedent to be satisfied (or waived under clause 2.3) has been satisfied (or waived under clause 2.3).

"Financial Model" means the Base Case Financial Model as updated from time to time in accordance with clause 45 (Financial Model).

"Fleet Management Facility System (FMFS) Side Deed" means the deed so titled between RailCorp, PPP Co, EDI Rail and the Original TLS Contractor dated on or about 19 January 2012.¹⁰

"Force Majeure Event" has the meaning given in clause 33.1.

"Frequent Breaches" has the meaning given in clause 49.4(a).

"Frequent Breaches Notice" means a notice given under clause 49.4(a) which complies with the requirements of clause 49.4(b).

"Future Information Documents" means the category of documents referred to in paragraph (b) of the definition of Information Documents.

"Future RailCorp Facility" means the area of land represented on the Auburn Masterplan reserved for future development by RailCorp.

"Future RailCorp Facility Areas" has the meaning given to that term in the Maintenance Facility Licence.

"General Change in Law" means a Change in Law that requires PPP Co to incur additional Capital Expenditure in performing the TLS Phase Activities, but excluding:

- (a) a Change in Law with respect to Tax;
- (b) a Discriminatory Change in Law;
- (c) a Change in Railway Law; and

¹⁰ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

(d) a Change in Disability Law.

"Graffiti" includes any writing, drawing, painting, street mural, spray painting or other defacement upon any surface of, or in, a Set or the Maintenance Facility.

"Handover Point" means the area described for the handover of Sets in the RailCorp Maintenance Facility Specification (or such other area as RailCorp and PPP Co may agree).

"Hazardous Substance" means any substance which would or might reasonably be expected to cause damage or injury to any person, any property or the Environment.

"Holding Trust" means the Reliance Rail Holding Trust.

"Holding Trust Deed" means the constitution of the Holding Trust dated on or about the date of this Contract and executed by the Holding Trustee.

"Holding Trust Equity Investors" means those Equity Investors referred to in paragraphs (a) and (b) of the definition of Equity Investor (other than Babcock & Brown).

"Holding Trustee" means Reliance Rail Holdings Pty Limited ACN 111 280 169.

"Human Resources Plan" means the plan of that name referred to in with clause 2.6 (Human Resources Plan) of the Contract Management Requirements, which is subsidiary to the Contract Management Plan.

"Incident" means an event or occurrence actually or potentially affecting the operation of trains on the RailCorp Network.

"Incident Response Payment" means, in respect of a month, the amount payable by PPP Co under clause 2.3.7 of the RailCorp Through Life Support Specification for Incident response services provided by RailCorp during that month.

"Industrial Action" means industrial action of any description including industrial action involving:

- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of work;
- (b) a ban, limitation or restriction on the performance of work, or acceptance of or offering for work; and
- (c) a failure or refusal by any person employed or engaged by PPP Co or its Associates to attend for work.

"Industrial Waste" means any waste arising from commercial, industrial or trade activities and any waste containing substances or materials which are potentially harmful to human beings, any property or the Environment.

"Information and Reference Document Repository" means the collection of Information Documents and Reference Documents completed by RailCorp and PPP Co in accordance with clause 39.7 (Information and Reference Documents Repository).

"Information Documents" means:

- (a) all documents provided to PPP Co prior to the date of this Contract which were or are expressly stated to be "Information Documents"; and

- (b) all documents provided to PPP Co after the date of this Contract which RailCorp is not required by the terms of this Contract or the other RailCorp Project Agreements to provide to PPP Co.

"Infrastructure Possession Manual" means the manual relating to infrastructure possessions, as published by RailCorp from time to time.

"Initial Reliability Requirement" means:

- (a) for Practical Completion of Set 7, the reliability requirement described in clause 19.2; and
- (b) for Final Completion of a Set, the reliability requirement described in clause 19.5.

"Insurance Proceeds Account" means the account referred to in clause 36.15.

"Insurance Proceeds" means all moneys received under the Insurances.

"Insurances" means the insurances required to be effected and maintained under this Contract.

"Integrated Test Plan" or **"ITP"** means the plan of that name prepared in accordance with clause 4.12.2 of the Contract Management Requirements, as updated from time to time.

"Intellectual Property Rights" includes all copyright and analogous rights, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), designs (whether or not registrable), circuit layouts and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields and all rights to register, rights in applications for the registration of and rights to extend or renew the registration of any of the foregoing.

"Interconnection Points" has the meaning given in the Call Option Deed.

"Interest Calculation Date" has the meaning given in schedule 7 (Payment regime).

"Interest Payment Adjustment" has the meaning given in schedule 7 (Payment regime).

"Interest Payment Start Date" has the meaning given in schedule 7 (Payment regime).

"Interest Period" has the meaning given in schedule 7 (Payment regime).

"Interface Protocols" means the interface protocols as issued by RailCorp from time to time under clause 23.3. An initial draft of the Interface Protocols appears as attachment 3 of the RailCorp Through Life Support Specification.

"Investigative Authority" means any Authority having a statutory right to investigate:

- (a) PPP Co's Activities or the Project; and
- (b) any RailCorp activities which are affected by PPP Co's Activities or the Project, including ITSRR and OTSI.

"IPR Claim" means any Claim by a third party that the Deliverables or their design, manufacture, delivery, supply, use or enjoyment in accordance with or as contemplated by this Contract, infringe any Intellectual Property Rights of that or any other third party and includes a claim by an individual author that any such design, manufacture, delivery, supply, use or enjoyment infringes that author's moral rights under any applicable copyright or other intellectual property laws.

"ITSRR" means the Independent Transport Safety and Reliability Regulator constituted under the Transport Administration Act.

"Key Person" means each individual referred to in attachment 5 of the Contract Management Requirements including PPP Co's Representative or any appointment or replacement approved by RailCorp under clause ~~10.6(e), 10.6(d) and 10.6(e)~~ [10.6\(a\)\(iii\), 10.6\(a\)\(iv\), 10.6\(a\)\(v\), 10.6\(g\) or 10.6\(h\)](#).¹¹

"KPI" or **"Key Performance Indicator"** means a key performance indicator set out in clause 4 of schedule 7.

"KPI Payment" means, in respect of a month, the KPI Payment for that month calculated in accordance with clause 4.1 of schedule 7.

"KPI Regime" means the KPI regime described in clause 4 of schedule 7.

"KPI Score" means, in respect of a KPI, the score for that KPI calculated in accordance with clause 4 of schedule 7.

"Law" means legislation of the State or the Commonwealth of Australia, including delegated legislation and any document or policy enforceable under such legislation or delegated legislation.

"Lease Area" has the meaning given in the Call Option Deed.

"Licensed Areas" has the meaning given in the Call Option Deed.

"Local Content" has the meaning given in clause 29.3(c).

"Local Content Requirement" has the meaning given in clause 29.3(a).

"Local Industry" means Australian and New Zealand industry.

"Local Industry Participation Plan" means the plan of that name referred to in clause 2.15 of the Contract Management Requirements.

"Local Possession Authority" or **"LPA"** means an advertised formal authority from RailCorp to occupy a closed defined portion of track for a specified period.

"Loss":

- (a) subject to paragraph (c), means any cost, expense, loss, damage or liability;
- (b) includes any fine or penalty, to the extent not prohibited by law; and
- (c) does not include any indirect, consequential or pure economic loss (including loss of profit or loss of data) unless and to the extent that such loss is recovered under any Insurance (or would have been recovered but for any conduct on the part of PPP Co or any other insured (except RailCorp) under the Insurances which entitles an insurer to avoid the relevant contract of insurance or to reduce its liability under the relevant contract of insurance).

"Maintenance Facility" means:

- (a) the Maintenance Facility Works; and

¹¹ [Amended by Deed of Variation No. 3, 15 February 2008](#)

(b) those RailCorp Enabling Works which are constructed on the Maintenance Site.

"Maintenance Facility Access Areas" has the meaning given to that term in the Maintenance Facility Licence.

"Maintenance Facility Construction Contract" means the Original Maintenance Facility Construction Contract and any other contract between PPP Co and a Maintenance Facility Contractor to design, construct and commission the Maintenance Facility Works.

"Maintenance Facility Construction Contract Side Deed" means the deed so entitled dated on or about the date of this Contract between RailCorp, PPP Co, the Original Maintenance Facility Contractor and the Original Maintenance Facility Contractor Guarantor.

"Maintenance Facility Construction Guarantee" means the Original Maintenance Facility Construction Guarantee and any other guarantee under which a Maintenance Facility Contractor Guarantor guarantees the obligations of a Maintenance Facility Contractor under a Maintenance Facility Construction Contract.

"Maintenance Facility Contractor" means the Original Maintenance Facility Contractor and any person who in addition or substitution is engaged by PPP Co to design, construct and commission the Maintenance Facility Works.

"Maintenance Facility Contractor Guarantor" means the Original Maintenance Facility Contractor Guarantor and any person who in addition or substitution guarantees the obligations of a Maintenance Facility Contractor under a Maintenance Facility Construction Contract.

"Maintenance Facility Design Book" means exhibit 8.

"Maintenance Facility Lease" means the lease of the Lease Area to be granted by RailCorp to PPP Co if PPP Co exercises its option under the Call Option Deed.

"Maintenance Facility Licence" means the licence of the Licensed Areas to be granted by RailCorp to PPP Co if PPP Co exercises its option under the Call Option Deed.

"Maintenance Facility Specifications" means:

- (a) the RailCorp Maintenance Facility Specification;
- (b) the Maintenance Facility Design Book; and
- (c) the RailCorp Enabling Works Specification.

"Maintenance Facility Subcontract" means the agreement titled "Rolling Stock Maintenance Facility Design and Construct Subcontract" between the Maintenance Facility Contractor and John Holland Pty Ltd ABN 11 004 282 268 dated on or about the date of this Contract.

"Maintenance Facility Works" means the physical things and works described in the RailCorp Maintenance Facility Specification and the Maintenance Facility Design Book. The RailCorp Enabling Works do not form part of the Maintenance Facility Works.

"Maintenance Facility Works Delivery Plan" means the plan of that name referred to in clause 7 of the Contract Management Requirements including all plans, supporting documents and information subsidiary to it.

"Maintenance Parts and Materials" means all spares, parts, components, goods or materials acquired, obtained or retained by PPP Co or its Associates for the purposes of providing

Through Life Support for the Cars, the Maintenance Facility (other than the Returned Facilities) and the Simulators.

"Maintenance Period" means, in respect of a Set, a period:

- (a) commencing when the Set is delivered by RailCorp to the Handover Point for maintenance or repairs by PPP Co; and
- (b) ending when the Set is collected by RailCorp from the Pick-up Point.

"Maintenance Site" means the Lease Area and the Licensed Areas.

"Maintenance Site Safety Interface Agreement" means a rail safety interface agreement under section 12 of the Rail Safety Act between RailCorp, PPP Co and, if necessary, appropriate third parties, as required in relation to the Maintenance Site and/or the Associated Work Sites for the purpose of the Project, including, without limitation for movements across the boundary between the RailCorp Network and the Maintenance Site and/or the Associated Work Sites.

"MainTrain Site" has the meaning given in schedule 4.

"Major Graffiti" means Graffiti in respect of a Set which covers an area in excess of 10 square metres using a technique which closely encloses the affected area.

"Manchester Road North Area" has the meaning given in the Maintenance Facility Licence.

"Mandatory Relevant Source Code" means all Relevant Source Code owned by, and/or identified in Table 2 in section 3.5.2 of the Train Design Book as being transferred or delivered to, the Original Rolling Stock Manufacturer.

"Manufacture Site" means EDI Rail's Cardiff manufacturing facility located at 460 Main Road, Glendale, New South Wales.

"Manufacturing Cost Schedule" means the manufacturing cost schedule contained in appendix 10 of the Local Industry Participation Plan.

"Milestone Payments" means the milestone payments referred to in clause 2.1 (Milestone Payments) of schedule 7 (Payment regime).

"Milestones" means the milestones referred to in clause 2.1 (Milestone Payments) of schedule 7 (Payment regime).

"Minimum Operating Standards for Available Sets" means the more stringent of:

- (a) the Minimum Standards; and
- (b) the standards which affect Availability set out in the Performance Operating Standards.

"Minimum Standards" means:

- (a) the minimum functional standards for trains set out in the Train Operations Manual; and
- (b) the minimum presentation standards for trains set out in the Train Presentation Manual.

"Minor Defect" means:

- (a) in relation to a Set, a Defect:
 - (i) which does not prevent the Set from satisfying the Minimum Operating Standards for Available Sets; and
 - (ii) in relation to which RailCorp's Representative determines that PPP Co has reasonable grounds for not promptly rectifying;
- (b) in relation to the Maintenance Facility Works or a Simulator, a Defect:
 - (i) which does not prevent the Maintenance Facility Works or the Simulator from being reasonably capable of being safely used for its intended purpose; and
 - (ii) in relation to which RailCorp's Representative determines that PPP Co has reasonable grounds for not promptly rectifying but does not include a Defect which prevents a RailCorp Enabling Works Package from commencing; and
- (c) in relation to a RailCorp Enabling Works Package, a Defect:
 - (i) which does not prevent the RailCorp Enabling Works Package from being reasonably capable of being safely used for its intended purpose; and
 - (ii) in relation to which RailCorp's Representative determines that RailCorp has reasonable grounds for not promptly rectifying but does not include a Defect which prevents the Maintenance Facility Works being continued or a RailCorp Enabling Works Package from commencing.

"Minor Graffiti" means Graffiti which is not Major Graffiti.

"Model Outputs Schedule" has the meaning given in the Closing Protocol.

"Modification" means, in respect of any Source Code, any amendment, modification, update, enhancement or other change to the Source Code.

"National Rail Safety Accreditation Package" means the National Rail Safety Accreditation Package issued by ITSRR, as updated from time to time.

"Native Title Claim" means any claim or application for a determination of native title under the *Native Title Act 1993* (Cth) or any similar law.

"Network Access Right" means:

- (a) a Work on Track Authority; or
- (b) a Train Run Entitlement.

"Network Procedures" means the procedures issued by RailCorp from time to time for the safe conduct of work on the RailCorp Network. These are to be read in conjunction with the Network Rules.

"Network Rules" means the rules issued by RailCorp from time to time to mandate the requirements for the safe operation of the RailCorp Network.

"New Year's Eve" means the period:

- (a) commencing at the start of the Weekday AM Availability Period or the Weekend Availability Period (as may be relevant) on 31 December; and
- (b) ending at the end of the Weekday PM Availability Period or the Weekend Availability Period (as may be relevant) on 1 January of the immediately following calendar year.

"No Authority Required" or **"NAR"** means a method used by Qualified Workers to carry out work on track without a formally issued Work on Track Authority.

"Non-Project Purposes" has the meaning given in clause 37.3(c).

"Not Rejected (NR)" has the meaning given in clause 13.5(a)(ii)A.

"Not Rejected Subject to Comments (SC)" has the meaning given in clause 13.5(a)(ii)B.

"Notifiable Occurrence" means an occurrence that is required to be reported in accordance with section 64 of the Rail Safety Act.

"Notional Initial Equity Investor" means a notional corporate tax payer who:

- (a) is issued with units in the Holding Trust and shares in the Holding Trustee, and provides unitholder or shareholder loans (or other loans in the nature of equity funding) to or for the benefit of PPP Co Holding Co, on or prior to the date of Financial Close; and
- (b) holds those units and shares, and provides the loans, from the date of Financial Close until the end of the Contract Term.

"Object Code" means, in respect of a computer program, the executable version of that computer program.

"Operational Set" means a Set which:

- (a) has achieved Practical Completion; and
- (b) has not been:
 - (i) withdrawn under clause 19.3 (Withdrawal of one of the first 6 Sets);
 - (ii) decommissioned under clause 25.2 (Decommissioning of Sets); or
 - (iii) transferred to RailCorp under clause 25.4 (If option to acquire is exercised).

"Operations Services" means the operations services referred to in clause 2.5 of the RailCorp Through Life Support Specification.

"Original Contract Term" means the period commencing on the date of Financial Close and ending on the earlier of:

- (a) the Original Expiry Date; and
- (b) the date on which this Contract is terminated.

"Original Decommissioning Date" means the 30th anniversary of each SAU Start Date of a Set, other than in respect of the last 10 Sets to be decommissioned, for which the Original Decommissioning Date is the 30th anniversary of the SAU Start Date of Set 69.

"Original Expert Determination Agreements" means the agreements between RailCorp, PPP Co and each Expert appointed pursuant to clauses 53.4(c) or 53.4(d) appointing the relevant Expert to the Expert Panel.

"Original Expiry Date" means the 30th anniversary of the SAU Start Date of Set 69.

"Original Maintenance Facility Construction Contract" means the contract between PPP Co and the Original Maintenance Facility Contractor dated on or about the date of this Contract for the design, construction and commissioning of the Maintenance Facility Works.

"Original Maintenance Facility Construction Guarantee" means the deed of guarantee dated on or about the date of this Contract from the Original Maintenance Facility Contractor Guarantor in favour of PPP Co in respect of the obligations of the Original Maintenance Facility Contractor under the Original Maintenance Facility Construction Contract.

"Original Maintenance Facility Contractor" means EDI Rail.

"Original Maintenance Facility Contractor Guarantor" means Downer EDI.

"Original Rolling Stock Manufacture Contract" means the contract between PPP Co and the Original Rolling Stock Manufacturer dated on or about the date of this Contract for the design, manufacture and commissioning of the Cars and the Simulators.

"Original Rolling Stock Manufacturer" means EDI Rail and Hitachi Australia Pty Limited ABN 34 075 381 332 jointly and severally.

"Original Rolling Stock Manufacture Guarantee" means each deed of guarantee dated on or about the date of this Contract from each Original Rolling Stock Manufacturer Guarantor in favour of PPP Co in respect of the obligations of the relevant Original Rolling Stock Manufacturer under the Original Rolling Stock Manufacture Contract.

"Original Rolling Stock Manufacturer Guarantor" means each of Downer EDI and Hitachi Limited ABN 35 002 539 693.

"Original Source Code Escrow Agent" means Assurex Escrow Pty Limited ABN 64 008 611 578 of level 5, suite 93, 330 Wattle Street, Ultimo, New South Wales.

"Original Source Code Escrow Agreement" means the agreement entitled "Original Source Code Escrow Agreement" between RailCorp, PPP Co and the Original Source Code Escrow Agent dated on or about the date of this Contract.

"Original TLS Contract" means the contract between PPP Co and the Original TLS Contractor dated on or about the date of this Contract for the Through Life Support of the Maintenance Facility, the Cars and the Simulators.

"Original TLS Contractor" means EDI Rail PPP Maintenance Pty Limited ABN 97 122 730 116.

"Original TLS Guarantee" means the deed of guarantee dated on or about the date of this Contract from the Original TLS Guarantor in favour of PPP Co in respect of the obligations of the Original TLS Contractor under the Original TLS Contract.

"Original TLS Guarantor" means Downer EDI.

"Other Sets" means RailCorp trains from time to time other than the Sets.

"Other Contractor" means any contractor, consultant, tradesperson or other person engaged by any person to do work, other than PPP Co and its Associates.

"OTSI" means the Office of Transport Safety Investigations constituted under the Transport Administration Act.

"Out Depot" means a location where Sets can be stabled (including maintenance centre sidings), which is operated and managed by RailCorp.

"PAFA Act" means the *Public Authorities (Financial Arrangements) Act 1987* (NSW).

"PAFA Act Guarantee" means the guarantee made on or prior to the date of Financial Close pursuant to section 22B of the PAFA Act in respect of RailCorp's obligations under the RailCorp Project Agreements.

"Package 1 RailCorp Enabling Works" has the meaning given in schedule 19.

"Performance Monitoring System" means the performance monitoring system referred to in clause 26.1.

"Performance Operating Standards" means the performance operating standards set out in attachment 1 of the RailCorp Through Life Support Specification, as updated from time to time.

"Permitted Share Capital Dealing" means a Share Capital Dealing specified in schedule 20.

"Performance Report" means the report referred to in clause 26.3.

"Persistent Breach Notice" means a notice issued under clause 49.3(a) which complies with the requirements of clause 49.3(b).

"Physical Configuration Audit" means, in respect of a System, Subsystem or Configuration Item, the audit carried out, or to be carried out, of that System, Subsystem or Configuration Item in accordance with clause 4.6.7 of the Contract Management Requirements.

"Pick-up Point" means the area described for the pickup of Sets in the RailCorp Maintenance Facility Specification (or such other area as RailCorp and PPP Co may agree).

"Planning Approval" means the determination with respect to the construction and operation of the Maintenance Facility issued by RailCorp, and dated 30 November 2006, in accordance with Part 5 of the EP&A Act, a copy of which is contained in exhibit 15.

"PPP Co Event of Default" means any event specified in clause 49.5.

"PPP Co Finance Co" means Reliance Rail Finance Pty Ltd ACN 120 380 805.

"PPP Co Group" means the PPP Co Holding Co (in its own right and as trustee of the Reliance Rail Holding Trust), PPP Co (in its own right and as trustee of the Trust), the PPP Co Finance Co and any "subsidiary" (as defined in the Corporations Act) or other entity "controlled" (as defined in the Equity Documents) from time to time by any of them.

"PPP Co Holding Co" means the Holding Trustee as trustee of the Holding Trust.

"PPP Co Intellectual Property Rights" means all Intellectual Property Rights owned by:

- (a) PPP Co or a Core Contractor; or

- (b) a Related Body Corporate of PPP Co or of a Core Contractor.

"PPP Co Related Defect" means a Defect which is attributable to PPP Co or its Associates. It includes any Defect arising out of the Delivery Phase Activities or the TLS Phase Activities.

"PPP Co Related Incident" means:

- (a) a Set is introduced into service 3.00 minutes or more after the commencement of any Availability Period due to one or more PPP Co Related Problems in respect of that Set;
- (b) a Set becomes 3.00 minutes or more behind the time nominated in the Timetable for the Set to pass any way point in the RailCorp Network due to one or more PPP Co Related Problems in respect of that Set;
- (c) a Set is cancelled by RailCorp whilst it is in service or when it is due to enter service because:
- (i) it fails or ceases to satisfy the Minimum Operating Standards for Available Sets;
 - (ii) it has a PPP Co Related Defect which RailCorp, acting reasonably, believes may delay the Set when in service by 10.00 minutes or more;
 - (iii) it:
 - A. is introduced into service 10.00 minutes or more after the commencement of an Availability Period; or
 - B. becomes 10.00 minutes or more behind the time nominated in the Timetable for the Set to pass any way point in the RailCorp Network,due to:
 - C. one or more PPP Co Related Problems in respect of that Set;
 - D. if the Set is a Spare Set which has been substituted for a Failed Set under clause 22.5(a) or 22.5(b), the Spare Set being so substituted; or
 - E. the Actual Delivery Time of the Set being after the Required Delivery Time for the Set; or
 - (iv) ITSRR or another Investigative Authority orders or directs RailCorp to cease operating the Set due to one or more PPP Co Related Problems; or
- (d) PPP Co does not achieve the Required Availability because a Set is withheld or withdrawn from service by PPP Co.

"PPP Co Related Problem" means:

- (a) a PPP Co Related Defect; or
- (b) any other act or omission of PPP Co or its Associates.

"PPP Co Safety Assurance Reports" means the safety assurance reports which PPP Co is required to prepare pursuant to clause 3.3.3 of the Contract Management Requirements for the purposes of PPP Co's Activities.

"PPP Co Schedule of Rates" means the schedule of rates and prices set out in annexure 4 of schedule 7.

"PPP Co Termination Event" means any event specified in clause 50.1.

"PPP Co's Activities" means all things or tasks which PPP Co is, or may be, required to do to comply with its obligations under this Contract, whether or not the performance of such things or tasks is subcontracted by PPP Co to another person.

"PPP Co's Contractors" means PPP Co's contractors, subcontractors, sub-subcontractors and so on right down the contracting chain (including all suppliers, tradespersons and consultants) involved in performing PPP Co's Activities.

"PPP Co's Safety Compliance and Accreditation Manager" means Andrew Phillip or any other person from time to time appointed to PPP Co to replace that person in accordance with clause 10.6 (Key Personnel).

"PPP Co's Representative" means Greg Pauline or any other person from time to time appointed by PPP Co to replace that person in accordance with clause 10.6 (Key Personnel).

"PPP Co's Variation Notice" means has the meaning given in clause 30.2.

"Practical Completion":

- (a) in respect of the Simulators, has the meaning given in clause 17.1;
- (b) in respect of the Maintenance Facility Works, has the meaning given in clause 17A.1; and
- (c) in respect of a Set, has the meaning given in clause 18.1.

"Pre-Agreed Variation" means a variation to the terms and scope of this Contract in accordance with schedule 12.

"Preconditions" means, in respect of a RailCorp Enabling Works Package, the preconditions applicable to that RailCorp Enabling Works Package set out in schedule 19.

"Predicted Mass" means ~~395,500~~ 395,688,¹² being the predicted mass of a Set in kilograms.

"Preliminary Design Review" or **"PDR"** means, in respect of a System, Subsystem or Configuration Item, the technical review of that System, Subsystem or Configuration Item carried out, or to be carried out, in accordance with clause 4.6.4 of the Contract Management Requirements.

"Prescribed Notice Period" means, in respect of a RailCorp Enabling Works Package, the period of notice applicable to that RailCorp Enabling Works Package set out in schedule 19.

"Prescribed Period" means, in respect of a RailCorp Enabling Works Package, the period or date for completion of the works comprising that RailCorp Enabling Works Package set out in schedule 19.

"Previous Planning Approval" means the determination with respect to the construction and operation of the Maintenance Facility issued by RailCorp, and dated 31 July 2006, in accordance with Part 5 of the EP&A Act.

¹² [The definition of "Predicted Mass" was initially amended by RFTA 0227 and then by RFTA 0322, both dated 26 June 2009.](#)

"Previous REF" means the Review of Environmental Factors referred to in the Previous Planning Approval.

"Price per SAU" has the meaning given in schedule 7 (Payment regime).

"Proceed Authority" means a formal authority for a train to enter a length of track within defined limits in which only one train is allowed at any time.

"Project" means:

- (a) the financing, design, manufacturing and commissioning of the Cars and the Simulators;
- (b) the financing, design, construction and commissioning of the Maintenance Facility Works;
- (c) the provision of the Required Availability;
- (d) the Through Life Support of the Cars, the Maintenance Facility (other than the Returned Facilities) and the Simulators;
- (e) the decommissioning of the Cars (other than Cars in respect of which RailCorp exercises its option to acquire in accordance with clause 25.3 (Option to acquire cars due for decommissioning)); and
- (f) the handover to RailCorp of the Maintenance Facility and, if RailCorp exercises its option to acquire any Cars in accordance with clause 51 (Option to acquire Cars following termination), those Cars,

in accordance with this Contract.

"Project Agreements" means:¹³

- (a) this Contract;
- (b) the Cross Guarantee and Indemnity;
- (c) the Call Option Deed;
- (d) the Maintenance Facility Lease;
- (e) the Maintenance Facility Licence;
- (f) any Maintenance Site Safety Interface Agreement;
- (g) the Rolling Stock Manufacture Contract;
- (h) the Rolling Stock Manufacture Contract Side Deed;
- (i) the Rolling Stock Manufacture Guarantee;
- (j) the Rolling Stock Subcontract;
- (k) the TLS Contract;
- (l) the TLS Contract Side Deed;

¹³ [Amended by RailCorp Consent Deed, 3 February 2012.](#)

- (m) the TLS Guarantee;
- (n) the Maintenance Facility Construction Contract;
- (o) the Maintenance Facility Construction Contract Side Deed;
- (p) the Maintenance Facility Construction Guarantee;
- (q) the Maintenance Facility Subcontract;
- (r) the Debt Financing Documents;
- (s) the Debt Finance Side Deed;
- (t) the RailCorp Deed of Charge;
- (u) the Equity Documents;
- (v) the PAFA Act Guarantee;
- (w) the Expert Determination Agreements;
- (x) the Source Code Escrow Agreement;
- (y) the Approved Escrow Deeds (Core Contractors); ~~and~~
- (z) the Right of Entry Deed for Cardiff Maintenance Depot~~;~~
- (aa) the Deed of Release - Independent Verifier Claim;
- (bb) the Deed of Release - CCTV Claim;
- (cc) the Deed of Release - Energy Australia Kiosk;
- (dd) the Deed of Release - Earthing & Bonding;
- (ee) the Deed of Release - Roads 5 and 7;
- (ff) the Deed of Release - Financial Close;
- (gg) the Fleet Management Facility System (FMFS) Side Deed;
- (hh) the RailCorp Consent Deed;
- (ii) the Restructure Coordination Agreement;
- (jj) the Capital Commitment Deed;
- (kk) the RSM Contractor Undertakings Deed;
- (ll) the Deed of Settlement;
- (mm) the RailCorp Set 7 Waiver Letter;
- (nn) the RSM Set 7 Waiver Letter;
- (oo) the RailCorp Set 1 Waiver Letter;
- (pp) the RSM Set 1 Waiver Letter; and

(qq) [the TLS Consent Letter.](#)

"Project Plans" means each of the following plans:

- (a) the Contract Management Plan;
- (b) the Safety Management Plan;
- (c) the Systems Assurance Plan;
- (d) the Configuration Management Plan;
- (e) the Train and Simulator Delivery Plan;
- (f) the Maintenance Facility Works Delivery Plan;
- (g) the Transition Plan; and
- (h) the Through Life Support Plan,

including all subsidiary project plans and supporting documents and information, as updated from time to time under clause 9. Initial versions of some of these plans are included in exhibit 17.

"Project Purposes" has the meaning given to it in clause 37.2(c).

"Project Site" means:

- (a) the Manufacture Site;
- (b) the Maintenance Site; and
- (c) the Associated Work Sites.

"Project Works" means the permanent and physical works required for:

- (a) the design, development, manufacturing and commissioning of the Cars and the Simulators; and
- (b) the design, development, construction and commissioning of the Maintenance Facility Works,

including the works more particularly described in this Contract (including the Specifications), and including any partly assembled Cars and Simulators.

"Promised Network Access Rights" means, in respect of each 12 month period specified in exhibit 16, the Network Access Rights specified for that period in exhibit 16.

"Protection Officer" means a Qualified Worker responsible for safe working protection at a work site within the Rail Corridor.

"Prototype" means a modified three car set consisting of two driving trailer cars and one motor car, as further described in the Integrated Test Plan.

"Public Holiday" means any day which is a public holiday in New South Wales.

"Qualified Worker" means a worker certified under the Rail Safety Act or by RailCorp as competent to carry out the relevant task.

"Qualifying Change in Law" means:

- (a) a Discriminatory Change in Law;
- (b) a Change in Railway Law;
- (c) a Change in Disability Law; or
- (d) a General Change in Law.

"Quarter End" means each 3 month period ending 31 March, 30 June, 30 September or 31 December.

"Rail Corridor" means the RailCorp Land between the fence-lines either side of the rails or, if there are no fences, the RailCorp Land within 15 metres of the outermost rails.

"Rail Infrastructure Facilities" has the same meaning as in the Transport Administration Act and includes "infrastructure of a railway" as that term is defined in the Rail Safety Act.

"Rail Safety Act" means the *Rail Safety Act 2002* (NSW).

"Rail Safety Interface Agreement" means a safety interface agreement as defined in the Rail Safety Act.

"RailCorp Consent Deed" has the meaning given in the Restructure Co-Ordination Deed.¹⁴

"RailCorp Deed of Charge" means the deed of charge dated on or about the date of this Contract between RailCorp as chargee and PPP Co and the PPP Co Finance Co as chargors.

"RailCorp Enabling Works" means the physical things and works described in the RailCorp Enabling Works Specification and comprising each RailCorp Enabling Works Package.

"RailCorp Enabling Works Package" has the meaning given in schedule 19.

"RailCorp Enabling Works Specification" means exhibit 11.

"RailCorp Infrastructure" means any existing or new railway track, civil works, associated track structures, signalling systems, power supply systems, train control systems, communication systems, equipment, nodes, conduits, ducting, cable, cable support structures and other plant, equipment, buildings or facilities constructed or to be constructed by RailCorp or its Associates on the Construction Site or the Maintenance Site (as the case may be).

"RailCorp Intellectual Property Rights" means all Intellectual Property Rights in any RailCorp Materials.

"RailCorp Interconnection Areas" has the meaning given in the Call Option Deed.

"RailCorp Land" means all land owned, leased, occupied or used by RailCorp and includes any easements or licences or other legal or beneficial interest in land used in relation to the operation of the Railway. It does not, however, include the Maintenance Site or the Manufacture Site.

"RailCorp Maintenance Facility Reference Design" means the reference design contained in attachment 6 of the RailCorp Maintenance Facility Specification.

¹⁴ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

"RailCorp Maintenance Facility Specification" means exhibit 7.

"RailCorp Materials" means any information, inventions (if any), ideas, documents, equipment or materials of any kind and however embodied, which are supplied, brought to the Project or otherwise made available to PPP Co under this Contract by RailCorp, whether forming part of the Deliverables or not.

"RailCorp Network" means that part of the New South Wales rail network vested in or owned by RailCorp and any other track in New South Wales on which RailCorp operates trains (excluding the Lease Area and the Manufacture Site).

"RailCorp Policy, Rule or Procedure" means:

- (a) the Minimum Standards;
- (b) the Performance Operating Standards;
- (c) the Train Presentation Manual;
- (d) the Train Operations Manual;
- (e) the Train Operating Conditions Manual;
- (f) the Interface Protocols;
- (g) the RailCorp Safety Management System;
- (h) the Network Rules;
- (i) the Network Procedures;
- (j) the Safety Protocol;
- (k) the Timetable;
- (l) the Infrastructure Possession Manual; and
- (m) any other policy, rule, procedure, manual, protocol, timetable or document (excluding any standard issued by RailCorp other than those referred to in paragraphs (a) and (b) above) issued by RailCorp from time to time.

"RailCorp Project Agreements" means those Project Agreements to which RailCorp is a party.

"RailCorp Project Land" means the Maintenance Site and the Associated Work Sites, but excluding the Manufacture Site.

"RailCorp Safety Assurance Reports" means the safety assurance reports which PPP Co is required to prepare and submit to RailCorp's Representative in accordance with clause ~~8.29.2~~, described in more detail in clause 3.3.2 of the Contract Management Requirements.

"RailCorp Safety Management System" means the RailCorp Safety Management System as published by RailCorp from time to time.

"RailCorp Schedule of Rates" means the schedule of rates and prices set out in annexure 5 of schedule 7.

"RailCorp Set 1 Waiver Letter" means the letter from RailCorp to PPP Co dated on or about 9 June 2011 (Ref: RC07549) and countersigned by PPP Co on or about 30 June 2011.¹⁵

"RailCorp Set 7 Waiver Letter" has the meaning given in the Restructure Co-Ordination Deed.¹⁶

"RailCorp Simulator Specification" means exhibit 9.

"RailCorp Termination Event" means any event specified in clause 50.3.

"RailCorp Territory" means that part of the New South Wales and Australian rail network vested in, owned by or operated on by RailCorp from time to time.

"RailCorp Through Life Support Specification" or **"RailCorp TLS Specification"** means exhibit 5.

"RailCorp Trade Marks" means the registered and unregistered trademarks of RailCorp and its Related Bodies Corporate from time to time.

"RailCorp Train Performance Specification" means exhibit 3.

"RailCorp's Accreditation Variation" means the variation to RailCorp's Accreditation which RailCorp must obtain from ITSRR as a consequence of the Project.

"RailCorp's Accreditation Variation Application" means RailCorp's application under section 27 of the Rail Safety Act for a variation of its Accreditation to enable it to operate the Sets.

"RailCorp's Facilities" means all railway track, railway stations, civil works, associated track structures, signalling systems, power supply systems, train control systems, communication systems, equipment, nodes, conduits, ducting, cable, cable support structures and other plant, equipment, buildings or facilities owned, leased, occupied or used by RailCorp on, or in relation to, or in any way comprising, any RailCorp Land, and for the avoidance of doubt, includes all Rail Infrastructure Facilities.

"RailCorp's Representative" means Fredrick George Paton or any other person from time to time appointed by RailCorp to replace that person in accordance with clause 6.3(a).

"Railway" means the guided system for transportation of passengers or freight or both (whether or not passengers, freight or both are being transported) on a railway track within the Rail Corridor.

"REF" means the document entitled "RailCorp, Proposed Maintenance Facility at Auburn, Review of Environmental Factors, November 2006" contained in exhibit 15.

"Reference Documents" means:

- (a) documents which the Specifications refer to or require PPP Co to comply with; and
- (b) all other documents provided to PPP Co prior to the date of this Contract which were expressly stated to be "Reference Documents".

¹⁵ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

¹⁶ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

"Refinancing" means:

- (a) any amendment, novation, supplement or replacement of any Debt Financing Document;
- (b) the exercise of any right, or the request for or grant of any waiver or consent, under any Debt Financing Document;
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Debt Financing Documents or the creation or granting of any other form of benefit or interest in either the Debt Financing Documents or the contracts, revenues or assets of PPP Co or PPP Co Finance Co whether by way of security or otherwise;
- (d) any new financing arrangements entered into by PPP Co or PPP Co Finance Co;
- (e) any other step or arrangement that has an effect which is similar to any of the actions referred to in paragraphs (a) - (d),

which is likely to:

- (f) give rise to a Refinancing Gain; or
- (g) adversely affect any of RailCorp's rights, obligations or liabilities under the RailCorp Project Agreements.

"Refinancing Assumptions" means each of the terms, conditions and assumptions concerning a Refinancing set out in schedule 22.

"Refinancing Gain" means, in respect of a Refinancing:

- (a) the positive amount of any Distributions made or to be made as a result of or in connection with the Refinancing on or before the effective date of the Refinancing;
- (b) the amount of any increase in, or the increased value attributable to any acceleration, novation or securitisation of, Distributions (less the amount of any reductions in, or the decreased value attributable to any deferral of Distributions) projected to be made in connection with the Refinancing in the period from the effective date of the Refinancing to the expiry of the Contract Term; and
- (c) the amount of any incremental tax benefits arising to the Equity Investors as a consequence of the Refinancing in the period from the effective date of the Refinancing to the expiry of the Contract Term,

taking due account of both the timing and the amount of any such gains which would have been delivered by an Assumed Refinancing if the relevant Refinancing is being undertaken instead of that Assumed Refinancing, it being acknowledged that gains from Assumed Refinancings have already been reflected in the Price per SAU and that RailCorp should receive no additional payment in respect of such gains.

"Reimbursable Damage Event" means:

- (a) a collision between:
 - (i) a Set; and
 - (ii) another train (including another Set), any road vehicle or any other object outside the Set;

- (b) a derailment;
- (c) Vandalism; or
- (d) Major Graffiti,

except where the event:

- (e) occurs:
 - (i) during a Maintenance Period in respect of a Set; or
 - (ii) when a Set is at the Maintenance Facility; or
- (f) is, or the consequences of the event requiring repair or other work are, attributable to a PPP Co Related Problem.

"Reimbursable Repairs" means repair or other work to a Car:

- (a) arising out of a Reimbursable Damage Event; or
- (b) required as a result of a direction or order by ITSRR or another Investigative Authority which is not attributable to a PPP Co Related Problem.

"Reimbursable Through Life Support" means:

- (a) Reimbursable Repairs;
- (b) the Operations Services;
- (c) the Wheel Profiling Services; and
- (d) the Train Washing Services.

"Reimbursable TLS Payment" means, in respect of a month, the amount payable for Reimbursable Through Life Support provided by PPP Co during that month calculated in accordance with clause 5 of schedule 7.

"Rejected (R)" has the meaning given in clause 13.5(a)(ii)C.

"Related Body Corporate" has the same meaning as in the Corporations Act, except that RailCorp's Related Bodies Corporate include Rail Infrastructure Corporation, the State Rail Authority of New South Wales and the Transport Infrastructure Development Corporation.

"Relevant Source Code" means all Source Code for any computer program, computer interface or Train Operating System screen included in or required for any Deliverable, other than Source Code for Approved Third Party Software.

"Reliability and Disruption Adjustment" or "RDA" means, in respect of a Set during an Availability Period, the Reliability and Disruption Adjustment for the Set calculated in accordance with clause 3.3 of schedule 7.

"Reliance Rail Holding Trust" means the trust so entitled created by the Holding Trust Deed.

"Reliance Rail Trust" means the trust so entitled created by the Trust Deed.

"Remedy" means, in respect of a PPP Co Event of Default, to remedy or cure the PPP Co Event of Default or otherwise overcome the consequences of the PPP Co Event of Default, and "Remedied" and "Remediation" have corresponding meanings.

"Reputable Insurer" means an insurance company having the Required Rating.

"Request for Certificate of Practical Completion" means a request in the form set out in schedule 18.

"Required Availability" has the meaning given in clause 22.2.

"Required Delivery Time" means the point in time which is the Required Train Preparation Period prior to the commencement of the relevant Availability Period.

"Required Rating" means a credit rating, or in the case of an insurer, a financial security rating, of at least A- by Standard and Poor's (Australia) Pty Limited or A3 by Moody's Investors Service, Inc (or such other credit rating as RailCorp may approve in writing from time to time) or, if no rating is provided by Standard and Poor's (Australia) Pty Limited or by Moody's Investors Service, Inc, an equivalent rating with another reputable rating agency.

"Required Train Preparation Period" means the period of time required to enable Train Preparation to be completed by RailCorp in respect of a Set, being the period determined by RailCorp's Representative in accordance with clause 22.4A(c) (Train Preparation).

"Rescue Refinancing" means a Refinancing the purpose of which is as described in clause [44.5\(a\)](#) ~~45.5(a)~~.

"Restructure Coordination Agreement" means the deed entitled "[Restructure Co-Ordination Deed](#)" dated on or about 25 January 2012 between the State, PPP Co Holding Co (in its own right and as trustee of the Holding Trust), PPP Co (in its own right and as trustee of the Operating Trust), PPP Co Finance Co, RailCorp, the Original Rolling Stock Manufacturer, the Security Trustee and others.¹⁷

"Return Condition Bond" means the bond referred to in clauses 5.1(b) and 52.3.

"Return Conditions" means the condition in which the Maintenance Facility (other than the Returned Facilities), the Maintenance Site, the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials are to be returned to RailCorp after the expiry of the Contract Term, as specified in schedule 15.

"Returned Facilities" means:

- (a) those parts of the Maintenance Facility Works in respect of which a Certificate of Practical Completion has been issued and which are located within the Associated Work Sites;
- (b) following the date on which the Commissioning Track Possession ends under clause 11.5(a)(ii), those parts of the Maintenance Facility Works in respect of which a Certificate of Practical Completion has been issued and which are located within the Maintenance Facility Access Areas;
- (c) following the date on which the licence of the Future RailCorp Facility Areas expires under the Maintenance Facility Licence, those parts of the Maintenance

¹⁷ [Inserted by RailCorp Consent Deed, 3 February 2012. This definition contains an error. It should be "Restructure Coordination Deed". When fixed, a consequential change to paragraph \(ii\) of the definition of Project Agreements will also be required. The date in the definition should also be changes to 3 February 2012.](#)

Facility Works in respect of which a Certificate of Practical Completion has been issued and which are located within the Future RailCorp Facility Areas; and

- (d) those parts of the Maintenance Facility Works in respect of which a Certificate of Practical Completion has been issued and which:
- (i) comprise Rail Infrastructure Facilities;
 - (ii) are located within a RailCorp Interconnection Area; and
 - (iii) lie between an Interconnection Point and the boundary of the Lease Area.

"Right of Entry Deed for Cardiff Maintenance Depot" means the deed so entitled dated on or about the date of this Contract between RailCorp, EDI Rail and PPP Co.

"Rolling Stock Manufacture Contract" means the Original Rolling Stock Manufacture Contract and any other contract between PPP Co and a Rolling Stock Manufacturer to design, manufacture and commission the Cars and the Simulators.

"Rolling Stock Manufacture Contract Side Deed" means the deed so entitled dated on or about the date of this Contract between RailCorp, PPP Co, the Original Rolling Stock Manufacturer and the Original Rolling Stock Manufacturer Guarantor.

"Rolling Stock Manufacture Guarantee" means the Original Rolling Stock Manufacture Guarantee and any other guarantee under which a Rolling Stock Manufacturer Guarantor guarantees the obligations of a Rolling Stock Manufacturer under a Rolling Stock Manufacture Contract.

"Rolling Stock Manufacturer" means the Original Rolling Stock Manufacturer and any person who, in addition or substitution, is engaged by PPP Co to design, manufacture and commission the Cars and the Simulators.

"Rolling Stock Manufacturer Guarantor" means the Original Rolling Stock Manufacturer Guarantor and any person who in addition or substitution guarantees the obligations of a Rolling Stock Manufacturer under a Rolling Stock Manufacture Contract.

"Rolling Stock Subcontract" means the agreement so named between EDI Rail and Changchun Railway Vehicles Co Limited dated on or about the date of this Contract.

"Royal Easter Show" means the period each year:

- (a) commencing at the start of the Weekday AM Availability Period or the Weekend Availability Period (as may be relevant) on the first calendared day of the Royal Easter Show; and
- (b) ending at end of the Weekday PM Availability Period or the Weekend Availability Period (as may be relevant) on the last calendared day of the Royal Easter Show.

"RSM Contractor Undertakings Deed" has the meaning given in the Restructure Co-Ordination Deed.¹⁸

"RSM Set 1 Waiver Letter" means the letter from PPP Co to the Original Rolling Stock Manufacturer dated on or about 30 June 2011 (Ref: RR#12465) and countersigned by the Original Rolling Stock Manufacturer.¹⁹

¹⁸ Inserted by RailCorp Consent Deed, 3 February 2012.

["RSM Set 7 Waiver Letter" has the meaning given in the Restructure Co-Ordination Deed.](#)²⁰

"**Safe Place**" means a place where workers and their equipment cannot be struck by a train or track vehicle.

"**Safety Committee**" means the committee established under clause 6.7.

"**Safety Management Plan**" means the plan of that name referred to in clause 3 of the Contract Management Requirements including all plans, supporting documents and information subsidiary to it.

"**Safety Management System**" means a safety management system required for the Project under section 14 of the Rail Safety Act.

"**Safety Protocol**" means the document set out in schedule 5, as amended by RailCorp and notified to PPP Co from time to time.

"**SAU**" or "**Set Availability Unit**" means an Available Set provided by PPP Co for an Availability Period in satisfaction of its obligations under clause 22.1 (PPP Co to provide Required Availability).

"**SAU Start Date**" means, in respect of a Set, the later of:

- (a) the date falling 3 months after the Date for Practical Completion of the Set; and
- (b) the Date of Practical Completion of the Set.

"**Securities**" has the meaning given in schedule 20 (Permitted Share Capital Dealings).

"**Security Interest**" means any mortgage, charge, pledge, lien, encumbrance, assignment, hypothecation, security interest, title retention, preferential right, trust arrangement, contractual right of set-off or any other security agreement or arrangement in favour of any person.

"**Security Trust Deed**" means the deed so entitled dated on or about the date of this Contract between the Security Trustee, PPP Co, PPP Co Finance Co and PPP Co Holding Co.

"**Security Trustee**" means, at any time, the person appointed as security trustee under the Security Trust Deed. At the date of this Contract the Security Trustee is Permanent Registry Limited (ACN 000 334 636).

"**Senior Project Group**" means the group established under clause 6.6.

"**Set**" means a group of 8 Cars capable of operating as a train in accordance with this Contract. Subject to clause 19.3(a):

- (a) "**Set 1**" or "**first Set**" means the first set to achieve Practical Completion;
- (b) "**Set 2**" means the second set to achieve Practical Completion, and so on; and
- (c) "**last Set**" means the last set to achieve Practical Completion.

"**Share Capital Dealing**" has the meaning given in clause 42.2.

¹⁹ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

²⁰ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

"Signaller" means a Qualified Worker who issues Proceed Authorities, and works points, signals and other signalling equipment to manage routes for safe and efficient transit of rail traffic on the RailCorp Network.

"Significant Contract" has the meaning given in clause 43.2(b).

"Significant Contractor" means a party (other than PPP Co) to a Significant Contract.

"Simulator Design Book" means exhibit 10.

"Simulator Specifications" means:

- (a) the RailCorp Simulator Specification; and
- (b) the Simulator Design Book.

"Simulators" means the simulator training facilities for the Sets described in the Simulator Specifications comprising:

- (a) the **"Mobile Version Simulator"** which comprises:
 - (i) a fully featured Driver's Simulator (Mobile Version);
 - (ii) a fully featured Guard's Simulator (Mobile Version);
 - (iii) a Simulator Control Station (Mobile Version); and
 - (iv) the software for a Part Task Simulator with 3 operator options, each as defined in the Simulator Specifications; and
- (b) the **"Motion System Version Simulator"** which comprises:
 - (i) a fully featured Driver's Simulator (Motion System Version);
 - (ii) a fully featured Guard's Simulator;
 - (iii) a Simulator Control Station; and
 - (iv) the software for a Part Task Simulator with 3 operator options, each as defined in the Simulator Specifications.

"Site Conditions" means the following conditions (whether latent or otherwise) relating to the RailCorp Project Land:

- (a) ground water, ground water hydrology, the existence of any wells and the effects of any de-watering;
- (b) physical and structural conditions on, above or in the vicinity of, or under the surface of, the RailCorp Project Land, including any partially completed structures or in ground works;
- (c) pastures, grasses or other vegetation on the RailCorp Project Land;
- (d) topography, ground surface and sub-surface conditions and geology including rock or other materials;

- (e) condition of roads and all other means of access to the RailCorp Project Land, and existence and location of all Utility Services (including drainage) servicing, or required to service, the RailCorp Project Land or the Maintenance Facility;
- (f) climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind, wind-blown dust and sand, seasons, mud and other effects of climatic and weather conditions;
- (g) all existing systems and Utility Services on, above or below the surface of the RailCorp Project Land, and the location of all facilities with which the systems and Utility Services are connected; and
- (h) all other physical conditions and characteristics of the RailCorp Project Land on, above, or below the surface which may affect the performance of PPP Co's Activities, other than Artefacts and Contamination.

"Source Code" means, in respect of a computer program, the human readable code of that computer program, and includes associated software including scripts and applets (collectively comprised in a complete copy of all of the foregoing in executable code) and all documentation necessary to operate, maintain and modify the executable code copy of that computer program including all technical documentation and specifications in respect of that computer program.

"Source Code Escrow Agent" means the Original Source Code Escrow Agent and any person who in addition or substitution is engaged by RailCorp and PPP Co (or any other relevant party) to hold any Relevant Source Code.

"Source Code Escrow Agreement" means the Original Source Code Escrow Agreement and any other contract between RailCorp, PPP Co and any Source Code Escrow Agent to hold any Relevant Source Code.

"Spare Set", being one of the Sets, means, in respect of an Availability Period, an Operational Set which:

- (a) is specified by PPP Co in the notice pursuant to clause 22.1(b) for that Availability Period;
- (b) satisfies the Minimum Operating Standards for Available Sets; and
- (c) is ready for use by RailCorp.

"Special Event Period" means the Royal Easter Show, New Years Eve or any Additional Special Event.

"Specifications" means:

- (a) the Contract Management Requirements;
- (b) the Train Performance Specifications;
- (c) the Through Life Support Specifications;
- (d) the Maintenance Facility Specifications; and
- (e) the Simulator Specifications.

"Standard" means a Reference Document and any standard, specification, drawing, plan, guide, code, manual or other document (howsoever described) that:

- (a) specifies requirements or standards for the performance of PPP Co's Activities; and
- (b) is referred to in the Specifications or elsewhere in this Contract,

but does not include:

- (c) any RailCorp Policy, Rule or Procedure;
- (d) any Project Plan; or
- (e) the National Rail Safety Accreditation Package.

"State" means the Crown in right of the State of New South Wales.

"Steady-state Phase" means the period:

- (a) commencing on the day after the Date of Practical Completion of Set 78; and
- (b) ending on the day before the date on which the first Set to be decommissioned by PPP Co, or acquired by RailCorp, is so decommissioned or acquired.

"Sub-contract" means any agreement between:

- (a) a Sub-contractor and a Core Contractor; or
- (b) two or more Sub-contractors,

under which a Sub-contractor is bound to design, manufacture, deliver or supply any Deliverable.

"Sub-contractor" means:

- (a) any sub-contractor of a Core Contractor; and
- (b) any sub-contractor of a person referred to in paragraph (a), whether directly or by virtue of one or more interposing contracts.

"Sub-contractor Source Code" means all Relevant Source Code of a Sub-contractor.

"Supported Land" means any land and improvements on land (not including the Construction Site) which relies upon any part of the Construction Site and/or improvements on the Construction Site for support.

"Surface Run-off Area" means the Rail Corridor, the Future RailCorp Facility, the Supported Land and any other land within or around the perimeter of the Construction Site which drains across the Construction Site (whether naturally or as the consequence of any improvements).

"System Definition Review" or **"SDR"** means, in respect of a System, Subsystem or Configuration Item, the technical review of that System, Subsystem or Configuration Item carried out, or to be carried out, in accordance with clause 4.6.3 of the Contract Management Requirements.

"System Verification Review" or **"SVR"** means, in respect of a System, Subsystem or Configuration Item, the technical review of that System, Subsystem or Configuration Item carried out, or to be carried out, in accordance with clause 4.6.6 of the Contract Management Requirements.

"Systems Assurance Plan" means the plan of that name referred to in clause 4 of the Contract Management Requirements, including all plans, supporting documents and information subsidiary to it.

"Taxes" means all income tax, stamp duty and other taxes, levies, imposts, duties, deductions, fees, charges, withholdings and workers compensation premiums (other than workers compensation premiums payable in respect of RailCorp and its Associates) plus any interest, penalties, charges, fees or other amounts payable in respect thereof.

"Technical Issues Lists" means the lists so titled contained in each Design Book or exhibit 17.

"Technical Maintenance Plan" means the plan of that name referred to in clause 4.11 of the Contract Management Requirements.

"Technical Review" means any of:

- (a) the System Definition Review;
- (b) the Preliminary Design Review;
- (c) the Critical Design Review;
- (d) the System Verification Review; and
- (e) the Physical Configuration Audit.

"Termination Date" means any date of early termination of this Contract in accordance with clause 33.11 (Termination for Force Majeure Event), 36.12 (Uninsurable Risks), 50.2 (Termination for PPP Co Termination Event), 50.4 (Termination for RailCorp Termination Event) or 50.5 (Voluntary termination by RailCorp).

"Termination Payment" means an amount payable by RailCorp to PPP Co under clause 50.9 (Termination Payments) or clause 51.2(b) (If option to acquire Cars following termination is exercised), in each case calculated in accordance with schedule 14.

"Tests" means those tests specified in the Integrated Test Plan.

"Testing" means the carrying out of the Tests.

"Third Party Intellectual Property Rights" means all Intellectual Property Rights excluding:

- (a) RailCorp Intellectual Property Rights; and
- (b) PPP Co Intellectual Property Rights.

"Third Party Operator" means an entity which has entered into a commercial agreement with RailCorp to operate trains on the Railway.

"Through Life Support" or "TLS" means the Car maintenance services, presentation services, operations services, technical services, logistics support services, Simulator support services, Maintenance Facility support services, Reimbursable Through Life Support services and other services required to be provided by or otherwise contemplated by the Through Life Support Specifications.

"Through Life Support Description" means exhibit 6.

"Through Life Support Phase" or "TLS Phase" means the period commencing on the earlier of:

- (a) the Date of Practical Completion of the Simulators;
- (b) the Date of Practical Completion of the Maintenance Facility Works; and
- (c) the Date of Practical Completion of the first Set,

and ending on the last day of the Contract Term.

"Through Life Support Plan" means the plan of that name referred to in clause 9 of the Contract Management Requirements, including all plans, supporting documents and information subsidiary to it.

"Through Life Support Specifications" or "TLS Specifications" means :

- (a) the RailCorp Through Life Support Specification; and
- (b) the Through Life Support Description.

"Timetable" means the general timetable for railway passenger services in New South Wales as published or updated by RailCorp from time to time.

["TLS Consent Letter" has the meaning given in the Restructure Co-Ordination Deed.](#)²¹

"TLS Contract" means the Original TLS Contract and any other contract between PPP Co and a TLS Contractor to provide the Through Life Support for the Maintenance Facility, the Cars and the Simulators.

"TLS Contract Side Deed" means the deed so entitled dated on or about the date of this Contract between RailCorp, PPP Co, the Original TLS Contractor and the Original TLS Guarantor.

"TLS Contractor" means the Original TLS Contractor and any person who in addition or substitution is engaged by PPP Co to provide the Through Life Support for the Maintenance Facility, the Cars and the Simulators.

"TLS Guarantee" means the Original TLS Guarantee and any other guarantee under which a TLS Guarantor guarantees the obligations of a TLS Contractor under a TLS Contract.

"TLS Guarantor" means the Original TLS Guarantor and any person who in addition or substitution guarantees the obligations of a TLS Contractor under a TLS Contract.

"TLS Documentation" means all documentation in computer readable and written forms which PPP Co or any other person creates in connection with the TLS Phase Activities including:

- (a) relevant documents specified in attachment 1 to the Contract Management Requirements; and
- (b) all records and data relating to the performance of the Cars, the Maintenance Facility and the Simulators during the TLS Phase, including:

²¹ [Inserted by RailCorp Consent Deed, 3 February 2012.](#)

- (i) the data contained in the Maintenance Management Information System (MMIS)); and
- (ii) the data for, or resulting from, the Performance Monitoring System.

"TLS Marginal Price" has the meaning given in schedule 7 (Payment regime).

"TLS Payments" means:

- (a) the Availability Payments;
- (b) the KPI Payments; and
- (c) the Reimbursable TLS Payments.

"TLS Phase Activities" means all things that PPP Co is, or may be, required to carry out or do:

- (a) in connection with:
 - (i) the Through Life Support of the Cars, the Maintenance Facility (other than the Returned Facilities) and the Simulators;
 - (ii) the decommissioning of Cars (other than Cars in respect of which RailCorp exercises its option to acquire in accordance with clause 25.3 (Option to acquire Cars due for decommissioning));
 - (iii) the handover to RailCorp of the Maintenance Facility and, if RailCorp exercises its option to acquire any Cars in accordance with clause 51 (Option to acquire Cars following termination), those Cars; or
- (b) to comply with its operation, Through Life Support, decommissioning and handover obligations under this Contract.

"TLS Phase Insurances" means the Insurances referred to in clause 36.2.

"Track Occupancy Authority" or **"TOA"** means a formal authority from RailCorp for Qualified Workers and their equipment to occupy a defined portion of track for a specified period.

"Track Work Authority" or **"TWA"** means a formal authority from RailCorp for non-exclusive occupancy of track by track workers within specified limits.

"Train and Simulator Delivery Plan" means the plan of that name referred to in clause 6 of the Contract Management Requirements, including all plans, supporting documents and information subsidiary to it.

"Train Control" means the control and regulation of rail traffic operating on the RailCorp Network to ensure the safe and efficient operation of the RailCorp Network.

"Train Controller" means a Qualified Worker who authorises and may issue occupancies and Proceed Authorities, and who manages Train Paths to ensure the safe and efficient transit of rail traffic in the RailCorp Network.

"Train Design Book" means exhibit 4.

"Train Operating Condition Waiver" or **"TOC Waiver"** means a notice of changes or exceptions to the requirements specified in the Train Operating Conditions Manual.

"Train Operating Conditions Manual" or **"TOC Manual"** means the manual issued by RailCorp from time to time that prescribes the minimum operating requirements for trains and track vehicles in the RailCorp Network.

"Train Operating System" or **"TOS"** has the meaning given in clause 7.4 of the RailCorp Train Performance Specification.

"Train Operation Data" means all data generated by a Set or anything fixed to a Set during the operation of the Set. It includes data from the event recorder, the train management system or the CCTV system.

"Train Operations Manual" or **"TOM"** means the Train Operations Manual as published by RailCorp from time to time.

"Train Order" means an instruction issued by a Train Controller in Train Order Territory to direct the movement of a Set.

"Train Order Territory" means the portions of rail line where the Train Order system of safeworking is used.

"Train Path" means a series of track segments over a particular time interval through which a Set or the Prototype can travel and may include stopping points and other set down or changeover points.

"Train Performance Specifications" means:

- (a) the RailCorp Train Performance Specification; and
- (b) the Train Design Book.

"Train Preparation" means the process defined in the Train Operations Manual and any other instructions issued by RailCorp from time to time which require the Crew to perform a series of checks to ensure that the Set meets the Minimum Operating Standards for Available Sets prior to the Set entering into operational service. Train Preparation is repeated on a regular basis depending on the use of the Set in service and the duration of any Stabled periods between operational services.

"Train Presentation Manual" means the RailCorp Staff Cleaning Manual as updated from time to time.

"Train Run" means a particular trip by a Set or the Prototype on a Train Path for Commissioning or Testing purposes.

"Train Run Entitlement" means a right to use the RailCorp Network for the purpose of conducting a Train Run on a Train Path.

"Train Washing Services" means the train washing services described in clause 2.4.3 of the RailCorp Through Life Support Specification.

"Transition-in Phase" means the period:

- (a) commencing on the Date of Practical Completion of Set 1; and
- (b) ending on the Date of Practical Completion of Set 78.

"Transition-out Phase" means the period:

- (a) commencing on the date on which the first Set to be decommissioned by PPP Co, or acquired by RailCorp, is so decommissioned or acquired; and

(b) ending on the last day of the Contract Term.

"Transition Plan" means the plan of that name referred to in clause 8 of the Contract Management Requirements, including all plans, supporting documents and information subsidiary to it.

"Transport Administration Act" means the *Transport Administration Act 1988* (NSW).

"Trust" means the Reliance Rail Trust.

"Trust Deed" means the constitution of the Trust dated 5 October 2005 and executed by the Trustee.

"Trustee" means Reliance Rail Pty Limited ABN 18 111 280 427.

"Unacceptable Availability Notice" means a notice issued under clause 49.1(a) which complies with the requirements of clause 49.1(b).

"Unacceptable Reliability Notice" means a notice under clause 49.2(a) which complies with the requirements of clause 49.2(c).

"Unfixed Maintenance Plant and Equipment" means all plant, equipment and special tools used by PPP Co or PPP Co's Contractors for the purposes of providing Through Life Support for the Cars, the Maintenance Facility (other than the Returned Facilities) or the Simulators but which are not affixed to any Car, the Maintenance Facility or the Simulators.

"Uninsurable Risk" means a risk:

- (a) which, at the date of this Contract, is usually covered by the TLS Phase Insurances specified in clause 36.2(a) (industrial special risk insurance) or clause 36.2(c) (general liability insurance); and
- (b) in respect of which insurance is not available with any Reputable Insurer at the time that the insurance is sought to be obtained.

"Utility Service" means any service, including water, electricity, gas, telephone, drainage, sewerage and electronic communications.

"Vandalism" means any malicious, reckless or deliberate damage to any part of a Set by any person other than PPP Co or its Associates, excluding Graffiti.

"Variation" means any variation to:

- (a) the Delivery Phase Activities;
- (b) the Project Works (including the Maintenance Facility Works);
- (c) a Car;
- (d) the Maintenance Facility;
- (e) the Simulators;
- (f) the TLS Phase Activities (other than a change to the Required Availability);
- (g) the Minimum Operating Standards for Available Sets;
- (h) the design specified in the Design Books (other than a change to the Design Books pursuant to clause 13.10(b)(i) or (ii)); or

- (i) the Through Life Support described in the Through Life Support Description (other than a change to the Through Life Support Description pursuant to clause 23.7(a)(i) or (ii)),

including any change, addition, reduction, increase, decrease, omission, deletion, demolition or removal to or from them but excluding:

- (j) any increase or decrease in the number of Cars to be designed, manufactured and commissioned by PPP Co under this Contract; or
- (k) the Pre-Agreed Variation.

"Variation Costs" means, in relation to a Variation, the direct costs and loss of revenue reasonably arising out of or in connection with the Variation (including any increased design costs, construction costs, manufacturing costs, commissioning costs, Through Life Support costs, decommissioning costs, or financing costs), after deducting all cost savings and increases in revenue arising out of or in connection with the Variation (including any savings in relation to design costs, construction costs, manufacturing costs, commissioning costs, Through Life Support costs, decommissioning costs or financing costs).

"Variation Savings" means, in relation to a Variation, the amount of Variation Costs if a negative number.

"Volume Adjustment" has the meaning given in schedule 7.

"Weekday AM Availability Period" means the period from commencement of the first service in the Timetable to 1200 hours on any weekday excluding any Public Holiday.

"Weekday PM Availability Period" means the period from 1200 hours to completion of the last service in the Timetable on any weekday excluding any Public Holiday (recognising that completion of the last service may occur after midnight).

"Weekend Availability Period" means the period from commencement of the first service in the Timetable to completion of the last service in the Timetable on any Saturday, Sunday or Public Holiday (recognising that completion of the last service may occur after midnight).

"Wheel Profiling Services" means the wheel profiling services described in clause 2.3.8 of the RailCorp Through Life Support Specification.

"Work on Track Authority" means any one of the following authorities to perform work in the Rail Corridor:

- (a) a Local Possession Authority (LPA);
- (b) a Track Occupancy Authority (TOA); or
- (c) a Track Work Authority (TWA).

1.2 Dictionary of Technical Definitions and Abbreviations

The definitions and abbreviations in the Dictionary of Technical Definitions and Abbreviations apply in this Contract unless the relevant term is defined differently in these Conditions of Contract.

1.3 Interpretation

In this Contract:

- (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 an additional trustee;
- (d) a reference to a document (including this Contract but excluding the Planning Approval) 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 indicating a gender includes every other gender;
- (g) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Contract, and a reference to this Contract includes all schedules, exhibits, attachments and annexures to it;
- (h) a reference in a schedule, exhibit, attachment or annexure to a clause, paragraph, section, schedule, exhibit, attachment or annexure is a reference to a clause, paragraph, section, schedule, exhibit, attachment or annexure to or of that schedule, exhibit, attachment or annexure;
- (i) 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;
- (j) **"includes"** or **"such as"** in any form are not words of limitation; and
- (k) a reference to **"\$"** or **"dollar"** is to Australian currency.

1.4 Standards

A reference to a Standard is a reference to:

- (a) the version of that Standard contained in the Information and Reference Document Repository; or
- (b) if there is no version of that Standard in the Information and Reference Document Repository, the version stated in this Contract or if no version is stated, that Standard as at the date of this Contract.

PPP Co may request that RailCorp's Representative approve that an equivalent national or international standard apply instead of a Standard. If approved by RailCorp's Representative (which approval will not be unreasonably withheld) all references in this Contract, or in a Standard or document referred to in this Contract, to the Standard will be read as a reference to the approved equivalent national or international standard.

1.5 CPI Indexed

Unless otherwise expressly provided, a reference to "CPI Indexed" after a monetary amount in a RailCorp Project Agreement means that the amount will be indexed for movements in the consumer price index in accordance with the following formula:

$$A \text{ (CPI Indexed)} = A \times \frac{CPI_{Q-1}}{CPI_{Base}}$$

Where:

A is the monetary amount originally specified;

CPI_{Q-1} is the Consumer Price Index All Groups weighted average for the eight capital cities published by the Australian Bureau of Statistics for the Quarter End following the date that occurs 3 months before the relevant calculation date; and

CPI_{Base} is the Consumer Price Index All Groups weighted average for the eight capital cities published by the Australian Bureau of Statistics for the Quarter End ending 30 June 2006, being 154.3.

If either:

- (a) the Consumer Price Index All Groups weighted average for the eight capital cities ceases to be published quarterly; or
- (b) the method of calculation of the Consumer Price Index All Groups weighted average for the eight capital cities substantially alters,

then the Consumer Price Index All Groups weighted average for the eight capital cities is to be replaced by the nearest equivalent index as selected in good faith by RailCorp's Representative and any necessary consequential amendments are to be made.

1.5A AWE Indexed

Unless otherwise expressly provided, a reference to "AWE Indexed" after a monetary amount in a RailCorp Project Agreement means that the amount will be indexed for movements in the Average Weekly Earnings, Industry, Australia index in accordance with the following formula:

$$A \text{ (AWE Indexed)} = A \times \frac{AWE_{Q-1}}{AWE_{Base}}$$

Where:

A is the monetary amount originally specified;

AWE_{Q-1} is the Average Weekly Earnings, Australia index (Persons, Full Time, Adult, Ordinary Time Earnings of All Persons, Original, All Australia ABS Catalogue No. 6302.0) published by the Australian Bureau of Statistics for the Quarter End following the date that occurs 3 months before the relevant calculation date; and

AWE_{Base} is the Average Weekly Earnings, Australia index (Persons, Full Time, Adult, Ordinary Time Earnings of All Persons, Original, All Australia ABS Catalogue No. 6302.0) published by the Australian Bureau of Statistics for the Quarter End ending 30 June 2006, being 1041.6.

If either:

- (a) the Average Weekly Earnings, Australia index (Persons, Full Time, Adult, Ordinary Time Earnings of All Persons, Original, All Australia ABS Catalogue No. 6302.0) ceases to be published quarterly; or
- (b) the method of calculation of the Average Weekly Earnings, Australia index (Persons, Full Time, Adult, Ordinary Time Earnings of All Persons, Original, All Australia ABS Catalogue No. 6302.0) substantially alters,

then the Average Weekly Earnings, Australia index (Persons, Full Time, Adult, Ordinary Time Earnings of All Persons, Original, All Australia ABS Catalogue No. 6302.0) is to be replaced by the nearest equivalent index as selected in good faith by RailCorp's Representative and any necessary consequential amendments are to be made.

1.6 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.

1.7 No bias against drafting party

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

1.8 Business Day

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

1.9 Certification

For the purposes of this Contract, a copy of a document will be regarded as duly certified by PPP Co if it is certified as a true copy by a director, secretary or general manager of PPP Co.

1.10 Cost of performing obligations

Each party must perform its obligations under this Contract at its own cost, unless expressly provided otherwise.

1.11 Provisions limiting or excluding liability

Any provision of this Contract which seeks to limit or exclude a liability of a party is to be construed as doing so only to the extent permitted by law.

1.12 Order of precedence

The following order of precedence applies in the event of any inconsistency, ambiguity or discrepancy between the various documents comprising this Contract:

- (a) this Contract (excluding the Specifications);
- (b) the RailCorp Enabling Works Specification; and
- (c) the remaining Specifications.

1.13 Operational delays attributable to more than one cause

- (a) Subject to clause 1.13(b) and clause 1.13(c), where a Set:
- (i) is made available after the commencement of an Availability Period; or
 - (ii) falls behind the time nominated in the Timetable for the Set to pass any way point in the RailCorp Network,
- and such delay is:
- (iii) partially due to one or more PPP Co Related Problems in respect of the Set; and
 - (iv) partially due to one or more other causes,
- only that part of the delay which is attributable to a PPP Co Related Problem will be taken into account when calculating Reliability and Disruption Adjustments or determining whether a PPP Co Related Incident has occurred.
- (b) While RailCorp may be able to assist PPP Co by having the Crew or an Equipment Examiner take steps to seek to address or mitigate the effects of the PPP Co Related Problem which has caused or is causing a delay, RailCorp will not be under any obligation to do so. Accordingly:
- (i) a delay or failure by RailCorp in taking steps to seek to address or mitigate the effects of a PPP Co Related Problem; or
 - (ii) the taking of steps by RailCorp to seek to address or mitigate the effects of a PPP Co Related Problem which:
 - A. fail to address or mitigate the effects of the PPP Co Related Problem; or
 - B. exacerbate the effects of the PPP Co Related Problem,
- will not count as a separate cause of delay, even if this has the effect of extending the delay period.
- (c) Subject to clause 1.13(d), in calculating the Reliability and Disruption Adjustments or determining whether a PPP Co Related Incident has occurred, where a delay is solely caused by a Deemed Action Problem, the delay time attributed to that Deemed Action Problem will be deemed to be the lesser of:
- (i) the actual delay time attributable to the PPP Co Related Problem; and
 - (ii) if a Deemed Action Time has been agreed or determined in accordance with schedule 21, the Deemed Action Time.
- (d) If:
- (i) a Crew member carries out the Deemed Action but the Deemed Action does not have the expected effect; or
 - (ii) the delay is attributable to:
 - A. more than one Deemed Action Problem; or

- B. a Deemed Action Problem and another PPP Co Related Problem,

then:

- (iii) clause 1.13(c) will not apply; and
- (iv) the actual delay time attributable to the PPP Co Related Problem will apply to the calculation of the Reliability and Disruption Adjustments or the determination of whether a PPP Co Related Incident has occurred.

1.14 Debt servicing payments

The references to costs in clauses 7.5 (Legal challenge to Planning Approval), 11.12 (Native Title Claims), 11.8 (Other Contractors and RailCorp Infrastructure), 11.13 (Artefacts), 11.19 (Right of support and drainage), 14.6 (Testing of Delivery Phase Activities) and 15.10 (Delay damages) includes any reasonable interest, fees and other amounts payable under the Debt Financing Documents.

1.15 Capacity

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

1.16 Design Books, Project Plans and Technical Issues Lists

- (a) Each Design Book and the Technical Issues List contained within that Design Book are mutually explanatory of each other and must be read together.
- (b) Each Project Plan and the Technical Issues List contained within exhibit 17 in respect of the relevant Project Plan are mutually explanatory of each other and must be read together.

2. Conditions Precedent

2.1 Conditions Precedent

This Contract will not commence unless and until each of the Conditions Precedent have been satisfied (or waived under clause 2.3), except for the provisions contained in:

- (a) clause 1 (Definitions and interpretation);
- (b) this clause 2 (Conditions Precedent);
- (c) clause 5 (Security Bonds), to the extent that the provisions of that clause relate to the Delivery Phase Bond;
- (d) clause 30.17 (Pre-Agreed Variation);
- (e) clause 38 (Representations and warranties);
- (f) clause 39 (PPP Co to inform itself);
- (g) clause 40 (Restrictions on PPP Co);
- (h) clause 41 (Assignment, security, ownership of Cars and restrictions on dealings);
- (i) clause 42 (Share Capital Dealings);

- (j) clause 43 (Contracts and dealings with contractors and third parties);
- (k) clause 44 (Refinancings);
- (l) clause 47 (Disclosure, confidentiality and publicity);
- (m) clause 53 (Dispute resolution);
- (n) clause 54 (Notices and time bar);
- (o) clause 55 (Governing law and jurisdiction);
- (p) clause 56 (Civil Liability Act); and
- (q) clause 57 (Miscellaneous),

(each a "**Day 1 Clause**") which will commence on the date of Contractual Close.

2.2 Satisfaction of Conditions Precedent

- (a) RailCorp must:
 - (i) apply for the consents and approvals under section 20 of the PAFA Act; and
 - (ii) otherwise use all reasonable endeavours to satisfy each Condition Precedent which is expressed to be included for the benefit of PPP Co (or PPP Co and RailCorp),

by the relevant Condition Precedent Deadline Date.
- (b) PPP Co must use all reasonable endeavours to satisfy each Condition Precedent which is expressed to be for the benefit of the RailCorp (or RailCorp and PPP Co) by the relevant Condition Precedent Deadline Date.
- (c) When a party is of the opinion that a Condition Precedent has been satisfied it must give the other party notice of its opinion.
- (d) The party receiving a notice given under clause 2.2(c) will notify the other party whether or not it agrees that the Condition Precedent has been satisfied, such agreement not to be unreasonably withheld.
- (e) If the party receiving a notice given under clause 2.2(c) fails to give the other party a notice under clause 2.2(d) within 7 days, the Condition Precedent will be deemed to have been satisfied.
- (f) Upon the satisfaction (or waiver under clause 2.3) of all Conditions Precedent, the parties must promptly acknowledge in writing the fact that Financial Close has occurred.

2.3 Waiver of Conditions Precedent

A Condition Precedent is waived if, and only if:

- (a) where the Condition Precedent is included for the benefit of a particular party, that party gives notice of the waiver of the Condition Precedent to the other party; and
- (b) where the Condition Precedent is included for the benefit of both parties, both parties agree in writing to waive the Condition Precedent.

2.4 Condition Precedent Deadline Dates

- (a) If a Condition Precedent has not been satisfied (or waived under clause 2.3) by 11.59 pm on the relevant Condition Precedent Deadline Date, then either party may give notice in writing to the other party that it is terminating this Contract if the Condition Precedent in question is not satisfied (or waived under clause 2.3) within the period specified in its notice (which must not be less than 5 Business Days).
- (b) If a party gives notice under clause 2.4(a) and the Condition Precedent in question is not satisfied (or waived under clause 2.3) within the period specified in that notice then this Contract will terminate upon the expiry of that period.
- (c) If this Contract is terminated pursuant to this clause 2.4 then:
 - (i) each of the other RailCorp Project Agreements will be taken to have terminated at the time this Contract is terminated;
 - (ii) RailCorp will return any Delivery Phase Bond provided in accordance with clause 5; and
 - (iii) no party will have any Claim against any other party under or in respect of the RailCorp Project Agreements or in respect of the reimbursement of costs or expenses or otherwise in connection with the Project, except for any Claim in relation to a breach of any Day 1 Clause.

3. Contract Term

3.1 Commencement date

Except for the Day 1 Clauses which commence on the date of this Contract, this Contract commences on the date of Financial Close.

3.2 Expiry Date

Unless terminated early or extended in accordance with clause 3.3, the Contract Term will end on the Original Expiry Date.

3.3 Extensions to Contract Term

RailCorp may extend the Contract Term:

- (a) by a period of 5 years, in accordance with clause 24.2 (RailCorp's option to extend); and
- (b) by a further period of 5 years, in accordance with clause 24.4 (Further Contract Term extension).

4. Primary obligations and risk allocation

4.1 PPP Co's primary obligations

PPP Co must:

- (a) finance the Project;
- (b) design, manufacture and commission the Cars and the Simulators;
- (c) design, construct and commission the Maintenance Facility Works;

- (d) provide the Required Availability;
- (e) provide Through Life Support for the Cars, the Maintenance Facility (other than the Returned Facilities) and the Simulators;
- (f) decommission the Cars (other than Cars in respect of which RailCorp exercises its option to acquire in accordance with clause 25.3 (Option to acquire Cars due for decommissioning)); and
- (g) handover to RailCorp the Maintenance Facility and, if RailCorp exercises its option to acquire any Cars, those Cars,

subject to, and in accordance with, this Contract.

4.2 RailCorp's primary obligations

RailCorp:

- (a) grants PPP Co the licences under clauses 11.1 (Licence to use Construction Site during Delivery Phase) and 11.1A (Licence to use Construction Site for site investigations);
- (b) grants PPP Co a licence under clause 11.2 (Licence to use Rail Corridor and Out Depots during TLS Phase);
- (c) must provide PPP Co with Network Access Rights in accordance with clause 11.5 (Network Access Rights);
- (d) must provide Crews required for Testing and Commissioning in accordance with clause 16.3 (Conduct of Tests) and Crews during the TLS Phase in accordance with clause 23.8 (Depot Crew);
- (e) must provide transitional stabling in accordance with clause 16.6 (Transitional stabling);
- (f) must design and construct the RailCorp Enabling Works; and
- (g) must pay PPP Co in accordance with clause 27 (Payment provisions),

subject to, and in accordance with, this Contract.

4.3 Project risks

Except as stated in this Contract, PPP Co accepts all risks associated with the Project, including:

- (a) the actual cost of the Project or the performance of PPP Co's Activities being greater than the cost estimated;
- (b) the TLS Payments and other payments actually due from RailCorp to PPP Co under this Contract being less than estimated;
- (c) the time required to perform the Delivery Phase Activities being greater than estimated;
- (d) the number of Sets manufactured being insufficient to enable PPP Co to provide the Required Availability;
- (e) the distance travelled by the Cars being greater or less than estimated;

- (f) without limiting clause 4.3(a), the maintenance requirements of the Cars being greater or less than that which is anticipated at Contractual Close, due to patronage on the Cars being greater or less than estimated;
- (g) changes to the Timetable, including the time for the commencement of the first service or the time for the completion of the last service;
- (h) the condition of the track and other interfaces being worse than estimated;
- (i) the liability for Taxes being greater than estimated;
- (j) land or interests in land additional to the Maintenance Site and the Associated Work Sites being necessary to enable PPP Co to carry out PPP Co's Activities;
- (k) Site Conditions;
- (l) the availability or quality of any materials to be used for the Project;
- (m) technical obsolescence occurring in relation to equipment or systems used by PPP Co or its Associates in carrying out PPP Co's Activities;
- (n) any law (now or in the future) affecting PPP Co's rights or obligations under the Project Agreements;
- (o) industrial action or interference from third parties;
- (p) inclement weather;
- (q) Variations to the Cars, the Maintenance Facility or the Simulators;
- (r) the risk that compliance with the Specifications will not satisfy PPP Co's obligations under this Contract;
- (s) all risks associated with carrying out PPP Co's Activities including any changes in PPP Co's Activities causing delay, increased cost or decreased revenue;
- (t) delay in, or refusal by, any Authority in granting any Approval;
- (u) any other act or omission of an Authority;
- (v) the ability to obtain any Utility Service;
- (w) the ability to obtain and maintain the Insurances;
- (x) the adequacy of the Insurances;
- (y) any occupational health and safety matters; and
- (z) availability and cost of finance,

and, except as stated in this Contract, PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with such risks.

Neither RailCorp's rights nor PPP Co's liabilities or obligations whether under this Contract or otherwise according to law will be limited by the terms of this clause 4.3.

5. Security Bonds

5.1 Provision of Bonds

PPP Co must provide RailCorp with:

- (a) two bonds which in aggregate total \$50 million ("**Delivery Phase Bond**") as a Condition Precedent under clause 2 (and item 3 of schedule 1); and
- (b) a bond for the amount referred to in clause 52.3(a)(iii) ("**Return Condition Bond**") within 7 days of the date on which RailCorp requests it.

5.2 Release of Bonds

Subject to RailCorp's right to have recourse to the Bonds, RailCorp must release:

- (a) the Delivery Phase Bond on the Date of Final Completion of Set 78; and
- (b) the Return Condition Bond within 20 Business Days after end of the Original Contract Term.

5.3 Requirements of Bonds

Each Bond must be:

- (a) in the form of:
 - (i) in the case of the Delivery Phase Bond, schedule 2 (Form of Bond) or schedule 2A (Form of Delivery Phase Bond); or
 - (ii) in the case of the Return Condition Bond, schedule 2 (Form of Bond), or such other forms as RailCorp may approve;
- (b) in favour of RailCorp;
- (c) a continuing liability without an expiry date;
- (d) at all times provided by a bank acceptable to RailCorp that maintains the Required Rating; and
- (e) payable at an office of the issuer in Sydney (or such other place as RailCorp may approve).

5.4 Replacement of Bonds

- (a) Upon PPP Co's request, RailCorp agrees to release any Bond issued in favour of RailCorp in accordance with this Contract ("**Released Bond**") where that Released Bond is simultaneously replaced with a new Bond which:
 - (i) meets all of the requirements set out in clause 5.3 (Requirements of Bonds); and
 - (ii) has a face value of not less than the uncalled amount of the Released Bond.

A request by PPP Co under this clause 5.4(a) may be made in relation to more than one Bond but may only be made once in relation to each Bond. Any such request must be made within 90 days of Financial Close.

- (b) If the issuer of a Bond ceases to have the Required Rating, then PPP Co must:
 - (i) promptly notify RailCorp of that circumstance; and
 - (ii) within 20 Business Days of being requested to do so, procure the issue to RailCorp of a replacement bond which must have a face value equal to that of the Bond being replaced and must satisfy the requirements of clause 5.3,

and RailCorp must promptly surrender the original Bond to PPP Co following the issue of the replacement bond.

5.5 No injunction

RailCorp may make a demand under a Bond at any time. PPP Co must not take any steps to injunct or otherwise restrain:

- (a) the issuer of a Bond from paying RailCorp pursuant to the Bond;
- (b) RailCorp from making a demand under a Bond; or
- (c) RailCorp from using the proceeds of a Bond.

5.6 Proceeds of Bonds

RailCorp may use the proceeds of any Bond to reimburse it for any Loss for which PPP Co is liable, and in payment of any other moneys owing by PPP Co to RailCorp (including monies owing under any indemnity).

Any proceeds remaining will be repaid to PPP Co in return for a replacement bond for the amount repaid and which satisfies the requirements of clause 5.3. The replacement bond will be regulated by this Contract as if it were the Bond RailCorp made the demand on.

5.7 No interest

RailCorp is not obliged to pay PPP Co interest on a Bond or the proceeds of a Bond.

5.8 No trust

If RailCorp makes a demand under a Bond, it does not hold the proceeds on trust for PPP Co.

6. Project participant roles and representatives

6.1 RailCorp as an Authority

- (a) Subject to clause 6.1(b), PPP Co acknowledges and agrees that:
 - (i) nothing in the RailCorp Project Agreements will in any way restrict or otherwise affect the unfettered discretion of RailCorp to exercise any of its statutory functions or powers; and
 - (ii) anything RailCorp does, fails to do, or purports to do, pursuant to its statutory functions or powers, will be deemed not to be an act or omission of RailCorp under this Contract and will not entitle PPP Co to

make any Claim against RailCorp arising out of the subject matter of this Contract or any other RailCorp Project Agreement.

- (b) Clause 6.1(a) does not, however, limit any liability which RailCorp would have had to PPP Co under any RailCorp Project Agreement, to the extent that it is expressly provided for in that RailCorp Project Agreement, or as a result of a breach by RailCorp of a term of any RailCorp Project Agreement but for clause 6.1(a).

6.2 Other Authorities

PPP Co acknowledges that it bears the risk of Authorities other than RailCorp exercising their statutory functions and powers in a manner which disrupts, interferes with or otherwise affects PPP Co's Activities, except as otherwise stated in this Contract.

6.3 RailCorp's Representative

- (a) RailCorp
may at any time by written notice to PPP Co replace RailCorp's Representative with another person.
- (b) RailCorp's Representative will carry out all of its functions under this Contract as the agent of RailCorp (and not as an independent certifier, assessor or valuer).
- (c) PPP Co must comply with all directions, instructions and other notices given by RailCorp's Representative under this Contract.

6.4 Appointees of RailCorp's Representative

RailCorp's Representative may:

- (a) by written notice to PPP Co appoint persons to exercise any of the functions of RailCorp's Representative under this Contract;
- (b) not appoint more than one person to exercise a specific function at any one time; and
- (c) revoke any appointment under clause 6.4(a) by written notice to PPP Co.

All references in this Contract to RailCorp's Representative include a reference to an appointee under this clause 6.4.

6.5 PPP Co's Representative

PPP Co must ensure that PPP Co's Representative is available at all reasonable times for communications with RailCorp's Representative.

6.6 Senior Project Group

- (a) **(Composition):** A Senior Project Group must be established consisting of:
 - (i) RailCorp's Representative;
 - (ii) PPP Co's Representative;
 - (iii) 2 persons from each party holding positions more senior than the persons referred to in clause 6.6(a)(i) and 6.6(a)(ii) (as applicable to the relevant party); and

- (iv) such other persons as the parties agree on.
- (b) **(Delegates):** The persons referred to in clause 6.6(a) may appoint delegates to attend Senior Project Group meetings in their absence.
- (c) **(Objectives):** The objectives of the Senior Project Group are to:
 - (i) monitor the overall progress of the Project;
 - (ii) assist with the resolution of any matters referred to the Senior Project Group by a party;
 - (iii) review each Delivery Phase Progress Report provided by PPP Co during the Delivery Phase; and
 - (iv) review each Performance Report provided by PPP Co during the TLS Phase.
- (d) **(Frequency of meetings):** The Senior Project Group will meet monthly during the Delivery Phase and quarterly thereafter.
- (e) **(Administration):** RailCorp's Representative will convene and chair meetings of the Senior Project Group and will take the minutes of all meetings and distribute the minutes to the members of the Senior Project Group.
- (f) **(RailCorp may require certain representatives to attend):** At RailCorp's request, PPP Co must procure the attendance of representatives of any Significant Contractor and/or the Debt Financiers at meetings of the Senior Project Group as observers. RailCorp is also entitled to have representatives of the State or any Authority attend meetings as observers.
- (g) **(PPP Co may bring certain representatives):** PPP Co is entitled to have a representative of each Core Contractor attend any meeting of the Senior Project Group as an observer.
- (h) **(Experts may attend):** Either party is entitled to have one or more of the Experts appointed to the Expert Panel attend any meeting of the Senior Project Group as observers.
- (i) **(No legal responsibilities or powers):** The Senior Project Group will have no legal responsibilities. Nothing which occurs during a meeting of the Senior Project Group will:
 - (i) relieve PPP Co from, or alter or affect, PPP Co's liabilities or responsibilities whether under this Contract or otherwise according to law;
 - (ii) prejudice RailCorp's rights against PPP Co whether under this Contract or otherwise according to law; or
 - (iii) be construed as a direction by RailCorp to do or not do anything.

6.7 Safety Committee

- (a) **(Composition):** A Safety Committee must be established consisting of:
 - (i) RailCorp's Representative;
 - (ii) a senior RailCorp safety representative;

- (iii) PPP Co's Representative;
 - (iv) PPP Co's Safety Compliance and Accreditation Manager; and
 - (v) such other persons as the parties agree on.
- (b) **(Delegates):** The persons referred to in clause 6.7(a) may appoint delegates to attend Safety Committee meetings in their absence.
- (c) **(Objectives):** The objectives of the Safety Committee are to:
- (i) give transparency to safety issues throughout the Project;
 - (ii) ensure that the Project has effective safety policies and systems in place;
 - (iii) consider the safety impact of reported, referred and observed issues on the Project;
 - (iv) monitor compliance with the safety obligations under the Contract, including facilitate the development of the RailCorp Safety Assurance Reports;
 - (v) facilitate the solving of safety issues; and
 - (vi) communicate safety developments.
- (d) **(Frequency of meetings):** The Safety Committee will meet monthly during the Delivery Phase and quarterly thereafter.
- (e) **(Administration):** RailCorp's Representative will convene and chair meetings of the Safety Committee and will take the minutes of all meetings and distribute the minutes to the members of the Safety Committee.
- (f) **(RailCorp may require certain representatives to attend):** At RailCorp's request, PPP Co must procure the attendance of representatives of any Significant Contractor and/or the Debt Financiers at meetings of the Safety Committee as observers. RailCorp is also entitled to have representatives of the State, ITSRR or any other Authority attend meetings as observers.
- (g) **(PPP Co may bring certain representatives):** PPP Co is entitled to have a representative of each Core Contractor attend any meeting of the Safety Committee as an observer.
- (h) **(No legal responsibilities or powers):** The Safety Committee will have no legal responsibilities. Nothing which occurs during a meeting of the Safety Committee will:
- (i) relieve PPP Co from, or alter or affect, PPP Co's liabilities or responsibilities whether under this Contract or otherwise according to law;
 - (ii) prejudice RailCorp's rights against PPP Co whether under this Contract or otherwise according to law; or
 - (iii) be construed as a direction by RailCorp to do or not do anything.
- (i) **(Safety awareness training):** RailCorp may require PPP Co's representatives on the Safety Committee to attend safety awareness training provided by RailCorp.

6.8 No partnership, joint venture or fiduciary relationship

Neither this Contract nor any other RailCorp Project Agreement to which RailCorp and PPP Co are parties creates a partnership, joint venture or fiduciary relationship between RailCorp and PPP Co.

7. Laws and Approvals

7.1 Compliance with laws

PPP Co must:

- (a) in carrying out PPP Co's Activities, comply with all applicable laws;
- (b) ensure that its Associates, in carrying out PPP Co's Activities, comply with all applicable laws; and
- (c) ensure that the Cars, the Maintenance Facility (other than to the extent clause 14A requires RailCorp to comply with all applicable laws and the Planning Approval in relation to a RailCorp Enabling Works Package) and the Simulators comply with all applicable laws.

7.2 Approvals

PPP Co must:

- (a) obtain and maintain, and ensure that its Associates obtain and maintain, all Approvals required to carry out PPP Co's Activities (other than those Approvals which this Contract or the Call Option Deed expressly states that RailCorp has obtained or requires RailCorp to obtain or maintain);
- (b) comply with, and ensure that its Associates, the Cars, the Maintenance Facility (other than to the extent clause 14A.1 requires RailCorp to comply with all applicable laws and the Planning Approval in relation to a RailCorp Enabling Works Package) and the Simulators comply with, all applicable requirements of all relevant Approvals (including those which RailCorp is expressed under the terms of the Approval to have obtained or to be required to comply with); and
- (c) pay all fees, effect all insurances, provide any bonds and execute any undertakings or agreements required by any relevant Authority in respect of any Approval which PPP Co must obtain or comply with (and ensure that its Associates do likewise in relation to any Approvals which they must maintain in connection with PPP Co's Activities).

7.3 Planning Approval for Maintenance Facility

- (a) RailCorp has obtained the Planning Approval.
- (b) Subject to clause 7.3(d), if PPP Co is:
 - (i) required to take any action pursuant to the conditions of or the mitigation measures described in the Planning Approval or the REF which are specific to the *wahlenbergia multicaulis* (Tadgell's Bluebells) or grey-headed flying foxes;
 - (ii) required to obtain or comply with any Approval under the *Threatened Species Conservation Act 1995* (NSW) or the *National Parks and Wildlife Act 1974* (NSW) or any other Act in respect of the

wahlenbergia multicaulis (Tadgell's Bluebells) or grey-headed flying foxes;

- (iii) delayed in achieving Practical Completion of a Set or the Maintenance Facility Works as a consequence of taking the action referred to in clause 7.3(b)(i) or obtaining or complying with an Approval referred to in clause 7.3(b)(ii); or
- (iv) delayed in achieving Practical Completion of a Set or the Maintenance Facility Works as a consequence of RailCorp being required to:
 - A. take any action pursuant to the conditions of or mitigation measures described in the Planning Approval or the REF which are specific to the *wahlenbergia multicaulis* (Tadgell's Bluebells) or grey-headed flying foxes; or
 - B. obtain or comply with an Approval under the *Threatened Species Conservation Act 1995* (NSW) or the *National Parks and Wildlife Act 1974* (NSW) in respect of the *wahlenbergia multicaulis* (Tadgell's Bluebells) or grey-headed flying foxes,

RailCorp must pay PPP Co the reasonable costs, expenses, loss or damage (including loss of revenue) suffered or incurred by PPP Co as a result of any of the items referred to in clauses 7.3(b)(i) to 7.3(b)(iv).

- (c) PPP Co must take (and ensure that PPP Co's Contractors take) all reasonable steps to mitigate the costs, expenses, loss and damage referred to in clause 7.3(b).
- (d) Clause 7.3(b) does not apply in respect of costs, expenses, loss or damage suffered or incurred by PPP Co to the extent that such costs, expense, loss or damage:
 - (i) would have been incurred in complying with the Previous Planning Approval or the Previous REF; or
 - (ii) result from a failure by PPP Co to comply with its obligations under clause 7.3(c).

7.4 Modifications to Planning Approval

Notwithstanding clause 32 (Change in Law), if:

- (a) either:
 - (i) RailCorp determines that it is necessary to carry out any further environmental impact assessment in connection with the Project;
 - (ii) the Planning Approval is modified under the EP&A Act;
 - (iii) a new Approval is issued under the EP&A Act in respect of the Maintenance Facility in substitution for or replacement of the Planning Approval; or
 - (iv) any such new Approval is modified under the EP&A Act; and
- (b) any of the events referred to in clause 7.4(a) relate to or arises out of or in connection with any Variation to the Maintenance Facility requested by PPP Co,

then any such events and any actions arising out of or in connection with any such events will be at PPP Co's cost and risk, irrespective of who is required to, or does, carry out any such assessment.

7.5 Legal challenge to Planning Approval

- (a) If there is a legal challenge brought about by way of commencement of court proceedings in relation to the Planning Approval, PPP Co must continue to perform PPP Co's Activities unless, as a result of that legal challenge, it is otherwise ordered by a court.
- (b) If PPP Co is ordered by a court to cease to perform PPP Co's Activities (or to change the way it does so) as referred to in clause 7.5(a), then:
 - (i) subject to clause 7.5(c), RailCorp must pay PPP Co:
 - A. the reasonable costs and expenses directly incurred by PPP Co which arise as a direct result of the Delivery Phase Activities being delayed as a consequence of a court order referred to in clause 7.5(a), but only to the extent that the court order prevents PPP Co from achieving Practical Completion of the Maintenance Facility Works by the Date for Practical Completion for the Maintenance Facility Works; and
 - B. any other reasonable costs and expenses directly incurred by PPP Co in:
 - 1) ceasing to perform PPP Co's Activities as a result of a court order referred to in clause 7.5(a); and
 - 2) recommencing the performance of PPP Co's Activities following the ceasing of the performance of PPP Co's Activities under clause 7.5(a); and
 - (ii) PPP Co must:
 - A. take all reasonable steps to mitigate such costs and expenses;
 - B. for this purpose, comply with all reasonable directions of RailCorp concerning the legal challenge and the consequences thereof; and
 - C. ensure that PPP Co's Contractors comply with the requirements of this clause 7.5(b)(ii).
- (c) Clause 7.5(b) does not apply to the extent that:
 - (i) any cost or expenses result from a failure by PPP Co to comply with its obligations under clause 7.5(b)(ii); or
 - (ii) the legal challenge:
 - A. is initiated or upheld, or the court order is made, due to PPP Co's non-compliance with its obligations under this Contract or some other wrongful act or omission of PPP Co or its Associates; or

- B. relates to or arises out of or in connection with any event the subject of clause 7.4.

7.6 Long service leave levy

Before commencing construction of the Maintenance Facility Works, PPP Co must:

- (a) pay (or procure payment) to the Building and Construction Industry Long Service Payments Corporation, or its agent, the amount of the long service levy payable in respect of the building and/or construction work under the *Building and Construction Industry Long Service Payments Act 1986* (NSW); and
- (b) produce to RailCorp's Representative the document evidencing payment of the levy.

8. Rail Safety Accreditation and Certificates of Competency

8.1 Acknowledgements

PPP Co acknowledges that:

- (a) RailCorp will need to obtain RailCorp's Accreditation Variation to enable it to operate the Sets;
- (b) a failure to obtain, or delay in obtaining, RailCorp's Accreditation Variation will have a significant adverse impact on RailCorp's business and its ability to fulfil its objectives under the Transport Administration Act;
- (c) ITSRR's requirements in relation to RailCorp's Accreditation Variation are not yet fully known, and are likely to evolve over time;
- (d) the process for obtaining RailCorp's Accreditation Variation will be an iterative one, and will require a flexible, responsive and co-operative approach from PPP Co;
- (e) ITSRR requires RailCorp's safety management system to cover PPP Co's Activities and to include:
 - (i) arrangements for ensuring the competence of PPP Co and its Associates involved in carrying out PPP Co's Activities;
 - (ii) arrangements for ensuring PPP Co and its Associates involved in carrying out PPP Co's Activities understand the relevant aspects of RailCorp's Accreditation and other relevant laws applicable to RailCorp, PPP Co and its Associates;
 - (iii) arrangements for ensuring appropriate communication between RailCorp, PPP Co and their respective Associates; and
 - (iv) arrangements for the identification, review, evaluation and monitoring of risk management systems and practices used by PPP Co and its Associates in carrying out PPP Co's Activities; and
- (f) ITSRR requires RailCorp to actively maintain and apply continuous improvement principles within RailCorp's safety management system, and that this will require reasonable ongoing co-operation and assistance from PPP Co.

Having regard to the preceding acknowledgements, PPP Co agrees that it will, in good faith, co-operate with RailCorp in enabling and assisting RailCorp to obtain RailCorp's

Accreditation Variation. Nothing in this clause 8.1 limits PPP Co's obligations under the other provision of this clause 8.

8.2 RailCorp's Accreditation Variation

- (a) **(RailCorp to obtain RailCorp's Accreditation Variation):** Subject to clause 8.2(b), RailCorp must obtain RailCorp's Accreditation Variation.
- (b) **(PPP Co to assist etc):** PPP Co must:
- (i) liaise and co-operate with RailCorp, and do everything reasonably necessary to enable and assist RailCorp to obtain RailCorp's Accreditation Variation, including by:
- A. preparing and submitting to RailCorp's Representative:
- 1) all Accreditation Variation Documents;
 - 2) all supporting documentation and certifications referred to in clause 8.2(d); and
 - 3) any other information and documentation as RailCorp's Representative may reasonably require in connection with RailCorp's Accreditation Variation,
- at times specified in this Contract or, where times are not specified, in a timely fashion and when directed to by RailCorp's Representative (subject to reasonable prior notice being given by RailCorp's Representative) and in a form reasonably required by RailCorp's Representative; and
- B. responding to any queries or requests by RailCorp's Representative within the periods reasonably required by RailCorp's Representative; and
- (ii) except as required by law, not do, or omit to do, anything which may hinder or delay RailCorp in obtaining RailCorp's Accreditation Variation.
- (c) **(Preparation of Accreditation Variation Documents):** Without limiting PPP Co's obligations under clause 8.2(b), PPP Co must develop and submit to RailCorp the draft and final Accreditation Variation Documents by the times specified for each RailCorp Safety Assurance Report in this Contract including the Contract Management Requirements, and in accordance with:
- (i) this Contract;
 - (ii) the Rail Safety Act;
 - (iii) the National Rail Safety Accreditation Package; and
 - (iv) the RailCorp Safety Management System.

A comprehensive draft of each Accreditation Variation Document must be submitted to RailCorp's Representative at least 30 Business Days before the date on which the corresponding final Accreditation Variation Document is to be submitted to RailCorp's Representative.

- (d) **(Supporting documentation and certification):** Each Accreditation Variation Document submitted by PPP Co under clause 8.2(b) must be accompanied by:
- (i) supporting documentation in such form as may be reasonably required by RailCorp's Representative which demonstrates how the Accreditation Variation Document complies with:
 - A. the documents referred to in clause 8.2(c)(i)-(iv); and
 - B. ITSRR's reasonable requirements for the Accreditation Variation Document; and
 - (ii) a certification by PPP Co's Safety Compliance and Accreditation Manager stating that the Accreditation Variation Document complies with:
 - A. the documents referred to in clause 8.2(c)(i)-(iv); and
 - B. ITSRR's reasonable requirements for the Accreditation Variation Document.
- (e) **(Review by RailCorp):** RailCorp's Representative must, within 20 Business Days of receiving a final Accreditation Variation Document submitted in accordance with clause 8.2(c) and the supporting documentation and certification required under clause 8.2(d), review the Accreditation Variation Document and either:
- (i) incorporate or integrate that Accreditation Variation Document into RailCorp's Accreditation Variation Application; or
 - (ii) reject the Accreditation Variation Document if the Accreditation Variation Document (or any part) does not comply with documents referred to in clause 8.2(c)(i)-(iv) or ITSRR's reasonable requirements for the Accreditation Variation Document, stating the nature of the non-compliance.
- (f) **(If rejected by RailCorp):** If RailCorp's Representative rejects an Accreditation Variation Document pursuant to clause 8.2(e)(ii), PPP Co must promptly, and in any event within no more than 10 Business Days (or such longer period as RailCorp, acting reasonably, may allow), rectify the non-compliance and resubmit the Accreditation Variation Document to RailCorp's Representative (together with an update of the supporting documentation and certification referred to in clause 8.2(d)) whereupon clause 8.2(e) will reapply to the Accreditation Variation Document.
- (g) **(If rejected by ITSRR):** If ITSRR rejects or requires changes to, or further information in respect of, RailCorp's Accreditation Variation Application, PPP Co must, if requested by RailCorp, promptly make the necessary changes to the Accreditation Variation Documents and/or provide the further information.
- (h) **(RailCorp to cooperate):** RailCorp will cooperate with PPP Co in connection with PPP Co's obligations under this clause 8.2 by making available to PPP Co relevant information in RailCorp's possession or control which has been reasonably requested by PPP Co.

8.3 Continuing RailCorp Accreditation and rail safety obligations

Throughout the Contract Term PPP Co must:

- (a) liaise and co-operate with RailCorp, and do everything reasonably necessary to enable and assist RailCorp to:
 - (i) maintain its Accreditation; and
 - (ii) comply with its other obligations in relation to rail safety,
 to the extent that RailCorp's Accreditation or rail safety obligations are affected by PPP Co's Activities;
- (b) except as required by law, not do, or omit to do, anything which may cause RailCorp's Accreditation to be suspended or cancelled; and
- (c) give ITSRR such access to premises and information as ITSRR lawfully requests to fulfil its functions with respect to the Project and PPP Co's Activities, within the time requested.

8.4 PPP Co's Accreditation

- (a) **(PPP Co to hold Accreditation):** Without limiting clause 7.2 (Approvals), PPP Co must, to the extent required by law:
 - (i) hold Accreditation; and
 - (ii) comply with all conditions of its Accreditation and all obligations of accredited persons under the Rail Safety Act.
- (b) **(PPP Co's Associates to hold Accreditation):** PPP Co must ensure that its Associates engaged in or in connection with PPP Co's Activities, to the extent required by law:
 - (i) hold Accreditation; and
 - (ii) comply with all conditions of their Accreditation and all obligations of accredited persons under the Rail Safety Act.
- (c) **(Documentation):** Without limiting PPP Co's obligations under clauses 8.4(a) and 8.4(b), PPP Co must develop, execute (where relevant), maintain and submit to RailCorp and, where relevant and subject to clause 8.4(f), to ITSRR:
 - (i) the Safety Management System and any other rail safety systems required by law or by ITSRR;
 - (ii) the PPP Co Safety Assurance Reports; and
 - (iii) the Maintenance Site Safety Interface Agreement and any other Rail Safety Interface Agreement required by the Rail Safety Act, by RailCorp (as required for the purpose of its Accreditation or any other relevant law applicable to RailCorp) or by ITSRR,
 in a timely manner and in accordance with:
 - (iv) this Contract;
 - (v) the Rail Safety Act; and
 - (vi) the National Rail Safety Accreditation Package.

- (d) **(ITSRR requirements):** Subject to clause 8.4(f), PPP Co must submit all required documentation as required by ITSRR.
- (e) **(PPP Co to liaise etc with RailCorp):** In performing its obligations under clause 8.4(c) PPP Co must liaise and cooperate with RailCorp and, where relevant, ITSRR.
- (f) **(RailCorp may provide comments):** RailCorp may, but is not obliged to, comment on any documents submitted by PPP Co to RailCorp under clause 8.4(c).
PPP Co:
 - (i) must allow RailCorp a period of 20 Business Days after the date of submission of the documents to RailCorp to review and comment on the documents;
 - (ii) if RailCorp makes any comments on the documents within this 20 Business Day period, must address RailCorp's comments on the documents and promptly resubmit the relevant documents to RailCorp, whereupon the provisions of this clause 8.4(f) will reapply to such resubmitted documents; and
 - (iii) must not submit the relevant documents to ITSRR until a period of 20 Business Days after the date of submission of those documents to RailCorp has expired without RailCorp making any comments on the documents or, if RailCorp does provide comments, after PPP Co has complied with clause 8.4(f)(ii).
- (g) **(Notices):** PPP Co must provide RailCorp with copies of all notices, reports and other correspondence given or received by PPP Co or a Significant Contractor under or in connection with:
 - (i) the Rail Safety Act; or
 - (ii) any Accreditation held or required by PPP Co or a Significant Contractor,

in connection with PPP Co's Activities or the Project, or which may adversely affect the ability of PPP Co or a Significant Contractor to carry out PPP Co's Activities, promptly after it is given or received.

8.5 Certificates of Competency

- (a) Without limiting clauses 7.1 (Compliance with laws) and 7.2 (Approvals), PPP Co must ensure that all persons engaged in or in connection with PPP Co's Activities:
 - (i) hold Certificates of Competency, to the extent required by law; and
 - (ii) comply with their obligations under the Rail Safety Act.
- (b) RailCorp will not issue Certificates of Competency to employees or contractors of PPP Co or its Associates engaged in or in connection with PPP Co's Activities, unless RailCorp agrees otherwise.

8.6 Cooperation with Investigative Authorities

PPP Co must:

- (a) promptly give all Investigative Authorities such access to premises and information as any Investigative Authority lawfully requests, within the time requested;

- (b) cooperate with and respond to any lawful requests made by any Investigative Authority, within the time requested; and
- (c) not hinder or delay any Investigative Authority in carrying out its duties.

8.7 Compliance with Accreditation requirements

Compliance by PPP Co with its obligations under this clause 8 and clause 3.3 of the Contract Management Requirements:

- (a) does not discharge or excuse PPP Co from complying with its other obligations under the Contract; and
- (b) is not evidence of compliance by PPP Co with its other obligations under the Contract.

9. Contract Management System and Project Plans

9.1 Contract Management System

PPP Co must establish a Contract Management System for the execution of PPP Co's Activities. The Contract Management System must:

- (a) be embodied in the Project Plans;
- (b) cover all management systems required for the performance of PPP Co's Activities (including the interface with RailCorp's management systems);
- (c) satisfy the requirements of, as applicable:
 - (i) AS/NZS ISO 9001:2000 for quality management;
 - (ii) AS/NZS ISO 14001:2004 for environment management;
 - (iii) AS4801:2001 for occupational health and safety;
 - (iv) AS4360:2004 for risk management;
 - (v) AS4292 for rail safety;
 - (vi) other relevant Australian Standards including any substituted or updated standards replacing the standards referred to in this clause 9.1(c);
 - (vii) any applicable Authorities;
 - (viii) RailCorp (acting reasonably), as advised from time to time; and
 - (ix) without being limited by any of the previous items, world's best practice from time to time in the preparation and maintenance of contract management systems;
- (d) align the management processes of PPP Co, PPP Co's Contractors and RailCorp;
- (e) satisfy the other requirements of this Contract, including those specified in the Contract Management Requirements; and
- (f) maximise the understanding and acceptance by PPP Co, PPP Co's Contractors and RailCorp of the management processes to be used for the performance of PPP Co's Activities.

9.2 Purpose

The intended purposes of the Contract Management System and the Project Plans include:

- (a) to demonstrate to RailCorp that PPP Co has the understanding, capacity and capability at all times to carry out PPP Co's Activities safely and in accordance with the requirements of this Contract;
- (b) to ensure that the Sets, the Maintenance Facility and the Simulators comply with the requirements of this Contract;
- (c) to support RailCorp in obtaining RailCorp's Accreditation Variation and otherwise maintaining its Accreditation;
- (d) to define responsibilities, resources and processes for planning, performing and verifying that PPP Co's Activities satisfy the requirements of this Contract; and
- (e) to allow RailCorp to understand how PPP Co will achieve the performance outcomes specified in this Contract and otherwise fulfil its obligations under this Contract.

9.3 Preparation of Project Plans

PPP Co must prepare and submit each Project Plan (including each updated Project Plan) to RailCorp:

- (a) in a manner and at a rate which will give RailCorp's Representative a reasonable opportunity to review the submitted Project Plans within the 20 Business Day period referred to in clause 9.6(a); and
- (b) otherwise in accordance with the Contract Management Requirements.

9.4 Fitness for purpose

PPP Co warrants that the Contract Management System and each Project Plan will at all times be fit for its intended purposes, as specified in clause 9.2 (Purpose) and the Contract Management Requirements.

9.5 Updated Project Plans

PPP Co must:

- (a) review and, if necessary, update the Contract Management System and the Project Plans:
 - (i) to take account of events or circumstances which will, or may, affect the manner in which PPP Co carries out PPP Co's Activities including:
 - A. Variations;
 - B. the Pre-Agreed Variation;
 - C. changes in law;
 - D. the commencement of new phases or stages of design, manufacture or construction as shown in the Delivery Programme; and

- E. any breach or potential breach of the warranty in clause 9.4; and
 - (ii) as otherwise specified in the Contract Management Requirements;
- (b) not update the Contract Management System or any Project Plan in a manner which makes RailCorp's obligations under the RailCorp Project Agreements more onerous or increases any liability or potential liability of RailCorp or its Associates in connection with the Project; and
- (c) promptly submit each updated Project Plan to RailCorp.

9.6 RailCorp may review Project Plans

- (a) RailCorp's Representative may (but is not obliged to):
 - (i) review any Project Plan submitted under this clause 9 (including under clauses 9.3, 9.5, and 9.7) or clause 15.3; and
 - (ii) within 20 Business Days of the submission of the Project Plan, indicate that:
 - A. the Project Plan is "Not Rejected (NR)";
 - B. the Project Plan is "Not Rejected Subject to Comments (SC)", if, in the reasonable opinion of RailCorp's Representative, PPP Co is required to make changes to the Project Plan to comply with the requirements of this Contract; or
 - C. the Project Plan is "Rejected (R)", if, in the reasonable opinion of RailCorp's Representative, the Project Plan does not comply with the requirements of this Contract.
- (b) If any Project Plan is Not Rejected Subject to Comments (SC) or Rejected (R):
 - (i) RailCorp's Representative must explain the reasons for the comments or rejection; and
 - (ii) PPP Co must, within 20 Business Days, submit the revised Project Plan to RailCorp's Representative whereupon the provisions of this clause 9.6 will reapply to the revised Project Plan.
- (c) The exercise (or failure to exercise) by RailCorp's Representative of any of its rights under this clause 9.6 will not preclude RailCorp from subsequently asserting that the Project Plan does not comply with the requirements of this Contract (even if RailCorp's Representative previously gave a notice under clause 9.6(a)(ii)A or 9.6(a)(ii)B in respect of that Project Plan).
- (d) For the purposes of a review under this clause 9.6, if requested by RailCorp's Representative, PPP Co must:
 - (i) make available to RailCorp's Representative all relevant records held by PPP Co and PPP Co's Contractors in relation to the Project Plan; and
 - (ii) provide all reasonable assistance to RailCorp's Representative during the review including:
 - A. attending reviews and meetings; and

- B. promptly implementing any corrective action required by RailCorp's Representative under clause 9.6(a)(ii).

9.7 RailCorp may request updates

If:

- (a) any Project Plan does not comply with the requirements of this Contract; or
- (b) PPP Co has not updated any Project Plan in accordance with the requirements of clause 9.5(a),

RailCorp's Representative may by written notice request that PPP Co amend or update the Project Plan specifying:

- (c) the reasons why such updating is required (or why the Project Plan does not comply with this Contract); and
- (d) the time within which such updating must occur (which must be reasonable, having regard to the amount of work required),

and PPP Co must:

- (e) amend or update the Project Plan as requested by RailCorp; and
- (f) submit the amended or updated Project Plan to RailCorp within the time specified under clause 9.7(d).

9.8 No obligation to review

Neither RailCorp nor RailCorp's Representative assumes or owes any duty of care to PPP Co to review, or if it does review it in reviewing, any Project Plan submitted by PPP Co for errors, omissions or compliance with this Contract.

No review of, comments upon, or notice in respect of, or any failure to review, comment upon or give any notice in respect of, any Project Plan submitted by PPP Co or any other direction, act or omission of RailCorp or RailCorp's Representative (including a request under clause 9.7 in respect of any Project Plan) will:

- (a) relieve PPP Co from, or alter or affect, PPP Co's liabilities, obligations or responsibilities whether under this Contract or otherwise according to law; or
- (b) prejudice or limit RailCorp's rights against PPP Co whether under this Contract or otherwise according to law.

9.9 Implementation and compliance

PPP Co must:

- (a) implement the Contract Management System; and
- (b) comply with each Project Plan which has been submitted to RailCorp and in respect of which RailCorp has not given a notice under clause 9.6(a)(ii).

9.10 Monitoring and auditing

Without limiting clause 9.6 (RailCorp may review Project Plans), PPP Co must allow RailCorp's Representative access to the Contract Management Systems of PPP Co and PPP

Co's Contractors to enable monitoring and auditing. RailCorp will carry out any such inspection in a manner which does not unreasonably interfere with PPP Co's Activities.

9.11 No relief

PPP Co will not be relieved from compliance with any of its obligations under this Contract or from any of its liabilities whether under this Contract or otherwise according to law as a result of:

- (a) compliance by PPP Co with its obligations under this clause 9 including the implementation of, and compliance with, the Contract Management System or any Project Plan;
- (b) any audits or other monitoring by RailCorp's Representative of PPP Co's compliance with the Contract Management System; or
- (c) any failure by RailCorp's Representative, or anyone else acting on behalf of RailCorp, to detect any non-compliance including where any failure arises from any negligence on the part of RailCorp's Representative or any other person.

Compliance by PPP Co with its obligations under this clause 9 (including clause 9.9) is not evidence of compliance by PPP Co with its other obligations under this Contract.

10. General obligations applying to all PPP Co's Activities

10.1 All work included

Except as stated in this Contract, PPP Co has allowed for the provision of all work and materials necessary for PPP Co's Activities, whether or not expressly mentioned in this Contract. All such work and materials:

- (a) must be undertaken and provided by PPP Co at its own cost;
- (b) must form part of PPP Co's Activities and will not constitute a Variation; and
- (c) will not entitle PPP Co to make a Claim except as provided for in this Contract.

10.2 Protection of persons and property

PPP Co must carry out PPP Co's Activities safely and so as to protect persons and property.

If RailCorp's Representative considers there is a risk of injury to people or damage to property arising from PPP Co's Activities, RailCorp's Representative may direct PPP Co to change its manner of working or to cease working and PPP Co must comply with any such direction at its cost.

10.3 Occupational health and safety

PPP Co must:

- (a) ensure that, in carrying out PPP Co's Activities:
 - (i) it complies with all laws and other requirements of this Contract for occupational health, safety and rehabilitation management including, without limiting any other requirement of this Contract:
 - A. the *Occupational Health and Safety Act 2000* (NSW);

- B. the New South Wales Occupational Health and Safety Management Systems Guidelines; and
 - C. schedule 3 (Occupational health and safety requirements); and
- (ii) its Associates comply with the requirements referred to in this clause 10.3; and
- (b) without limiting its obligations under schedule 3 (Occupational health and safety requirements), keep RailCorp's Representative fully informed of any incidents to which section 86 of the *Occupational Health and Safety Act 2000* (NSW) applies arising out of, or in any way in connection with, PPP Co's Activities as soon as possible after they occur.

10.4 Prevention of nuisance etc

In carrying out PPP Co's Activities, PPP Co must prevent nuisance and unreasonable noise, dust, vibration and disturbance (except to the extent that such nuisance, noise, dust, vibration or disturbance is not reasonably avoidable in the performance of PPP Co's Activities in accordance with this Contract, or is permitted by law).

10.5 Industrial relations

PPP Co must, in carrying out PPP Co's Activities:

- (a) assume sole responsibility for and manage all aspects of industrial relations (other than as between RailCorp and RailCorp's employees);
- (b) comply with its Human Resources Plan;
- (c) consult with RailCorp in relation to any proposed action which could reasonably be expected to impact on RailCorp's industrial relations with RailCorp's employees;
- (d) keep RailCorp informed of all industrial relations problems or issues which are likely to affect PPP Co's Activities; and
- (e) at the end of Contract Term, pay those of its employees that become redundant, an amount which:
 - (i) complies with the relevant employment agreement (if any) and applicable laws; and
 - (ii) is consistent with general standards applicable at that time.

10.6 Key Personnel²²

- (a) PPP Co must:
 - (i) employ the Key Personnel which clause 2.8 of the Contract Management Requirements requires PPP Co to employ in the jobs specified in attachment 5 of the Contract Management Requirements ([as updated from time to time in accordance with this clause 10.6](#));
 - (ii) ensure that PPP Co's Contractors employ the Key Personnel which clause 2.8 of the Contract Management Requirements requires PPP Co's

²² [As amended by Deed of Variation No. 3, 15 February 2008.](#)

Contractors to employ in the jobs specified in attachment 5 of the Contract Management Requirements (as updated from time to time in accordance with this clause 10.6);

- (iii) if no name has been specified for a particular position in attachment 5 of the Contract Management Requirements or a new position is created in accordance with the procedure set out in clause 10.6(c), promptly employ, or ensure that the PPP Co's Contractors promptly employ (as applicable), in that position a person:
 - A. possessing at least the experience, ability and expertise required in relation to the relevant job, as set out in the "Position Description Attributes" section of attachment 5 of the Contract Management Requirements (as updated from time to time in accordance with this clause 10.6); and
 - B. approved by RailCorp's Representative (such approval not to be unreasonably withheld);
- (iv) subject to clause 10.6(a)(v), not replace, or permit PPP Co's Contractors to replace, any Key Person for a position stated in attachment 5 of the Contract Management Requirements (as at the date on which Deed of Variation No. 3 was executed) without the prior written approval of RailCorp's Representative; and
- (v) if any Key Person for a position stated in attachment 5 of the Contract Management Requirements (as at the date on which Deed of Variation No. 3 was executed) dies, becomes seriously ill or resigns from the employment of PPP Co or a PPP Co's Contractor (as the case may be), replace, or ensure that the relevant PPP Co's Contractor replaces, him or her with a person:
 - A. possessing at least the experience, ability and expertise required in relation to the relevant job, as set out in the "Position Description Attributes" section of attachment 5 of the Contract Management Requirements (as updated from time to time in accordance with this clause 10.6); and
 - B. approved by RailCorp's Representative (which approval must not be unreasonably withheld, except in the case of PPP Co's Representative).
- (b) Subject to clause 10.6(c), the parties acknowledge that attachment 5 of the Contract Management Requirements may be updated from time to time to reflect changes to the project management and organisational structure.
- (c) To give effect to clause 10.6(b), PPP Co may at any time make a proposal to RailCorp to update or amend attachment 5 of the Contract Management Requirements setting out the reasons for its proposal and attaching a copy of the proposed replacement attachment 5. Proposed amendments or updates may include (among others) any of the categories referred to in clause 10.6(g).
- (d) Within 20 Business Days of receipt of a proposal from PPP Co under clause 10.6(c) (or such longer period as RailCorp may reasonably require), RailCorp's Representative must advise PPP Co that:
 - (i) it accepts the updated or amended attachment 5 of the Contract Management Requirements; or

- (ii) subject to clause 10.6(g) or clause 10.6(h) (as applicable), it rejects the updated or amended attachment 5 of the Contract Management Requirements. Any rejection by RailCorp of a proposal by PPP Co under clause 10.6(c) must be in writing and must, if the proposal changes fall within any of the categories referred to in clause 10.6(g), clause 10.6(a)(iii) or 10.6(a)(v) (except in the case of PPP Co's Representative), give reasons for the rejection.
- (e) If RailCorp's Representative rejects the updated or amended attachment 5 of the Contract Management Requirements under clause 10.6(d)(ii), PPP Co may resubmit a revised proposal to RailCorp's Representative whereupon the provisions of clause 10.6(d) will apply to the revised proposal.
- (f) If RailCorp's Representative approves the updated or amended attachment 5 of the Contract Management Requirements, attachment 5 is deemed to be updated or amended in the terms proposed by PPP Co.
- (g) Without limiting the operation of clause 10.6(a)(iii)B and clause 10.6(a)(v)B, RailCorp's Representative must not unreasonably withhold its approval to a proposal by PPP Co under clause 10.6(c) if the proposal falls within any of the following categories:
 - (i) an addition (over and above what is stated in attachment 5 of the Contract Management Requirements as at the date on which Deed of Variation No. 3 was executed) of any position, including responsibilities, position description attributes or experience, considered by PPP Co to be desirable in the interests of the management of the Project;
 - (ii) amendments to the responsibilities, position description attributes or experience required for each position referred to in clause 10.6(g)(i), having regard to the nature of the position at the relevant time;
 - (iii) removal of any position, including responsibilities, position description attributes and experience, referred to in clause 10.6(g)(i) considered by PPP Co to be redundant having regard to the progress of the Project;
 - (iv) identity or replacement (for whatever reason) of any Key Person in a position contemplated in clause 10.6(g)(i) or clause 10.6(g)(ii).
- (h) In all other cases not falling within clause 10.6(a)(iii)B, clause 10.6(a)(v)B or clause 10.6(g), RailCorp's approval of a proposal by PPP Co under clause 10.6(c) may be given or withheld, or may be given subject to any conditions, as RailCorp (in its absolute discretion) thinks fit.
- (i) In this clause, references to Deed of Variation No. 3 are references to the deed so titled which amended this clause 10.6 and attachment 5 of the Contract Management Requirements.

10.7 Barring of persons

RailCorp's Representative may, acting reasonably, direct PPP Co to bar from any RailCorp Land any person employed or engaged in connection with PPP Co's Activities.

PPP Co must ensure that any person the subject of such a direction is not again employed by PPP Co or any Associate of PPP Co on any RailCorp Land.

10.8 Utility Services

- (a) Subject to clause 10.8(b), PPP Co:
 - (i) must obtain and pay for any Utility Services and all connections for all Utility Services it needs to perform PPP Co's Activities;
 - (ii) must investigate, protect, relocate, modify and provide for all Utility Services necessary for it to comply with its obligations under the Project Agreements;
 - (iii) assumes the risk of the existence, location, condition and availability of Utility Services (in so far as they affect PPP Co's Activities);
 - (iv) must procure the connection to the stormwater discharge points; and
 - (v) indemnifies RailCorp from and against any Loss or Claim brought against, incurred or suffered by RailCorp arising out of or in connection with:
 - A. any disruption to any Utility Service resulting from PPP Co's Activities; or
 - B. a failure by PPP Co to comply with its obligations under this Contract with respect to the Utility Services.
- (b) RailCorp will connect and supply (at no cost to PPP Co) the electricity required for the Overhead Traction Power System.
- (c) PPP Co must use its best endeavours to minimise the electricity drawn from the Overhead Traction Power System.
- (d) Subject to clauses 10.8(b) and 22.6(f), RailCorp will not be liable under this Contract or otherwise in relation to any Utility Services for the Project.

10.9 Alert Events

- (a) PPP Co must notify RailCorp's Representative immediately upon becoming aware of any matter that may cause an Alert Event.
- (b) If PPP Co becomes aware of an Alert Event occurring, PPP Co must, at its cost:
 - (i) immediately inform RailCorp's Representative of the Alert Event;
 - (ii) keep RailCorp's Representative informed about the Alert Event; and
 - (iii) provide RailCorp's Representative with sufficient information to enable RailCorp to assess the nature of the Alert Event and the likely effect of the Alert Event on:
 - A. the Railway, RailCorp's Facilities and any RailCorp Land;
 - B. the safety of RailCorp passengers, station patrons or representatives of RailCorp; and
 - C. the operation of the Railway.

- (c) If any Alert Event causes:
- (i) the Railway, RailCorp Facilities or any RailCorp Land;
 - (ii) the safety of Railway passengers, station patrons or representatives of RailCorp; or
 - (iii) the operations of the Railway,
- to be at risk (as determined by RailCorp in its absolute discretion), PPP Co must:
- (iv) immediately co-operate with RailCorp (including by ceasing to carry out that part of PPP Co's Activities in respect of which the Alert Event applies and, if applicable, vacating the Rail Corridor); and
 - (v) at its cost assist RailCorp to take such action as RailCorp directs is necessary to avert any danger and ameliorate the risk.
- (d) Neither RailCorp's rights nor PPP Co's liabilities or obligations, whether under this Contract or otherwise according to law, in respect of Alert Events, will be limited by the terms of this clause 10.9.

10.10 Co-operative incident management

Without limiting the rights of RailCorp under clause 50.2 arising as a result of the PPP Co Termination Event described in clause 50.1(k) (Major safety breach) or the obligations of PPP Co under this Contract, the parties agree to co-operate openly and constructively (having regard to the reasonable protection of their commercial and legal positions) in relation to the investigation and management of, and response to, incidents occurring with respect to the Sets while in service where such incidents have resulted, or have the potential to result, in serious injury or death to any person.

11. Project Site

11.1 Licence to use Construction Site during Delivery Phase

- (a) RailCorp grants to PPP Co for \$1 a non-exclusive licence to use, and to permit its Associates to use the Construction Site for the purpose of designing and constructing the Maintenance Facility Works.
- (b) This licence:
 - (i) commences on the date of issue of a Certificate of Compliance in respect of the Package 1 RailCorp Enabling Works; and
 - (ii) terminates on the earlier of:
 - A. the Date of Practical Completion of the Maintenance Facility Works; and
 - B. the termination of this Contract; and
 - (iii) is subject to the conditions of access set out in schedule 4.
- (c) PPP Co is responsible for gaining access to and from the Construction Site and will not be entitled to make any Claim against RailCorp in connection with access, or failure to gain or delay in gaining access, to and from the Construction Site.

- (d) Without limiting clause 11.7 (RailCorp's right of entry), the non-exclusive licence granted by RailCorp to PPP Co under this clause does not in any way limit RailCorp's right to use the Construction Site (or such use by any person authorised by RailCorp) for the purpose of:
- (i) gaining access through the Construction Site to any Rail Infrastructure Facilities, RailCorp Infrastructure, the Rail Corridor, the Future RailCorp Facility or any other property;
 - (ii) moving any plant, equipment, materials, personnel or other items through the Construction Site;
 - (iii) constructing, placing, repairing, operating or maintaining RailCorp Infrastructure in accordance with clause 11.8(b) (Other Contractors and RailCorp Infrastructure);
 - (iv) exercising its rights under clause 11.19 (Right of support and drainage);
 - (v) exercising the Reserved Rights (as defined in schedule 2 of the Call Option Deed); and
 - (vi) carrying out the RailCorp Enabling Works.

PPP Co acknowledges that areas of land in the vicinity of the Construction Site may be developed and redeveloped by RailCorp and others and any such development or redevelopment will not of itself constitute a breach by RailCorp of this clause 11.1.

- (e) PPP Co must ensure that RailCorp and its Associates have such access to the Construction Site as is reasonably required by RailCorp in order to carry out the RailCorp Enabling Works.
- (f) To the extent that the Construction Site comprises the Manchester Road North Area, PPP Co must:
- (i) only use the Manchester Road North Area for the purposes of:
 - A. passing and repassing with vehicles over the Manchester Road North Area for the purpose of vehicular access to the Construction Site; and
 - B. carrying out that part of the Maintenance Facility Works relating to the construction and installation of infrastructure for Utility Services to be located on the Manchester Road North Area;
 - (ii) cooperate with RailCorp and third parties in relation to the execution of the Maintenance Facility Works on the Manchester Road North Area; and
 - (iii) take all steps necessary, and ensure that its Associates will take all steps necessary, to minimise any disruption, interference or delay to RailCorp's or any third party's use of the Manchester Road North Area and the passage of vehicles and pedestrians on Manchester Road.
- (g) The non-exclusive licence granted by RailCorp to PPP Co under this clause does not in any way limit RailCorp's use of the Manchester Road North Area (or such use by any third parties).

- (h) During the term of the licence in clause 11.1, PPP Co must, and must ensure that its Associates will, where any damage to or loss or destruction of the Manchester Road North Area occurs which arises out of the use of the Manchester Road North Area by PPP Co or its Associates, or out of PPP Co's Activities, promptly repair, replace or reinstate the damage, loss or destruction or, if RailCorp agrees, reasonably compensate RailCorp.
- (i) If PPP Co fails to carry out the repair, replacement or reinstatement work or pay reasonable compensation (where clause 11.1(h) requires PPP Co to do so), RailCorp may, after giving reasonable prior notice to PPP Co, carry out the repair, replacement or reinstatement work or pay reasonable compensation to any affected third party and any Loss incurred by RailCorp will be a debt due and payable from PPP Co to RailCorp.

11.1A Licence to use Construction Site for site investigations

- (a) RailCorp grants to PPP Co for \$1 a non-exclusive licence to use, and to permit its Associates to use, the Construction Site to undertake preliminary site investigation and assessment work on the Construction Site for the purpose of designing and constructing the Maintenance Facility Works.
- (b) This licence commences on Financial Close and terminates on the earlier of:
 - (i) the date of issue of a Certificate of Compliance in respect of the Package 1 RailCorp Enabling Works; and
 - (ii) the termination of this Contract.
- (c) The non exclusive licence granted by RailCorp to PPP Co under this clause does not in any way limit RailCorp's use of the Construction Site (or such use by any person authorised by RailCorp).
- (d) PPP Co must, when using the Construction Site for the purpose of undertaking preliminary site investigation and assessment work:
 - (i) minimise any disruption, interference or delay to the RailCorp Enabling Works; and
 - (ii) comply with all directions by RailCorp as principal contractor of the Construction Site for the purposes of section 210 of the *Occupational Health and Safety Regulation 2001* (NSW).

11.2 Licence to use Rail Corridor and Out Depots during TLS Phase

RailCorp grants to PPP Co for \$1 a non-exclusive licence to use, and to permit its Associates to use, the Rail Corridor and any Out Depots from the Date of Practical Completion of Set 1 until the end of the TLS Phase for the purpose of:

- (a) carrying out repairs and maintenance to the Operational Sets when they are on the RailCorp Network; and
- (b) recovering Operational Sets which have broken down in service.

11.3 Conditions of access to Rail Corridor and Out Depots during TLS Phase

When exercising its rights under clause 11.2 (Licence to use Rail Corridor and Out Depots during TLS Phase), PPP Co must comply with, and ensure that its Associates comply with:

- (a) the Train Operations Manual;
- (b) the Safety Protocol;
- (c) the Network Rules and the Network Procedures;
- (d) the Through Life Support Specifications;
- (e) the Interface Protocols;
- (f) all reasonable requirements and directions of RailCorp; and
- (g) the other requirements of this Contract.

11.4 Work in Danger Zone

PPP Co must ensure that, in carrying out PPP Co's Activities, work in the Danger Zone is carried out only by using one of the following five methods:

- (a) Local Possession Authority (LPA);
- (b) Track Occupancy Authority (TOA);
- (c) Track Work Authority (TWA);
- (d) Controlled Signal Blocking (CSB); or
- (e) No Authority Required (NAR).

11.5 Network Access Rights

- (a) **(Commissioning Track Possession):** RailCorp will grant PPP Co for \$1 a Local Possession Authority in respect of the Commissioning Track (to the extent not falling within the Maintenance Facility Access Areas) for the purpose of Testing and Commissioning the Sets ("**Commissioning Track Possession**") on the following terms:
 - (i) The Commissioning Track Possession will commence on the Date of Practical Completion of the Maintenance Facility Works.
 - (ii) The Commissioning Track Possession will end on the earlier of:
 - A. 31 December 2015; and
 - B. such date determined by RailCorp following Practical Completion of the last Set.
 - (iii) PPP Co releases RailCorp from all Claims by PPP Co and its Associates in connection with or arising out of the utilisation of the Commissioning Track Possession by PPP Co.
- (b) **(Promised and Agreed Network Access Rights):** Subject to this clause 11.5, RailCorp must provide, and PPP Co may utilise, for \$1, the Promised Network Access Rights for the purposes of Testing and Commissioning the Sets and the Prototype. The configurations (including dates, locations and types) for the Promised Network Access Rights will be agreed or determined as follows:
 - (i) PPP Co must issue a written request to RailCorp's Representative no less than 15 months before:

- A. the date on which PPP Co proposes to first utilise a Network Access Right covering the 12 month period from that date; and
 - B. each anniversary of the date referred to in clause 11.5(b)(i)A, covering the 12 month period from that anniversary.
- (ii) Each request under clause 11.5(b)(i) must set out the following details for each Network Access Right which PPP Co requests for the relevant 12 month period:
- A. the activities it proposes to carry out during the Network Access Right (including whether persons or equipment will intrude into the Danger Zone and, where applicable, the side of the Set on which the activities will be carried out);
 - B. the location or route;
 - C. the duration (start and end times);
 - D. the periods within which PPP Co wishes to utilise the Network Access Right; and
 - E. such other details as RailCorp may reasonably request from time to time.
- (iii) Within 25 Business Days of RailCorp's Representative receiving a written request under clause 11.5(b)(i), RailCorp's Representative will determine possible Network Access Rights for PPP Co to utilise, having regard to:
- A. the Promised Network Access Rights for the relevant period;
 - B. the availability of Network Access Rights during the periods nominated by PPP Co;
 - C. the matters detailed in PPP Co's request; and
 - D. any other factors RailCorp's Representative (acting reasonably) considers relevant,
- and will notify PPP Co in writing of possible configurations for Network Access Rights for the relevant 12 month period.
- (iv) Within 5 Business Days of RailCorp's Representative issuing a notice under clause 11.5(b)(iii), RailCorp's Representative and PPP Co will meet and endeavour to agree suitable configurations for the Network Access Rights for the relevant 12 month period. If the parties cannot agree suitable configurations for the Network Access Rights the configurations will be determined by RailCorp's Representative. The configurations for the Network Access Rights determined by RailCorp's Representative must be at least as suitable for the activities which PPP Co proposes to carry out during the 12 month period as the Promised Network Access Rights for the relevant 12 month period.
- (v) The configurations of the Network Access Rights agreed or determined in accordance with clause 11.5(b)(iv) will be the "**Agreed Network Access Rights**".

(c) **(Cancellations or changes to Agreed Network Access Rights):**

- (i) RailCorp may cancel or change an Agreed Network Access Right at any time. If RailCorp cancels or changes an Agreed Network Access Right:
- A. PPP Co must take all reasonable steps to mitigate the effect of the cancellation or change; and
 - B. RailCorp must, as soon as reasonably practicable, provide equivalent Network Access Rights which PPP Co is reasonably able to utilise, having taken the steps referred to in clause 11.5(c)(i)A.

PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with the cancellation of, or a change to, an Agreed Network Access Right if RailCorp provides equivalent Network Access Rights in accordance with clause 11.5(c)(i)B.

- (ii) If PPP Co is or believes that it will be unable to utilise an Agreed Network Access Right because the Delivery Phase Activities have been delayed by:
- A. a breach by RailCorp of this Contract;
 - B. a Force Majeure Event; or
 - C. any other material event (other than a breach by PPP Co of a RailCorp Project Agreement or an event arising as a consequence of such a breach), the risk of which is not specifically allocated to PPP Co in the RailCorp Project Agreements, is beyond the reasonable control of PPP Co and its Associates, and could not have been prevented, avoided, remedied or overcome by PPP Co or its Associates taking those steps which a prudent experienced and competent designer, constructor and maintainer of rolling stock and rolling stock maintenance facilities would have taken,

PPP Co must promptly notify RailCorp and:

- D. where the delay is due to a breach by RailCorp of this Contract:
 - 1) PPP Co must take all reasonable steps to mitigate the effect of the inability to utilise the Agreed Network Access Right; and
 - 2) RailCorp must, as soon as reasonably practicable, provide equivalent Network Access Rights which PPP Co is reasonably able to utilise, having taken the steps referred to in clause 11.5(c)(ii)D.1).

PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with its inability to utilise an Agreed Network Access Right if RailCorp provides equivalent Network Access Rights in accordance with clause 11.5(c)(ii)D.2); and

E. where the delay is due to a Force Majeure Event or an event referred to in clause 11.5(c)(ii)C:

- 1) PPP Co must take all reasonable steps to mitigate the effect of the inability to utilise the Agreed Network Access Right; and
- 2) RailCorp must use its reasonable endeavours to provide equivalent Network Access Rights which PPP Co is reasonably able to utilise, having taken the steps referred to in clause 11.5(c)(ii)E.1).

PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with its inability to utilise an Agreed Network Access Right if RailCorp uses its reasonable endeavours to provide equivalent Network Access Rights in accordance with clause 11.5(c)(ii)E.2).

(d) **(Additional Network Access Rights):**

(i) PPP Co must minimise the need for Additional Network Access Rights.

(ii) If PPP Co wishes to request any Additional Network Access Rights:

- A. PPP Co must issue a written request to RailCorp's Representative setting out the details specified in clause 11.5(b)(ii) for each Additional Network Access Right requested; and
- B. RailCorp will endeavour to grant any Additional Network Access Right requested by PPP Co, but will not be under any obligation to do so.

(iii) RailCorp may cancel or change an Additional Network Access Right at any time.

(iv) PPP Co releases and indemnifies RailCorp from all Claims by PPP Co and its Associates in connection with or arising out of:

- A. RailCorp's delay or refusal to grant an Additional Network Access Right; or
- B. the cancellation of, or a change to, an Additional Network Access Right.

(e) **(Late handback of track):** PPP Co must:

- (i) cease to occupy the relevant part of the Rail Corridor at the end of any Work on Track Authority or in the event of an emergency;
- (ii) immediately notify RailCorp's Representative if PPP Co considers it may be late in vacating the Rail Corridor; and
- (iii) reimburse RailCorp for all reasonable costs incurred by RailCorp as a result of PPP Co continuing to occupy the Rail Corridor following the end of a Work on Track Authority, except to the extent this is caused by an act or omission of RailCorp or its Associates.

This clause 11.5(e) does not apply to the Commissioning Track Possession.

- (f) **(PPP Co fails to utilise a Work on Track Authority):**
- (i) PPP Co must promptly notify RailCorp if PPP Co expects it will not be able to utilise a Work on Track Authority which has been allocated to it.
 - (ii) Subject to clause 11.5(f)(iii), if PPP Co fails to utilise any Work on Track Authority (whether wholly or partially) for any reason other than an act or omission of RailCorp or its Associates, PPP Co must reimburse RailCorp for all reasonable costs incurred by RailCorp in connection with the Work on Track Authority, including costs incurred in arranging:
 - A. the Work on Track Authority;
 - B. any alternative transport operation that is required due to the Work on Track Authority;
 - C. any site protection and/or security measures required during the Work on Track Authority; and
 - D. the supply of Crew and/or safeworking personnel,except where PPP Co requests the cancellation of the Work on Track Authority at least 14 weeks before the date on which the Work on Track Authority was to commence.
 - (iii) If RailCorp or an Other Contractor performs other works during a Work on Track Authority which PPP Co fails to utilise, then PPP Co will only be required to reimburse RailCorp on a pro-rata basis.
- (g) **(Preconditions to entitlement to use Train Run Entitlements):** The following preconditions must be satisfied before PPP Co can utilise a Train Run Entitlement for a Set:
- (i) PPP Co has submitted its Incident Response Plan to RailCorp and 20 Business Days have passed since it was submitted without RailCorp notifying PPP Co under clause 9.6(a)(ii) of any non-compliance;
 - (ii) PPP Co has demonstrated to the reasonable satisfaction of RailCorp an ability to implement its Incident Response Plan;
 - (iii) the relevant Set has passed the Tests referred to in clause 4.12.6(b)(i)-(iv) (inclusive) of the Contract Management Requirements; and
 - (iv) PPP Co has submitted the Implementation Safety Assurance Report (Testing and Commissioning) in accordance with clause 8.4(c) and 20 Business Days have passed since it was submitted without RailCorp providing any comments under clause 8.4(f).
- (h) **(Requirements when utilising a Train Run Entitlement):** PPP Co must, when utilising a Train Run Entitlement:
- (i) ensure that the relevant Set complies with the Train Operating Conditions Manual as varied in accordance with any Train Operating Condition Waiver;

- (ii) comply with, and ensure that its Associates comply with, all Train Orders given by a Train Controller;
- (iii) not permit its Associates to drive the relevant Set beyond the Pick-up Point or on the RailCorp Network; and
- (iv) notify the Train Controller:
 - A. as soon as PPP Co becomes aware of any changes in, or delays to, the Train Run or anything else which may affect Train Control; and
 - B. immediately if PPP Co or its Associates do not comply with a Train Order, or expect that they will not comply with a Train Order.
- (i) **(Incidents):** If during a Train Run there is an Incident due to one or more PPP Co Related Problems, PPP Co must:
 - (i) promptly assist RailCorp to remove the Set from the Rail Corridor causing as little disruption to RailCorp's operations as possible; and
 - (ii) if the Incident results in the cancellation of one or more RailCorp trains, pay RailCorp \$10,000 (CPI Indexed).

The amount referred to in clause 11.5(i)(ii) is a genuine pre-estimate of the loss which RailCorp will incur if a RailCorp train is cancelled due to an Incident during a Train Run (having regard to the times and locations at which Train Runs are expected to occur), and will be a debt due from PPP Co to RailCorp. The parties agree that, as between RailCorp and PPP Co, this clause 11.5(i) is RailCorp's sole remedy in respect of any Incident due to a PPP Co Related Problem to which this clause applies.

- (j) **(Network Access Rights generally):** PPP Co acknowledges and agrees that:
 - (i) RailCorp cannot, and will never, guarantee any configuration for a Network Access Right (including an Agreed Network Access Right) as fixed;
 - (ii) RailCorp may be required to cancel or change a Network Access Right at short notice;
 - (iii) RailCorp or Other Contractors may perform other works during certain Network Access Rights;
 - (iv) RailCorp may be required to provide Third Party Operators and other persons with access to the Rail Corridor at the same time as PPP Co has access to the Rail Corridor pursuant to certain Network Access Rights, including for the performance of works on the Rail Corridor;
 - (v) PPP Co must co-ordinate its activities with any Other Contractors, Third Party Operators and any others sharing the Network Access Right; and
 - (vi) during all Network Access Rights PPP Co must comply with:
 - A. PPP Co's safety obligations, including its obligations under the Safety Protocol and any Rail Safety Interface Agreement;

- B. all directions of RailCorp's Representative; and
- C. all relevant RailCorp policies and procedures including:
 - 1) the Infrastructure Possession Manual;
 - 2) the Network Rules; and
 - 3) the Network Procedures.

11.6 No work or facilities from RailCorp

Except as stated in this Contract, RailCorp is not obliged to perform any work or provide any facilities to PPP Co which may be necessary to enable PPP Co to obtain adequate access to the Construction Site or the Rail Corridor to carry out PPP Co's Activities.

11.7 RailCorp's right of entry

RailCorp (and any person authorised by RailCorp) will:

- (a) subject to PPP Co's reasonable safety and security constraints, have the right to enter:
 - (i) the Construction Site at any time; and
 - (ii) the Manufacture Site and other areas used or occupied by PPP Co or a Significant Contractor in connection with the Project or PPP Co's Activities:
 - A. during Business Hours; or
 - B. if RailCorp (or a person authorised by RailCorp) requires access outside Business Hours, on 24 hours' notice (except in the case of emergency when the right of access will be immediate); and
- (b) be entitled to exercise this right of entry for the purposes of:
 - (i) observing PPP Co's Activities and monitoring compliance by PPP Co of its obligations under this Contract;
 - (ii) exercising any right or performing any obligation which RailCorp has under any RailCorp Project Agreement; and
 - (iii) accessing RailCorp's Facilities, whether on the Maintenance Site, the Associated Work Sites or elsewhere.

RailCorp will exercise its rights under this clause 11.7 in a manner which does not unreasonably interfere with PPP Co's Activities.

PPP Co acknowledges and agrees that RailCorp and its authorised representatives have full and unfettered access to the Rail Corridor and RailCorp's Facilities at all times and may not be excluded from entry on the Rail Corridor by any action of PPP Co.

11.8 Other Contractors and RailCorp Infrastructure

- (a) RailCorp may engage Other Contractors to perform work upon or in the vicinity of the RailCorp Project Land at the same time as PPP Co.
- (b) RailCorp may enter, remain upon and take anything onto the Construction Site to do anything reasonably necessary in connection with constructing, placing, repairing, operating or maintaining RailCorp Infrastructure provided that:
 - (i) the construction of RailCorp Infrastructure does not unreasonably interfere with the construction of the Maintenance Facility Works or PPP Co's lawful use of the Construction Site at that time;
 - (ii) where the construction of RailCorp Infrastructure does unreasonably interfere with the construction of the Maintenance Facility Works or PPP Co's lawful use of the Construction Site at that time, RailCorp:
 - A. ensures that such interference is of a short term nature; and
 - B. pays to PPP Co the reasonable costs and expenses directly incurred by PPP Co which arise as a direct result of such interference to the extent that it prevents PPP Co from carrying out the construction of the Maintenance Facility Works; and
 - (iii) RailCorp provides reasonable notice to PPP Co of its intention to exercise such rights and provides reasonable details to PPP Co of the nature of the work to be performed, the interface between the works and PPP Co's Activities and the interface between the proposed physical works and the Maintenance Facility Works.

11.9 Co-operation with RailCorp's Other Contractors and employees

Subject to clause 11.7 (RailCorp's right of entry), but without limiting clause 11.16 (PPP Co to co-operate with RailCorp), PPP Co must, whenever carrying out PPP Co's Activities on RailCorp Project Land:

- (a) permit Other Contractors and RailCorp employees to execute their work on or near the RailCorp Project Land;
- (b) fully co-operate with Other Contractors and RailCorp employees;
- (c) carefully coordinate and interface PPP Co's Activities with the work carried out or to be carried out by Other Contractors and RailCorp employees; and
- (d) use its best endeavours to perform PPP Co's Activities so as to avoid interfering with, disrupting or delaying the work of Other Contractors and RailCorp employees.

11.10 Minimise disruption and inconvenience

In exercising its right to use the Rail Corridor under clause 11.2 (Licence to use Rail Corridor and Out Depots during TLS Phase), PPP Co must minimise any disruption, interference, delay or inconvenience to:

- (a) RailCorp;
- (b) other users of the Rail Corridor; and

- (c) others having right of access to the Rail Corridor.

11.11 Site Conditions and suitability

RailCorp makes no representation and gives no warranty as to the adequacy or suitability of any RailCorp Project Land for the Project.

Without limiting PPP Co's rights under clauses 11.12 (Native Title Claims) and 11.13 (Artefacts), PPP Co accepts the RailCorp Project Land in its present condition and state of repair and subject to:

- (a) all Site Conditions;
- (b) existing or future third party claims, rights or interests (whether or not registered) including Native Title Claims;
- (c) any Artefacts; and
- (d) any Contamination.

11.12 Native Title Claims

- (a) **(No representation or warranty):** PPP Co acknowledges and agrees that neither RailCorp nor any other person has made any representation, given any advice or given any warranty as to the existence or otherwise of any native or aboriginal title in respect of the Maintenance Site, the Associated Work Sites or any part of a Maintenance Site, the Associated Work Sites or any other RailCorp Project Land.
- (b) **(RailCorp responsible):** As between RailCorp and PPP Co:
 - (i) RailCorp will deal with any Native Title Claim in respect of the Maintenance Site, the Associated Work Sites or any part of a Maintenance Site or the Associated Work Sites; and
 - (ii) RailCorp will pay any compensation or other moneys required to be paid to the native title holders of the Maintenance Site, the Associated Work Sites or any part of a Maintenance Site or the Associated Work Sites pursuant to a Native Title Claim by those native title holders.
- (c) **(PPP Co's obligations):** If there is a Native Title Claim with respect to the Maintenance Site, the Associated Work Sites or any part of the Maintenance Site or the Associated Work Sites, PPP Co must:
 - (i) continue to perform PPP Co's Activities, except to the extent otherwise:
 - A. directed by RailCorp;
 - B. ordered by a court or tribunal; or
 - C. required by law; and
 - (ii) at the request of RailCorp, or if required to do so under any law or by order of a court or tribunal, and at RailCorp's cost, provide all reasonable assistance in connection with dealing with the Native Title Claim (including giving RailCorp and any other persons authorised by RailCorp access to the Maintenance Site, the Associated Work Sites or that part of the Maintenance Site or the Associated Work Sites which is

the subject of the Native Title Claim when reasonably required by RailCorp for that purpose).

For the purposes of clause 11.12(c)(i)A, RailCorp may by written notice direct PPP Co to suspend performance of any or all of PPP Co's Activities until such time as RailCorp gives PPP Co further written notice. No party will be in default of its obligations under this Contract in so far as the failure or delay in the observance or performance of those obligations by that party arises as a consequence of a direction, order or requirement specified in clause 11.12(c)(i).

- (d) **(Compensation):** If PPP Co is directed, ordered or required to cease to perform PPP Co's Activities (or to change the way it does so) as referred to in clause 11.12(c)(i) then:
- (i) subject to clause 11.12(e), RailCorp will pay PPP Co:
 - A. the reasonable costs and expenses directly incurred by PPP Co which arise as a direct result of the Delivery Phase Activities being delayed as a consequence of such direction, order or requirement, but only to the extent that the direction, order or requirement prevents PPP Co from achieving Practical Completion of the Maintenance Facility Works or a Set by its Date for Practical Completion; and
 - B. any other reasonable costs and expenses directly incurred by PPP Co in:
 - 1) ceasing to perform PPP Co's Activities as directed, ordered or required as referred to in clause 11.12(c)(i); and
 - 2) recommencing the performance of PPP Co's Activities following the ceasing of the performance of PPP Co's Activities under clause 11.12(c)(i); and
 - (ii) PPP Co must:
 - A. take all reasonable steps to mitigate such costs and expenses;
 - B. comply with all reasonable directions of RailCorp concerning the Native Title Claim and its consequences; and
 - C. ensure that PPP Co's Contractors comply with the requirements of this clause 11.12(d)(ii).
- (e) **(Exception):** Clause 11.12(d)(i) does not apply to the extent that any costs or expenses result from a failure by PPP Co to comply with its obligations under clause 11.12(d)(ii).
- (f) **(No other liability):** Except as stated in this Contract, RailCorp will not be liable to PPP Co for any Loss which PPP Co or its Associates suffer or incur as a result of a Native Title Claim in respect of the Maintenance Site, the Associated Work Sites or any part of the Maintenance Site, the Associated Work Sites or any other RailCorp Project Land.

11.13 Artefacts

All Artefacts found on or under the surface of any RailCorp Project Land will, as between the parties, be the absolute property of RailCorp.

Where such an Artefact is found, PPP Co must:

- (a) immediately notify RailCorp's Representative;
- (b) protect it and not disturb it further; and
- (c) comply with any instructions of RailCorp's Representative in relation to the Artefact.

RailCorp must reimburse PPP Co for the extra costs reasonably incurred by PPP Co in complying with instructions of RailCorp's Representative. PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with the discovery of an Artefact other than for the amount payable under this clause 11.13. PPP Co will not be in default of its obligations under this Contract in so far as the failure or delay in the observance or performance of those obligations by PPP Co arises as a consequence of any instruction to suspend work by RailCorp's Representative under clause 11.13(c).

11.14 Working hours

Unless otherwise agreed between PPP Co and RailCorp's Representative, the hours of work applicable to PPP Co's Activities to be carried out on RailCorp Project Land are those permitted by relevant law and relevant Authorities.

11.15 Permitted use

PPP Co must not use any RailCorp Project Land, or permit it to be used, for any purpose other than:

- (a) the Project; or
- (b) the provision of maintenance and other through life support services in respect of Other Sets,

without RailCorp's prior written consent.

11.16 PPP Co to co-operate with RailCorp

Without limiting clause 11.9 (Co-operation with RailCorp's Other Contractors and employees):

- (a) PPP Co acknowledges that:
 - (i) the Maintenance Facility Works interface with the RailCorp Enabling Works and that it is necessary for PPP Co to co-operate with RailCorp and co-ordinate the execution of the Maintenance Facility Works with RailCorp's execution of the RailCorp Enabling Works;
 - (ii) RailCorp will be executing the RailCorp Enabling Works on parts of the Construction Site or on land adjacent to the Construction Site at or about the same time as PPP Co is carrying out the Maintenance Facility Works; and

- (iii) delays in carrying out the Maintenance Facility Works or a failure to comply with its other obligations under this Contract may impact on, interfere with or delay the execution of the RailCorp Enabling Works;
- (b) PPP Co must:
- (i) permit RailCorp to execute the RailCorp Enabling Works on the applicable parts of the Construction Site including at the same time as PPP Co is carrying out the Maintenance Facility Works so as to enable RailCorp to comply with its obligations under clause 14A;
 - (ii) provide RailCorp with safe, clean and clear access to those parts of the Construction Site where the RailCorp Enabling Works are being undertaken;
 - (iii) carefully interface and co-ordinate the Maintenance Facility Works and PPP Co's Activities with the RailCorp Enabling Works and RailCorp's activities in respect of the execution of the RailCorp Enabling Works;
 - (iv) take all reasonable precautions to ensure that the Maintenance Facility Works are protected from accidental damage by RailCorp;
 - (v) fully co-operate with RailCorp to facilitate the execution of the RailCorp Enabling Works;
 - (vi) carry out the Maintenance Facility Works and PPP Co's Activities so as to minimise any disruption, interference or delay to the RailCorp Enabling Works; and
 - (vii) seek to resolve any problems arising out of the interfacing and co-ordination of the Maintenance Facility Works and PPP Co's Activities with the RailCorp Enabling Works;
- (c) PPP Co must provide to RailCorp such information reasonably requested by RailCorp within the period reasonably specified by RailCorp to enable RailCorp to progress the execution of the RailCorp Enabling Works;
- (d) PPP Co must carry out such works reasonably requested by RailCorp which are necessary to enable RailCorp to progress the execution of the RailCorp Enabling Works within the period reasonably specified by RailCorp provided that:
- (i) such works will be carried out at PPP Co's cost if the works form part of the Maintenance Facility Works; and
 - (ii) RailCorp will pay to PPP Co the cost of carrying out such works in accordance with the PPP Co Schedule of Rates if the works do not form part of the Maintenance Facility Works; and
- (e) PPP Co acknowledges that any delay in providing the information required by clause 11.16(c) or the carrying out of the works referred to in clause 11.16(d) by the relevant dates may delay the execution of the RailCorp Enabling Works.

11.17 RailCorp to co-operate with PPP Co

- (a) RailCorp acknowledges that:
- (i) the RailCorp Enabling Works interface with the Maintenance Facility Works to be provided by PPP Co and that it is necessary for RailCorp to

co-operate with PPP Co and co-ordinate the execution of the RailCorp Enabling Works with PPP Co's execution of the Maintenance Facility Works;

- (ii) PPP Co will be executing the Maintenance Facility Works on parts of the Construction Site at or about the same time as RailCorp is carrying out the RailCorp Enabling Works; and
- (iii) delays in carrying out the RailCorp Enabling Works or a failure to comply with its other obligations under this Contract may impact on, interfere with or delay the execution of the Maintenance Facility Works.

(b) RailCorp must:

- (i) carefully interface and co-ordinate the RailCorp Enabling Works and RailCorp's activities in respect of the execution of the RailCorp Enabling Works with the Maintenance Facility Works and PPP Co's Activities;
- (ii) take all reasonable precautions to ensure that the RailCorp Enabling Works are protected from accidental damage by PPP Co;
- (iii) fully co-operate with PPP Co to facilitate the execution of the Maintenance Facility Works;
- (iv) carry out the RailCorp Enabling Works and RailCorp's activities in respect of the execution of the RailCorp Enabling Works so as to minimise any disruption, interference or delay to the Maintenance Facility Works; and
- (v) seek to resolve any problems arising out of the interfacing and co-ordination of the RailCorp Enabling Works and RailCorp's activities in respect of the execution of the RailCorp Enabling Works with the Maintenance Facility Works and PPP Co's Activities.

11.18 Location of Utility Services

- (a) Subject to clause 11.18(c), PPP Co must not construct any part of the infrastructure for the Utility Services outside the Construction Site without the prior consent of RailCorp (such consent not to be unreasonably withheld provided that RailCorp will be entitled to take into account the current and prospective use of any other land proposed to be used by PPP Co in determining whether to provide its consent).
- (b) PPP Co must obtain the prior consent of RailCorp in relation to the exact location of the Utility Services within the Construction Site (such consent not to be unreasonably withheld or delayed provided that RailCorp will be entitled to take into account the current and prospective use of such land in determining whether to provide its consent).
- (c) PPP Co will endeavour to procure that the electricity substation kiosk required for the Maintenance Facility to be constructed by EnergyAustralia (or any successor to EnergyAustralia) ("**EA Kiosk**") is constructed on land other than land of which RailCorp is the registered proprietor ("**RailCorp Owned Land**") if it is reasonably practical. However, subject to clause 11.18(b), the EA Kiosk may be constructed within RailCorp Owned Land if there is no other reasonable alternative.

11.19 Right of support and drainage

- (a) PPP Co must ensure that:

- (i) at all times during the construction of the Maintenance Facility Works, the Supported Land and all improvements erected upon the Supported Land requiring support from the soil of or improvements on the Construction Site for stability are supported by the soil of, or improvements on the Construction Site; and
 - (ii) no excavations are made on the Construction Site without leaving means of support of the Supported Land and improvements upon it. Any excavation on the Construction Site made without provision for sufficient support for the Supported Land and/or improvements on the Supported Land will be deemed a breach of this undertaking from the commencement of the excavation.
- (b) Subject to clauses 11.19(d) to 11.19(f) (inclusive), RailCorp or its Associates may:
- (i) construct and maintain on the Construction Site whatever batter, embankment or structure is reasonably necessary to support the surfaces or subsurface of the Supported Land or any part of it, or any structure or works on the Supported Land; and
 - (ii) do anything necessary for that purpose, including:
 - A. entering the Construction Site;
 - B. taking anything on to the Construction Site; and
 - C. carrying out any construction, repair or maintenance work in and around the Construction Site.
- (c) Subject to clauses 11.19(d) to 11.19(f) (inclusive), RailCorp or its Associates may construct, place, lay, inspect, clean, maintain, change, repair, replace, relay, renew, use and manage:
- (i) drains, pipes, conduits and channels; and
 - (ii) all ancillary plant, equipment, fittings and attachments and works to protect or support any of them,
- for carrying rainwater and other lawful discharges from the Rail Corridor, the Future RailCorp Facilities and Surface Run-off Area through, across or under the Construction Site to drainage outlets (whether located on, in, under or outside the Construction Site).
- (d) RailCorp must provide reasonable notice to PPP Co of any action which it or its Associates propose to take under clause 11.19(b) or 11.19(c) and must provide reasonable details to PPP Co of the nature of the work to be performed, the interface between the works and PPP Co's Activities and the interface between the proposed physical works and the Maintenance Facility Works.
- (e) In taking any action under clauses 11.19(b) or 11.19(c), RailCorp must, and must ensure that its Associates, minimise any interference with the Maintenance Facility Works and PPP Co's lawful use of the Construction Site at the time.
- (f) If any action taken by RailCorp or its Associate under clause 11.19(b) or 11.19(c) unreasonably interferes with the Maintenance Facility Works or PPP Co's lawful use of the Construction Site at that time, RailCorp must:
- (i) ensure that such interference is of a short term nature; and

- (ii) pay to PPP Co the reasonable costs and expenses directly incurred by PPP Co which arise as a direct result of such interference to the extent that it prevents PPP Co or its Associates from carrying out the Maintenance Facility Works.

11.20 Excess capacity in Utility Services

- (a) Following Practical Completion of the Maintenance Facility Works, and subject to PPP Co obtaining any necessary Approvals, PPP Co must ensure that RailCorp and its Associates are able to:
 - (i) use any excess capacity in the Utility Services supplied to the Maintenance Facility for their own purposes. Where RailCorp or its Associates use any such excess capacity in the Utility Services supplied to the Maintenance Facility:
 - A. such use must be in accordance with the terms of the supply agreement pursuant to which the relevant Utility Service is supplied to the Maintenance Facility;
 - B. subject to clauses 11.20(a)(i)C and 11.20(b), such use will be at no cost to RailCorp; and
 - C. RailCorp must reimburse PPP Co for the applicable usage charges payable by PPP Co under the terms of the relevant supply agreement in respect of the Utility Services used by RailCorp; and
 - (ii) utilise any excess capacity in the infrastructure located on the Maintenance Site or infrastructure constructed by PPP Co as part of the Maintenance Facility Works in each case which is used for the purposes of supplying Utility Services to the Maintenance Facility ("**Utility Services Infrastructure**"). Where RailCorp or its Associates utilise any such excess capacity in the Utility Services Infrastructure:
 - A. subject to clause 11.20(b), such use will be at no cost to RailCorp; and
 - B. RailCorp will be entitled to enter into a supply agreement with a third party for the supply of the relevant Utility Service to the Maintenance Facility using such Utility Services Infrastructure for use by RailCorp or its Associates.
- (b) RailCorp must reimburse PPP Co for the cost of installing any additional metering equipment required to separately meter the use of the Utility Services by RailCorp.
- (c) In this clause 11.20, a reference to "excess capacity" means any capacity which is in excess of PPP Co's requirements for the purposes of carrying out PPP Co's Activities.

12. Environmental issues

12.1 Contamination

Without limiting clauses 11.11 (Site Conditions and suitability) and 39 (PPP Co to inform itself), PPP Co bears the risk of all Contamination on or under the Maintenance Site and the Associated Work Sites which:

- (a) is disturbed by the carrying out of PPP Co's Activities; or
 - (b) otherwise arises out of or in connection with PPP Co's Activities,
- and PPP Co must:
- (c) dispose of, or otherwise deal with, such Contamination in accordance with law;
 - (d) remediate the Maintenance Site and the Associated Work Sites to the extent to which:
 - (i) any of them is in any way degraded by such Contamination; and
 - (ii) the Contamination is of such a nature that an Authority could issue a statutory notice in respect of it; and
 - (e) indemnify RailCorp against any Claim or Loss brought against, suffered or incurred by RailCorp arising out of or in any way in connection with such Contamination or a breach by PPP Co of its obligations under this clause 12.1.

12.2 Environmental compliance

PPP Co must:

- (a) **(No improper use of RailCorp Project Land):** not use any RailCorp Project Land, or allow its Associates to use any RailCorp Project Land, so that:
 - (i) any Industrial Waste or Hazardous Substance is abandoned or dumped on the RailCorp Project Land;
 - (ii) any Industrial Waste or Hazardous Substance is handled in a manner which is likely to cause an Environmental Hazard; or
 - (iii) any other substance is released from, deposited to, or emanates from, the RailCorp Project Land such that a state of Contamination occurs;
- (b) **(Be environmentally responsible):** at all times carry out, and ensure that the Significant Contractors carry out, PPP Co's Activities in an environmentally responsible manner and so as to protect the Environment;
- (c) **(Comply with Environmental laws):** without limiting clause 7 (Laws and Approvals):
 - (i) comply with, and ensure that the Significant Contractors in carrying out PPP Co's Activities comply with, all laws relating to the Environment; and
 - (ii) obtain and comply with all requirements of, and ensure that its Associates in carrying out PPP Co's Activities obtain and comply with all requirements of, any Approvals required in order to release or emit anything from any RailCorp Project Land into the air or water or onto the ground or otherwise into the Environment or to emit any substantial noise;
- (d) **(No Contamination from Sets):** without limiting clauses 12.2(b) and 12.2(c), ensure that the Sets do not cause any Contamination;

- (e) **(Notification):** immediately notify RailCorp in writing as soon as PPP Co becomes aware of any non compliance with the requirements of any law or Approval regarding the Environment in the carrying out of PPP Co's Activities; and
- (f) **(Indemnity):** indemnify RailCorp from and against any Claim or Loss brought against, suffered or incurred by RailCorp arising out of or in any way in connection with a breach by PPP Co of its obligations under this clause 12.2.

12.3 Environmental management system

PPP Co:

- (a) must, as soon as practicable, implement the environmental management system specified in clause 2.9 (Environmental Management Plan) of the Contract Management Requirements;
- (b) must allow RailCorp's Representative access to the environmental management system of PPP Co and the Significant Contractors to enable monitoring and auditing; and
- (c) will not be relieved from compliance with any of its obligations under this Contract or from any of its liabilities whether under this Contract or otherwise according to law as a result of:
 - (i) the implementation of, and compliance with, the environmental management requirements of this Contract;
 - (ii) any audits or other monitoring by RailCorp's Representative of PPP Co's compliance with the environmental management system; or
 - (iii) any failure by RailCorp's Representative, or anyone else acting on behalf of RailCorp, to detect any non-compliance including where any failure arises from any negligence on the part of RailCorp's Representative or other person.

13. Design

13.1 Design obligations

Subject to clauses 13.8 (Resolution of ambiguities) and 13.11 (RailCorp Maintenance Facility Reference Design), PPP Co must design the Cars, the Maintenance Facility Works, the Simulators and any works carried out as part of the TLS Phase Activities in accordance with:

- (a) the relevant Specifications;
- (b) any Variation:
 - (i) directed by RailCorp by a document titled "Variation Order"; or
 - (ii) approved by RailCorp by a document titled "Variation Approval"; and
- (c) the other requirements of this Contract.

13.2 Design warranties

PPP Co warrants that:

- (a) each Design Book:
 - (i) has been prepared by PPP Co;
 - (ii) is free of any ambiguities, discrepancies, inconsistencies, errors, omissions or inaccuracies; and
 - (iii) is proper, adequate and fit for the purposes of enabling PPP Co to complete the design, manufacturing and construction obligations under this Contract, including ensuring that the Cars, the Maintenance Facility (subject to clause 14A.1) and the Simulators (as the case may be) will, upon Practical Completion of the Cars, the Maintenance Facility Works and the Simulators (respectively), and thereafter at all relevant times during the Contract Term, be safe and fit for their intended purposes as ascertainable from the RailCorp Project Agreements; and
- (b) the Design Documentation for the Cars, the Maintenance Facility Works, the Simulators and any works carried out as part of the TLS Phase Activities will:
 - (i) be prepared in accordance with the requirements of this Contract, including the relevant Specifications;
 - (ii) satisfy the requirements of this Contract, including the relevant Specifications; and
 - (iii) be safe and fit for their intended purposes as ascertainable from the RailCorp Project Agreements.

Subject to clause 30 (RailCorp initiated Variations), PPP Co agrees that the warranties given in this clause 13.2 will remain unaffected, and that it will bear and continue to bear full liability and responsibility for the design of the Cars, the Simulators, the Maintenance Facility Works and any works carried out as part of the TLS Phase Activities, despite any Variation directed by RailCorp by a document entitled "Variation Order" or approved by RailCorp by a document entitled "Variation Approval".

13.3 Technical Reviews

- (a) PPP Co must conduct the following Technical Reviews with RailCorp in respect of the Cars, the Maintenance Facility Works and the Simulators:
 - (i) a System Definition Review (SDR);
 - (ii) a Preliminary Design Review (PDR);
 - (iii) a Critical Design Review (CDR);
 - (iv) a System Verification Review (SVR); and
 - (v) a Physical Configuration Audit (PCA).
- (b) The objectives and requirements for each Technical Review are described in clause 4.6 of the Contract Management Requirements.
- (c) Without limiting clause 13.7 (No obligation to review), the parties acknowledge and agree that the Technical Reviews are solely for the purpose of enabling RailCorp to

monitor the progress of, and provide feedback on, the compliance of PPP Co's Activities with the requirements of this Contract. Nothing which occurs during a Technical Review will:

- (i) relieve PPP Co from, or alter or affect, PPP Co's liabilities, obligations or responsibilities whether under this Contract or otherwise according to law;
- (ii) prejudice RailCorp's rights against PPP Co whether under this Contract or otherwise according to law; or
- (iii) be construed as a direction by RailCorp or RailCorp's Representative to do or not do anything.

13.4 Submission of Design Documentation

PPP Co must:

- (a) complete the Design Documentation for the Cars, the Maintenance Facility Works, the Simulators and any works to be carried out as part of the TLS Phase Activities in accordance with the requirements of this Contract;
- (b) in the case of the Cars, the Maintenance Facility Works and the Simulators, submit to RailCorp's Representative the Design Documentation required for:
 - (i) the System Definition Review;
 - (ii) the Preliminary Design Review; and
 - (iii) the Critical Design Review,in accordance with the Delivery Programme;
- (c) in the case of any work to be carried out as part of the TLS Phase Activities, submit to RailCorp's Representative the Design Documentation before it commences carrying out any such works;
- (d) without limiting clause 13.4(b) or 13.4(c), submit the Design Documentation to RailCorp's Representative in a manner and at a rate which will give RailCorp's Representative a reasonable opportunity to review the submitted Design Documentation within the 20 Business Day period referred to in clause 13.5; and
- (e) if required by RailCorp, make available the appropriate design personnel to:
 - (i) explain the Design Documentation; and
 - (ii) provide such information regarding the Design Documentation as RailCorp reasonably requests.

13.5 Review of Design Documentation

- (a) RailCorp's Representative may (but is not obliged to):
 - (i) review the Design Documentation provided by PPP Co:
 - A. as part of:
 - 1) the System Definition Review;

- 2) the Preliminary Design Review; and
 - 3) the Critical Design Review; or
 - B. pursuant to clause 13.4(c);
 - (ii) within 20 Business Days after the submission by PPP Co of such Design Documentation, either indicate that:
 - A. the Design Documentation is "Not Rejected (NR)" and that RailCorp has no objection to PPP Co proceeding to the next Technical Review for the relevant System, Subsystem or Configuration Item or commencing the relevant TLS Phase Activities (as applicable);
 - B. the Design Documentation is "Not Rejected Subject to Comments (SC)" (if, in the reasonable opinion of RailCorp's Representative, PPP Co is required to make changes to the Design Documentation to comply with the requirements of this Contract and that RailCorp has no objection to PPP Co proceeding to the next Technical Review for the relevant System, Subsystem or Configuration Item or commencing the relevant TLS Phase Activities (as applicable), subject to PPP Co addressing to RailCorp's satisfaction the comments made by RailCorp's Representative; or
 - C. the Design Documentation is "Rejected (R)" if, in the reasonable opinion of RailCorp's Representative, the Design Documentation does not comply with the requirements of this Contract.
- (b) If any Design Documentation is Not Rejected Subject to Comments (SC) or Rejected (R):
- (i) RailCorp's Representative must explain the reasons for the comments or rejection; and
 - (ii) PPP Co must, within 20 Business Days, submit amended Design Documentation to RailCorp's Representative whereupon the provisions of this clause 13.5 will reapply to the amended Design Documentation.
- (c) The exercise (or failure to exercise) by RailCorp's Representative of any of its rights under this clause 13.5 will not preclude RailCorp from subsequently asserting that Design Documentation (including Final Design Documentation) does not comply with the requirements of this Contract (even if RailCorp's Representative previously gave a notice under clause 13.5(a)(ii)A or 13.5(a)(ii)B in respect of that Design Documentation).
- (d) Subject to clause 13.5(e), a Technical Review for a System, Subsystem and Configuration Item will be complete when:
- (i) PPP Co has submitted to RailCorp's Representative all Design Documentation for the Technical Review for that System, Subsystem or Configuration Item; and
 - (ii) a period of 20 Business Days after the submission of that Design Documentation has expired and that Design Documentation has not been Rejected (R) by RailCorp's Representative.

- (e) Each Technical Review (as a whole) will be completed when:
 - (i) PPP Co has submitted to RailCorp's Representative all Design Documentation for all relevant Systems, Subsystems and Configuration Items; and
 - (ii) a period of 20 Business Days after submission of that Design Documentation has expired and that Design Documentation has not been:
 - A. Rejected (R); or
 - B. Not Rejected Subject to Comments (SC),by RailCorp's Representative.

13.6 Amendments to Final Design Documentation

Except where otherwise determined pursuant to clause 30 (RailCorp initiated Variations) or 31 (PPP Co initiated Variation), the Final Design Documentation may only be amended if:

- (a) PPP Co submits the amended Design Documentation to RailCorp's Representative together with:
 - (i) the design certification referred to in clause 4.4.7 (Design certification) of the Contract Management Requirements; and
 - (ii) an explanation as to why it is seeking to amend the Final Design Documentation; and
- (b) a period of 20 Business Days after submission of the amended Design Documentation has expired and the amended Design Documentation has not been:
 - (i) Rejected (R); or
 - (ii) Not Rejected Subject to Comments (SC),by RailCorp's Representative.

13.7 No obligation to review

Neither RailCorp nor RailCorp's Representative assumes or owes any duty of care to PPP Co to review, or if it does review it in reviewing, the Design Documentation submitted by PPP Co for errors, omissions or compliance with this Contract.

No participation in the development of, review of, comments upon, acceptance or rejection of, or failure to participate in the development of, review or comment upon or accept or reject, any Design Documentation submitted by PPP Co or any other direction, act or omission by RailCorp or RailCorp's Representative in respect of the Design Documentation will:

- (a) lessen or otherwise affect PPP Co's warranties under clause 13.2 or otherwise relieve PPP Co from, or alter or affect, PPP Co's liabilities, obligations or responsibilities whether under this Contract or otherwise according to law; or
- (b) prejudice or limit RailCorp's rights against PPP Co whether under this Contract or otherwise according to law.

13.8 Resolution of ambiguities

If there is any ambiguity, discrepancy or inconsistency in the documents which make up this Contract, or between this Contract and the Final Design Documentation:

- (a) where the ambiguity, discrepancy or inconsistency is in the documents which make up this Contract, the order of precedence set out in clause 1.12 (Order of precedence) will apply;
- (b) where the ambiguity, discrepancy or inconsistency is between this Contract and any part of the Final Design Documentation, the higher standard, quality or quantum will prevail but if this does not resolve the ambiguity, discrepancy or inconsistency this Contract will prevail;
- (c) where the ambiguity discrepancy or inconsistency is between figured and scaled dimensions, the figured dimensions will prevail;
- (d) if it is discovered by either PPP Co or RailCorp, that party must notify the other and RailCorp's Representative within 5 Business Days of such discovery; and
- (e) RailCorp's Representative must then, within 10 Business Days of the notice under clause 13.8(d) being received by RailCorp's Representative, instruct PPP Co as to the interpretation to be followed so as to resolve the ambiguity, discrepancy or inconsistency.

13.9 Design Books

- (a) Subject to clause 30 (RailCorp initiated Variations), PPP Co accepts all risks arising out of each Design Book including the risk that:
 - (i) it will not be fit for its intended purpose as ascertainable from the RailCorp Project Agreements; and
 - (ii) the Project Works will cost more than anticipated to construct.
- (b) Without limiting PPP Co's obligations under this Contract, PPP Co must do whatever may be necessary to ensure that the Project Works are designed and constructed in accordance with the Design Books.

13.10 Changes from the Design Books

- (a) The parties acknowledge that the process of developing the design from a Design Book to the Design Documentation may (subject to this clause 13.10) result in changes to the design specified in the Design Book.
- (b) PPP Co must not make a change referred to in clause 13.10(a) unless:
 - (i) PPP Co demonstrates to the satisfaction of RailCorp's Representative that the change is necessary to comply with the relevant Specifications (other than the relevant Design Book) where the Specifications (other than the relevant Design Book) impose the greater or higher standard, level of service, scope or requirement;
 - (ii) PPP Co demonstrates to the satisfaction of RailCorp's Representative that the change:
 - A. complies with the Specifications (other than the relevant Design Book); and

B. is consistent with the design intent in the relevant Design Book and (without limitation) does not result in a lessening of any standard, level of service, scope or requirement for any work set out in the Design Book, including any reduction in:

- 1) capacity;
- 2) durability;
- 3) aesthetics of visible features;
- 4) whole of life performance;
- 5) functional performance;
- 6) safety;
- 7) security;
- 8) passenger or crew amenity;
- 9) passenger or crew benefits; or
- 10) RailCorp benefits,

of any part of the Project Works; or

(iii) the change has been instructed, agreed, determined or approved as a Variation under clause 30 (RailCorp initiated Variations) or clause 31 (PPP Co initiated Variations).

(c) Without limiting clause 30.16 (No liability unless Variation Order), PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, any change which occurs in accordance with this clause 13.10. This does not affect any entitlement which PPP Co has under clause 30.14 (Variation Costs) in respect of a Variation which is implemented in accordance with clause 30 (RailCorp initiated Variation).

13.11 RailCorp Maintenance Facility Reference Design

Despite any other provision to the contrary, PPP Co is not obliged to comply with the drawings in the RailCorp Maintenance Facility Reference Design to the extent that the Maintenance Facility Design Book specifically contemplates an alternative design solution which is of a greater or higher standard, level of service, scope or requirement.

14. Manufacture and construction during Delivery Phase

14.1 Manufacture and construction obligations

Subject to clauses 13.8 (Resolution of ambiguities) and 13.11 (RailCorp Maintenance Facility Reference Design), PPP Co must manufacture the Cars and the Simulators, and construct the Maintenance Facility Works, in accordance with:

- (a) the Specifications;
- (b) the Final Design Documentation;

- (c) any Variation:
 - (i) directed by RailCorp by a document titled "Variation Order"; or
 - (ii) approved by RailCorp by a document titled "Variation Approval"; and
- (d) the other requirements of this Contract,

PPP Co accepts full responsibility for all manufacturing and construction means, methods and techniques used in the performance of the Delivery Phase Activities.

14.2 Manufacture and construction warranties

PPP Co warrants that:

- (a) the manufacture of the Cars and the Simulators, and the construction of the Maintenance Facility Works, in accordance with clause 14.1 will satisfy the requirements of this Contract; and
- (b) the Cars, the Maintenance Facility Works and the Simulators will, upon Practical Completion and thereafter at all relevant times, be safe and fit for their intended purposes as ascertainable from the RailCorp Project Agreements.

Subject to clause 30 (RailCorp initiated Variations), PPP Co agrees that the warranties given in this clause 14.2 will remain unaffected, and that it will bear and continue to bear full liability and responsibility for the manufacture of the Cars and the Simulators and the construction of the Maintenance Facility Works, despite any Variation directed by RailCorp by a document entitled "Variation Order" or approved by RailCorp by a document entitled "Variation Approval".

14.3 Simulators

- (a) RailCorp will provide rooms to house the Motion System Version Simulator which are suitable for the purpose of installing and housing the Motion System Version Simulator, at the Australian Rail Training Facility at Petersham or elsewhere as notified in writing by RailCorp's Representative at least 60 Business Days in advance of the anticipated date of installation of the Motion System Version Simulator. RailCorp will grant PPP Co and its Associates reasonable access to the nominated location in order to install the Motion System Version Simulator.
- (b) Except where RailCorp wishes to use the Mobile Version Simulator at other locations, PPP Co will provide facilities to house the Mobile Version Simulator for use by RailCorp at the Maintenance Facility in accordance with the RailCorp Maintenance Facility Specification.

14.4 Workmanship and materials

PPP Co must, in carrying out the Delivery Phase Activities:

- (a) use workmanship:
 - (i) of:
 - A. the standard prescribed in the Specifications; or
 - B. to the extent it is not so prescribed, a standard consistent with best industry standards for work of a similar nature to the

manufacture of the Cars or the Simulators or the construction of the Maintenance Facility Works (as the case may be); and

- (ii) which is fit for its purpose; and
- (b) use parts, components, goods and materials:
 - (i) which:
 - A. comply with the requirements of the Specifications; or
 - B. if not fully described in the Specifications, are new and consistent with the best industry standards for work of a similar nature to the manufacture of the Cars or the Simulators or the construction of the Maintenance Facility Works (as the case may be); and
 - (ii) which:
 - A. are of merchantable quality; and
 - B. are fit for their intended purpose.

14.5 RailCorp's right to inspect

RailCorp (or any person authorised by RailCorp) may inspect the Delivery Phase Activities (wherever occurring), provided that in doing so RailCorp must comply with clause 11.7 (RailCorp's right of entry).

PPP Co, however, acknowledges that:

- (a) RailCorp owes no duty to PPP Co to:
 - (i) inspect the Delivery Phase Activities; or
 - (ii) review manufacturing or construction for errors, omissions or compliance with the requirements of this Contract if it does so inspect; and
- (b) any inspection of the Delivery Phase Activities or review of manufacturing or construction (or lack of inspection or review) by or on behalf of RailCorp will not in any way lessen or affect:
 - (i) PPP Co's obligations whether under this Contract or otherwise according to law; or
 - (ii) RailCorp's rights against PPP Co whether under this Contract or otherwise according to law.

RailCorp will carry out any such inspection in a manner which does not unreasonably interfere with the Delivery Phase Activities. PPP Co must provide RailCorp with every reasonable facility and other assistance necessary for the inspection.

14.6 Testing of Delivery Phase Activities

RailCorp's Representative may carry out, or direct PPP Co to carry out, reasonable tests (in addition to the Tests) in respect of the Delivery Phase Activities. RailCorp's Representative must give PPP Co reasonable prior notice of these tests (being at least 24 hours). PPP Co must

provide all reasonable assistance required by RailCorp's Representative in relation to these tests.

RailCorp's Representative may direct that any part of the Delivery Phase Activities not be covered up or made inaccessible without RailCorp's Representative's prior written approval.

The reasonable costs incurred by PPP Co in connection with these tests will be determined by RailCorp's Representative and paid or reimbursed by RailCorp unless:

- (a) the results of the test show the work is not in accordance with this Contract;
- (b) the test is in respect of work covered up or made inaccessible without the prior written approval of RailCorp's Representative where such was required; or
- (c) the test is upon work undertaken to correct or overcome a PPP Co Related Defect,

in which event these costs will be borne by PPP Co and any reasonable costs incurred by RailCorp in connection with these tests will be a debt due from PPP Co to RailCorp.

Results of tests carried out under this clause 14.6 must be made available by the relevant party to the other within 5 Business Days of them being available.

14.7 Suspension

RailCorp's Representative may instruct PPP Co to:

- (a) suspend the carrying out of all or part of the Delivery Phase Activities if PPP Co is not carrying out the Delivery Phase Activities in accordance with the requirements of this Contract; and
- (b) after a suspension has been instructed, recommence the performance of all or part of the relevant Delivery Phase Activities.

PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, a suspension directed by RailCorp's Representative under this clause 14.7.

This clause 14.7 is not limited by clause 10.9 (Alert Events).

Subject to the other provisions of this Contract, RailCorp is not entitled to instruct PPP Co to suspend the carrying out of all or part of the Delivery Phase Activities under paragraph (a) if PPP Co is carrying out the Delivery Phase Activities in accordance with the requirements of this Contract.

14A. RailCorp Enabling Works

14A.1 RailCorp to carry out RailCorp Enabling Works

RailCorp must design, construct and commission the RailCorp Enabling Works:

- (a) in accordance with the RailCorp Enabling Works Specification, all applicable laws and, subject to clause 14A.1A, the Planning Approval; and
- (b) so that the works comprising a RailCorp Enabling Works Package are, following the issue of a Certificate of Compliance in respect of such RailCorp Enabling Works Package:
 - (i) fit for their intended purposes as ascertainable from the RailCorp Project Agreements; and

- (ii) free from Defects (other than Minor Defects to which clause 14A.7 applies).

14A.1A Heritage requirements in Planning Approval

- (a) RailCorp's obligations in respect of those Planning Approval requirements which relate to heritage for the RailCorp Enabling Works are as set out in clause 14A.1A(b).
- (b) On the date of issue of a Certificate of Compliance in respect of the Package 1 RailCorp Enabling Works, RailCorp will provide to PPP Co:
 - (i) a photographic record of land and improvements on the land:
 - A. on which works forming part of the Package 1 RailCorp Enabling Works were carried out; and
 - B. which have sufficient heritage significance to warrant recording for the purposes of the Planning Approval;
 - (ii) a drawing showing those parts of the Construction Site:
 - A. on which works forming part of the Package 1 RailCorp Enabling Works were carried out; and
 - B. which have sufficient heritage significance to warrant recording for the purposes of the Planning Approval;
 - (iii) a written statement from RailCorp confirming that:
 - A. all items identified in that statement have been recorded or mapped as required under the Planning Approval;
 - B. the heritage water tower has been relocated as required under the Planning Approval; and
 - C. except as otherwise specified in the statement, no heritage items are visible above ground on the land on which works forming part of the Package 1 RailCorp Enabling Works were carried out or were discovered in the course of carrying out these works.
- (c) PPP Co acknowledges and agrees that:
 - (i) RailCorp is providing the documents set out in clause 14A.1A(b) to PPP Co to assist PPP Co in complying with all Planning Approval requirements which relate to heritage; and
 - (ii) PPP Co is responsible for complying with all Planning Approval requirements which relate to heritage.

14A.2 RailCorp Enabling Works Packages

- (a) RailCorp must carry out the works comprising a RailCorp Enabling Works Package if:
 - (i) PPP Co has, where applicable, satisfied the Preconditions applicable to the relevant RailCorp Enabling Works Package and issued RailCorp with

a Certificate of Compliance stating that such Preconditions have been satisfied in accordance with the requirements of this Contract; and

- (ii) PPP Co has, where applicable, provided RailCorp with the Prescribed Notice Period of notice applicable to the relevant RailCorp Enabling Works Package that it requires RailCorp to carry out the works comprising the relevant RailCorp Enabling Works Package.

(b) Where:

- (i) RailCorp must carry out the works comprising a RailCorp Enabling Works Package in accordance with clause 14A.2(a); or
- (ii) no Preconditions and no Prescribed Notice Period is prescribed in respect of a RailCorp Enabling Works Package,

RailCorp must, subject to clause 14A.2(c) (where applicable), carry out such works and issue a Certificate of Compliance within the Prescribed Period.

(c) If upon expiration of the Prescribed Notice Period of notice provided by PPP Co in relation to a RailCorp Enabling Works Package, PPP Co has not satisfied the requirement in clause 14A.2(a)(i) in relation to that RailCorp Enabling Works Package (if applicable), RailCorp must carry out the works comprising a RailCorp Enabling Works Package and issue a Certificate of Compliance in respect of such works within the Prescribed Period, as extended by:

- (i) the period equivalent to any period of delay by PPP Co to:
 - A. satisfy the Preconditions applicable to the relevant RailCorp Enabling Works Package; and/or
 - B. issue RailCorp with a Certificate of Compliance in respect of the satisfaction of the Preconditions; and
- (ii) such further period as may be necessary for RailCorp to undertake the relevant RailCorp Enabling Works Package having regard to:
 - A. the availability of Work on Track Authorities and any required equipment; and
 - B. the need to remobilise contractors;

(d) If RailCorp becomes aware of any matter which will, or is likely to, give rise to a delay in carrying out the works comprising a RailCorp Enabling Works Package and issuing a Certificate of Compliance within the Prescribed Period, RailCorp must give PPP Co a notice setting out detailed particulars of the delay as soon as reasonably practicable.

14A.3 Requirements for issue of a Certificate of Compliance

RailCorp will be entitled to issue a Certificate of Compliance in respect of a RailCorp Enabling Works Package when the RailCorp Enabling Works Package is complete and complies with the requirements of this Contract, except for Minor Defects.

14A.4 Notice of issue of Certificate of Compliance

RailCorp must give RailCorp's Representative and PPP Co's Representative at least 10 Business Days' notice of when it expects to issue a Certificate of Compliance in respect of a RailCorp Enabling Works Package.

14A.5 Inspection and issue of Certificate of Compliance

Within 10 Business Days after receiving the notice under clause 14A.4, RailCorp's Representative and PPP Co's Representative must inspect the RailCorp Enabling Works Package. Upon the expiration of the 10 Business Day period referred to in clause 14A.4, RailCorp's Representative must, if the requirements of clause 14A.3 have been satisfied in respect of a RailCorp Enabling Works Package, issue a Certificate of Compliance in respect of that RailCorp Enabling Works Package to PPP Co:

- (a) stating the date upon which the requirements of clause 14A.3 were satisfied; and
- (b) listing any Minor Defects.

14A.6 Certificate of Compliance not issued

If RailCorp's Representative does not issue a Certificate of Compliance under clause 14A.5 following the issue of a notice under clause 14A.4, RailCorp must continue to carry out the works comprising the RailCorp Enabling Works Package and clauses 14A.4 and 14A.5 will reapply.

14A.7 Rectification of defects

RailCorp must expeditiously and diligently rectify all Minor Defects in a RailCorp Enabling Works Package listed in the Certificate of Compliance for that RailCorp Enabling Works Package.

14A.8 As-built drawings

RailCorp must provide to PPP Co's Representative all relevant as-built drawings relating to a RailCorp Enabling Works Package which are required to enable PPP Co to carry out PPP Co's Activities in a timely manner having regard to when PPP Co requires the relevant as-built drawings to carry out PPP Co's Activities.

14A.9 Effect of Certificate of Compliance

A Certificate of Compliance will not:

- (a) constitute an approval by PPP Co of RailCorp's performance of its obligations under this Contract;
- (b) be taken as an admission or evidence that the RailCorp Enabling Works in respect of which the Certificate of Compliance is issued comply with this Contract; or
- (c) prejudice any rights or powers of PPP Co under this Contract or otherwise according to law.

15. Time

15.1 Commencement

PPP Co must promptly commence performance of the Delivery Phase Activities relating to the Cars, the Maintenance Facility Works and the Simulators following Financial Close.

The parties acknowledge that the terms of the Original Rolling Stock Manufacture Contract and the Original Maintenance Facility Construction Contract and the proper administration of those contracts are consistent with the proper performance of PPP Co's obligations under clause 15.2(a).

15.2 Dates for Practical Completion

PPP Co must:

- (a) use its best endeavours to achieve Practical Completion of:
 - (i) each Set;
 - (ii) the Maintenance Facility Works; and
 - (iii) the Simulators,by the relevant Date for Practical Completion; and
- (b) consistent with its obligations under clause 15.2(a), regularly and diligently progress the Delivery Phase Activities relating to the Cars, the Maintenance Facility Works and the Simulators.

15.3 Delivery Programme

PPP Co must:

- (a) update the Delivery Programme periodically at intervals no less than monthly to take account of:
 - (i) changes to the programme;
 - (ii) delays which have occurred; and
 - (iii) any corrective action plan submitted by PPP Co under clause 15.6 for which RailCorp does not issue a notice under clause 15.7(b);
- (b) ensure that each update of the Delivery Programme contains the details required by clause 2.10.2 (Delivery Programme) of the Contract Management Requirements or which RailCorp's Representative otherwise reasonably directs;
- (c) ensure that each update of the Delivery Programme makes allowance for the Project Plans and Design Documentation to be submitted to RailCorp's Representative in a manner and at a rate which will give RailCorp's Representative a reasonable opportunity to review the submitted Project Plans or Design Documentation within the 20 Business Day period referred to in clause 9.6 or 13.5 (as the case may be); and
- (d) give RailCorp's Representative copies of each update of the Delivery Programme for its review in accordance with clause 9.

15.4 PPP Co not relieved

Any review of, comments upon or approval of, or failure to review, comment upon or approve, a programme (including the Delivery Programme) by RailCorp will not:

- (a) relieve PPP Co from or affect its liabilities, obligations or responsibilities under this Contract;

- (b) evidence or constitute the granting of an extension of time or an instruction by RailCorp's Representative to accelerate, disrupt, prolong or vary any, or all, of the Delivery Phase Activities; or
- (c) affect the time for the carrying out of RailCorp's or RailCorp's Representative's obligations.

15.5 Acceleration by PPP Co

If PPP Co chooses to accelerate progress of the Delivery Phase Activities then:

- (a) RailCorp may assist PPP Co but neither RailCorp nor RailCorp's Representative will be obliged to take any action to assist or enable PPP Co achieve Practical Completion before any Date for Practical Completion;
- (b) the time for the carrying out of RailCorp's or RailCorp's Representative's obligations will not be affected; and
- (c) PPP Co will not be entitled to make any Claim against RailCorp in relation to such acceleration (or any failure or inability by PPP Co or RailCorp to accelerate).

15.6 Delays

- (a) If PPP Co becomes aware of any matter which will, or is likely to, give rise to a delay in achieving Practical Completion of a Set, the Maintenance Facility Works or the Simulators, PPP Co must give RailCorp:
 - (i) a notice setting out detailed particulars of the delay; and
 - (ii) a detailed corrective action plan in accordance with clause 15.7 (Corrective action plan),in each case as soon as reasonably practicable.
- (b) If RailCorp reasonably believes that PPP Co will be delayed in achieving Practical Completion of a Set, the Maintenance Facility Works or the Simulators, RailCorp may give notice to that effect to PPP Co, and PPP Co must then give RailCorp a detailed corrective action plan in accordance with clause 15.7 (Corrective action plan).
- (c) PPP Co must take all reasonable steps to:
 - (i) preclude the cause of any delay to the Delivery Phase Activities; and
 - (ii) avoid or minimise the consequences of any delay,including any delay arising from a delay to the RailCorp Enabling Works.

15.7 Corrective action plan

- (a) Each corrective action plan which PPP Co must provide pursuant to clause 15.6 must show how PPP Co proposes to avoid, mitigate or minimise the consequences of the delay consistent with its obligations under clause 15.2.
- (b) RailCorp may, within 15 Business Days of receipt of a corrective action plan, give notice to PPP Co that it does not accept that implementation of the corrective action plan will enable PPP Co to avoid, mitigate or minimise the consequences of the delay, consistent with its obligations under clause 15.2.

- (c) If RailCorp gives PPP Co a notice under clause 15.7(b), PPP Co must amend and resubmit the corrective action plan to RailCorp, after which clause 15.7(b) and this clause 15.7(c) will continue to apply until RailCorp does not issue a notice under clause 15.7(b).
- (d) PPP Co must comply with a corrective action plan for which RailCorp does not issue a notice under clause 15.7(b).
- (e) PPP Co will not be relieved of any liability or responsibility under this Contract or otherwise at law arising out of or in connection with:
 - (i) any notice given by RailCorp under clause 15.7(b); or
 - (ii) the implementation of any corrective action plan in respect of which RailCorp has or has not issued a notice under clause 15.7(b).
- (f) PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with any direction by RailCorp under clause 15.6(b) or any Loss suffered or incurred by PPP Co in preparing, or complying with, a corrective action plan.
- (g) Where the corrective action plan provided by PPP Co relates to one or more Sets or the Simulators, nothing in this clause 15.7 or the terms of the corrective action plan will require PPP Co to do more than to use its best endeavours to achieve Practical Completion of each Set and the Simulators by the relevant Date for Practical Completion.

15.8 Delivery Phase Progress Reports

In addition to PPP Co's obligations under clauses 15.6 and 15.7, PPP Co must give RailCorp a Delivery Phase Progress Report containing the details required by clause 2.10.3 (Delivery Phase Progress Reports) of the Contract Management Requirements each month during the Delivery Phase.

15.9 No damages

If PPP Co complies with clause 15.2:

- (a) RailCorp's sole remedy in relation to delays or disruption in the progress of the Project Works will be pursuant to clauses 49 (Default) and 50 (Termination); and
- (b) RailCorp will have no entitlement to claim damages from PPP Co for any such delay or disruption.

15.10 Delay damages

- (a) If PPP Co is:
 - (i) delayed in achieving Practical Completion of a Set or Practical Completion of the Maintenance Facility Works; or
 - (ii) required to incur additional costs and expenses to avoid or minimise any delay to Practical Completion of a Set or delay to Practical Completion of the Maintenance Facility Works,
 as a result of:
 - (iii) a breach by RailCorp of its obligations under this Contract; or

- (iv) any negligent, illegal, fraudulent or reckless act or omission of RailCorp or its Associates,
- (v) any Industrial Action by staff employed by RailCorp or its Related Bodies Corporate, other than where it is caused directly or indirectly, by the action or inaction, as the case may be, of PPP Co, or its Associates (except where such action or inaction is required by this Contract),

RailCorp will pay PPP Co the reasonable and reasonably foreseeable costs, expenses, loss or damage (including loss of revenue) suffered or incurred by PPP Co as a result of the breach, act, omission or event.

- (b) PPP Co must take (and ensure that PPP Co's Contractors take) all reasonable steps to mitigate any costs, expenses, loss or damage (including loss of revenue) suffered by PPP Co under clause 15.10(a).
- (c) Clause 15.10(a) does not apply in respect of costs, expenses, loss or damage (including loss of revenue) incurred by PPP Co to the extent that such costs, expenses, loss or damage (including loss of revenue) result from a failure by PPP Co to comply with its obligations under clause 15.10(b).

15.11 Set running shortfall²³

- (a) If:
 - (i) after 21 weeks following the Date of Practical Completion of Set 1 neither of the following tests are satisfied:

- A. the average weekly Set usage (W_u) is at least 1,925 kilometres, where W_u is calculated as follows:

$$W_u = \left(\frac{KM_p}{N_{ASP} \times N_w} \right)$$

where:

KM_p = the total number of kilometres travelled by the first 6 Operational Sets during the preceding 21 week period;

N_{ASP} = the average number of Available Sets in the preceding 21 week period, being the sum of Available Sets in each Availability Period in the preceding 21 week period, divided by the number of Availability Periods in the preceding 21 week period; and

N_w = 21 weeks,

nor

²³ [Under the Set 7 Waiver Letter \(RC08847\) dated 3 February 2012, PPP Co acknowledges that it is not entitled to, and will not be entitled to, make any claim under this clause.](#)

- B. the average Availability Period usage of Sets that are Available over the preceding 21 week period is at least 9 out of 12 Availability Periods, provided that if a Set:
- 1) fails to meet the Minimum Operating Standards for Available Sets in service; or
 - 2) is withdrawn or withheld from service by PPP Co,
- the Set will be included as having being used for the purposes of this test; and
- (ii) all Operational Sets have collectively travelled less than 150,000 kilometres, whether in service or otherwise (but excluding any kilometres travelled by a Set prior to Practical Completion of that Set); and
 - (iii) all requirements for Practical Completion of Set 7 have been achieved except for the Initial Reliability Requirement for Practical Completion of Set 7,

then RailCorp will pay to PPP Co the reasonable costs, expenses, loss or damage (including loss of revenue) suffered or incurred by PPP Co as a result of the delay to the achievement of Practical Completion of Set 7 for the period from the date which is 21 weeks after the Date of Practical Completion of Set 1 until the earlier of:

- (iv) the achievement of the Initial Reliability Requirement for Practical Completion of Set 7;
 - (v) the first date on which one of the tests referred to in clause 15.11(a)(i) is satisfied; or
 - (vi) the date on which all Operational Sets collectively accumulate 150,000 kilometres, whether in service or otherwise (but excluding any kilometres travelled by a Set prior to Practical Completion of that Set).
- (b) PPP Co must take (and ensure the PPP Co's Contractors take) all reasonable steps to mitigate any costs, expenses, loss or damage (including loss of revenue) suffered by PPP Co under clause 15.11(a).
 - (c) Clause 15.11(a) does not apply in respect of costs, expenses, loss or damage (including loss of revenue) incurred by PPP Co to the extent that such costs, expenses, loss or damage (including loss of revenue) result from a failure by PPP Co to comply with its obligations under clause 15.11(b).
 - (d) If:
 - (i) the failure of a test in clause 15.11(a)(i); or
 - (ii) the reason why the Operational Sets have collectively travelled less than 150,000 kilometres, whether in service or otherwise (but excluding any kilometres travelled by a Set prior to Practical Completion of that Set),

is due to a Force Majeure Event, then the period of 21 weeks referred to in this clause 15.11 will be extended by the period calculated as follows:

$$\text{Extension period} = S \times \frac{SA}{OS}$$

where:

S = the period during which Sets were not used due to the Force Majeure Event;

SA = the number of Sets not used due to the Force Majeure Event; and

OS = the number of Operational Sets at the point in time when Sets were not used during the Force Majeure Event.

16. Testing and Commissioning

16.1 Integrated Test Plan

Testing and Commissioning will be conducted in accordance with the Integrated Test Plan.

16.2 Notice

(a) Without limiting PPP Co's notice obligations under the Integrated Test Plan, PPP Co must give RailCorp:

(i) 180 days' notice; and

(ii) 30 days' notice,

of the date on which it expects to commence Commissioning of a Set.

(b) For the purposes of obtaining Network Access Rights for Testing and Commissioning of the Sets, PPP Co must comply with clause 11.5 (Network Access Rights), including the notice obligation under clause 11.5(b)(i).

16.3 Conduct of Tests

(a) PPP Co will conduct all Tests and must provide everything else required to conduct all Tests, except to the extent specified otherwise in this clause 16.3 and clause 4.12 of the Contract Management Requirements.

(b) RailCorp's only obligations in respect of the Tests are to:

(i) provide Crews required for Testing and Commissioning in accordance with requirements set out in the Integrated Test Plan; and

(ii) comply with its obligations with respect to Network Access Rights under clause 11.5.

(c) PPP Co must use Crew time efficiently.

16.4 Results of Tests

PPP Co must provide the results of all Tests to RailCorp's Representative in accordance with clause 4.12 of the Contract Management Requirements.

16.5 Failure of Test

If a Set fails a Test then PPP Co must:

- (a) provide RailCorp's Representative with a Test failure report in accordance with clause 4.12.10 of the Contract Management Requirements;
- (b) carry out necessary rectification work (after removing the Set from the Test location if necessary); and
- (c) when it believes it has completed all necessary rectification work:
 - (i) give notice to RailCorp's Representatives in accordance with the Contract Management Requirements; and
 - (ii) re-conduct the Test in accordance with the Integrated Test Plan and the provisions of this clause 16.

16.6 Transitional stabling

RailCorp will provide safe and secure transitional stabling for up to 8 Sets which are in the process of being Commissioned in accordance with the Integrated Test Plan at sites other than the Maintenance Site.

16.7 Alternative facility for Testing and Commissioning

- (a) Subject to clause 16.7(b), if:
 - (i) for any reason (including by reason of any delays solely attributable to PPP Co), PPP Co fails to achieve Practical Completion of the Maintenance Facility Works by the Date for Practical Completion of the Maintenance Facility Works; and
 - (ii) as a direct result of such failure, the Maintenance Facility is not available for use by PPP Co for the Testing and Commissioning of the Prototype and the first Set which is programmed to commence Testing and Commissioning by the date set out in the Delivery Programme for such Testing and Commissioning,

RailCorp will use its reasonable endeavours to provide PPP Co with suitable alternative facilities to carry out the Testing and Commissioning of the Prototype and the first Set only.

- (b) RailCorp is under no obligation to provide PPP Co with alternative facilities for the Testing and Commissioning of the Prototype and the first Set which is programmed to commence Testing and Commissioning on any date prior to the relevant date programmed by PPP Co in the Delivery Programme for such Testing and Commissioning.

17. Practical Completion of Simulators

17.1 Requirements for Practical Completion of the Simulators

Practical Completion of the Simulators will be achieved when:

- (a) the Simulators are complete based on the then current versions of the Driver's Cab, Guard's Cab, Part Task Simulator equipment and relevant systems (including Train Operating System screens, communications equipment, Workstation layout and Cab fittings) and comply with the requirements of this Contract, except for Minor Defects;

- (b) all documents and other information and things (including instruments, manuals, spares, tools and training material) relating to the Simulators which are required under this Contract have been completed and supplied to RailCorp's Representative before Practical Completion of the Simulators and the time periods for review of same specified in this Contract have expired;
- (c) PPP Co has provided RailCorp's Representative with copies of all Approvals relating to the Simulators which this Contract requires PPP Co to obtain prior to Practical Completion of the Simulators; and
- (d) PPP Co has done everything else which this Contract requires it to have done as a precondition to Practical Completion of the Simulators.

17.2 Notice of Practical Completion of the Simulators

PPP Co must:

- (a) give RailCorp's Representative at least 20 Business Days' notice of when it expects to achieve Practical Completion of the Simulators; and
- (b) give RailCorp's Representative a Request for Certificate of Practical Completion when it believes Practical Completion has been achieved (which Request must not be given earlier than 20 Business Days after the date on which PPP Co gives notice under clause 17.2(a)).

17.3 Inspection and Practical Completion of the Simulators

Within 10 Business Days after receiving the request under clause 17.2(b) RailCorp's Representative must inspect the Simulators and either:

- (a) if Practical Completion has been achieved, issue a Certificate of Practical Completion to PPP Co:
 - (i) stating as the Date of Practical Completion, the date on which the Certificate of Practical Completion is issued to PPP Co; and
 - (ii) listing any Minor Defects; or
- (b) if Practical Completion has not been achieved, either (at the discretion of RailCorp's Representative):
 - (i) issue a notice to PPP Co listing the things remaining to be performed to achieve Practical Completion; or
 - (ii) issue a written notice to PPP Co stating that the Simulators are so far from Practical Completion that it is not practical to provide the list referred to in clause 17.3(b)(i).

17.4 Practical Completion not achieved

If a notice is issued under clause 17.3(b), PPP Co must continue with the Delivery Phase Activities to achieve Practical Completion of the Simulators and clauses 17.2 and 17.3 will reapply.

17.5 No restriction

In making a determination as to whether Practical Completion of the Simulators has been achieved, RailCorp's Representative:

- (a) will not be restricted by any notice already provided under clause 17.3; and
- (b) will be entitled to raise any items of work (other than the Minor Defects) as a ground for determining that Practical Completion has not been achieved.

17.6 Effect of Certificate of Practical Completion

A Certificate of Practical Completion will not:

- (a) constitute an approval by RailCorp of PPP Co's performance of its obligations under this Contract;
- (b) be taken as an admission or evidence that the Simulators comply with this Contract; or
- (c) prejudice any rights or powers of RailCorp under this Contract or otherwise according to law.

17.7 Rectification of Defects

PPP Co must expeditiously and diligently rectify all Minor Defects in the Simulators listed in the Certificate of Practical Completion.

17A. Practical Completion of Maintenance Facility Works

17A.1 Requirements for Practical Completion of the Maintenance Facility Works

Practical Completion of the Maintenance Facility Works will be achieved when:

- (a) the Maintenance Facility Works are complete and comply with the requirements of this Contract, except for Minor Defects;
- (b) PPP Co has provided RailCorp's Representative with copies of all Approvals which this Contract requires PPP Co to obtain prior to Practical Completion of the Maintenance Facility Works;
- (c) a Certificate of Compliance has been issued by RailCorp in relation to each RailCorp Enabling Works Package; and
- (d) PPP Co has done everything else which this Contract requires it to have done as a precondition to Practical Completion of the Maintenance Facility Works.

17A.2 Notice of Practical Completion

PPP Co must:

- (a) give RailCorp's Representative at least 20 Business Days' notice of when it expects to achieve Practical Completion of the Maintenance Facility Works; and
- (b) give RailCorp's Representative a Request for Certificate of Practical Completion when it believes Practical Completion has been achieved (which Request must not be given earlier than 20 Business Days after the date on which PPP Co gives notice under clause 17A.2(a)).

17A.3 Inspection and Practical Completion

Within 10 Business Days after receiving the request under clause 17A.2(b) RailCorp's Representative must inspect the Maintenance Facility Works and either:

- (a) if Practical Completion has been achieved, issue a Certificate of Practical Completion to PPP Co:
 - (i) stating as the Date of Practical Completion, the date on which Practical Completion was achieved; and
 - (ii) listing any Minor Defects; or
- (b) if Practical Completion has not been achieved, either (at the discretion of RailCorp's Representative):
 - (i) issue a notice to PPP Co listing the things remaining to be performed to achieve Practical Completion; or
 - (ii) issue a written notice to PPP Co stating that the Maintenance Facility Works is so far from Practical Completion that it is not practical to provide the list referred to in clause 17A.3(b)(i).

17A.4 Practical Completion not achieved

If a notice is issued under clause 17A.3(b), PPP Co must continue with PPP Co's Activities, to achieve Practical Completion of the Maintenance Facility Works and clauses 17A.2 and 17A.3 will reapply.

17A.5 No restriction

In making a determination as to whether Practical Completion of a the Maintenance Facility Works has been achieved, RailCorp's Representative will be entitled to raise any items of work (other than Minor Defects) as a ground for determining that Practical Completion has not been achieved.

17A.6 Effect of Certificate of Practical Completion

The Certificate of Practical Completion will not:

- (a) constitute an approval by RailCorp of PPP Co's performance of its obligations under this Contract;
- (b) be taken as an admission or evidence that the Maintenance Facility Works comply with this Contract; or
- (c) prejudice any rights or powers of RailCorp under this Contract or otherwise according to law.

17A.7 Rectification of Defects

PPP Co must expeditiously and diligently rectify all Minor Defects in the Maintenance Facility Works listed in a Certificate of Practical Completion of the Maintenance Facility Works.

17B. Defects for Returned Facilities

17B.1 Correction of Defects

- (a) **(General Obligation):** PPP Co must correct all Defects in respect of the Returned Facilities during the relevant Defects Liability Period.
- (b) **(Notification by RailCorp):** Without limiting clause 17B.1(a), if, during a Defects Liability Period, RailCorp believes there is a Defect in the Returned Facilities, then

RailCorp may, without prejudicing any other rights which RailCorp may have under this Contract or otherwise at law, give PPP Co a notice specifying the Defect and directing PPP Co to correct the Defect (or part of it), specifying a reasonable period of time within which this must occur.

- (c) **(Disputes):** If PPP Co disagrees with any notice under clause 17B.1(b), PPP Co must, within 5 Business Days of receipt of that notice, give notice of its disagreement to RailCorp. RailCorp and PPP Co must use reasonable endeavours to resolve the matter the subject of the disagreement.
- (d) **(Compliance with RailCorp Notice):** If RailCorp directs PPP Co to correct a Defect under clause 17B.1(b) prior to the expiration of the relevant Defects Liability Period and PPP Co does not give notice under clause 17B.1(c) or, if it does, it is determined under clause 53 (Dispute resolution) that a Defect exists, PPP Co must correct the Defect:
 - (i) within the time specified in RailCorp's notice;
 - (ii) at times agreed with RailCorp and in accordance with the requirements of any other relevant Authority;
 - (iii) so as to minimise any adverse effect on the relevant part of the Returned Facilities; and
 - (iv) so as to minimise the impact on the use of the Returned Facilities by PPP Co, RailCorp and third parties.
- (e) **(Notice of correction):** PPP Co must give notice to RailCorp that the Defect has been corrected promptly after the correction of the Defect.

17B.2 Defects Liability Periods

Each Returned Facility has:

- (a) a Defects Liability Period which begins on the Date of Practical Completion of the Maintenance Facility Works and which expires 12 months after that date; and
- (b) a further Defects Liability Period of 12 months in respect of any work the subject of a notice from RailCorp under clause 17B.1(b) relating to a Returned Facility, which begins on the date on which the Defect is corrected.

17B.3 Failure to comply with direction

If PPP Co fails to comply with a notice given under clause 17B.1(b), RailCorp may (without limiting any other rights it may have):

- (a) apply for a court order for specific performance; or
- (b) correct the Defect itself or engage others to correct the Defect, in which case any Loss suffered or incurred by RailCorp in doing so will be a debt due and payable from PPP Co to RailCorp.

17B.4 Rights not affected

Neither RailCorp's rights, nor PPP Co's liability, whether under this Contract or otherwise according to law in respect of Defects, whether before or after the expiration of any relevant Defects Liability Period or the Delivery Phase, will be in any way affected or limited by:

- (a) the rights conferred upon RailCorp by this clause 17B or any other provision of this Contract;
- (b) the exercise of, or the failure by RailCorp to exercise, any such rights; or
- (c) any direction of RailCorp under this clause 17B.

17B.5 Maintenance Facility Access Areas

This clause 17B will not apply in relation to those parts of the Returned Facilities comprising paragraph (b) of the definition of Returned Facilities.

18. Practical Completion of Sets

18.1 Requirements for Practical Completion of a Set²⁴

Practical Completion of a Set is achieved when:

- (a) the Set is complete and complies with the requirements of the Contract, except for Minor Defects;
- (b) the Set has passed all Tests and all results of the Tests have been provided to RailCorp's Representative;
- (c) the Set complies with the Configuration Baseline;
- (d) in the case of Set 1:
 - (i) 3 months has expired since the Date of Practical Completion of the Maintenance Facility Works;
 - (ii) 6 months has expired since the Date of Practical Completion of the Simulators;
 - (iii) PPP Co has provided RailCorp's Representative with the design certificate for the Sets in accordance with clause 4.4.7 of the Contract Management Requirements;
 - (iv) PPP Co has provided RailCorp's Representative with the Implementation Safety Assurance Report (Interim) in a form satisfactory to RailCorp's Representative; and
 - (v) the Simulators have been updated so that they accurately reflect the configuration and the visual, physical and operating characteristics of Set 1;

²⁴ Amended by the Set 1 Waiver Letter (RC07549) dated 9 June 2011, which conditionally waives in respect of Set 1: (a) specified Defects, the requirement to correct the Defect before Practical Completion of the Set; (b) specified Tests which have not been passed or performed, the requirement for Practical Completion that the Set has passed such Tests and the results provided to RailCorp's Representative; (c) specified other requirements for Practical Completion which have not been satisfied, the requirement to satisfy such requirements before Practical Completion; and treats each such Defect, Test and unsatisfied requirement as if it were a Minor Defect for Set 1. Where such items were required to be rectified, passed or satisfied as a precondition to PC of Set 7, the Set 7 Waiver Letter (RC08847) dated 3 February 2012 provided a further conditional waiver of that requirement.

- (e) in the case of Set 7:
 - (i) the Initial Reliability Requirement described in clause 19.2 (Initial Reliability Requirement for Practical Completion of Set 7) has been satisfied;²⁵
 - (ii) the Deemed Action Times have been agreed to by the parties, or determined under clause 53 (Dispute Resolution), in accordance with clause 1 of schedule 21;²⁶
 - (iii) the Actual Mass of each of the first 6 Sets is not more than 10% above the Predicted Mass; and
 - (iv) PPP Co has provided RailCorp's Representative with the Implementation Safety Assurance Report (Revenue Operation) in accordance with clause 8.4(c) in a form satisfactory to RailCorp's Representative;
- (f) PPP Co has trained all personnel nominated by RailCorp who are required under clause 2.7.2 of the RailCorp Through Life Support Specification to be trained by PPP Co prior to Practical Completion of the Set;
- (g) all documents and other information and things (including instruments, maintenance and operation manuals, spares, tools or training material) relating to the Sets which are required under this Contract have been completed and supplied to RailCorp's Representative before Practical Completion of the Set and the time periods for review of same specified in this Contract have expired;
- (h) PPP Co has provided RailCorp's Representative with copies of all Approvals which this Contract requires PPP Co to obtain prior to Practical Completion of the Set;
- (i) PPP Co has:
 - (i) in the case of Set 1, complied with all of its obligations under clause 8.2 (RailCorp's Accreditation Variation); and
 - (ii) in the case of Set 2 and subsequent Sets, complied with all of its obligations under clause 8.3 (Continuing RailCorp Accreditation and rail safety obligations); and
- (j) PPP Co has done everything else which this Contract requires it to have done as a precondition to Practical Completion of the Set.

18.2 Notice of Practical Completion of a Set

PPP Co must:

- (a) give RailCorp 5 Business Days' notice of the date on which it expects to achieve Practical Completion of a Set; and
- (b) give RailCorp's Representative a Request for Certificate of Practical Completion when it believes Practical Completion has been achieved (which Request must not be given earlier than 5 Business Days after the date on which PPP Co gives notice under clause 18.2(a) in respect of the relevant Set).

²⁵ [Amended by the Set 7 Waiver Letter \(RC08847\) dated 3 February 2012, which provides a conditional waiver of the Initial Reliability Requirement as described at clause 19.2.](#)

²⁶ [Amended by the Set 7 Waiver Letter \(RC08847\) dated 3 February 2012, which provides an unconditional waiver of this requirement regarding Deemed Action Times.](#)

18.3 Inspection and Practical Completion of Sets

Subject to clause 18.4 (No early or compressed Practical Completion), RailCorp's Representative must:

- (a) in the case of Set 1, within 20 Business Days after receiving the request under clause 18.2(b); and
- (b) in the case of each subsequent Set, within 5 Business Days after receiving the request under clause 18.2(b),

inspect the Set and either:

- (c) if Practical Completion has been achieved, issue a Certificate of Practical Completion to PPP Co:
 - (i) stating as the Date of Practical Completion, the date on which the Certificate of Practical Completion is issued to PPP Co; and
 - (ii) listing any Minor Defects; and
- (d) if Practical Completion has not been achieved, either (at the discretion of RailCorp's Representative):
 - (i) issue a written notice to PPP Co listing the things remaining to be performed to achieve Practical Completion; or
 - (ii) issue a written notice to PPP Co stating that the Set is so far from Practical Completion that it is not practicable to provide the list referred to in clause 18.3(d)(i).

PPP Co must ensure that the relevant Set is available for inspection by RailCorp's Representative at the Maintenance Facility at all times during the period referred to in clauses 18.3(a) or 18.3(b), as applicable.

18.4 No early or compressed Practical Completion

RailCorp is not obliged to inspect a Set or issue a Certificate of Practical Completion for a Set:

- (a) before the Date for Practical Completion of that Set;
- (b) less than 15 Business Days after the Date of Practical Completion of the previous Set that achieved Practical Completion in respect of Set 2 to Set 6; or
- (c) less than 10 Business Days after the Date of Practical Completion of the previous Set that achieved Practical Completion in respect of all Sets after Set 6,

unless RailCorp agrees otherwise.

18.5 Practical Completion not achieved

If a notice is issued under clause 18.3(d), PPP Co must continue with the Delivery Phase Activities to achieve Practical Completion of the relevant Set and clauses 18.2 and 18.3 will reapply in respect of that Set.

18.6 No restriction

In making a determination as to whether Practical Completion has been achieved, RailCorp's Representative:

- (a) will not be restricted by any Certificate of Practical Completion in respect of any other Set or any notice already provided under clause 18.3(d) in respect of the relevant Set or any other Set; and
- (b) will be entitled to raise any items of work (other than Minor Defects) as a ground for determining that Practical Completion has not been achieved.

18.7 Effect of Certificate of Practical Completion

A Certificate of Practical Completion will not:

- (a) constitute an approval by RailCorp of PPP Co's performance of its obligations under this Contract;
- (b) be taken as an admission or evidence that the relevant Set complies with this Contract; or
- (c) prejudice any rights or powers of RailCorp under this Contract or otherwise according to law.

18.8 Rectification of Defects

PPP Co must expeditiously and diligently rectify all Minor Defects listed in the Certificate of Practical Completion of a Set.

18.9 Practical Completion and hire of the Sets

The parties acknowledge and agree that:

- (a) to provide the Required Availability PPP Co will be manufacturing 78 Sets which will be identified in the Certificates of Practical Completion issued pursuant to this clause 18 as Set 1 to Set 78 inclusive;
- (b) this Contract is a master set of terms and conditions in relation to the hire of the Sets, and that the hire of a Set by RailCorp from PPP Co will be effected by and will take effect on and from the issue of the Certificates of Practical Completion for the Sets;
- (c) each request for a Certificate of Practical Completion under clause 18.2(b) must be in writing and contain a description of the Set (and each Car comprising the Set) in a clear and identifiable manner by reference to its make, model, Set number and any other information relevant to identify the Set (and each Car comprising the Set) and distinguishing the Set from the other Sets;
- (d) each Certificate of Practical Completion issued under clause 18.3(c) must:
 - (i) be in writing and contain a description of the Set (and each Car comprising the Set) in a clear and identifiable manner by reference to its make, model, Set number and any other information relevant to identify the Set (and each Car comprising the Set) and distinguishing the Set from the other Sets; and
 - (ii) be signed on behalf of RailCorp and PPP Co; and
- (e) PPP Co will only use the Sets (and the Cars making up such Sets) manufactured and owned under and in connection with this Contract to provide the Required Availability, except in the event that one or more of Set 1 to Set 78 (or a Car or Cars making up such Set or Sets):

- (i) are lost, destroyed or stolen; or
- (ii) fail or malfunction in the normal course of operation or use, or are temporarily replaced during the servicing, maintenance or repair of one or more of Set 1 to Set 78 inclusive (or a Car or Cars making up such Set or Sets).

19. Initial Reliability Requirements

19.1 Precondition to Practical Completion of Set 7

It is a precondition to Practical Completion of Set 7 that the Initial Reliability Requirement for Practical Completion of Set 7 described in clause 19.2 is satisfied.

19.2 Initial Reliability Requirement for Practical Completion of Set 7²⁷

To satisfy the Initial Reliability Requirement for Practical Completion of Set 7:

- (a) there must have been not more than 12 PPP Co Related Incidents in total during the period over which the first 6 Sets collectively:
 - (i) accumulate an initial 150,000 kilometres in service; or
 - (ii) are Available for an initial 750 Availability Periods; or

²⁷ [This requirement was conditionally waived by the Set 7 Waiver Letter \(RC08847\) dated 3 February 2012. Instead, PPP Co must satisfy the following requirements: \(a\) Set 7 must, subject to the further waivers set out in RC08847 in respect of clause 18.1\(e\)\(ii\) and certain TIAMDs, meet all other other contractual requirements \(including the provision of such documents in satisfactory form necessary to support RailCorp's Accreditation Variation to ITSR\); \(b\) in respect of Sets 8 to 17, prior to presentation for Practical Completion, each of Sets 8 to 17 will have accumulated at least 6,500 kms in the same configuration as it is presented for Practical Completion, with a continuous block of at least 1,500 of these kms being free of any faults of a technical nature which, if the Set was in service or due to enter service, would result in a cancellation or withdrawal of the Set from service; \(c\) RailCorp will pay Variation Costs of \\$3,000,000 to PPP Co in 10 equal instalments of \\$300,000, with each instalment paid by RailCorp within 5 Business Days of the Date of Practical Completion of each of Sets 8 to 17; \(d\) PPP Co acknowledges that it is not entitled to make any Claim against RailCorp arising out of any delay or any effect on the matters referred to in clause 31.2\(f\), in either case caused solely by the Variation in condition \(b\); \(e\) PPP Co acknowledges that it is not, and will not be, entitled to make any claim under clause 15.11; \(f\) any late payment of amounts properly due and payable under these conditions will incur simple interest at the Default Rate from the day after the date for payment to \(and including\) the date of payment; and \(g\) PPP Co must submit a plan for the reform of the TLS processes and management by 7 February 2012 such that this plan will ensure the availability and reliability requirements of the Project Contract are met and it will be a precondition to each payment under condition \(c\) that PPP Co is complying with this plan \(if a material non compliance is identified, any payment claimed may only be delayed until the non-compliance is addressed\).](#)

[Within 10 Business Days of achieving Practical Completion of Set 17, RailCorp will procure that the Director General of Transport NSW completes a review of the reliability and performance of Sets 1 to 17 \(this review may commence following the achievement of Practical Completion of Set 13\). As part of this review, the Director General will facilitate a process to review and establish an appropriate and relevant interpretation of a PPP Co Related Incident.](#)

[If the Director General is satisfied having regard to the original provisions of the Project Contract and the nature of the incidents, the Director General shall notify the parties in writing and train deliveries will continue in accordance with the Project Contract. If the Director General is not satisfied, the Director General shall notify the parties in writing and train deliveries will continue upon agreement between the parties of a corrective action plan.](#)

[The Director General will facilitate a process to consider opportunities and agree improvements to the Delivery Programme.](#)

- (b) there must have been not more than 9 PPP Co Related Incidents in total attributable to the first 6 Sets during a rolling period over which the first 6 Sets collectively are Available for 750 Availability Periods.

19.3 Withdrawal of one of the first 6 Sets

To assist it to satisfy the Initial Reliability Requirement referred to in clause 19.2, PPP Co may, at its discretion, withdraw one of the first 6 Sets from service, in which event:

- (a) all references in clauses 18.1, 19.1, 19.2, 49.2, the definition of "Initial Reliability Requirement", clause 2.1(j) of schedule 7 and clauses 3.3.2(e), 3.3.2(f), 4.6.6(b), 4.6.7, 4.12.2, 4.12.9 and attachment 1 of the Contract Management Requirements to:
 - (i) "the first 6 Sets" will be read as a reference to the first 7 Sets excluding the withdrawn Set; and
 - (ii) "Set 7" will be read as a reference to Set 8;
- (b) all:
 - (i) PPP Co Related Incidents caused by that Set;
 - (ii) kilometres in service travelled by that Set; and
 - (iii) Availability Periods for which that Set is Available,will be disregarded for the purposes of determining whether the Initial Reliability Requirement referred to in clause 19.2 has been satisfied;
- (c) PPP Co must not reintroduce that Set into service until the Initial Reliability Requirement referred to in clause 19.2 is satisfied; and
- (d) RailCorp will not be required to pay any further Availability Payments in respect of that Set until it is reintroduced into service.

The withdrawal of a Set under this clause 19.3 will not affect any Reliability and Disruption Adjustments for PPP Co Related Problems attributed to that Set during the period prior to its withdrawal.

19.4 Precondition to Final Completion of Sets

It is a precondition to Final Completion of each Set that the Initial Reliability Requirement described in clause 19.5 is satisfied for the relevant Set.

19.5 Initial Reliability Requirement for Sets

To satisfy the Initial Reliability Requirement referred to in clause 19.4 the relevant Set must not have had more than 2 PPP Co Related Incidents over:

- (a) a rolling period of 180 consecutive days on which it is Available; or
- (b) a rolling distance of 50,000 consecutive kilometres in service.

20. Final Completion

20.1 Requirements for Final Completion

Final Completion of a Set is achieved when:

- (a) the Minor Defects listed in the Certificate of Practical Completion for that Set have been corrected;
- (b) the Initial Reliability Requirement described in clause 19.5 (Initial Reliability Requirements for Sets) has been satisfied for that Set; and
- (c) the Set is free of any Defects which would prevent the Set from satisfying the Minimum Operating Standards for Available Sets.

20.2 Notice of Final Completion of a Set

When PPP Co considers it has achieved Final Completion of a Set, it must:

- (a) notify RailCorp's Representative of its opinion; and
- (b) request that RailCorp's Representative issue a Certificate of Final Completion.

20.3 Inspection and Final Completion of Sets

Within 10 Business Days after receiving the request RailCorp's Representative must inspect the relevant Set (or Sets) and either:

- (a) if Final Completion has been achieved, issue a Certificate of Final Completion to PPP Co stating that Final Completion has been achieved and the date of Final Completion; or
- (b) if Final Completion has not been achieved, issue a written notice to PPP Co listing the things remaining to be done to achieve Final Completion.

20.4 Final Completion not achieved

If a notice is issued under clause 20.3(b), PPP Co must continue with the Delivery Phase Activities to achieve Final Completion and clauses 20.2 and 20.3 will reapply.

20.5 No restriction

In making a determination as to whether Final Completion has been achieved for a particular Set, RailCorp's Representative:

- (a) will not be restricted by:
 - (i) any Certificate of Final Completion issued in respect of any other Set;
 - (ii) any Certificate of Practical Completion or any notice already provided under clause 20.3(b) in respect the relevant Set or any other Set; or
 - (iii) PPP Co's Defect rectification obligations under clause 23 (Through Life Support); and
- (b) will be entitled to raise any items of work as a ground for determining that Final Completion has not been achieved.

20.6 Effect of Certificate of Final Completion

A Certificate of Final Completion will not:

- (a) constitute an approval by RailCorp of PPP Co's performance of its obligations under this Contract;
- (b) be taken as an admission or evidence that the relevant Set complies with this Contract; or
- (c) prejudice any rights or powers of RailCorp under this Contract or otherwise according to law.

21. Training

PPP Co must:

- (a) develop and provide a training programme;
- (b) provide training; and
- (c) provide training aids and materials,

in accordance with requirements of clauses 2.6.3 and 8.3.3 of the Contract Management Requirements and clause 2.7.2 of the RailCorp Through Life Support Specification.

22. Required Availability

22.1 PPP Co to provide Required Availability

- (a) PPP Co must, in respect of each Availability Period during:
 - (i) the Transition-in Phase;
 - (ii) the Steady-state Phase; and
 - (iii) the Transition-out Phase,provide RailCorp with the Required Availability.
- (b) PPP Co must, in respect of each Availability Period, specify in accordance with the Interface Protocols which Operational Sets will not be made Available to provide the Required Availability for that Availability Period.
- (c) For each Availability Period, the number of Sets specified under clause 22.1(b) must not be less than the difference between:
 - (i) the number of Operational Sets at that time; and
 - (ii) the Required Availability for that Availability Period.

22.2 What is the Required Availability?

Subject to clauses 22.8 (Additional Required Availability for special events) and 22.9 (Ad-hoc Additional Required Availability), the Required Availability for an Availability Period is the number of Available Sets specified for that Availability Period in schedule 8 (Required Availability).

22.3 When is a Set Available?

An Available Set is a Set which is Available.

A Set is Available when it has achieved Practical Completion and:

- (a) the Set satisfies the following requirements:
 - (i) the Set satisfies the Minimum Operating Standards for Available Sets; and
 - (ii) the Set:
 - A. has been delivered to the Pick-up Point and is ready for collection by RailCorp for introduction into service;
 - B. is at an Out Depot and is ready for use by RailCorp; or
 - C. is in service; and
 - (iii) the Set:
 - A. is not one of the Sets specified for the relevant Availability Period pursuant to clause 22.1(b); or
 - B. is a Spare Set which has been substituted for a Failed Set in accordance with clause 22.5; or
- (b) the Set is deemed to be Available under clause 22.6.

22.4 When is a Set in service?

- (a) **(When a Set is in service):** A Set is in service from the time the Set is Available and introduced into service by RailCorp until the time it is taken out of service.
- (b) **(When a Set is introduced into service):** A Set is introduced into service when:
 - (i) it leaves the Maintenance Facility to commence a run;
 - (ii) it leaves an Out Depot to commence a run; or
 - (iii) it commences or resumes a run following the completion of any Unscheduled Maintenance carried out at a place other than the Maintenance Facility.
- (c) **(When a Set is taken out of service):** A Set is taken out of service when:
 - (i) the Set enters an Out Depot following completion of a run;
 - (ii) the Set is delivered by RailCorp to the Handover Point for Scheduled Maintenance or Unscheduled Maintenance;
 - (iii) the service is cancelled by RailCorp;
 - (iv) PPP Co withdraws the Set from service as contemplated by clause 19.3 (Withdrawal of one of the first 6 Sets); or
 - (v) PPP Co withdraws the Set from service for any other reason.

22.4A Train Preparation

- (a) **(Required Delivery Time):** Each Set must be ready for Train Preparation prior to the commencement of the relevant Availability Period by the Required Delivery Time.
- (b) **(Lateness for Required Delivery Time):** Where a Set is made ready for Train Preparation by PPP Co after the Required Delivery Time in relation to an Availability Period and, as a result, RailCorp fails to complete the Train Preparation prior to the commencement of the relevant Availability Period, the relevant Set will be deemed to be either 'late' or 'very late' into service or 'cancelled' in accordance with clause 3.3(a) or (b) of schedule 7.
- (c) **(Determination of Required Train Preparation Period):** Prior to Practical Completion of Set 1, RailCorp's Representative must (acting reasonably) determine the Required Train Preparation Period having regard to the following considerations:
 - (i) the time that, in accordance with the instructions contained in the relevant PPP Co operation and maintenance manual and the Train Operations Manual, is expected for Train Preparation;
 - (ii) a demonstration of how long the Train Preparation actually takes by a representative sample of Crew. In considering simulated or demonstrated times, the Required Train Preparation Period will be based on an upper quartile figure, not an average;
 - (iii) the level of training which can be expected of the Crew; and
 - (iv) any other relevant considerations.

22.5 Substituting Spare Sets

- (a) **(Set fails at commencement of Availability Period and Spare Set is co-located):**
If:
 - (i) PPP Co wishes to substitute a Spare Set for a Set which, at the commencement of an Availability Period:
 - A. does not satisfy the Minimum Operating Standards for Available Sets;
 - B. has a PPP Co Related Defect which RailCorp, acting reasonably, believes may delay the Set when in service by 10.00 minutes or more; or
 - C. ITSRR or another Investigative Authority orders or directs RailCorp to cease operating due to one or more PPP Co Related Defects,(in this clause 22.5(a), the "**Failed Set**");
 - (ii) the Spare Set is at the same location as the Failed Set; and
 - (iii) PPP Co gives RailCorp a notice specifying:
 - A. the Failed Set which is to be substituted; and

B. the Spare Set which will be substituted for the Failed Set,

then:

- (iv) the Spare Set will be substituted for the Failed Set from the commencement of the Availability Period referred to in clause 22.5(a)(i);
- (v) the Failed Set will not be deemed to have been 'cancelled' for the purposes of clause 3.3(b) of schedule 7 by reason of the substitution; and
- (vi) PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Spare Set which relate to Availability Periods from the commencement of the Availability Period referred to in clause 22.5(a)(i).

(b) **(Set fails at commencement of Availability Period and Spare Set is not co-located):** If:

- (i) PPP Co wishes to substitute a Spare Set for a Set which at the commencement of an Availability Period:
 - A. does not satisfy the Minimum Operating Standards for Available Sets;
 - B. has a PPP Co Related Defect which RailCorp, acting reasonably, believes may delay the Set when in service by 10.00 minutes or more; or
 - C. ITSRR or another Investigative Authority orders or directs RailCorp to cease operating due to one or more PPP Co Related Defects,

(in this clause 22.5(b), the "**Failed Set**");

- (ii) the Spare Set is not at the same location as the Failed Set; and
- (iii) PPP Co gives RailCorp a notice specifying:
 - A. the Failed Set which is to be substituted; and
 - B. the Spare Set which will be substituted for the Failed Set,

then:

- (iv) RailCorp may, but is not obliged to, allow the substitution of the Spare Set for the Failed Set;
- (v) if RailCorp allows the substitution:
 - A. the Spare Set will be substituted for the Failed Set from the commencement of the Availability Period referred to in clause 22.5(b)(i);
 - B. the Failed Set will not be deemed to have been 'cancelled' for the purposes of clause 3.3(b) of schedule 7 by reason of the substitution; and
 - C. PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Spare Set which relate to

Availability Periods from the commencement of the Availability Period referred to in clause 22.5(b)(i); and

- (vi) if RailCorp does not allow the substitution, the Failed Set will be deemed to have been 'cancelled' for the purposes of clause 3.3(b) of schedule 7 for the Availability Period referred to in clause 22.5(b)(i).

(c) **(Set fails in service; at least 3 hours notice):** If:

- (i) PPP Co wishes to substitute a Set for a Set which:
 - A. has been cancelled in service; or
 - B. has incurred a Defect or is otherwise in a condition which, under the Performance Operating Standards, would lead to the Set being taken out of service,

(in this clause 22.5(c), the "**Failed Set**"); and

- (ii) PPP Co gives RailCorp a notice at least 3 hours prior to the commencement of the Availability Period from which the substitution is to take effect specifying:
 - A. the Failed Set which is to be substituted;
 - B. the Spare Set which will be substituted for the Failed Set; and
 - C. the Availability Period during and from which the substitution is to take effect,

then:

- (iii) the Spare Set will be substituted for the Failed Set from the commencement of the Availability Period specified in the notice;
- (iv) the Failed Set will not be deemed to be 'withdrawn' for the purposes of clause 3.3(c) of schedule 7 by reason of the substitution;
- (v) PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Failed Set which relate to the Availability Periods prior to the Availability Period specified in the notice; and
- (vi) PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Spare Set which relate to the Availability Periods from the commencement of the Availability Period specified in the notice.

(d) **(Set fails in service; less than 3 hours notice):** If:

- (i) PPP Co wishes to substitute a Set for a Set which:
 - A. has been cancelled in service; or
 - B. has incurred a Defect or is otherwise in a condition which, under the Performance Operating Standards, would lead to the Set being taken out of service,

(in this clause 22.5(d), the "**Failed Set**"); and

- (ii) PPP Co gives RailCorp a notice less than 3 hours prior to the commencement of Availability Period from which the substitution is to take effect specifying:
 - A. the Failed Set which is to be substituted;
 - B. the Spare Set which will be substituted for the Failed Set; and
 - C. the Availability Period during and from which the substitution is to take effect,

then:

- (iii) RailCorp may, but is not obliged to, allow the substitution of the Spare Set for the Failed Set;

- (iv) if RailCorp allows the substitution:

- A. the Spare Set will be substituted for the Failed Set from the commencement of the Availability Period specified in the notice;
- B. the Failed Set will not be deemed to be 'withdrawn' for the purposes of clause 3.3(c) of schedule 7 by reason of the substitution;
- C. PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Failed Set which relate to the Availability Periods prior to the Availability Period specified in the notice; and
- D. PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Spare Set which relate to the Availability Periods from the commencement of the Availability Period specified in the notice; and

- (v) if RailCorp does not allow the substitution, PPP Co will be subject to any Reliability and Disruption Adjustments in respect of the Failed Set whether they relate to Availability Periods prior to or from the commencement of the Availability Period specified in the notice.

22.6 When is a Set deemed to be Available?

A Set will be deemed to be Available if it has achieved Practical Completion but does not satisfy a requirement of clause 22.3(a) due to:

- (a) damage to the Set caused by a Reimbursable Damage Event, except where PPP Co has been directed by RailCorp's Representative to carry out the relevant repair work for the damage but has not done so within the time required, in which case the deemed Availability will not apply beyond the expiry of the time required for reinstatement;
- (b) damage to the Set or the Maintenance Facility caused by an Excepted Risk, except where PPP Co has been directed by RailCorp's Representative to carry out the relevant repair work for the damage but has not done so within the time required, in which case the deemed Availability will not apply beyond the expiry of the time required for reinstatement;

- (c) a Variation directed by RailCorp under clause 30 (RailCorp initiated Variations), except where PPP Co has not completed the Variation within the time required, in which case the deemed Availability will not apply beyond the expiry of the required time;
- (d) a Variation approved by RailCorp under clause 31 (PPP Co initiated Variations) which is required to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility:
 - (i) comply with a Qualifying Change in Law; or
 - (ii) will have the same functionality as prior to a modification to RailCorp's Facilities,
 except where PPP Co has not completed the Variation within the time required, in which case the deemed Availability will not apply beyond the expiry of the required time;
- (e) damage to or loss or destruction of the Set which RailCorp bears the risk of under clause 34.2(b) and which PPP Co is obliged to repair or replace under clause 34.1, except where PPP Co fails to repair or replace the Set within the time required, in which case the deemed Availability will not apply beyond the expiry of the time required for reinstatement;
- (f) any default under this Contract by RailCorp, or any negligent, illegal, fraudulent or reckless act or omission of RailCorp or its Associates;
- (g) a Defect caused by the work of RailCorp or an Other Contractor of RailCorp;
- (h) ITSRR or another Investigative Authority ordering or directing RailCorp to cease operating the Set or ordering or directing the cessation of use of the Maintenance Facility, except where:
 - (i) the order or direction is attributable to a PPP Co Related Problem; or
 - (ii) PPP Co has been directed to carry out the rectification work to deal with the issue for which ITSRR or the other Investigative Authority issued the order or direction but has not done so within the time required, in which case the deemed Availability will not apply beyond the expiry of the time required for reinstatement; or
- (i) any Industrial Action by staff employed by RailCorp or its Associates, other than where it is caused directly or indirectly, by the action or inaction, as the case may be, of PPP Co, or of its Associates (except where such action or inaction is required by this Contract).

22.7 Withholding or withdrawing a Set from a service

- (a) **(Meaning of "withheld from service"):** A reference in this Contract to a Set being "withheld" from service by PPP Co is a reference to:
 - (i) where the Set is at the Maintenance Facility, PPP Co advising RailCorp that the Set will not be delivered to the Pick-up Point and made ready for Train Preparation by RailCorp at the Required Delivery Time; or
 - (ii) where the Set is at an Out Depot, PPP Co advising RailCorp that the Set will not be ready for use by RailCorp at the commencement of the next Availability Period.

- (b) **(Meaning of "withdrawn from service"):** A reference in this Contract to a Set being "withdrawn" from service by PPP Co (other than under clause 19.3) is a reference to PPP Co advising RailCorp that a Set which is:
- (i) in service; or
 - (ii) cancelled in service or when it is due to enter service,
- will not be ready for use by RailCorp at the commencement of the next Availability Period.
- (c) **(When a Set may not be withheld from service):** PPP Co may not withhold a Set from service:
- (i) where the Set is at the Maintenance Facility, after the Set has been delivered by PPP Co to the Pick-up Point; or
 - (ii) where the Set is at an Out Depot, after the Crew commences Train Preparation in respect of the Set at or immediately prior to the commencement of an Availability Period.
- (d) **(When a Set may not be withdrawn from service):** For any given Availability Period, PPP Co may not withdraw a Set from service during the period:
- (i) commencing when the Set is introduced into service for that Availability Period; and
 - (ii) ending when the Set is taken out of service at the end of that Availability Period.

This does not, however, prevent PPP Co from advising RailCorp that a Set will not be ready for use by RailCorp at the commencement of the next Availability Period.

- (e) **(Effect of conduct in contravention of this clause):** If PPP Co advises RailCorp that:
- (i) a Set is not available for collection from the Pick-up Point, or is not ready for use;
 - (ii) a Set will not be ready for use at the commencement of the next Availability Period; or
 - (iii) PPP Co wishes to take a Set out of service,
- in contravention of clause 22.7(c) or 22.7(d), RailCorp will be entitled to cancel the Set and clause 3.3(b) of schedule 7 will apply.

22.8 Additional Required Availability for special events

- (a) During the Royal Easter Show and New Year's Eve:
- (i) the Required Availability which PPP Co must provide will be increased by the relevant Additional Required Availability, except for the purposes of clause 49.1(a); and
 - (ii) the payment and other provisions of this Contract will apply in respect of such increased Required Availability.

- (b) RailCorp may nominate 4 additional events in each financial year as "Additional Special Events", provided that:
 - (i) RailCorp has given 1 month prior written notice of the Additional Special Event;
 - (ii) the notice specifies the Availability Periods which the Additional Special Event will cover; and
 - (iii) the Additional Special Event does not coincide with the Royal Easter Show, New Year's Eve or any other Additional Special Event.
- (c) RailCorp may, not less than 48 hours before the commencement of the relevant Additional Special Event, give PPP Co written notice stating that RailCorp does not require PPP Co to provide the Additional Required Availability during the relevant Additional Special Event.
- (d) If RailCorp does not issue a written notice under clause 22.8(c) then:
 - (i) the Required Availability which PPP Co must provide will be increased by the relevant Additional Required Availability, except for the purposes of clause 49.1(a); and
 - (ii) the payment and other provisions of this Contract will apply in respect of such increased Required Availability.
- (e) If RailCorp issues a written notice under clause 22.8(c) in respect of any Additional Special Event, then:
 - (i) PPP Co is not required to provide the Additional Required Availability to RailCorp for that Additional Special Event; and
 - (ii) RailCorp may nominate a different additional event during the relevant financial year under clause 22.8(b).
- (f) If, in any financial year, PPP Co is not required to provide Additional Required Availability for 4 Additional Special Events, PPP Co will be entitled to make a claim in July of the following financial year for an Availability Payment for the Additional Required Availability which PPP Co would have been required to provide had PPP Co been required to provide Additional Required Availability for one Availability Period for each unused Additional Special Event and PPP Co provided such Additional Required Availability in June of the relevant financial year.
- (g) This clause 22.8 only applies during the Steady-state Phase.

22.9 Ad-hoc Additional Required Availability

- (a) Without limiting clause 22.8, RailCorp may from time to time request PPP Co to nominate the number of Available Sets in addition to the Required Availability which PPP Co is willing to provide for one or more particular Availability Period. PPP Co must respond to any such request by written notice within 5 Business Days.
- (b) If RailCorp advises PPP Co that it wishes to utilise some or all of the additional Available Sets nominated by PPP Co in its response under clause 22.9(a), then the Required Availability which PPP Co must provide will be increased accordingly during the relevant Availability Periods, and the payment and other provisions of this Contract will apply in respect of such Additional Required Availability.

22.10 Exclusive remedy

- (a) Subject to clauses 22.10(b) and 22.10(c), RailCorp acknowledges and agrees that:
 - (i) PPP Co will not be liable for any Loss suffered or incurred by RailCorp as a result of any breach by PPP Co of its obligation to provide the Required Availability under clause 22.1; and
 - (ii) PPP Co's liability to RailCorp for pure economic loss or loss of use (whether total or partial) of the Sets or any real or personal property belonging to RailCorp resulting from an event which results in a Reliability and Disruption Adjustment is limited to the amount of that Reliability and Disruption Adjustment.
- (b) Clause 22.10(a) does not affect:
 - (i) the application of any Reliability and Disruption Adjustments; or
 - (ii) PPP Co's liability under clause 35.1 (Indemnity from PPP Co).
- (c) If a Reliability and Disruption Adjustment is held to be legally unenforceable, PPP Co will be liable for any Loss suffered or incurred by RailCorp as a result of the event which would have triggered that Reliability and Disruption Adjustment up to the amount of the Disruption and Reliability Adjustment which would have applied if it were enforceable.

22.11 Change to Minimum Operating Standards for Available Sets and RailCorp Policies, Rules or Procedures

If a change to:

- (a) the Minimum Operating Standards for Available Sets; or
- (b) any RailCorp Policy, Rule or Procedure (except a change to the Timetable or the Interface Protocols),

increases the cost of performing PPP Co's Activities, the change will be treated as an instruction to implement a Variation under clause 30 and clause 30.14(b) will apply, except that any such increase in costs will be shared as follows:

- (c) PPP Co will bear 100% of the increase in costs (whether one-off or recurrent) up to \$100,000 (CPI Indexed) in any calendar year in the aggregate for all changes; and
- (d) RailCorp will bear 100% of the increase in costs (whether one-off or recurrent) above \$100,000 (CPI Indexed) in any calendar year in the aggregate for all changes.

23. Through Life Support

23.1 Through Life Support

PPP Co must provide Through Life Support for the Sets, the Simulators, the Maintenance Facility (other than the Returned Facilities), the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials:

- (a) in accordance with:
 - (i) the Through Life Support Specifications; and

- (ii) the other requirements of this Contract;
- (b) so that it is able to provide the Required Availability;
- (c) so that the requirements of the Specifications and the Final Design Documentation are at all times met during the TLS Phase;
- (d) so that all Defects are rectified in accordance with the requirements of this Contract; and
- (e) so that they remain, at all times during the TLS Phase, fit for their intended purpose as ascertainable from the RailCorp Project Agreements.

PPP Co accepts full responsibility for all means, methods and techniques used in the performance of the TLS Phase Activities.

23.2 Reimbursable Through Life Support

- (a) **(PPP Co to provide):** PPP Co must provide any Reimbursable Through Life Support which RailCorp's Representative directs PPP Co to provide under clause 2.10.1 of the RailCorp Through Life Support Specification in accordance with the requirements of this Contract including the Through Life Support Specifications.
- (b) **(Payment):** To the extent that the proceeds of any Insurances do not cover the costs of the Reimbursable Through Life Support, PPP Co will be entitled to payment for such Reimbursable Through Life Support which PPP Co is directed to provide under clause 2.10.1 of the RailCorp Through Life Support Specification in accordance with the PPP Co Schedule of Rates.
- (c) **(Reimbursable Through Life Support to be carried efficiently):** PPP Co must carry out all Reimbursable Through Life Support in an efficient and cost effective manner.

23.3 Interface Protocols

- (a) Each party must comply with its respective obligations as set out in the Interface Protocols.
- (b) PPP Co must:
 - (i) further develop the draft Interface Protocols included in attachment 3 of the RailCorp Through Life Support Specification; and
 - (ii) submit the more detailed draft Interface Protocols to RailCorp no later than 1 year before the earlier of:
 - A. the Date for Practical Completion of Set 1; and
 - B. the date on which PPP Co expects to achieve Practical Completion of Set 1.
- (c) Upon submission of the more detailed draft Interface Protocols under clause 23.3(b)(ii), the parties will meet to discuss each other's requirements in relation to the more detailed Interface Protocols.
- (d) Either party may request that the Interface Protocols be updated or amended at any time by giving notice to the other setting out the reasons for its request.

- (e) Within 10 Business Days of any such notice, the parties will meet to discuss the request and how it would affect each party's requirements in relation to the Interface Protocols.
- (f) If:
 - (i) RailCorp issues a notice pursuant to clause 23.3(d); and
 - (ii) within 10 Business Days after the meeting, PPP Co notifies RailCorp that it considers that an update or amendment to the Interface Protocols proposed by RailCorp will cause PPP Co to:
 - A. incur additional or increased costs; or
 - B. lose revenue in respect of the Project,
 the proposed update or amendment will be treated as a "Variation Proposal" issued by RailCorp under clause 30.1 (Variation Proposal) and clause 30 (RailCorp initiated Variations) will apply.
- (g) If clause 23.3(f) does not apply in relation to an update or amendment to the Interface Protocol:
 - (i) RailCorp's Representative will, having reasonable regard to the reasons for the request and the effect it would have on each party's requirements as discussed at the meeting, make a determination as to whether the Interface Protocols will be updated or amended and if so, what amendments will be made;
 - (ii) if RailCorp's Representative determines that amendments will be made, it will make the amendments and reissue the Interface Protocols to both parties; and
 - (iii) PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, the amendments.

23.4 Manufacture and construction warranties

PPP Co warrants that:

- (a) the manufacture and/or construction of any works carried out as part of the TLS Phase Activities will satisfy the requirements of this Contract; and
- (b) the works carried out as part of the TLS Phase Activities will, when complete and thereafter at all relevant times, be safe and fit for their intended purposes.

Subject to clause 30 (RailCorp initiated Variations), PPP Co agrees that the warranties given in this clause 23.4 will remain unaffected, and that it will bear and continue to bear full liability and responsibility for the manufacture and/or construction works carried out as part of the TLS Phase Activities, despite any Variation directed by RailCorp by a document entitled "Variation Order" or approved by RailCorp by a document entitled "Variation Approval".

23.5 Workmanship and materials

PPP Co must, in carrying out the TLS Phase Activities:

- (a) use workmanship:
 - (i) of:
 - A. the standard prescribed in the Specifications; or
 - B. to the extent it is not prescribed, a standard consistent with best industry standards for work of a similar nature to the Through Life Support of the Cars, the Maintenance Facility or the Simulators (as the case may be); and
 - (ii) which is fit for its purpose; and
- (b) use parts, components, goods and materials:
 - (i) which:
 - A. comply with the requirements of the Specifications; or
 - B. if not fully described in the Specifications, are new and consistent with the best industry standards for work of a similar nature to the Through Life Support of the Cars, the Maintenance Facility and the Simulators (as the case may be); and
 - (ii) which:
 - A. are of merchantable quality; and
 - B. are fit for their intended purpose.

23.6 Through Life Support Description

- (a) PPP Co warrants that the Through Life Support Description has been prepared by PPP Co and will be fit for its intended purpose as ascertainable from the RailCorp Project Agreements.
- (b) Subject to clause 30 (RailCorp initiated Variations), PPP Co accepts all risks arising out of the Through Life Support Description including the risk that:
 - (i) it will not be fit for its intended purpose as ascertainable from the RailCorp Project Agreements; and
 - (ii) the Through Life Support will cost more than anticipated to provide.
- (c) Without limiting PPP Co's obligations under this Contract, PPP Co must do whatever may be necessary to ensure that the Through Life Support is provided in accordance with Through Life Support Description.

23.7 Changes from the Through Life Support Description

- (a) PPP Co must not make a change to the Through Life Support described in the Through Life Support Description unless:
 - (i) PPP Co demonstrates to the satisfaction of RailCorp's Representative that the change is notified to RailCorp and is necessary to comply with the RailCorp Through Life Support Specification where the RailCorp Through Life Support Specification imposes the greater or higher standard, level of service, scope or requirement;

- (ii) PPP Co demonstrates to the satisfaction of RailCorp's Representative that the change:
 - A. complies with the RailCorp Through Life Support Specification; and
 - B. is consistent with the intent in the Through Life Support Description and (without limitation) does not result in a lessening of any standard, level of service or scope for any support set out in the Through Life Support Description, including any reduction in:
 - 1) capacity;
 - 2) durability;
 - 3) aesthetics of visible features;
 - 4) whole of life performance;
 - 5) functional performance;
 - 6) safety;
 - 7) security;
 - 8) passenger or crew amenity;
 - 9) passenger or crew benefits; or
 - 10) RailCorp benefits,
 of any part of the Through Life Support; or
- (iii) the change has been instructed, agreed, determined or approved as a Variation under clause 30 (RailCorp initiated Variation) or clause 31 (PPP Co initiated Variations).

- (b) Without limiting clause 30.16 (No liability unless Variation Order), PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, any change which occurs in accordance with this clause 23.7. This does not affect any entitlement which PPP Co has under clause 30.14 (Variation Costs) in respect of a Variation which is implemented in accordance with clause 30 (RailCorp initiated Variations).

23.8 Depot Crews

- (a) RailCorp must ensure that there is at least one Crew assigned to the Maintenance Facility at the following times:
 - (i) at least one hour prior to the commencement of the Required Delivery Time for each Availability Period, until after commencement of the Availability Period; and
 - (ii) during morning and afternoon peaks.
- (b) The parties acknowledge and agree that the utilisation of Crews assigned to the Maintenance Facility in accordance with clause 23.8(a) will include:

- (i) undertaking trial running for Sets following major maintenance or intermittent failures; and
 - (ii) preparing Sets stabled at the Maintenance Facility,
- but will not include the movement of Sets to or from the Maintenance Building.
- (c) The parties acknowledge that Crews assigned to the Maintenance Facility in accordance with clause 23.8(a) will work under the direction of RailCorp on-site management staff.

23.9 Modification of RailCorp's Facilities

RailCorp will use reasonable endeavours to notify PPP Co of any modification or proposed modification to RailCorp's Facilities which is likely to require a Variation to the Project Works, the Sets, the Simulators or the Maintenance Facility.

24. Extension of Contract Term

24.1 Estimate of continued TLS costs

- (a) Eighteen months prior to the first Decommissioning Date, PPP Co must provide RailCorp with an estimate of costs of continued Through Life Support for Sets in accordance with clause 24.1(b).
- (b) The cost estimate must:
 - (i) cover a period of 5 years from the Original Expiry Date;
 - (ii) set out the costs of Through Life Support for the Sets in lots of 5;
 - (iii) be calculated on the basis of continued occupation of the Maintenance Facility at no rental cost;
 - (iv) include the cost of any additional support which PPP Co will need to provide in respect of a Set if RailCorp exercises its rights to extend under clause 24.2 to ensure that the Sets continue to comply with:
 - A. the Minimum Operating Standards for Available Sets; and
 - B. the other requirements of this Contract; and
 - (v) include such other details as RailCorp may reasonably request.

24.2 RailCorp's option to extend

RailCorp may elect to extend the Contract Term for a period of 5 years by giving PPP Co a notice within 6 months of receipt of PPP Co's notice under clause 24.1 (or if PPP Co fails to give notice under clause 24.1, by giving PPP Co a notice not later than 12 months prior to the first Decommissioning Date) specifying that RailCorp is exercising its option to extend under this clause 24.2 and stating how many Sets RailCorp requires PPP Co to continue to support.

24.3 If option to extend is exercised

If RailCorp gives a notice under clause 24.2:

- (a) **(PPP Co to continue TLS):** PPP Co must continue to:
- (i) provide RailCorp with the Required Availability on the basis that each Extended TLS Set remains an Operational Set; and
 - (ii) provide Through Life Support for each Extended TLS Set and otherwise comply with its obligations under this Contract (other than schedule 7) in respect of each Extended TLS Set (including under clause 25 (Decommissioning of Sets)),

until the earlier of:

- (iii) the date specified by RailCorp in a notice to PPP Co provided at least 20 Business Days in advance advising PPP Co that RailCorp requires PPP Co to decommission an Extended TLS Set, in which event, PPP Co must at its cost decommission the Set on the date so specified by RailCorp in accordance with clause 25.2;
- (iv) the date specified by RailCorp in a notice to PPP Co advising PPP Co that RailCorp wishes to acquire an Extended TLS Set, in which event clause 25.4 will apply as if references in clause 25.4 to "Decommissioning Date" were references to the date so specified by RailCorp; or
- (v) the Decommissioning Date of the relevant Extended TLS Set (as extended).

If RailCorp exercises its rights under clause 24.3(a)(iii) or 24.3(a)(iv) in respect of some, but not all, of the Extended TLS Sets, PPP Co must continue to comply with its obligations under this clause 24.3 in respect of the remaining Extended TLS Sets.

If RailCorp exercises its rights under clause 24.3(a)(iii) or 24.3(a)(iv) such that PPP Co is no longer providing Through Life Support for any Extended TLS Sets, the Contract Term will come to an end on the date PPP Co decommissions or transfers title in (as the case may be) the last Extended TLS Set;

- (b) **(RailCorp's obligations):** RailCorp must:
- (i) subject to clause 24.3(d), continue to comply with its obligations under this Contract in respect of the Extended TLS Sets; and
 - (ii) pay PPP Co monthly in arrears an amount equal to:
 - A. the direct additional costs incurred by PPP Co in complying with its obligations under clause 24.3(a) on an open book basis (and to this end PPP Co must allow RailCorp to review and audit PPP Co's records to verify that PPP Co's payment claim has been prepared on an open book basis); plus
 - B. 7.5% of the amount referred to in clause 24.3(b)(ii)A on account of profit and contribution to overhead;

- (c) **(Maintenance Facility):** PPP Co must continue to use the Maintenance Facility to provide Through Life Support in respect of the Extended TLS Sets, provided that from the Original Expiry Date to the end of the Contract Term:
 - (i) the parties must, acting in good faith, endeavour to agree on the basis upon which PPP Co will be entitled to occupy the Maintenance Site. Failing, or pending agreement, the basis upon which PPP Co will be entitled to occupy the Maintenance Facility will be determined by RailCorp's Representative;
 - (ii) PPP Co will not be required to pay any rental cost in respect of the Maintenance Facility; and
 - (iii) PPP Co may not be the only user of the Maintenance Facility; and
- (d) **(TLS Payment profile remains the same):** The payment regime in schedule 7 will not apply in relation to the Extended TLS Sets. However, the TLS Payments for the balance of the Original Contract Term will continue to be calculated as if a Set was decommissioned by PPP Co in accordance with clause 25.2, or acquired by RailCorp in accordance with clause 25.4, on each Original Decommissioning Date.

24.4 Further Contract Term extension

RailCorp may extend the Contract Term a second time for a period of 5 years by issuing a written notice to PPP Co:

- (a) stating that it is a notice under this clause 24.4;
- (b) no later than 12 months prior to the first Decommissioning Date (as extended) for an Extended TLS Set; and
- (c) nominating the number of Extended TLS Sets RailCorp requires PPP Co to continue to support (which must not be more than the number of Sets specified in RailCorp's notice under clause 24.2).

If RailCorp issues a notice in accordance with this clause 24.4, clause 24.3 will apply as if the reference to clause 24.2 were a reference to this clause 24.4.

25. Decommissioning of Sets

25.1 Notice of Set to be decommissioned

At least 60 days prior to each Decommissioning Date, PPP Co must notify RailCorp of the Operational Set which it proposes to decommission.

25.2 Decommissioning of Set

Subject to clause 25.3:

- (a) RailCorp must deliver the Set nominated by PPP Co in its notice under clause 25.1 to the Handover Point on the Decommissioning Date; and
- (b) PPP Co must at its cost:
 - (i) remove all RailCorp branding from the Set; and
 - (ii) remove the Set from the Maintenance Site or any other land which is owned, leased or occupied by RailCorp.

25.3 Option to acquire Sets due for decommissioning

RailCorp may elect to acquire the Set which PPP Co proposes to decommission by giving PPP Co a notice within 30 days of receipt of PPP Co's notice under clause 25.1 (Notice of Set to be decommissioned) specifying that RailCorp is exercising its option to acquire the relevant Set.

25.4 If option to acquire is exercised

If RailCorp gives PPP Co a notice under clause 25.3:

- (a) PPP Co must at its cost give RailCorp (or its nominee) possession of the relevant Set:
 - (i) on the Decommissioning Date; and
 - (ii) in a state and condition which:
 - A. complies with:
 - 1) the Minimum Operating Standards for Available Sets; and
 - 2) the other requirements of this Contract; and
 - B. is consistent with all Scheduled Maintenance having been carried out;
- (b) title in and ownership of the Set (including all of PPP Co's rights, title and interest in it) is transferred to RailCorp (or its nominee):
 - (i) with effect from the Decommissioning Date; and
 - (ii) free from any encumbrances,and PPP Co must do all things necessary to give effect to this transfer;
- (c) PPP Co will be relieved of its obligation under clause 25.2 to decommission the relevant Set; and
- (d) subject to RailCorp's obligation to pay any amounts payable under this Contract in respect of the relevant Set up to the Decommissioning Date, PPP Co will not be entitled to any further payment or compensation in respect of that Set.

26. TLS Phase performance monitoring

26.1 Performance Monitoring System

- (a) During the TLS Phase, PPP Co must monitor its own performance by means of the Performance Monitoring System (subject to RailCorp's right of review and audit).
- (b) The Performance Monitoring System must be capable of fulfilling the functions set out in clause 6 of schedule 7.

26.2 Warranty that performance data is correct

PPP Co warrants that the performance data which results from the Performance Monitoring System (including source information, Performance Reports, documentation and data created

for or by the Performance Monitoring System) will, at all times, be accurate, complete and correct.

26.3 Performance Report

PPP Co must give RailCorp's Representative a Performance Report with each payment claim under clause 27.6 (Payment claims for TLS Payments and other amounts for TLS Phase Activities). Each Performance Report must:

- (a) contain the information set out in annexure 7 of schedule 7; and
- (b) include sufficient information to enable RailCorp's Representative to confirm the calculation of the TLS Payments for the preceding month.

26.4 RailCorp's right to monitor

During the TLS Phase, RailCorp (or any person authorised by RailCorp) may monitor and review the TLS Phase Activities and the Performance Monitoring System in any way it thinks fit (subject to clause 26.5 (Inspections within Maintenance Facility)), including by way of:

- (a) customer satisfaction surveys;
- (b) the audit process described in clause 26.7;
- (c) scheduled and unscheduled reviews and inspections of the Cars, the Maintenance Facility, the Simulators and/or the TLS Phase Activities, subject to compliance with PPP Co's reasonable requirements as to security and safety; or
- (d) feedback from Crew.

26.5 Inspections within Maintenance Facility

Where RailCorp (or any person authorised by RailCorp) conducts an audit, review or inspection of the Maintenance Facility or of Cars in the Maintenance Facility:

- (a) RailCorp will do so in a manner which does not unreasonably interfere with the TLS Phase Activities as scheduled in the Technical Maintenance Plan, and subject to compliance with PPP Co's reasonable requirements as to site security and safety; and
- (b) PPP Co must exercise reasonable endeavours to:
 - (i) coordinate the TLS Phase Activities so they do not interfere with the audit, review or inspection; and
 - (ii) provide RailCorp with every reasonable facility and other assistance necessary for the audit, review or inspection.

26.6 Access to information

PPP Co must:

- (a) give RailCorp and its Associates access to the Performance Monitoring System and any data for, or resulting from, the Performance Monitoring System at all reasonable times (subject to RailCorp providing PPP Co reasonable prior notice);
- (b) keep copies of all information, documents and data relevant to the Performance Monitoring System or the TLS Phase Activities for 7 years after their creation or production; and

- (c) provide such assistance and access as RailCorp reasonably requires in the exercise of its performance monitoring rights.

26.7 Audits

RailCorp's Representative (or any person authorised by RailCorp's Representative) may audit the Performance Monitoring System or the TLS Phase Activities or any performance data for, or resulting from, the Performance Monitoring System at any time during the TLS Phase and the 6 month period following the end of the TLS Phase. Where this clause 26.7 applies, PPP Co must, within a reasonable period, make its Performance Monitoring System, the TLS Phase Activities and any performance data available for any such audit.

26.8 Inaccurate Performance Monitoring System or performance data

If any audit under clause 26.7 reveals an inaccuracy or incompleteness or incorrectness in the Performance Monitoring System or any performance data for, or resulting from, the Performance Monitoring System then PPP Co must:

- (a) correct and reissue the affected report or data and (where applicable) take steps to remedy the fault in its monitoring, measuring and reporting system; and
- (b) if the error has affected the amount of a TLS Payment, make the appropriate adjustment to the next scheduled payment claim or, if there are no further payment claims scheduled and the adjustment amount is a deduction, the amount will be a debt due from PPP Co to RailCorp.

If any fraud or intentionally false, misleading or deceptive reporting is discovered during any audit, this will constitute a PPP Co Event of Default.

26.9 No duty or relief

PPP Co acknowledges that:

- (a) neither RailCorp nor RailCorp's Representative assumes or owes any duty of care to PPP to:
 - (i) inspect the TLS Phase Activities; or
 - (ii) review maintenance or repair work for errors, omissions or compliance with the requirements of this Contract if it does so inspect; and
- (b) no inspection of (or failure to inspect) the TLS Phase Activities or review (or failure to review) of maintenance or repair work by or on behalf of RailCorp or RailCorp's Representative will:
 - (i) relieve PPP Co from, or alter or affect, PPP Co's liabilities, obligations or responsibilities whether under this Contract or otherwise according to law; or
 - (ii) prejudice or limit RailCorp's rights against PPP Co whether under this Contract or otherwise according to law.

27. Payment provisions

27.1 Performance based payment regime

Without limiting clause 2 of the Deed of Agreement, PPP Co acknowledges and agrees that:

- (a) certain Milestone Payments will be adjusted if the Actual Mass of a Set exceeds the Predicted Mass;
- (b) the formula for the calculation of the Availability Payment for each month contemplates deductions for Reliability and Disruption Adjustments;
- (c) the adjustment referred to in clause 27.1(a) is a genuine pre-estimate of the additional power consumption costs and other detriments which RailCorp will incur if the Actual Mass of a Set exceeds the Predicted Mass;
- (d) each Reliability and Disruption Adjustment is a genuine pre-estimate of the losses, costs, expenses and detriments which RailCorp will suffer if the event which triggers the Reliability and Disruption Adjustment occurs;
- (e) both RailCorp and PPP Co require a formula for the calculation of losses, costs, expenses and detriments which RailCorp may incur should PPP Co fail to discharge its obligations under this Contract, that is able to be readily applied without unnecessary administrative costs, delay or difficulty;
- (f) it is in the economic and other best interests of both RailCorp and PPP Co that a formula of the nature referred to in clause 27.1(e) be adopted;
- (g) there are many and varied matters which form part of the losses, costs, expenses and detriments which RailCorp may incur as a result of a failure by PPP Co to discharge its performance obligations under this Contract many of which are either difficult, or in some cases impossible, to calculate with precision;
- (h) the formula adopted in this Contract and set out in clause 3 of schedule 7 meets the requirements set out in clauses 27.1(e), 27.1(f) and 27.1(g); and
- (i) PPP Co:
 - (i) is contracting with RailCorp at arms length;
 - (ii) possesses equivalent bargaining power to RailCorp;
 - (iii) possesses extensive commercial experience and expertise;
 - (iv) has had access to and been advised by its own legal, accounting, technical, financial, economic, commercial and other professionals and experts in relation to its rights and obligations under this Contract;
 - (v) having received advice, warrants that the payment regime (including the adjustments and deductions referred to in clauses 27.1(a) and 27.1(b)) is legally binding, valid and enforceable according to its terms and does not constitute a penalty in any respect;
 - (vi) enters into this Contract without any duress, coercion, undue influence or other form of unconscionable conduct or impermissible or objectionable persuasion on the part of RailCorp;
 - (vii) enters into this Contract not dependent on or influenced by any statements or representations (whether express or implied) made by or on behalf of RailCorp, other than those stated in this Contract; and
 - (viii) enters into this Contract with the intention that the payment regime (including the adjustments and deductions referred to in clauses 27.1(a)

and 27.1(b)) is legally binding, valid and enforceable in accordance with its terms.

PPP Co agrees to exclude and waive any right of the benefit of, to the extent permissible, the application of any legal rule or norm, including under statute, equity and common law, relating to the enforceability of the payment regime (including the adjustments or deductions referred to in clauses 27.1(a) and 27.1(b)) or the characterisation of such adjustments or deductions or any of them as penalties.

27.2 RailCorp's payment obligation

Subject to this clause 27, RailCorp must pay PPP Co:

- (a) the Milestone Payments;
- (b) the Availability Payments;
- (c) the KPI Payments;
- (d) the Reimbursable TLS Payments;
- (e) the Interest Payment Adjustment (if positive); and
- (f) any other amounts which are payable by RailCorp to PPP Co under this Contract.

27.3 PPP Co's payment obligation

Subject to this clause 27, PPP Co must pay RailCorp:

- (a) the Incident Response Payments;
- (b) the Interest Payment Adjustment (if negative); and
- (c) any other amounts which are payable by PPP Co to RailCorp under this Contract.

27.4 Payment claims for Milestone Payments and other amounts for Delivery Phase Activities

PPP Co must give RailCorp's Representative claims for payment on account of the Milestone Payments and any other amounts payable by RailCorp to PPP Co in respect of the Delivery Phase Activities (such as Variation Costs and reimbursement under clause 28.2 (Reimbursement of stamp duty), but excluding Interest Payment Adjustments):

- (a) in the case of Milestone Payments, upon completion of the Milestones described in clause 2.1 of schedule 7 (Payment regime);
- (b) in the case of any other amounts payable by RailCorp in respect of the Delivery Phase Activities, within 7 days after the end of each month during the Delivery Phase;
- (c) in the format set out in annexure 1 of schedule 7 (Payment regime) or such other format as RailCorp's Representative reasonably requires;
- (d) which are valid tax invoices for any taxable supplies to which the payment relates;
- (e) which, in the case of Milestone Payments, include a certificate of compliance in the format set out in annexure 2 of schedule 7 (Payment regime) (or such other format as RailCorp's Representative reasonably requires):

- (i) signed by PPP Co and each Core Contractor; and
- (ii) accompanied by the registers of compliance records described in clause 2.11.5 of the Contract Management Requirements;
- (f) which include the evidence reasonably required by RailCorp's Representative of the amount claimed; and
- (g) which are based on the PPP Co Schedule of Rates, to the extent relevant.

27.5 Payment of Milestone Payments and other amounts for Delivery Phase Activities

- (a) Subject to clauses 27.13 (Set-off) and 27.14 (Payment of workers and subcontractors), RailCorp must within 30 Business Days of receiving a payment claim under clause 27.4:
 - (i) pay PPP Co:
 - A. the amount claimed; or
 - B. such lesser amount as RailCorp's Representative reasonably determines is due in accordance with this Contract; and
 - (ii) if RailCorp's Representative determines that a lesser amount is due, give PPP Co a written statement of the reasons why.
- (b) If RailCorp gives a notice under clause 27.5(a)(ii), PPP Co must issue a revised tax invoice or adjustment note, as the case may be.

27.6 Payment claims for TLS Payments and other amounts for TLS Phase Activities

PPP Co must give RailCorp's Representative claims for payment on account of the TLS Payments and any other amounts payable by RailCorp to PPP Co in respect of the TLS Phase Activities (excluding Interest Payment Adjustments):

- (a) within 7 days after the end of each month during the TLS Phase;
- (b) in the format set out in annexure 3 of schedule 7 (Payment regime) or such other format as RailCorp's Representative reasonably requires;
- (c) which are valid tax invoices for any taxable supplies to which the payment relates;
- (d) which include:
 - (i) the Performance Report required under clause 26.3 (Performance Report); and
 - (ii) in the case of Reimbursable TLS Payments and other amounts for TLS Phase Activities, any other evidence reasonably required by RailCorp's Representative of the amount claimed; and
- (e) which are based on the PPP Co Schedule of Rates, to the extent relevant.

27.7 Payment of TLS Payments and other amounts for TLS Phase Activities

- (a) Subject to clauses 27.7(c), 27.13 (Set-off) and 27.14 (Payment of workers and subcontractors), RailCorp must within 20 Business Days of receiving a payment claim under clause 27.6:
 - (i) pay PPP Co:
 - A. the amount claimed; or
 - B. such lesser amount as RailCorp's Representative reasonably determines is due in accordance with this Contract; and
 - (ii) if RailCorp's Representative determines that a lesser amount is due, give PPP Co a written statement of the reasons why.
- (b) If RailCorp gives a notice under clause 27.7(a)(ii), PPP Co must issue a revised tax invoice or adjustment note, as the case may be.
- (c) If RailCorp receives a payment claim under clause 27.6 in respect of a month on the first Business Day of the following month, RailCorp must comply with clause 27.7(a) by no later than the last day of that following month which is not a Saturday, Sunday or Public Holiday and on which banks are open for business generally.

27.8 Net amount due from PPP Co to RailCorp

Where a payment claim shows, or RailCorp's Representative reasonably determines, that a net amount is due from PPP Co to RailCorp, PPP Co must:

- (a) pay that amount to RailCorp within 20 Business Days of being requested by RailCorp's Representative to do so; or
- (b) otherwise carry forward the amount and set it off against the next payment claim.

27.9 Payment on account

Any payment of moneys by RailCorp to PPP Co is not:

- (a) evidence of the value of work or services, or that any work or services have been satisfactorily carried out in accordance with this Contract;
- (b) an admission of liability; or
- (c) approval by RailCorp or RailCorp's Representative of PPP Co's performance or compliance with this Contract,

but is only taken to be payment on account.

27.10 Early payment option for cost of Sets and Simulators

- (a) RailCorp may, at its option, choose to pay, on Financial Close, to PPP Co the amount described as "Cost of Sets and Simulators" in the Model Outputs Schedule. Such option is exercisable, by notice in writing to PPP Co, no later than 5 Business Days prior to Financial Close. This amount has been calculated as the cost of the Sets and Simulators only and does not include the cost of provision of the Maintenance Facility Works or any Through Life Support for the Sets, Simulators or the Maintenance Facility.

- (b) If RailCorp exercises the option described in clause 27.10(a):
- (i) the Price per SAU will be the amount described as the "Price per SAU (early payment option)" in the Model Outputs Schedule;
 - (ii) RailCorp must reimburse PPP Co and the Debt Financiers for all costs incurred in relation to the Project, whether incurred prior to or subsequent to Financial Close;
 - (iii) RailCorp must pay PPP Co and the Debt Financiers an option exercise fee equal to 25% of the costs calculated in accordance with clause 27.10(b)(ii); and
 - (iv) this Contract will be amended as required to reflect RailCorp's acquisition of the Sets and Simulators including providing PPP Co with access to the Sets and Simulators to enable PPP Co to continue to perform its obligations under this Contract.

27.11 Payment disputes

- (a) Subject to clause 27.11(b), either PPP Co or RailCorp's Representative may refer a dispute relating to:
- (i) the Performance Monitoring System or the output thereof; and
 - (ii) any matter arising from any Performance Report or any payment claim (including the calculation of any TLS Payment),
- for resolution in accordance with clause 53 (Dispute resolution).
- (b) PPP Co may refer any dispute in relation to the calculation of a TLS Payment by RailCorp for resolution in accordance with clause 53 (Dispute resolution) if, and only if, the dispute is notified within 30 days after the issue of the written statement under clause 27.7(a)(ii).
- (c) If the dispute is not referred for resolution by PPP Co in accordance with clause 27.11(b), then PPP Co:
- (i) is not entitled to make any Claim in respect of such dispute; and
 - (ii) releases RailCorp from any liability in respect of such dispute.
- (d) If, following resolution of the dispute under clause 53, an adjustment is agreed or determined in respect of any previous TLS Payment, then that adjustment will be added to or deducted from (as the case may be) the next TLS Payment after that agreement is reached or that determination is made (as the case may be) and PPP Co must issue a revised tax invoice or adjustment note, as the case may be.

27.12 Interest

Any late payment of amounts that are properly due and payable by either RailCorp or PPP Co to the other under any RailCorp Project Agreement (including a previously disputed amount or an amount which is not paid due to the application of set-off by RailCorp under clause 27.13(a) where the amount set-off is determined to be incorrect) will incur simple interest at the Default Rate from the day after the date on which the payment was due to (and including) the date of payment.

27.13 Set off

- (a) Subject to clause 27.13(b), RailCorp will be entitled to set-off or deduct from any amount due from RailCorp to PPP Co under a RailCorp Project Agreement:
- (i) any debt or other monies due from PPP Co to RailCorp; and
 - (ii) any bona fide claim to money which RailCorp may have against PPP Co whether for damages or otherwise,
- whether under a RailCorp Project Agreement or otherwise at law relating to the Project.
- (b) RailCorp will not be entitled to set off any amount against:
- (i) any Interest Payment Adjustment; or
 - (ii) any Termination Payment which results from termination of this Contract:
 - A. under clause 50.4 (Termination for RailCorp Termination Event), clause 50.5 (Voluntary termination by RailCorp), clause 33.11 (Termination for Force Majeure Event) or clause 36.12 (Uninsurable Risks); or
 - B. due to the occurrence of the PPP Co Termination Event described in clause 50.1(k) (Major safety breach),except to the extent the Termination Payment would be greater than or equal to the Debt Termination Amount following any set-off; or
 - C. under clause 50.2 (Termination for PPP Co Termination Event (other than due to the occurrence of the PPP Co Termination Event described in clause 50.1(k) (Major safety breach))) except to the extent expressly set out in clause 2 of schedule 14).
- (c) PPP Co must make all payments due to RailCorp under the RailCorp Project Agreements without set-off or counterclaim, and without any deduction to the extent permitted by law.
- (d) Nothing in this clause 27.13 affects RailCorp's right to recover from PPP Co the whole of the debt or any balance that remains owing after any set-off.

27.14 Payment of workers and subcontractors

PPP Co is not entitled to give RailCorp a payment claim under clause 27.4 or 27.6, and RailCorp's Representative is not obliged to make any payment under clause 27.5 or 27.7, unless PPP Co has provided RailCorp's Representative with:

- (a) a statutory declaration, together with any supporting evidence which may be reasonably required by RailCorp's Representative, duly signed by PPP Co's Representative, that, except to the extent disclosed in the statutory declaration (such disclosure to specify all relevant amounts and subcontractors) all subcontractors have been paid all moneys due and payable to them in respect of PPP Co's Activities;

- (b) a written statement for the purposes of, and which complies with, section 127 of the *Industrial Relations Act 1996* (NSW), section 175B of the *Workers Compensation Act 1987* (NSW) and section 31H of the *Pay-Roll Tax Act 1971* (NSW), which is in a form approved by RailCorp's Representative, covering the period covered by the relevant payment claim; and
- (c) copies of all relevant certificates of currency in respect of workers compensation insurance which PPP Co has in place in connection with PPP Co's Activities.

Clauses 27.14(b) and 27.14(c) will only apply in respect of those parts of PPP Co's Activities carried out in New South Wales.

27.15 Payment of Interest Payment Adjustments

- (a) At least 20 Business Days prior to each Interest Calculation Date PPP Co must give RailCorp's Representative a statement setting out:
 - (i) the amount of the Interest Payment Adjustment due on that Interest Calculation Date;
 - (ii) whether the Interest Payment Adjustment is positive or negative;
 - (iii) the detailed calculations supporting the Interest Payment Adjustment; and
 - (iv) any evidence necessary to explain or verify the calculations.
- (b) Within 10 Business Days of receipt of the statement referred to in clause 27.15(a), RailCorp must give written notice to PPP Co stating:
 - (i) whether it agrees with the statement; or
 - (ii) if it does not agree with the statement, a revised statement of the amount of the Interest Payment Adjustment and reasonable particulars of the reasons why it does not agree with the statement.
- (c) If RailCorp does not give a notice to PPP Co within the period referred to in clause 27.15(b) it will be taken to have agreed with the statement.
- (d) The amount of the Interest Payment Adjustment, to the extent it is not in dispute, must be paid by:
 - (i) RailCorp to PPP Co (if the Interest Payment Adjustment is a positive number); or
 - (ii) PPP Co to RailCorp (if the Interest Payment Adjustment is a negative number),

no later than 2 Business Days prior to the relevant Interest Calculation Date. Any amount in dispute may be referred for dispute resolution under clause 53.
- (e) Notwithstanding anything contained in this clause 27.15 or clause 3.8 of schedule 7 (Payment regime):
 - (i) the first Interest Period will commence on and include the Interest Payment Start Date; and
 - (ii) the last such Interest Period will end on, but exclude, the earlier of:

- A. the Final Maturity Date; and
 - B. the Termination Date,
- as the case may be.

28. Taxes

28.1 General liability for Taxes

PPP Co must pay and, subject to clauses 28.2 and 28.3, indemnify RailCorp against, all Taxes incurred in connection with:

- (a) the execution, stamping and registration of any Project Agreement;
- (b) the performance of any Project Agreement and each transaction effected by or made under any Project Agreement, including PPP Co's Activities; or
- (c) any amendment to, or any consent, approval, waiver, release or discharge of or under any Project Agreement.

28.2 Reimbursement of stamp duty

RailCorp must reimburse PPP Co for:

- (a) all stamp duty paid to the New South Wales Office of State Revenue in respect of the execution, stamping and registration of any Project Agreement;
- (b) all hire of goods duty paid to the New South Wales Office of State Revenue in respect of the Sets; and
- (c) all transfer duty paid to the New South Wales Office of State Revenue in respect of the Sets and the exercise of any option by RailCorp to acquire the Sets under this Contract, including under clauses 25.3 and 51.1.

28.3 Reimbursement of land based rates

RailCorp must reimburse PPP Co for all:

- (a) municipal rates, water, sewerage and drainage rates (other than water usage rates); and
- (b) land tax (on a single holding basis and not subject to any special trust),

levied on PPP Co in respect of the Maintenance Site.

28.4 GST

- (a) Except where the context suggests otherwise, terms used in this clause 28.4 have the meanings given to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (b) 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 28.4.

- (c) Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 28.4.
- (d) Any payment or reimbursement required to be made under this Contract that is calculated by reference to a cost, expense or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (e) If GST is payable in relation to a supply made under or in connection with this Contract then:
- (i) any party ("**Recipient**") that is required to provide consideration to another party ("**Supplier**") for that supply must pay an additional amount to the Supplier equal to the amount of that GST; and
 - (ii) the additional amount is payable in the same manner and at the same time as the consideration or any part of the consideration is provided or to be provided for that supply and the Supplier will provide a tax invoice or tax invoices to the Recipient in respect of that supply, no later than the time or times at which the additional amount in respect of that supply is to be provided.
- (f) Where additional amounts are payable during the same month between parties to this Contract pursuant to clause 28.4(e), amounts so payable, to the extent they are equivalent in amount, will be set off against each other as if paid.
- (g) If for any one reason (including the occurrence of an adjustment event), the amount of GST payable on a supply (taking into account any increasing or decreasing adjustments relevant to the supply) varies from the additional amount provided by the Recipient pursuant to clause 28.4(e) and the Supplier is required to pay a further amount of GST in respect of that supply or the Supplier receives a refund or credit of the whole or any part of the GST paid by the Supplier in relation to that supply:
- (i) the Supplier must provide a refund or credit to the Recipient or the Recipient must pay a further amount to the Supplier, as appropriate;
 - (ii) the refund, credit or further amount (as the case may be) will be calculated by the Supplier in accordance with the GST law;
 - (iii) the Supplier must notify the Recipient of the refund, credit or further amount within 14 days after becoming aware of the variation to the amount of GST payable; and
 - (iv) if there is an adjustment event in relation to the supply, the requirement for the Supplier to notify the Recipient will be satisfied by the Supplier issuing to the Recipient an adjustment note within 14 days after becoming aware of the occurrence of the adjustment event,
- then the Supplier will be entitled to receive the amount of that variation from the Recipient or the Supplier will provide a corresponding refund or credit to the Recipient, as appropriate. For the purposes of calculating variations, any additional amount referred to in this clause 28.4 is taken to be amended by the amount of any earlier variation made under this clause 28.4.
- (h) If RailCorp incurs any penalty, fine, interest or fee in respect of GST directly or indirectly as a result of:

- (i) any failure by PPP Co to comply with this clause 28.4; or
- (ii) PPP Co issuing a tax invoice or adjustment note to RailCorp which overstates the GST liability incurred or to be incurred by PPP Co in respect of the supply to which the invoice relates,

PPP Co will indemnify or reimburse on demand to RailCorp for the amount of such penalty, fine, fee or interest.

- (i) Subject to clause 28.4(j), any ruling, advice, document or other information received by RailCorp from the Australian Taxation Office ("**ATO Ruling**") in relation to the administration of the GST law with respect to any supply or acquisition made under or in connection with this Contract (including an acquisition referred to in clause 28.4(d)) will be conclusive as between the parties as to the application of any provision of the GST law in that regard, including in relation to the GST payable on a supply made under or in connection with this Contract or the amount of any input tax credit to which an entity is entitled for an acquisition that relates to this Contract or any increasing or decreasing adjustment that an entity may have in relation to this Contract.
- (j) Provided that, in circumstances where RailCorp has applied to the Commissioner of Taxation for an ATO Ruling, RailCorp has used a form of ruling request approved by PPP Co (such approval not to be unreasonably withheld or delayed) ("**Ruling Request**"), RailCorp may rely on clause 28.4(i) in respect of any ATO Ruling received in connection with that Ruling Request.

29. Local Industry participation and apprenticeships

29.1 Acknowledgements

PPP Co acknowledges the importance placed by RailCorp and the State upon:

- (a) Local Industry participation and development for economic and social development reasons; and
- (b) the development and retention of skilled tradespersons within the Local Industry.

29.2 Local Industry Participation Plan and Local Content Requirement

PPP Co must:

- (a) implement and comply with, and ensure that its Core Contractors implement and comply with, the Local Industry Participation Plan; and
- (b) without limiting clause 29.2(a), achieve the Local Content Requirement.

29.3 What is the Local Content Requirement?

- (a) To achieve the Local Content Requirement, at least 20% of the Assessable Content must be Local Content.
- (b) Assessable Content is the total cost of the items listed in the Manufacturing Cost Schedule.
- (c) Local Content is that portion of the cost of each item listed in the Manufacturing Cost Schedule which is accounted for by manufacturing activity carried out by the Rolling Stock Manufacturer in Australia or New Zealand or by the purchase of components manufactured in Australia or New Zealand.

29.4 Reporting and records

- (a) PPP Co must report on its compliance with the Local Industry Participation Plan in accordance with the reporting requirements set out in section 9 of the Local Industry Participation Plan.
- (b) PPP Co must:
 - (i) keep sufficient records to enable its compliance with its obligations under clause 29.2 to be audited;
 - (ii) allow RailCorp (or any other person authorised by RailCorp) to audit PPP Co's compliance with its obligations under clause 29.2; and
 - (iii) ensure that its Core Contractors comply with this clause 29.4(b).

29.5 Compliance

- (a) It is a precondition to PPP Co's entitlement to receive the Milestone Payment referred to in clause 2.1(d) of schedule 7 (Payment regime) that PPP Co demonstrate that:
 - (i) PPP Co has complied with, and ensured that its Core Contractors have complied with, the Local Industry Participation Plan in all material respects; and
 - (ii) the Local Content Requirement is reasonably likely to be achieved.
- (b) Within 20 Business Days of the Date of Practical Completion of Set 78, PPP Co must demonstrate that the Local Content Requirement has been achieved.

29.6 Human Resources Plan and Apprenticeship Requirement

PPP Co must:

- (a) implement and comply with, and ensure that its Core Contractors implement and comply with, the Human Resources Plan; and
- (b) without limiting clause 29.6(a):
 - (i) achieve the Apprenticeship Requirement; and
 - (ii) continue to achieve the Apprenticeship Requirement throughout the Contract Term.

29.7 What is the Apprenticeship Requirement?

- (a) To achieve the Apprenticeship Requirement, each of:
 - (i) PPP Co;
 - (ii) the Rolling Stock Manufacturer during the Delivery Phase; and
 - (iii) the TLS Contractor during the TLS Phase,must employ 1 apprentice for every 9 tradespersons employed in Australia and New Zealand in respect of PPP Co's Activities at any time.

- (b) The Apprenticeship Requirement must be satisfied through the employment of persons undertaking traditional trade apprenticeships (Australian Qualifications Framework Level III), and not by the employment of persons undertaking apprenticeships or traineeships of a clerical, administrative or similar nature.

29.8 No relief

Compliance by PPP Co with its obligations under clauses 29.2 and 29.6 will not relieve PPP Co from:

- (a) compliance with any of its other obligations under this Contract; or
- (b) its other liabilities whether under this Contract or otherwise according to law, including its liability for any PPP Co Related Defects arising from any defects in the goods or services provided by Local Industry or work carried out by apprentices.

30. RailCorp initiated Variations

30.1 Variation Proposal

RailCorp may at any time issue to PPP Co a notice titled "Variation Proposal" setting out the details of a proposed Variation which RailCorp is considering, including RailCorp's proposed requirements for the implementation of the proposed Variation.

RailCorp will not be obliged to proceed with any Variation proposed in a "Variation Proposal".

30.2 PPP Co's Variation Notice

As soon as practicable and in any event within 20 Business Days after receipt of a "Variation Proposal" (or such longer period as may be requested by PPP Co, having regard to the nature of the relevant Variation Proposal, and approved by RailCorp (acting reasonably)), PPP Co must provide RailCorp with a notice ("**PPP Co's Variation Notice**") setting out detailed particulars of:

- (a) the Variation Costs which it will incur, or the Variation Savings which it will derive, as a result of the proposed Variation;
- (b) the basis (if any) on which PPP Co would be prepared to fund the Variation and the cost difference, if PPP Co, rather than RailCorp, funds the Variation;
- (c) if the Variation is proposed to be carried out during the Delivery Phase, the effect which the proposed Variation will have on the Delivery Programme;
- (d) if the Variation is proposed to be carried out after the Delivery Phase, the time within which the proposed Variation will be implemented;
- (e) the effects which the proposed Variation will have on:
 - (i) the workmanship, durability or functional integrity of any element of the Project Works (including the Maintenance Facility Works), a Car, the Maintenance Facility or the Simulators;
 - (ii) PPP Co's ability to provide the Required Availability;
 - (iii) the Maintenance Facility;
 - (iv) the use of the Cars by RailCorp and its passengers;

- (v) any Accreditation held or required by RailCorp, PPP Co or PPP Co's Associates;
- (vi) the safety of the Cars;
- (vii) RailCorp's Facilities;
- (viii) any training requirements;
- (ix) PPP Co's ability to return the Maintenance Facility to RailCorp (or its nominee) in accordance with the requirements of this Contract; or
- (x) PPP Co's ability to:
 - A. satisfy any warranty given by PPP Co under this Contract; or
 - B. perform any of its other obligations under this Contract;
- (f) any relief required by PPP Co from its obligations under this Contract to ensure that PPP Co would be left in a no better and no worse position than it would be in if the Variation were not implemented; and
- (g) any other information requested by RailCorp.

30.3 PPP Co's Variation Notice requirements

PPP Co's Variation Notice must be prepared:

- (a) so as to avoid, as far as practicable, the need for a new Approval or a modification to an existing Approval for the implementation of the Variation;
- (b) where applicable, on the basis of the prices and rates set out in annexure 4 of schedule 7 (Payment regime);
- (c) on an open book basis (and to this end PPP Co must allow RailCorp to review and audit PPP Co's records to verify that PPP Co's Variation Notice has been prepared on an open book basis);
- (d) assuming PPP Co is a willing, efficient and competent provider of the Variation in an efficient and competitive market;
- (e) in a manner which is consistent with the requirements of RailCorp for the implementation of the Variation;
- (f) having regard to minimising the disruption to railway operations;
- (g) having regard to minimising any delay in achieving Practical Completion in relation to each Set, the Maintenance Facility Works or the Simulators, to the extent that Practical Completion has not yet been achieved;
- (h) having regard to minimising any adverse safety impacts of the Variation;
- (i) in a manner which ensures that all appropriate insurances relevant to the Variation are taken out and maintained consistently with those that would have been required by RailCorp if the Variation had been included in the original requirements of this Contract, unless RailCorp otherwise determines;
- (j) in a manner so that there is no double counting; and

- (k) in the form of an offer capable of immediate acceptance by RailCorp within 40 Business Days after the date on which RailCorp receives PPP Co's Variation Notice.

30.4 Instruction to proceed

Whether or not RailCorp's Representative has issued a "Variation Proposal" under clause 30.1 and whether or not PPP Co has issued a PPP Co's Variation Notice under clause 30.2 in response to a "Variation Proposal", RailCorp's Representative may at any time during the Contract Term instruct PPP Co to implement a Variation by issuing a notice titled "Variation Order". In these circumstances, the matters set out in clauses 30.2(a), 30.2(d), 30.2(e)(v) (in respect of the Accreditation of PPP Co or PPP Co's Associates) and 30.2(f) will, until RailCorp and PPP Co agree otherwise or a determination is made in accordance with clause 53 (Dispute resolution), be reasonably determined by RailCorp's Representative. In making his or her determination, RailCorp's Representative will:

- (a) have regard to the principles set out in clause 30.3 (PPP Co's Variation Notice requirements), to the extent relevant;
- (b) assume that funding for the Variation will be provided by RailCorp, unless the parties otherwise agree; and
- (c) determine all matters required to enable the Variation to be implemented.

If PPP Co disagrees with a matter determined by RailCorp's Representative under this clause 30.4:

- (d) PPP Co may refer the matter for dispute resolution in accordance with clause 53;
- (e) PPP Co must proceed to implement the Variation on the basis determined by RailCorp notwithstanding that the matters in dispute have not been agreed or determined in accordance with clause 53; and
- (f) any necessary adjustments will be made following the expert or arbitrator's determination.

If RailCorp has not issued a "Variation Proposal" under clause 30.1, the "Variation Order" under this clause 30.4 will also be taken to be a "Variation Proposal" under clause 30.1. However, clauses 30.5, 30.6(c), 30.7(a), 30.9(a), 30.11, 30.12 and 30.13 will not apply where RailCorp issues a "Variation Order" under this clause 30.4.

30.5 Tender for works

If RailCorp issues a "Variation Proposal" under clause 30.1 after the Delivery Phase, RailCorp may require that PPP Co conduct a tender process for all or part of the works which would be required to effect the Variation if the value of those works is likely to exceed \$500,000 (CPI Indexed). If RailCorp elects to require the tender process:

- (a) the tender process must be carried out promptly and in accordance with RailCorp's reasonable requirements; and
- (b) the date by which PPP Co must provide PPP Co's Variation Notice will be extended by such period as is reasonably required to conduct the tender process.

PPP Co must have regard to the outcome of the tender process (including the tendered prices) in PPP Co's Variation Notice (or, if PPP Co's Variation Notice has been submitted before the completion of the tender process, promptly submit an appropriately amended PPP Co's Variation Notice).

30.6 Election by RailCorp

Within 40 Business Days after receipt of PPP Co's Variation Notice or, if clause 30.5 applies, 40 Business Days after the receipt of an amended PPP Co's Variation Notice, RailCorp may either:

- (a) accept PPP Co's Variation Notice and if PPP Co's Variation Notice contains any options, nominate which option RailCorp accepts;
- (b) reject PPP Co's Variation Notice; or
- (c) withdraw the proposed Variation,

by notice to PPP Co (which in the case of paragraph (a) must be titled "Variation Order").

30.7 RailCorp accepts PPP Co's Variation Notice

If RailCorp accepts PPP Co's Variation Notice in accordance with clause 30.6(a):

- (a) PPP Co must proceed to implement the Variation on the basis of PPP Co's Variation Notice (as accepted by RailCorp); and
- (b) PPP Co will be relieved of its obligations under this Contract to the extent specified in PPP Co's Variation Notice (as accepted by RailCorp).

30.8 RailCorp rejects PPP Co's Variation Notice

If RailCorp rejects PPP Co's Variation Notice in accordance with clause 30.6(b), the parties must consult in good faith, and use their reasonable endeavours to agree on a mutually acceptable resolution to the matters set out in PPP Co's Variation Notice which are in dispute.

30.9 If parties reach agreement

If the parties reach agreement on the disputed matters in PPP Co's Variation Notice and RailCorp directs PPP Co to implement the Variation (by notice titled "Variation Order"):

- (a) PPP Co must proceed to implement the Variation on the basis of PPP Co's Variation Notice (as varied by the parties' agreement, as recorded in the "Variation Order" to both parties' reasonable satisfaction, on the matters in PPP Co's Variation Notice which were in dispute); and
- (b) PPP Co will be relieved of its obligations under this Contract to the extent specified in PPP Co's Variation Notice (as varied by the parties' agreement, as recorded in the "Variation Order", on the matters in PPP Co's Variation Notice which were in dispute).

30.10 If parties fail to reach agreement

If the parties are unable to reach agreement within 10 Business Days after the commencement of the consultation under clause 30.8 (RailCorp rejects PPP Co's Variation Notice), RailCorp may refer the matter for dispute resolution in accordance with clause 53 (Dispute resolution). In determining the dispute under clause 53:

- (a) the principles set out in clause 30.3 (PPP Co's Variation Notice requirements) must be considered, to the extent relevant;
- (b) it must be assumed that funding for the Variation will be provided by RailCorp, unless the parties otherwise agree; and

- (c) all matters required to enable the Variation to be implemented must be determined, assuming RailCorp makes the election referred to in clause 30.12(a).

30.11 RailCorp may direct PPP Co to proceed pending outcome of dispute resolution process

If RailCorp refers the matter for dispute resolution, RailCorp may also direct PPP Co to implement the Variation by a notice titled "Variation Order" whether or not the matters in dispute have been agreed or determined in accordance with clause 53 (Dispute resolution).

If RailCorp gives such a notice:

- (a) the disputed matters will, until RailCorp and PPP Co otherwise agree or a determination is made in accordance with clause 53 (Dispute resolution), be reasonably determined by RailCorp's Representative. In making his or her determination, RailCorp's Representative will:
 - (i) have regard to the principles set out in clause 30.3 (PPP Co's Variation Notice requirements), to the extent relevant;
 - (ii) assume that funding for the Variation will be provided by RailCorp, unless the parties otherwise agree; and
 - (iii) determine all matters required to enable the variation to be implemented;
- (b) PPP Co must proceed to implement the Variation on the basis determined by RailCorp notwithstanding that the matters in dispute have not been agreed or determined in accordance with clause 53;
- (c) PPP Co will be relieved of its obligations under this Contract to the extent specified in RailCorp's notice; and
- (d) any necessary adjustments will be made following the determination of the matters in dispute.

30.12 RailCorp options following determination

Following determination of the dispute referred for dispute resolution under clause 30.10 (If parties fail to reach agreement), RailCorp may, if it has not already exercised its right under clause 30.11, elect to do either of the following:

- (a) require PPP Co to proceed to implement the Variation in accordance with PPP Co's Variation Notice as varied by the determination; or
- (b) withdraw the proposed Variation,

by notice to PPP Co (which in the case of clause 30.12(a) must be titled "Variation Order").

30.13 PPP Co to implement Variation

If RailCorp gives PPP Co notice pursuant to clause 30.12(a):

- (a) PPP Co must proceed to implement the Variation in accordance with PPP Co's Variation Notice (as varied by the determination, once made); and
- (b) PPP Co will be relieved of its obligations under this Contract to the extent specified in PPP Co's Variation Notice (as varied by the determination, once made).

30.14 Variation Costs

- (a) **(Variation Costs, when agreed):** If PPP Co implements a Variation in accordance with clause 30.7 or 30.9 and PPP Co's Variation Notice (as subsequently agreed, if clause 30.9 applies) states that the Variation will result in Variation Costs in an amount greater than zero, PPP Co may:
- (i) if the Variation is being funded by RailCorp, submit a payment claim in accordance with clause 27 in respect of the relevant portion of the Variation Costs stated in PPP Co's Variation Notice (as subsequently agreed, if clause 30.9 applies) after each month in which the relevant work was undertaken; or
 - (ii) if the Variation is being funded by PPP Co, submit a payment claim in accordance with clause 27 in respect of the amounts (if any) which PPP Co's Variation Notice (as subsequently agreed, if clause 30.9 applies) specifies will be paid by RailCorp after each month during which such amounts fall due.
- (b) **(Variation Costs, when not agreed):** If PPP Co implements a Variation in accordance with clause 30.4, 30.11 or 30.13 which results in Variation Costs in an amount greater than zero, or if clause 22.11 applies, PPP Co may submit a payment claim in accordance with clause 27 in respect of the relevant portion of the Variation Costs:
- (i) pending determination in accordance with clause 53 (Dispute resolution) or agreement between the parties, as reasonably determined by RailCorp's Representative; and
 - (ii) following determination in accordance with clause 53 or agreement between the parties, as so determined or agreed,

after each month in which the relevant work was undertaken (or when agreed, if the parties agreed that PPP Co would fund the Variation). If the Variation Costs paid under clause 30.14(b)(i) are more or less than the Variation Costs for the relevant month as subsequently determined or agreed, then the difference will be paid by the relevant party to the other.

30.15 Variation Savings

If PPP Co implements a Variation in accordance with clauses 30.4, 30.7, 30.9, 30.11 or 30.13, that results in Variation Savings, PPP Co must pay RailCorp 50% of the Variation Savings as follows:

- (a) to the extent that the Variation Savings relate to the Delivery Phase Activities, the Variation Savings may be set-off against Variation Costs for another Variation in respect of the Delivery Phase Activities or Milestone Payments payable by RailCorp to PPP Co, or where this is not set-off, it must be paid by PPP Co to RailCorp progressively within 10 Business Days after each month in which:
- (i) the relevant work the subject of the Variation was performed; or
 - (ii) if the Variation involved the deletion or omission of work, the relevant work which has been deleted or omitted would have been undertaken but for the Variation; or
- (b) to the extent that the Variation Savings relate to the TLS Phase Activities, RailCorp may set-off against its obligations to pay the TLS Payments, the Variation Savings

in the manner and at the time as agreed between RailCorp and PPP Co or, to the extent that they fail to agree, as determined in accordance with clause 53 (Dispute resolution) (or as reasonably determined by RailCorp pending determination under clause 53 (Dispute resolution)). In determining the dispute under clause 53, the timing of the set-off must not have an adverse impact upon the ability which, prior to the Variation:

- (i) PPP Co Finance Co or PPP Co (as applicable) had to pay or repay the Actual Debt on the due dates for payment (without regard to any acceleration of the obligation to pay or repay); and
- (ii) PPP Co Holding Co had to give to the Equity Investors the Equity Return they would have received if the Variation had not been implemented.

30.16 No liability unless Variation Order

Without limiting clauses 13.10(c) (Changes from Design Books) and 23.7(b) (Changes from Through Life Support Description), PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, any Variation, except where PPP Co is directed to carry out a Variation pursuant to a "Variation Order" issued by RailCorp under clause 30.4, 30.6, 30.9, 30.11 or 30.12.

30.17 Pre-Agreed Variation

- (a) RailCorp may, by notice to PPP Co at anytime prior to 30 June 2007, require PPP Co to implement the Pre-Agreed Variation or elect that it will not (and will not in the future) require PPP Co to implement the Pre-Agreed Variation. Where RailCorp requires PPP Co to implement or elects not to implement the Pre-Agreed Variation in accordance with this clause 30.17(a), the terms of this Contract will be deemed to have been amended in accordance with schedule 12 with effect from the date of issue of the notice.
- (b) RailCorp is not under any obligation to require PPP Co to implement the Pre-Agreed Variation and PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with RailCorp not requiring PPP Co to implement the Pre-Agreed Variation.
- (c) Where RailCorp requires PPP Co to implement the Pre-Agreed Variation in accordance with clause 30.17(a):
 - (i) PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with RailCorp requiring PPP Co to implement the Pre-Agreed Variation;
 - (ii) PPP Co will not be relieved of its liabilities or obligations (including those arising out of any warranties given under this Contract) whether under this Contract or otherwise according to any law; and
 - (iii) nothing will limit or otherwise affect RailCorp's rights against PPP Co (including those arising out of any warranties given under this Contract) whether under this Contract or otherwise according to any law.

31. PPP Co initiated Variations

31.1 No Variation without consent

PPP Co must not undertake any Variation without RailCorp's prior written consent.

31.2 PPP Co may propose a Variation

PPP Co may propose a Variation by giving a written notice with details of:

- (a) the proposed Variation;
- (b) the reason for the proposed Variation;
- (c) the Variation Costs it will incur, or the Variation Savings it will derive, by carrying out the proposed Variation;
- (d) the time within, and the manner in which, PPP Co proposes to implement the proposed Variation;
- (e) the effect the proposed Variation will have on the Delivery Programme; and
- (f) the effects which the proposed Variation will have on:²⁸
 - (i) the workmanship, durability or functional integrity of any element of the Project Works (including the Maintenance Facility Works), a Car, the Maintenance Facility or the Simulators;
 - (ii) PPP Co's ability to provide the Required Availability;
 - (iii) the Maintenance Facility;
 - (iv) the use of the Cars by RailCorp and its passengers;
 - (v) any Accreditation held or required by RailCorp, PPP Co or its Associates;
 - (vi) the safety of the Cars;
 - (vii) RailCorp's Facilities;
 - (viii) any training requirements;
 - (ix) PPP Co's ability to return the Maintenance Facility to RailCorp (or its nominee) in accordance with the requirements of this Contract; or
 - (x) PPP Co's ability to:
 - A. satisfy any warranty given by PPP Co under this Contract; or

²⁸ Under the Set 7 Waiver Letter (RC08847) dated 3 February 2012, PPP Co is not entitled to make any Claim against RailCorp arising out of any effect on the matters referred to in this clause 31.2(f) caused solely by the Variation described in paragraph (b) of RC08847, namely that, in respect of Sets 8 to 17, prior to presentation for Practical Completion and as a precondition to Practical Completion, each of Sets 8 to 17 will have accumulated at least 6,500 kms in the same configuration as it is presented for Practical Completion, with a continuous block of at least 1,500 of these kms being free of any faults of a technical nature which, if the Set was in service or due to enter service, would result in a cancellation or withdrawal of the Set from service.

B. perform any of its other obligations under this Contract.

31.3 PPP Co to provide statement

If RailCorp requires, PPP Co must provide in respect of any Variation it proposes:

- (a) a written statement stating that the proposed Variation:
 - (i) will not adversely affect the functional integrity of the Cars, the Maintenance Facility Works, the Maintenance Facility or the Simulators or the ability of PPP Co to provide the Required Availability or otherwise carry out PPP Co's Activities in accordance with this Contract; and
 - (ii) will not adversely affect the quality standards, warranties and other obligations required under this Contract; and
- (b) any other information and supporting documentation RailCorp requires.

31.4 RailCorp may approve or reject

If PPP Co gives a notice under clause 31.2 together with any written statement or other information or supporting documentation which RailCorp requires under clause 31.3, RailCorp:

- (a) will consider PPP Co's proposed Variation in good faith; and
- (b) subject to clause 31.5:
 - (i) may approve (with or without conditions) or reject the proposed Variation in its absolute discretion by notice to PPP Co (which in the case of an approval must be titled "Variation Approval"); and
 - (ii) will be under no obligation to approve the proposed Variation for the convenience of or to assist PPP Co.

If RailCorp approves the Variation:

- (c) PPP Co must proceed to implement the Variation on the basis approved by RailCorp; and
- (d) PPP Co will be relieved of its obligations under this Contract to the extent specified in RailCorp's approval.

31.5 Variation required as a result of a change in law

- (a) **(Change in law):** To the extent that any Variation requested by PPP Co is required to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility comply with a change in law, RailCorp must, in its discretion, either:
 - (i) approve the Variation proposed by PPP Co (by notice titled "Variation Approval");
 - (ii) direct PPP Co to carry out a Variation in accordance with clause ~~3031~~ to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility comply with the change in law; or
 - (iii) take such other action as RailCorp considers necessary to ensure the Project Works, the Sets, the Simulators or the Maintenance Facility

comply with the change in law (including modifying RailCorp's Facilities).

- (b) **(Change to RailCorp Facilities):** To the extent, as a direct result of a modification to RailCorp's Facilities, a Variation requested by PPP Co is required to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility have the same functionality as prior to such modification to RailCorp's Facilities, RailCorp must, in its discretion, either:
- (i) approve the Variation proposed by PPP Co (by notice titled "Variation Approval");
 - (ii) direct PPP Co to carry out a Variation in accordance with clause ~~30~~³¹ (RailCorp initiated Variations) to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility have the same functionality as prior to such modification to RailCorp's Facilities; or
 - (iii) take such other action as RailCorp considers necessary to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility have the same functionality as prior to such modification to RailCorp's Facilities (including making further modifications to RailCorp's Facilities).
- (c) **(If RailCorp approves Variation):** If RailCorp approves a Variation in accordance with clause 31.5(a)(i) or 31.5(b)(i):
- (i) PPP Co must proceed to implement the Variation on the basis of PPP Co's notice under clause 31.2 (as approved by RailCorp);
 - (ii) if the Variation is required to ensure that the Project Works, the Sets, the Simulators or the Maintenance Facility comply with a Qualifying Change in Law, clause 32 (Change in Law) will apply; and
 - (iii) if the Variation is required to ensure the Project Works, the Sets, the Simulators or the Maintenance Facility have the same functionality as prior to such modification to RailCorp's Facilities, PPP Co may submit a payment claim in accordance with clause 27 in respect of the relevant portion of the Variation Costs stated in PPP Co's notice under clause 31.2 (as approved by RailCorp) after each month in which the relevant work was undertaken.

31.6 PPP Co to bear risks and costs

Unless otherwise agreed in writing by RailCorp and subject to clause 31.5:

- (a) PPP Co will bear all risks and costs:
- (i) associated with proposing a Variation and providing the details under clause 31.2 and complying with clause 31.3;
 - (ii) reasonably incurred by RailCorp in assessing a Variation proposed by PPP Co; and
 - (iii) associated with carrying out a Variation proposed by PPP Co and approved by RailCorp under clause 31.4; and

- (b) PPP Co will not be entitled to make any Claim against RailCorp arising out of, or in any way in connection with, a Variation proposed by PPP Co and approved by RailCorp under clause 31.4.

31.7 Variation Savings

If PPP Co implements a Variation in accordance with this clause 31, that results in Variation Savings, PPP Co must pay RailCorp 50% of the Variation Savings as follows:

- (a) to the extent that the Variation Savings relate to the Delivery Phase Activities, the Variation Savings may be set off against any Variation Costs for another Variation in respect of the Delivery Phase Activities or Milestone Payments payable by RailCorp to PPP Co or where this is not set-off, it must be paid by PPP Co to RailCorp progressively within 10 Business Days after each month in which:
 - (i) the relevant work the subject of the Variation was performed; or
 - (ii) if the Variation involved the deletion or omission of work, the relevant work which has been deleted or omitted would have been undertaken but for the Variation;
- (b) to the extent that the Variation Savings relate to the TLS Phase Activities, RailCorp may set-off against its obligations to pay the TLS Payments, the Variation Savings in the manner and at the time as agreed between RailCorp and PPP Co or, to the extent that they fail to agree, as determined in accordance with clause 53 (Dispute resolution). In making a determination, the expert or arbitrator must ensure, and the parties must require that the expert or arbitrator ensures, the timing of the payment will not have an adverse impact upon the ability which, prior to the change:
 - (i) PPP Co Finance Co or PPP Co (as applicable) had to pay or repay the Actual Debt on the due dates for payment (without regard to any acceleration of the obligation to repay); and
 - (ii) PPP Co Holding Co had to give the Equity Investors the Equity Return they would have received if the Variation had not been made.

32. Change in Law

32.1 Non-Qualifying Changes in Law

Subject to clause 32.2, PPP Co will be liable for the consequences of, and will have no Claim against RailCorp arising out of or in any way in connection with, a change in law.

32.2 Qualifying Change in Law

If, and to the extent, a Qualifying Change in Law occurring after the date of this Contract requires PPP Co to incur:

- (a) in the case of a Discriminatory Change in Law, a Change in Railway Law or a Change in Disability Law, additional costs; or
- (b) in the case of a General Change in Laws, Capital Expenditure,

PPP Co:

- (c) must use all reasonable endeavours to minimise such additional costs or Capital Expenditure; and

- (d) subject to clause 7.4 (Modifications to Planning Approval), may claim compensation in respect of such additional costs or Capital Expenditure (net of any savings) in accordance with this clause 32.

32.3 Notice of proposed Qualifying Change in Law

If PPP Co becomes aware of a proposed Qualifying Change in Law, PPP Co must:

- (a) promptly notify RailCorp of the proposed Qualifying Change in Law; and
- (b) if requested by RailCorp:
 - (i) provide RailCorp with details of the likely effects of the Qualifying Change in Law on PPP Co; and
 - (ii) otherwise consult with RailCorp in relation to the proposed Qualifying Change in Law.

32.4 Compensation for Discriminatory Change in Law, Change in Railway Law or Change in Disability Law

If the Qualifying Change in Law is a Discriminatory Change in Law, a Change in Railway Law or a Change in Disability Law, RailCorp must compensate PPP Co by way of:

- (a) to the extent that the Change in Law increases the cost of performing the Delivery Phase Activities, a payment after each month in which the additional costs are incurred; and
- (b) to the extent that the Change in Law increases the cost of performing the TLS Phase Activities, either of the following, at RailCorp's discretion,
 - (i) an increase to the Availability Payments over the balance of the Contract Term;
 - (ii) a lump sum to be paid at the time of the next Availability Payment; or
 - (iii) a payment after each month in which the additional costs are incurred,which, in each case, puts PPP Co in the same financial position it would have been in had the Change in Law not occurred.

32.5 Compensation for General Changes in Law

If PPP Co submits the notices required by clause 32.3 and the Qualifying Change in Law is a General Change in Law:

- (a) **(Capex):** any additional Capital Expenditure incurred by PPP Co in performing the TLS Phase Activities as a result of the General Change in Law will be shared as follows:
 - (i) PPP Co will bear 100% of the additional Capital Expenditure up to \$500,000 (CPI Indexed) in the aggregate for all General Changes in Law;
 - (ii) RailCorp and PPP Co will each bear 50% of the additional Capital Expenditure between \$500,000 (CPI Indexed) and \$1 million (CPI Indexed) in the aggregate for all General Changes in Law; and

- (iii) RailCorp will bear 100% of the additional Capital Expenditure above \$1 million (CPI Indexed) in the aggregate for all General Changes in Law; and
- (b) **(Form of compensation):** RailCorp must compensate PPP Co for RailCorp's share of the additional Capital Expenditure. RailCorp may, at its discretion, choose to compensate PPP Co by way of:
 - (i) an increase to the Availability Payments over the balance of the Contract Term;
 - (ii) a lump sum to be paid at the time of the next Availability Payment; or
 - (iii) a payment after each month in which the additional Capital Expenditure is incurred.

32.6 Exception

Clauses 32.4(a) and 32.5 do not apply in respect of costs or Capital Expenditure incurred by PPP Co to the extent such costs or Capital Expenditure:

- (a) are incurred or relate to the period prior to PPP Co providing the notification under clause 32.3(a); or
- (b) result from a failure by PPP Co to comply with, or could have been avoided if PPP Co had complied with, its obligations under clause 32.2 or clause 32.3.

33. Force Majeure

33.1 Force Majeure Events

Each of the following events is a Force Majeure Event:

- (a) lightning, earthquake, cyclone, natural disaster, landslide, mudslide, fire and explosion;
- (b) a flood which might be expected to occur once or less in every 50 years;
- (c) a "terrorist act" (as defined in section 5 of the *Terrorism Insurance Act 2003* (Cth) as at the date of this Contract);
- (d) war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection or military or usurped powers, martial law or confiscation by order of any Authority;
- (e) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (f) a failure of supply of any Utility Service to the RailCorp Project Land, other than a failure of supply of electricity;
- (g) Industrial Action within Australia affecting the Project which has been caused by the party that is not the Affected Party; or
- (h) state wide or industry wide Industrial Action within Australia excluding any such Industrial Action caused by the Affected Party or its Associates,

which:

- (i) is beyond the reasonable control of the Affected Party and its Associates; and
- (j) prevents or delays the Affected Party from performing any of its non-financial obligations under this Contract where that cause or the consequences of the cause:
 - (i) has not resulted from the Affected Party breaching a term of the Project Agreements; and
 - (ii) if the Affected Party is PPP Co, could not have been prevented, avoided, remedied or overcome by PPP Co or its Associates taking those steps which a prudent, experienced and competent designer, constructor and maintainer of rolling stock and rolling stock maintenance facilities (as applicable) would have taken.

33.2 Notification

- (a) If the Affected Party alleges or wishes to claim that a Force Majeure Event has occurred it must promptly give the other party notice of the Force Majeure Event as soon as the Affected Party becomes aware of the occurrence of the Force Majeure Event.
- (b) As soon as reasonably practicable after giving notice under clause 33.2(a), if the Affected Party is PPP Co, PPP Co must give RailCorp (progressively if necessary) full particulars of relevant matters pertaining to the Force Majeure Event including:
 - (i) the nature of the Force Majeure Event;
 - (ii) the obligations affected;
 - (iii) the action that PPP Co has taken and/or proposes to take to remedy, overcome or mitigate the situation;
 - (iv) an estimate of the time during which PPP Co will be unable to carry out the affected obligations due to the Force Majeure Event;
 - (v) an estimate of the costs that PPP Co will incur to remedy, overcome or mitigate the situation (including pursuant to clause 33.6); and
 - (vi) all insurance moneys to which PPP Co believes it will be entitled in making good damage caused by the Force Majeure Event.
- (c) After giving notice under clause 33.2(a) and, if the Affected Party is PPP Co, clause 33.2(b), PPP Co must continue to keep RailCorp's Representative informed of all relevant information pertaining to the Force Majeure Event.

33.3 Meeting

The parties must meet within 5 Business Days of delivery of a notice under clause 33.2(a) to determine:

- (a) whether a Force Majeure Event has occurred;
- (b) the extent to which the Force Majeure Event is covered by insurance; and
- (c) the estimated duration of the Force Majeure Event.

33.4 Suspension of obligations

If a Force Majeure Event occurs and the Affected Party gives notice under clause 33.2(a), then:

- (a) the Affected Party's non-financial obligations under this Contract (other than this clause 33) which are affected by the Force Majeure Event will be suspended, but only to the extent and for so long as the Force Majeure Event prevents or delays the Affected Party from performing those obligations; and
- (b) no default notice may be given under clause 49.6 (Default Notice) in respect of a breach of such obligations during the period of suspension.

Upon the Affected Party becoming able to recommence performing its obligations which were suspended under clause 33.4(a), subject to a reasonable period in order to remobilise, the Affected Party must recommence the performance of its obligations.

33.5 Availability Payments

Subject to clauses 22.6 (When is a Set deemed to be Available?) and 33.12(b)(i), nothing in this clause 33 will oblige RailCorp to pay any Availability Payments with respect to Sets which are not Available due to a Force Majeure Event.

33.6 Best endeavours to mitigate effect

During the period of suspension under clause 33.4, the Affected Party must use its best endeavours to overcome or mitigate the effects of the Force Majeure Event. This may include incurring reasonable expenditure, rescheduling resources or implementing appropriate temporary measures.

33.7 Alternative arrangements

During the period of suspension under clause 33.4, RailCorp may make alternative arrangements for the performance of any suspended obligations of PPP Co (without incurring any liability to PPP Co, except to the extent set out in clause 22.6(g)).

33.8 Cessation of Force Majeure Event

The Affected Party must notify the other party immediately after it ceases to be prevented or delayed from performing its obligations as a result of a Force Majeure Event.

33.9 No financial relief to PPP Co

Subject to clauses 15.10 (Delay damages), 22.6 (When is a Set deemed to be Available?) and 33.12(b)(i), RailCorp will not be obliged to provide any financial relief to PPP Co during the period of suspension, to the extent of the suspension.

33.10 No compensation to RailCorp

PPP Co will not be liable to compensate RailCorp for any costs or losses which RailCorp incurs during the period of suspension in respect of the suspended obligations.

33.11 Termination for Force Majeure Event

If the Force Majeure Event prevents PPP Co from performing its material non-financial obligations for a continuous period of at least 180 days then, subject to clause 33.12, either party may terminate this Contract by giving 20 Business Days' notice to the other party.

33.12 Suspension of PPP Co's right to terminate

- (a) If PPP Co gives a termination notice under clause 33.11, RailCorp may suspend PPP Co's right to terminate by giving a suspension notice within 20 Business Days of receipt of PPP Co's termination notice.

- (b) If RailCorp gives PPP Co a suspension notice then:
- (i) RailCorp must, during the period PPP Co's right to terminate is suspended, pay PPP Co the Availability Payment and KPI Payment which would have been payable based on the average performance of PPP Co for the 6 months immediately prior to the occurrence of the Force Majeure Event less an amount equal to PPP Co's net saved costs, being the costs which PPP Co would have incurred but for the suspension of its obligations under clause 33.4 during the relevant period after deducting any reasonable demobilisation costs associated with the suspension; and
 - (ii) this Contract will not terminate until RailCorp notifies PPP Co that it is ending the suspension of PPP Co's right to terminate.
- (c) If PPP Co becomes able to recommence performing the relevant obligations after RailCorp gives PPP Co a suspension notice:
- (i) PPP Co must recommence performance of those obligations;
 - (ii) PPP Co's termination notice under clause 33.11 will cease to have any effect.

34. Reinstatement of loss or damage

34.1 Reinstatement of Cars

- (a) If a Car (or any Project Works in respect of a Car) is damaged, lost or destroyed during the Delivery Phase then PPP Co must repair or replace the Car within a reasonable period specified by RailCorp's Representative (having regard to PPP Co's obligations with respect to the holding of spare parts under clause 2.7.5 of the RailCorp TLS Specification).
- (b) If a Car is damaged, lost or destroyed after the end of the Delivery Phase and it is economically practicable to repair or replace the Car then PPP Co must repair or replace the Car within a reasonable period specified by RailCorp's Representative (having regard to PPP Co's obligations with respect to the holding of spare parts under clause 2.7.5 of the RailCorp TLS Specification), unless RailCorp's Representative gives a notice in writing to PPP Co that clause 34.2(b)(iv) or 34.2(d)(iv) is to apply.
- (c) If a Car is damaged, lost or destroyed after the end of the Delivery Phase and it is not economically practicable to repair or replace the Car then PPP Co will not be obliged to repair or replace the Car.
- (d) If the parties are unable to reach agreement on whether or not it is practicable to repair or replace the Car within 20 Business Days after the date on which it is damaged, lost or destroyed, either party may refer the matter for dispute resolution under clause 53.
- (e) Without limiting PPP Co's obligations under clause 23 (Through Life Support) or the operation of the KPI Regime, references in this clause 34 to damage, loss or destruction of a Car do not include fair wear and tear after the Date of Practical Completion of the relevant Set.

34.2 Risk of loss or damage to Cars

- (a) **(Prior to Practical Completion and not Excepted Risk - PPP Co bears loss):** PPP Co bears the risk of damage to or loss or destruction of a Car (or the Project Works relating to a Car) which:
- (i) occurs prior to the Date of Practical Completion of the Set containing the Car; and
 - (ii) does not arise from an Excepted Risk,
- and PPP Co must bear the cost of carrying out the repair or replacement work arising from any such damage, loss or destruction (to the extent the Insurance Proceeds, if any, are insufficient).
- (b) **(After Practical Completion and not attributable to PPP Co, or Excepted Risk - RailCorp bears loss):** RailCorp bears the risk of damage to or loss or destruction of a Car (other than Minor Graffiti) which:
- (i) occurs:
 - A. after the Date of Practical Completion of the Set containing the Car; and
 - B. other than during a Maintenance Period,and is not attributable to:
 - C. an act or omission of PPP Co or its Associates; or
 - D. an event which occurred prior to the Date of Practical Completion of the Set; or
 - (ii) arises from an Excepted Risk,
- and:
- (iii) if PPP Co is required to repair or replace the Car under clause 34.1 and RailCorp's Representative does not give a notice under clause 34.1(b) that clause 34.2(b)(iv) is to apply, RailCorp must pay PPP Co the reasonable cost of carrying out the repair or replacement work arising from any such damage, loss or destruction (to the extent the Insurance Proceeds, if any, are insufficient); or
 - (iv) if PPP Co is not required to repair or replace the Car under clause 34.1 or RailCorp gives PPP Co a written notice under clause 34.1(b) or clause 36.12 that this clause is to apply:
 - A. RailCorp and PPP Co must meet and negotiate in good faith with a view to agreeing upon the means by which:
 - 1) PPP Co is able to continue to provide the Required Availability (or an agreed lesser Required Availability); and
 - 2) PPP Co is entitled to earn the same level of Availability Payments it would have earned but for the damage, loss or destruction to the Car,

and the parties acknowledge that the outcome of these negotiations may include rotating any spare Cars as part of the Required Availability or RailCorp using a Set which contains less than 8 Cars; and

B. if RailCorp and PPP Co do not come to an agreement pursuant to clause 34.2(b)(iv)A which is reduced to writing and executed by the parties in a manner which is contractually binding on them within 30 Business Days of:

- 1) the parties agreeing or it being determined by dispute resolution under clause 53 that it is not practicable to repair or replace the Car under clause 34.1; or
- 2) RailCorp issuing a notice under clause 34.1(b) or clause 36.12(d)(ii) that this clause 34.2(b)(iv) is to apply,

(as the case may be), then:

- 3) the Required Availability will be adjusted appropriately to reflect the decrease in the number of Cars; and
- 4) RailCorp must pay to PPP Co an amount which ensures that PPP Co is left in a no better and no worse position after the Base Case Financial Model has been adjusted to reflect the change to Required Availability following the damage, loss or destruction of the Car and the payment of this amount and any Insurance Proceeds received by PPP Co.

(c) **(During Maintenance Period and not Excepted Risk - PPP Co bears loss):** PPP Co bears the risk of damage to or loss or destruction of a Car which:

- (i) occurs during a Maintenance Period; and
- (ii) does not arise from an Excepted Risk,

and:

- (iii) if PPP Co is required to repair or replace the Car under clause 34.1, PPP Co must bear the cost of the repair or replacement work arising from such damage, loss or destruction (to the extent the Insurance Proceeds, if any, are insufficient); or
- (iv) if PPP Co is not required to repair or replace the Car under clause 34.1:

A. RailCorp and PPP Co must meet and negotiate in good faith with a view to agreeing upon the means by which:

- 1) PPP Co is able to continue to provide the Required Availability (or an agreed lesser Required Availability); and

- 2) PPP Co is entitled to earn the same level of Availability Payments it would have earned but for the damage, loss or destruction to the Car (with an appropriate adjustment to the Availability Payments where the level of service received by RailCorp is less),

and the parties acknowledge that the outcome of these negotiations may include rotating any spare Cars as part of the Required Availability or RailCorp using a Set which contains less than 8 Cars; and

- B. if RailCorp and PPP Co do not come to an agreement pursuant to clause 34.2(c)(iv)A which is reduced to writing and executed by the parties in a manner which is contractually binding on them within 30 Business Days of the parties agreeing or it being determined by dispute resolution under clause 53 that it is not practicable to repair or replace the Car under clause 34.1:

- 1) the Required Availability will be adjusted appropriately to reflect the decrease in the number of Cars; and
- 2) RailCorp will not be obliged to provide any financial relief or compensation to PPP Co on account of Availability Payments which PPP Co would have earned but for the damage, loss or destruction to the Car.

- (d) **(After Practical Completion and attributable to PPP Co - parties share loss):**
The parties will share the risk of damage to or loss or destruction of a Car which:

- (i) occurs:

- A. after the Date of Practical Completion of the Set containing the Car; and
- B. other than during a Maintenance Period; and

- (ii) is attributable to:

- A. an act or omission of PPP Co or its Associates; or
- B. an event which occurred prior to the Date of Practical Completion of the Set,

as follows:

- (iii) if PPP Co is required to repair or replace the Car under clause 34.1 and RailCorp's Representative does not give a notice under clause 34.1(b) that clause 34.2(d)(iv) is to apply:

- A. PPP Co will be liable for the first \$500,000 (CPI Indexed) of the costs of repair or replacement (to the extent the Insurance Proceeds, if any, are insufficient); and

- B. RailCorp must pay PPP Co the reasonable costs of carrying out the repair or replacement work (to the extent the Insurance Proceeds, if any, are insufficient) in excess of \$500,000 (CPI Indexed); and
- (iv) if PPP Co is not required to repair or replace the Car under clause 34.1 or RailCorp gives PPP Co a written notice under clause 34.1(b) that this clause is to apply:

- A. RailCorp and PPP Co must meet and negotiate in good faith with a view to agreeing upon the means by which:
- 1) PPP Co is able to continue to provide the Required Availability (or an agreed lesser Required Availability); and
 - 2) PPP Co is entitled to earn the same level of Availability Payments it would have earned but for the damage, loss or destruction to the Car, less \$500,000 (CPI Indexed),

and the parties acknowledge that the outcome of these negotiations may include rotating any spare Cars as part of the Required Availability or RailCorp using a Set which contains less than 8 Cars; and

- B. if RailCorp and PPP Co do not come to an agreement pursuant to clause 34.2(d)(iv)A which is reduced to writing and executed by the parties in a manner which is contractually binding on them within 30 Business Days of:
- 1) the parties agreeing or it being determined by dispute resolution under clause 53 that it is not practicable to repair or replace the Car under clause 34.1; or
 - 2) RailCorp issuing a notice under clause 34.1(b) that this clause 34.2(d)(iv) is to apply,

(as the case may be), then:

- 3) the Required Availability will be adjusted appropriately to reflect the decrease in the number of Cars;
- 4) subject to clause 34.2(d)(iv)B.5), RailCorp must pay to PPP Co an amount which ensures that PPP Co is left in a no better and no worse position after the Base Case Financial Model has been adjusted to reflect the change to Required Availability following the damage, loss or destruction of the Car and the payment of this amount and any Insurance Proceeds received by PPP Co; and
- 5) PPP Co must pay to RailCorp \$500,000 (CPI Indexed).

34.3 Risk of loss or damage to Maintenance Facility or Simulators

- (a) PPP Co bears the risk of any damage to or loss or destruction of:
- (i) prior to the Date of Practical Completion of the Maintenance Facility Works, the Maintenance Facility Works;
 - (ii) after the Date of Practical Completion of the Maintenance Facility Works, the Maintenance Facility (other than the Returned Facilities), except for any damage or loss or destruction caused by a breach by RailCorp of its obligations under clause 14A;
 - (iii) the Unfixed Maintenance Plant and Equipment;
 - (iv) the Maintenance Parts and Materials;
 - (v) prior to the Date of Practical Completion of the Simulators, the Simulators; or
 - (vi) after the Date of Practical Completion of the Simulators, the Simulators to the extent that the damage to or loss or destruction is attributable to:
 - A. an act or omission of PPP Co or its Associates; or
 - B. an event which occurred prior to the Date of Practical Completion of the Simulators,

and PPP Co must repair, replace or reinstate them within a reasonable period specified by RailCorp's Representative if any such damage, loss or destruction occurs. The repair or replacement work must be carried out at PPP Co's cost, unless the damage, loss or destruction arises from an Excepted Risk.

- (b) If the damage, loss or destruction arises from an Excepted Risk then RailCorp must pay PPP Co the reasonable cost of carrying out the repair, replacement or reinstatement work.
- (c) Subject to clause 34.3(a)(vi), RailCorp bears the risk of any damage to or loss or destruction of the Simulators after the Date of Practical Completion of the Simulators. Where any damage to or loss or destruction of the Simulators occurs after the Date of Practical Completion of the Simulators for which RailCorp is responsible under this clause 34.3(c):
- (i) PPP Co must repair, replace or reinstate the Simulators within a reasonable period specified by RailCorp's Representative; and
 - (ii) RailCorp must pay PPP Co the reasonable cost of carrying out the repair, replacement or reinstatement work.

34.4 Reinstatement work

Where PPP Co is required to repair, replace or reinstate a Car, the Simulators, the Maintenance Facility Works, the Maintenance Facility, the Unfixed Maintenance Plant and Equipment or the Maintenance Parts and Materials, PPP Co must:

- (a) take immediate steps to clear debris and begin initial repair work, subject to allowing reasonable time for inspection by insurers;

- (b) promptly consult with RailCorp and carry out steps necessary to ensure that:
 - (i) the repair, replacement or reinstatement work complies with the Specifications and is completed within a reasonable period as specified by RailCorp's Representative (having regard to matters including the need for an appropriate transition-in period for the relevant Car in returning to service); and
 - (ii) to greatest extent possible, PPP Co continues to comply with its obligations under the RailCorp Project Agreements;
- (c) manage all repair, replacement and reinstatement activities so as to minimise any impact on railway operations;
- (d) keep RailCorp informed of progress of repair, replacement and reinstatement activities; and
- (e) subject to the Debt Finance Side Deed, apply all Insurance Proceeds towards the cost of repair, replacement or reinstatement.

34.5 Damage to third party property

Without limiting clause 35 (Indemnity and limitation of liability), where any damage to or loss or destruction of real or personal property of third parties occurs which arises out of:

- (a) a breach by PPP Co of its obligations under this Contract, PPP Co must promptly repair the damage, loss or destruction at PPP Co's cost; and
- (b) PPP Co's Activities, PPP Co must promptly repair, replace or reinstate the damage, loss or destruction (where PPP Co has legal liability to do so), or if the affected person agrees, reasonably compensate the affected person (where PPP Co has legal liability to do so).

If PPP Co fails to carry out the repair, replacement or reinstatement work or pay reasonable compensation (where this clause 34.5 requires PPP Co to do so), RailCorp may after giving reasonable prior notice to PPP Co carry out the repair, replacement or reinstatement work or pay reasonable compensation and any Loss incurred by RailCorp will be a debt due and payable from PPP Co to RailCorp.

35. Indemnity and limitation on liability

35.1 Indemnity from PPP Co

Subject to clause 35.2, PPP Co must indemnify RailCorp from and against any Claim or Loss brought against, suffered or incurred by RailCorp in respect of:

- (a) damage to, loss or destruction of, or loss of use (whether total or partial) consequent on the damage to or loss or destruction of, any real or personal property (including property belonging to RailCorp);
- (b) any injury to, or death or disease of, persons; or
- (c) any reasonably foreseeable economic loss (including increased cost of working and loss of net revenue), arising directly as a result of damage to, loss or destruction of, or loss of use of any real or personal property (except to the extent the economic loss results from an event which results in a Reliability and Disruption Adjustment),

to the extent caused or contributed to by:

- (d) any breach by PPP Co of any RailCorp Project Agreement; or
- (e) any other wrongful (including negligent) act or omission of PPP Co or its Associates in respect of:
 - (i) PPP Co's Activities; or
 - (ii) the use or occupation of the Maintenance Site or the Associated Work Sites by PPP Co or its Associates.

35.2 Exclusion from indemnity

PPP Co's liability under clause 35.1 will be reduced to the extent that:

- (a) a Claim or Loss arises from a fraudulent or wrongful (including negligent) act or omission of RailCorp or its Associates or a breach by RailCorp of any RailCorp Project Agreement;
- (b) a Claim or Loss arises from loss of use (whether total or partial) of the Sets or any real or personal property belonging to RailCorp and such loss of use results from an event which results in a Reliability and Disruption Adjustment;
- (c) where RailCorp has assumed control of an Insurance claim or a Claim, the conduct of that claim by RailCorp (including the terms on which it is settled) directly or indirectly reduce the proceeds available under any Insurance;
- (d) an act or omission of RailCorp (other than as referred to in clause 35.2(c)) directly or indirectly reduces the proceeds available under any Insurance; or
- (e) a Claim or Loss arises from RailCorp or its Associates failing to take any reasonably necessary steps to mitigate any Losses or the effect of any Claim,

provided that nothing in clauses 35.2(d) or 35.2(e) will reduce PPP Co's liability under clause 35.1 to the extent RailCorp acts in good faith:

- (f) to protect passengers, employees of RailCorp, the general public, RailCorp's Facilities or any other property; or
- (g) in the exercise by RailCorp of its statutory powers or functions.

35.3 Obligations not affected

Clause 35.1 does not lessen PPP Co's other obligations under this Contract.

35.4 Not used

35.5 Limitation on liability

Subject to clause 35.6, the liability of PPP Co to RailCorp:

- (a) under, or for matters covered by, clause 35.1; or
- (b) for:
 - (i) indirect, consequential or pure economic loss of any kind;
 - (ii) increased cost of working or loss of net revenue, business or opportunity arising from damage to, loss or destruction of, or loss of use consequent

on the damage to or loss or destruction of, real or personal property belonging to RailCorp; or

(iii) third party claims or liabilities,

caused by, arising out of, or in any way in connection with:

(iv) PPP Co's Activities;

(v) the use or occupation of the Maintenance Site or the Associated Work Sites by PPP Co or its Associates; or

(vi) any act or omission of PPP Co or its Associates in relation to, or in consequence of, the Project (including from the performance or non-performance by PPP Co of its obligations under the Project Agreements),

and whether by way of indemnity, by statute (to the extent that it is possible to limit or exclude such liability), in tort (for negligence or otherwise) or on any other basis at law or in equity, is limited to \$250 million (CPI Indexed) for each event giving rise to a liability of PPP Co to RailCorp ("**Liability Event**").

35.6 Exclusions from limitation on liability

Clause 35.5 does not apply to, limit or restrict in any way:

(a) the application of any Reliability and Disruption Adjustment;

(b) PPP Co's liability for third party claims or liabilities in respect of any injury to, or death or disease of, persons;

(c) PPP Co's liability for Loss caused by the malicious or fraudulent acts of PPP Co or its Associates;

(d) any liability exceeding \$250 million (CPI Indexed) per Liability Event to the extent to which it is recovered by PPP Co under any Insurance (or would have been recovered but for any conduct on the part of PPP Co or any other insured (except RailCorp) under the Insurances which entitles an insurer to avoid the relevant contract of insurance or to reduce its liability under the relevant contract of insurance);

(e) PPP Co's liability for Loss exceeding \$250 million (CPI Indexed) per Liability Event, to the extent such Loss is recovered by PPP Co from a third party (such as PPP Co's Associates);

(f) liability which is otherwise limited by any other provision of this Contract; and

(g) liability which, by law, PPP Co cannot limit or exclude.

35.7 No circularity

(a) In determining:

(i) whether an Insurance extends to cover PPP Co in respect of any matter referred to in clause 35.5 and the liability (if any) of PPP Co arising out of or in connection with that matter;

(ii) the amount recovered or recoverable by PPP Co under an Insurance in connection with the matter referred to in clause 35.5;

- (iii) whether PPP Co has a Claim for contribution against a third party in connection with any Liability Event; or
- (iv) the amount recovered or recoverable by PPP Co from a third party as a result of a Liability Event,

(together the "**Determinable Matters**"), the limitation on PPP Co's liability pursuant to clause 35.5 will be disregarded and it must be assumed that PPP Co has paid in full the amount of its liability to RailCorp (unlimited by clause 35.5) in a manner which entitles PPP Co to claim under a relevant Insurance or recover from a third party.

- (b) PPP Co waives and disclaims any right or entitlement it may now or in the future have, but for this clause 35.7(b), to:
 - (i) not disregard clause 35.5, in connection with any determination of the Determinable Matters; or
 - (ii) do any of the following:
 - A. claim or assert (including by way of defence, counter-claim or third party proceeding); or
 - B. instigate, participate in, consent to, or lend its name to, any action or proceedings of any kind under which it is claimed or asserted (including by way of defence, counter-claim or third party proceeding),

that clause 35.5 is not to be disregarded in connection with the determination of the Determinable Matters.

- (c) The parties agree that clauses 35.7(a) and 35.7(b) may be pleaded in bar to any claim or assertion by:
 - (i) PPP Co;
 - (ii) any insurer; or
 - (iii) any third party,

in any Claim to the effect that clause 35.5 is not to be disregarded as provided in clause 35.7(a).

- (d) If clause 35.5 is for any reason taken into account in determining any Determinable Matter for the benefit of PPP Co, an insurer or a third party, clause 35.5 will be treated as if it was severed from, and had never been a term of, this Contract and as of no force or effect whatsoever as against the person(s) who benefits from clause 35.5 being so taken into account.

35.8 Insurance claims and third party actions

In relation to any matter referred to in clause 35.1 and which results in a Claim or Loss in respect of which RailCorp is entitled to be indemnified PPP Co must:

- (a) diligently pursue any claim which it has made under any Insurance including by:
 - (i) providing such notices and if, and to the extent it is able to do so, evidence in support of the Insurance claim as the relevant insurer requires; and

- (ii) without limiting clause 35.8(a)(i), taking such action (including legal proceedings) as the relevant insurer may require in connection with the Insurance claim;
- (b) take such action (including legal proceedings against the relevant insurer) in relation to the matter as RailCorp reasonably requires to enforce any Insurance claim and obtain payment or indemnification pursuant to an Insurance;
- (c) at RailCorp's option:
 - (i) take such action (including legal proceedings) as RailCorp requires to enforce any associated Claim against a third party and collection of any moneys recoverable against a third party in connection with such a Claim; or
 - (ii) validly assign to RailCorp all Claims against a third party which PPP Co has in connection with the matter;
- (d) subject to the rights of any insurer under an Insurance, if RailCorp requests, permit RailCorp to assume control (at PPP Co's expense) of any associated:
 - (i) claim under an Insurance; or
 - (ii) Claim against a third party,

and give or lend its name to any reasonable act, deed, document, instrument, action or proceedings for the pursuit or enforcement of such Insurance claim or Claim against a third party as RailCorp reasonably requires provided that where RailCorp assumes control of any claim under an Insurance, RailCorp will diligently pursue any such claim, take such action as the relevant insurer may require in connection with the claim, keep PPP Co informed of developments in relation to the progress of the claim and consult with PPP Co in relation to any proposed settlement of the claim (provided that if RailCorp has assumed control of a claim under an Insurance pursuant to this claim, RailCorp will determine whether to settle the claim and on what terms);
- (e) keep RailCorp informed concerning the form and substance of all actions taken in accordance with clauses 35.8(a) to 35.8(c) including, without limiting clauses 35.8(d) or 35.8(f), regarding any settlement or compromise or any proposed settlement or compromise, of a claim under an Insurance or a Claim against a third party;
- (f) not compromise or settle any claim under an Insurance or Claim against a third party without the prior written consent of RailCorp's Representative (which must not be unreasonably withheld or delayed); and
- (g) provide RailCorp with access to information and documents in its possession and control and otherwise with such information as RailCorp reasonably requests in relation to any claim under an Insurance or Claim against a third party including access to employees with knowledge of the relevant matter.

This clause 35.8 does not limit PPP Co's obligations under clause 36.14 (Claims under Insurances).

36. Insurance

36.1 Delivery Phase Insurances

From the date of Financial Close, PPP Co must effect and maintain (or cause to be effected and maintained) the following insurances for amounts not less than, and with deductibles not more than, those specified in schedule 9 (Insurance - Sums insured and deductibles):

(a) **(Cars):**

(i) **(contract works insurance):** a contract works or construction risks insurance policy:

- A. in respect of the Project Works relating to the Cars and the Simulators, the Rolling Stock Manufacturer's production line, plant and equipment, and all materials and things brought to the Project Site by PPP Co or its Associates for the purpose of designing, manufacturing, Testing and Commissioning the Cars and the Simulators including inland transit cover and cover for goods and materials stored off site;
- B. against physical damage, loss or destruction and such other insurable risks as are reasonably required by RailCorp;
- C. covering Testing and Commissioning activities; and
- D. covering PPP Co, the Rolling Stock Manufacturer, RailCorp and others as described in the policy for their respective rights and interests;

(ii) **(transit insurance):** a transit insurance (including wet marine insurance) policy:

- A. in respect of the Cars and the Simulators and all materials, components and things which are intended to be used for or incorporated in the Cars and the Simulators;
- B. against physical damage, loss or destruction and such other insurable risks as are reasonably required by RailCorp; and
- C. covering PPP Co, the Rolling Stock Manufacturer, RailCorp and others as described in the policy for their respective rights and interests;

(iii) **(general liability insurance):** a public and products liability insurance policy, written on an occurrence basis, which covers the liability of PPP Co and the Rolling Stock Manufacturer (including to RailCorp) in respect of:

- A. damage to, loss or destruction of, or loss of use of, real or personal property; and
- B. injury to, or death or disease of, any persons (other than employees),

arising out of, or in connection with, the design, manufacture, Testing and Commissioning of the Cars and the Simulators; and

- (iv) **(professional indemnity insurance):** a project specific professional indemnity insurance policy covering the liability of PPP Co and EDI Rail in respect of any breach of a duty owed in a professional capacity by PPP Co, the Rolling Stock Manufacturer and anyone engaged by them in a professional capacity;
- (b) **(Maintenance Facility Works):**
- (i) **(contract works insurance):** a contract works or construction risks policy:
 - A. in respect of the Maintenance Facility Works (including any associated temporary works) and all materials and things brought to the Project Site by PPP Co or its Associates for the purposes of designing, constructing and commissioning the Maintenance Facility Works including inland transit cover and cover for goods and materials stored off site;
 - B. against physical damage, loss, destruction and such other insurable risks as are reasonably required by RailCorp; and
 - C. covering PPP Co, RailCorp, Maintenance Facility Contractor and others as described in the policy for their respective rights and interests;
 - (ii) **(transit insurance):** a transit insurance (including wet marine insurance) policy:
 - A. in respect of all materials, components and things which are intended to be used for or incorporated in the Maintenance Facility Works;
 - B. against physical damage, loss, destruction and such other insurable risks as are reasonably required by RailCorp; and
 - C. covering PPP Co, RailCorp, Maintenance Facility Contractor and others as described in the policy for their respective rights and interests;
 - (iii) **(general liability insurance):** a public and products liability insurance policy, written on an occurrence basis, which covers the liability of PPP Co and the Maintenance Facility Contractor (including to RailCorp) in respect of:
 - A. damage to, loss or destruction of, or loss of use of, real or personal property; and
 - B. injury to, or death or disease of, any persons (other than employees),

arising out of, or in connection with, the design, construction or commissioning of the Maintenance Facility Works; and
 - (iv) **(professional indemnity insurance):** a project specific professional indemnity insurance policy covering the liability of PPP Co and EDI Rail in respect of any breach of a duty owed in a professional capacity by PPP Co, the Maintenance Facility Contractor and anyone engaged by them in a professional capacity; and

- (c) **(General):**
- (i) **(employers' liability and workers' compensation insurance):** an employers' liability and workers' compensation insurance policy or registration against any liability for death of, or injury to, persons employed by PPP Co, or employed by those PPP Co's Contractors which are required by law to effect and maintain such insurance in carrying out the Delivery Phase Activities, whether under statute or at common law;
 - (ii) **(third party property damage motor vehicle insurance):** a motor vehicle insurance policy which covers third party property damage related to any motor vehicles used in the performance of the Delivery Phase Activities; and
 - (iii) **(compulsory third party motor vehicle insurance):** compulsory third party motor vehicle insurance, in respect of all registrable motor vehicles used in the performance of the Delivery Phase Activities.

36.2 TLS Phase Insurances

From the Date of Practical Completion of the Maintenance Facility Works, PPP Co must effect and maintain (or cause to be effected and maintained) the following insurances for amounts not less than, and with deductibles not more than, those specified in schedule 9 (Insurances - sums insured and deductibles):

- (a) **(industrial special risks insurance):** an industrial special risks insurance policy:
 - (i) covering:
 - A. the Maintenance Facility (other than the Returned Facilities); and
 - B. during a Maintenance Period, the relevant Cars;
 - (ii) against physical damage, loss or destruction and other insurable risks as are reasonably required by RailCorp;
 - (iii) including cover for business interruption arising from such loss, damage or destruction; and
 - (iv) extending cover to PPP Co, RailCorp, the TLS Contractor, the Security Trustee and others as described in the policy for their respective rights and interests;
- (b) **(transit insurance):** a transit insurance (including wet marine insurance) policy:
 - (i) in respect of materials, components and things which are to be used for or incorporated in the Cars or the Maintenance Facility (other than the Returned Facilities) as part of the TLS Activities;
 - (ii) against physical damage, loss, destruction and such other insurable risks as are reasonably required by RailCorp; and
 - (iii) covering PPP Co, RailCorp, the TLS Contractor and the Security Trustee for their respective rights and interests;

- (c) **(general liability insurance):** a public and products liability insurance policy, written on an occurrence basis, which covers the liability of PPP Co and the TLS Contractor (including to RailCorp) in respect of:
 - (i) damage to, loss or destruction of, or loss of use of, real or personal property; and
 - (ii) injury to, or death or disease of, any persons (other than employees), arising out of, or in connection with, the TLS Phase Activities;
- (d) **(professional indemnity insurance):** a project specific professional indemnity insurance policy covering the liability of PPP Co and the TLS Contractor in respect of any breach of a duty owed in a professional capacity by PPP Co and the TLS Contractor and anyone engaged by them in a professional capacity;
- (e) **(employers' liability and workers' compensation insurance):** employers' liability and workers' compensation insurance policy against any liability for death of, or injury to persons employed by PPP Co, or employed by those PPP Co's Contractors which are required by law to effect and maintain such insurance in carrying out the TLS Phase Activities, whether under statute or at common law;
- (f) **(third party property damage motor vehicle insurance):** a motor vehicle insurance policy which covers third party property damage related to any motor vehicles used in connection with the TLS Phase Activities; and
- (g) **(compulsory third party motor vehicle insurance):** compulsory third party motor vehicle insurance, in respect of all registrable motor vehicles used in the performance of the TLS Phase Activities.

36.3 Additional, increased or varied insurances

- (a) If RailCorp at any time reasonably requires PPP Co to:
 - (i) insure against a risk not specifically provided for or contemplated under clause 36.1 or 36.2; or
 - (ii) increase the extent of, or change the terms of, an existing Insurance from that set out in clause 36.1 or 36.2,
 it may notify PPP Co in writing and request that PPP Co give effect to RailCorp's requirements.
- (b) PPP Co must promptly inform RailCorp of the amount of any additional premium payable in giving effect to a requirement of RailCorp under clause 36.3(a) before it implements the requirement, and RailCorp will advise PPP Co in writing whether it still requires PPP Co to give effect to that requirement.
- (c) Any additional premiums paid on any additional, increased or varied insurances required by RailCorp under clause 36.3(b), as well as any brokerage and Taxes payable in respect of those premiums, will be reimbursed by RailCorp to PPP Co within 20 Business Days after PPP Co provides evidence satisfactory to RailCorp (acting reasonably) that the insurance cover has been so effected and the premium paid.

36.4 Periods of insurance

PPP Co must maintain:

- (a) the Delivery Phase Insurances in respect of the Cars referred to in clause 36.1(a) (other than the contract works insurance policy referred to in clause 36.1(a)(i) and the professional indemnity insurance policy referred to in clause 36.1(a)(iv)) until the end of the Delivery Phase;
- (b) the contract works insurance policy referred to in clause 36.1(a)(i) until the end of a period of 18 months after the end of the Delivery Phase;
- (c) the professional indemnity insurance policy referred to in clause 36.1(a)(iv) until the date which is 7 years after the end of the Delivery Phase;
- (d) the Delivery Phase Insurances in respect of the Maintenance Facility Works referred to in clause 36.1(b) (other than the professional indemnity insurance policy referred to in clause 36.1(b)(iv)) until the Date of Practical Completion of the Maintenance Facility Works;
- (e) the professional indemnity insurance policy referred to in clause 36.1(b)(iv) until the date which is 7 years after the Date of Practical Completion of the Maintenance Facility Works;
- (f) the other Delivery Phase Insurances referred to in clause 36.1(c) until the end of the Delivery Phase; and
- (g) the professional indemnity insurance policy referred to in clause 36.2(d) until the date which is 7 years after the end of the Contract Term; and
- (h) the TLS Phase Insurances referred to in clause 36.2 (other than the professional indemnity insurance policy referred to in clause 36.2(d)) until the end of the Contract Term.

36.5 Review of Insurance Limits and Deductibles

The minimum sums insured and maximum deductibles for the TLS Phase Insurances (other than the TLS Phase Insurances referred to in clauses 36.2(e) and 36.2(g)) will be reviewed by RailCorp's Representative on each anniversary of the Date of Practical Completion of the Maintenance Facility Works to determine whether and by how much the minimum sums insured and maximum deductibles should be increased or decreased, having regard to the opinion of a reputable insurance broker as to prudent insurance practice at the time. Clause 36.3 will not apply to any increase or decrease in the minimum sums insured or maximum deductibles pursuant to this clause 36.5. Rather, any change in insurance costs due to an increase or decrease in the minimum sums insured or maximum deductibles pursuant to this clause 36.5 will be shared in accordance with clause 36.13 (Changes in insurance costs).

36.6 Insurance requirements generally

All Insurances effected by PPP Co in compliance with this clause 36 other than the insurance referred to in clauses 36.1(c), 36.2(e), 36.2(f) and 36.2(g):

- (a) **(insurers):** must be taken out with Reputable Insurers or with insurers approved by RailCorp's Representative (such approval not to be unreasonably withheld);
- (b) **(terms):** must:
 - (i) in the case of the Delivery Phase Insurances, be on the terms required by this clause 36 or exhibit 12 or otherwise as approved by RailCorp's Representative (such approval not to be unreasonably withheld); and

- (ii) in the case of the TLS Phase Insurances, be on the terms required by this clause 36 or otherwise as approved by RailCorp's Representative (such approval not to be unreasonably withheld);
- (c) **(exclusions):** must not contain any exclusion, endorsement or alteration unless it is first approved in writing by RailCorp's Representative (such approval not to be unreasonably withheld);
- (d) **(contractually assumed liability):** in the case of the Insurances specified in clauses 36.1(a)(iii) (general liability insurance - Cars), 36.1(b)(iii) (general liability insurance - Maintenance Facility Works) and 36.2(c) (general liability insurance - TLS Phase), will not expressly exclude liability arising under clause 35.1 (Indemnity from PPP Co) solely on the basis that it is a contractually assumed liability;
- (e) **(proportionate liability):** in the case of the Insurances specified in clauses 36.1(a)(iv) (professional indemnity insurance - Cars), 36.1(b)(iv) (professional indemnity insurance - Maintenance Facility Works) and 36.2(d) (professional indemnity insurance - TLS Phase), must cover any legal liability contractually assumed to the extent that PPP Co, RailCorp and any other insureds under those Insurances have contracted out of the operation of Part 4 of the *Civil Liability Act* 2002 (NSW) or assumed liability for others under this Contract;
- (f) **(waiver and cross liability clause):** which name more than one insured must include a waiver and cross liability clause in which the insurer agrees:
 - (i) to waive all rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured, provided that in relation to the Insurance required by clause 36.1(a)(i) (Cars - contract works insurance) the insurer may retain its rights of subrogation against RailCorp, but not the other insureds, if ITSRR makes a finding that there has been gross negligence by RailCorp in relation to the maintenance of the RailCorp Network;
 - (ii) that the term "insured" applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased as a result); and
 - (iii) that any non-disclosure, breach of any duty or act or omission by one insured does not prejudice the right of any other insured to claim under any Insurance;
- (g) **(prior notice):** must contain a term which requires the lead insurer to give RailCorp 20 Business Days notice prior to:
 - (i) the lead insurer giving PPP Co a notice of cancellation;
 - (ii) the lead insurer cancelling the policy on the request of PPP Co;
 - (iii) PPP Co allowing the policy to expire; or
 - (iv) the lead insurer giving PPP Co any other notice in respect of the policy;
- (h) **(loss payee):** in the case of the Insurances specified in clauses 36.1(a)(i) (contract works insurance for the Cars), 36.1(b)(i) (contract works insurance for the Maintenance Facility Works) and 36.2(a) (industrial special risks insurance) (other

than the business interruption insurance policy referred to in clause 36.2(a)(iii)), must specify RailCorp, PPP Co and the Security Trustee as joint loss payees;

- (i) **(reinstatement):** in the case of the Insurances specified in clauses 36.1(a) (Delivery Phase - Cars), 36.1(b) (Delivery Phase - Maintenance Facility Works) and 36.2(a) (TLS Phase - industrial special risks insurance), 36.2(b) (TLS Phase - transit), 36.2(c) (TLS Phase - general liability insurance) and 36.2(d) (TLS Phase - professional indemnity insurance), must be endorsed to note and allow PPP Co's obligations under clause 34.1 (Reinstatement of Cars) and 34.4 (Reinstatement work), to the effect that compliance with the provisions of those clauses will not prejudice PPP Co's or any other insured's rights to indemnity under the Insurances; and
- (j) **(acknowledgment):** must contain a term under which the insurer acknowledges PPP Co's obligations under clauses 35.7 (No circularity) and 35.8 (Insurance claims and third party actions).

36.7 Premiums

PPP Co must punctually pay all premiums and other amounts payable in respect of the Insurances effected by it, and give RailCorp evidence of payments for premiums if and when requested by RailCorp.

PPP Co will be entitled to reimbursement from RailCorp of the premiums and other amounts for the TLS Phase Insurances referred to in clause 36.2(a) (industrial special risks insurance), 36.2(c) (general liability insurance) and 36.2(d) (professional indemnity insurance) which RailCorp must bear under clause 36.13.

36.8 Evidence of insurance

In respect of the Insurances, PPP Co must give RailCorp's Representative:

- (a) except in relation to the insurances required by clauses 36.1(c), 36.2(e), 36.2(f) and 36.2(g), certified copies of all:
 - (i) policies;
 - (ii) renewal certificates; and
 - (iii) endorsement slips,within 10 Business Days after it receives them from the insurer or broker; and
- (b) provide a certificate of currency satisfactory to RailCorp's Representative (acting reasonably) to confirm that the Insurances which PPP Co must effect and maintain pursuant to this clause 36 have been effected and maintained, whenever requested by RailCorp's Representative.

36.9 Failure to produce proof of insurance

If PPP Co fails to provide evidence satisfactory to RailCorp's Representative within 10 Business Days of a request under clause 36.8(b), RailCorp may effect and maintain the relevant Insurances and pay the premium. The costs incurred by RailCorp in connection with taking such action will be recoverable from PPP Co as a debt due and payable from PPP Co to RailCorp.

36.10 PPP Co's obligations not limited

The effecting of Insurances does not limit the liabilities or obligations of PPP Co under this Contract.

36.11 General insurance obligations

PPP Co must:

- (a) not knowingly do or permit, or omit to do, anything which prejudices any Insurance;
- (b) rectify anything which might prejudice any Insurance;
- (c) reinstate an Insurance if it lapses;
- (d) not cancel, vary or allow any Insurance to lapse without the prior written consent of RailCorp's Representative;
- (e) immediately notify RailCorp of any fact or circumstance or change in circumstances which may prejudice an Insurance;
- (f) give full and true particular information to the insurer of all matters and things the non disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefits under the Insurance; and
- (g) comply at all times with the terms of each Insurance.

36.12 Uninsurable Risks

- (a) **(Notice):** If PPP Co considers that a risk which, at the date of this Contract, is usually covered by the TLS Phase Insurances specified in clause 36.2(a) (industrial special risk insurance) or clause 36.2(c) (general liability insurance) has become an Uninsurable Risk then PPP Co must immediately notify RailCorp's Representative in writing, giving particulars.
- (b) **(Relief from obligation to insure):** If the parties agree, or it is determined under clause 53, that the relevant risk has become an Uninsurable Risk, and the risk did not become an Uninsurable Risk as a result of an act or omission of PPP Co or its Associates, then, for so long as the risk is and remains an Uninsurable Risk, PPP Co is not required to procure insurance against that risk.
- (c) **(Meeting to agree changes):** The parties will then meet and endeavour to agree any changes to PPP Co's rights and obligations arising out of the unavailability of the relevant required insurance including the amount of any change to the Availability Payment.
- (d) **(If no agreement):** If the parties cannot reach agreement under clause 36.12(c), then:
 - (i) this Contract will continue but the Availability Payment will be adjusted to deduct an amount equal to the premium that was last paid for insuring the risk prior to it becoming an Uninsurable Risk;

- (ii) if the Uninsurable Risk materialises, RailCorp must (at RailCorp's option) do one of the following within a reasonable period of the relevant event occurring:
- A. pay to PPP Co an amount equal to the insurance proceeds that would have been payable had the relevant insurance continued to be available (after deducting any deductibles that would have been deducted); or
 - B. where the Uninsurable Risk causes damage, loss or destruction to or of one or more Cars, give a notice to PPP Co that clause 34.2(b)(iv) is to apply; or
 - C. where the Uninsurable Risk causes damage, loss or destruction to or of the Maintenance Facility, or other plant or equipment, provided that it is practicable to continue the Project without the relevant part of the Maintenance Facility, or other plant or equipment:
 - 1) direct that PPP Co not repair or reinstate the relevant part of the Maintenance Facility, or other plant or equipment;
 - 2) negotiate in good faith with PPP Co with a view to agreeing upon the means by which:
 - a) PPP Co is able to continue to provide the Required Availability; and
 - b) PPP Co is entitled to earn the same level of Availability Payments it would have earned but for the damage, loss or destruction of the relevant part of the Maintenance Facility, or other plant and equipment; and
 - 3) if RailCorp and PPP Co do not come to an agreement pursuant to clause 36.12(d)(ii)C.2) which is reduced to writing and executed by the parties in a manner that is contractually binding on them within 30 Business Days of RailCorp giving a direction under clause 36.12(d)(ii)C.1), pay to PPP Co an amount which ensures PPP Co is left in a no better and no worse position; or
 - D. where the Uninsurable Risk causes damage, loss or destruction to all or to a substantial portion of the Cars or the Maintenance Facility, terminate this Contract.

- (e) **(Risk becomes insurable again):** If a risk is an Uninsurable Risk, PPP Co must approach the insurance market on a regular basis to establish whether that risk remains uninsurable and advise RailCorp accordingly. Upon the insurance becoming available again for the Uninsurable Risk, PPP Co must effect and maintain (or cause to be effected and maintained) that insurance, and the Availability Payment will be readjusted.

36.13 Changes in insurance costs

- (a) **(Annual reviews):** The cost of the Delivery Phase Insurances will not be reviewed. However, the cost of the TLS Phase Insurances referred to in clause 36.2(a) (industrial special risks insurance) 36.2(c) (general liability insurance) and 36.2(d) (professional indemnity insurance) will be reviewed retrospectively on each anniversary of the Date of Practical Completion of the Maintenance Facility Works to determine whether and by how much the actual cost of those TLS Phase Insurances for the preceding one year period has varied from the original estimated cost (CPI Indexed). The original estimated cost for each relevant TLS Phase Insurance is set out in schedule 10. For the purposes of this clause, the cost of an Insurance includes the premium and all statutory charges.
- (b) **(Sharing of insurance cost increases):** Subject to clause 36.13(c) and 36.13(f), insurance cost increases will be shared as follows:
- (i) **(<150%):** If the aggregate actual cost of the relevant TLS Phase Insurances is 100% or more but less than 150% of the original estimated cost (CPI Indexed), PPP Co will be liable for the full insurance cost increase for the preceding one year period.
- (ii) **(150%-<200%):** If the actual cost is 150% or more but less than 200% of the original estimated cost (CPI Indexed):
- A. RailCorp will be liable for 50% of the difference between the actual cost and 150% of the original estimated cost (CPI Indexed); and
- B. PPP Co will be liable for the remainder of the insurance cost increase,
- for the preceding one year period.
- (iii) **(200%-<500%):** If the actual cost is 200% or more but less than 500% of the original estimate cost (CPI Indexed):
- A. RailCorp will be liable for:
- 1) 50% of the difference between 150% of the original estimated cost (CPI Indexed) and 200% of the original estimated cost (CPI Indexed); and
- 2) 90% of the difference between the actual cost and 200% of the original fixed cost (CPI Indexed);
- B. PPP Co will be liable for the remainder of the insurance cost increase,
- for the preceding one year period.
- (iv) **(>500%):** If the actual cost is 500% or more of the original estimated cost (CPI Indexed):
- A. RailCorp will be liable for:
- 1) 50% of the difference between 150% of the original estimated cost (CPI Indexed) and 200% of the original estimated cost (CPI Indexed);

- 2) 90% of the difference between 200% of the original fixed cost (CPI Indexed) and 500% of the original estimated cost (CPI Indexed); and
- 3) 100% of the difference between the actual cost and 500% of the original fixed cost (CPI Indexed); and

B. PPP Co will be liable for the remainder of the insurance cost increase,

for the preceding one year period.

(c) **(Insurance cost increase > 500%):** For so long as the actual cost of an TLS Phase Insurance referred to in clause 36.2(a) (industrial special risks insurance), 36.2(c) (general liability insurance) or 36.2(d) (professional indemnity insurance) is 500% or more of the original estimated cost (CPI Indexed) of that Insurance, RailCorp will have the option of either:

- (i) sharing the cost on the basis set out in clause 36.13(b); or
- (ii) declaring the risk which was covered by that insurance to be an Uninsurable Risk, in which event clause 36.12 will apply,

and may alternate between these options during such period.

(d) **(Sharing of insurance cost reductions):** Insurance cost reductions will be shared as follows:

- (i) **(>50%):** If the aggregate actual cost of the TLS Phase Insurances referred to in clause 36.2(a) (industrial special risks insurance), 36.2(c) (general liability insurance) or 36.2(d) (professional indemnity insurance) is between 50% and 100% of the original estimated cost (CPI Indexed) for the preceding one year period, PPP Co will be entitled to retain the cost savings in full.
- (ii) **(0%-50%):** If the actual cost is less than 50% of the original estimated cost (CPI Indexed), 50% of the difference between the actual cost and the original estimated cost (CPI Indexed) for the preceding one year period will be a debt due and payable from PPP Co to RailCorp.

(e) **(Payment of RailCorp's share of cost increase):** Where RailCorp is to share an insurance cost increase under clause 36.13(b), RailCorp must in the payment period following the review pay PPP Co RailCorp's share of the insurance cost increase.

(f) **(Exception):** RailCorp will not be liable for insurance cost increases attributable to PPP Co or its Associates (including the claims history of each such party).

(g) **(Reasonable endeavours):** PPP Co must use all reasonable endeavours to minimise any insurance cost increase, and maximise any insurance cost reduction.

36.14 Claims under Insurances

In addition to the obligations to notify the insurer under any Insurance, PPP Co must:

- (a) notify RailCorp's Representative of any occurrence of which it is aware that may give rise to a claim (other than a claim by RailCorp or its Associates) under any Insurance other than statutory insurance;

- (b) keep RailCorp's Representative informed of subsequent developments of which it is aware concerning the claim;
- (c) subject to clause 36.14(d), diligently pursue any material claim which it has under any Insurance in relation to that occurrence; and
- (d) not compromise, settle, prosecute or enforce a claim under any Insurance without the prior written consent of RailCorp's Representative (which must not be unreasonably withheld or delayed).

This clause does not apply to claims under non-Project specific Insurances, where the claim would not prejudice PPP Co's ability to perform its obligations under this Contract (including any future potential reinstatement obligations) and is otherwise unrelated to the performance of this Contract.

36.15 Insurance Proceeds Account

- (a) **(Establish account):** PPP Co must:
 - (i) establish an account to be known as the Insurance Proceeds Account;
 - (ii) maintain that account in the name of PPP Co and the Security Trustee with a financial institution nominated by PPP Co and approved by RailCorp (each approval not to be unreasonably withheld) or with a financial institution which is a party to the Debt Finance Side Deed);
 - (iii) give details of that account to RailCorp;
 - (iv) notify the financial institution referred to in clause 36.15(a)(ii) of the charge over the Insurance Proceeds Account in accordance with the RailCorp Deed of Charge and procure, and provide RailCorp with a copy of, acknowledgment of that notice from the financial institution; and
 - (v) procure the agreement of the financial institution referred to in clause 36.15(a)(ii) not to exercise any right of set off or combination of accounts in relation to the Insurance Proceeds Account.
- (b) **(Deposit insurance proceeds):** PPP Co and RailCorp must, and PPP Co must ensure that the Rolling Stock Manufacturer, the Maintenance Facility Contractor and TLS Contractor, deposit all Insurance Proceeds received in respect of the costs of replacement, reinstatement or indemnity value of the Cars, Maintenance Facility Works or the Maintenance Facility under the insurance policies specified in clauses 36.1(a)(i) (contract works insurance - Cars), 36.1(a)(ii) (transit insurance - Cars), 36.1(b)(i) (contract works insurance - Maintenance Facility Works), 36.1(b)(ii) (transit insurance - Maintenance Facility Works) and 36.2(a) (industrial special risks insurance) into the Insurance Proceeds Account.
- (c) **(Application of moneys):** Subject to the Debt Finance Side Deed, moneys in the Insurance Proceeds Account may only be applied towards the repair or reinstatement of the Cars, the Maintenance Facility Works or the Maintenance Facility (as the case may be), in relation to which the insurance moneys were paid, or applied towards payment of amounts under clause 34.2(b)(iv)B or 34.2(d)(iv)B.
- (d) **(Records):** PPP Co must give RailCorp records of expenditure from the Insurance Proceeds Account within 45 days of such expenditure.

- (e) **(Surplus funds):** Any funds remaining in the Insurance Proceeds Account after application in accordance with clause 36.15(c) may be treated by PPP Co as revenue from the Project.

37. Intellectual Property Rights

37.1 Warranties

PPP Co warrants, both at the date of this Contract and, to the extent that any Intellectual Property Rights or moral rights or other protected rights come into existence at some time in the future, such future date, that:

- (a) it will not breach any Intellectual Property Rights or moral rights or other protected rights of any person in performing PPP Co's Activities;
- (b) its design, manufacture, delivery, supply or use of the Deliverables in accordance with or as contemplated by this Contract will not infringe any Intellectual Property Rights or moral rights or other protected rights of any person;
- (c) the use or enjoyment of the Deliverables in accordance with or as contemplated by this Contract by RailCorp or any person authorised by RailCorp in accordance with or as contemplated by this Contract:
- (i) in Australia; or
 - (ii) with respect to any Deliverable, in the country or countries in which the Deliverable will be, is or was designed, manufactured, delivered, or supplied in accordance with or as contemplated by this Contract,

will not infringe any Intellectual Property Rights or moral rights or other protected rights of any person;

- (d) it is not aware of any claims that any of the Deliverables or their use or enjoyment in accordance with or as contemplated by this Contract infringe or will infringe any Intellectual Property Rights or moral rights or other protected rights of any person;
- (e) it:
- (i) owns and may assign to RailCorp under this clause 37, the Assigned Intellectual Property Rights;
 - (ii) has the authority to grant the rights granted to RailCorp under this clause 37 in respect of the PPP Co Intellectual Property Rights; and
 - (iii) has the authority to grant the rights granted to RailCorp under this clause 37 in respect of the Third Party Intellectual Property Rights,

and neither the use nor the exercise of those rights by RailCorp or any person authorised by RailCorp in accordance with or as contemplated by this Contract:

- (iv) in Australia; or
- (v) with respect to any particular Assigned Intellectual Property Rights, PPP Co Intellectual Property Rights or Third Party Intellectual Property Rights in the country or countries in which the relevant PPP Co's Activities using those Assigned Intellectual Property Rights, PPP Co Intellectual Property Rights or Third Party Intellectual Property Rights

(as the case may be) will be, are or were performed in accordance with or as contemplated by this Contract,

will infringe any Intellectual Property Rights or moral rights of any person or give rise to any liability on the part of RailCorp or any person authorised by RailCorp (including any liability to pay compensation (including any royalty) to any third party); and

- (f) in respect of each computer program forming part of the Deliverables, the Source Code will compile into the Object Code.

37.2 Licence to use Intellectual Property Rights for Project Purposes

- (a) **(PPP Co Intellectual Property Rights):** PPP Co:

- (i) hereby grants to RailCorp and its Related Bodies Corporate; and
- (ii) must do all things necessary to give effect to the grant to RailCorp and its Related Bodies Corporate of,

an irrevocable, non-exclusive, perpetual, transferable, (on the terms of clause 41.1), royalty-free licence (including the right of sub-licence) to use and exercise for Project Purposes all or any of the PPP Co Intellectual Property Rights (whether owned by PPP Co or not) in or used in:

- (iii) any of the Deliverables; and
- (iv) methods of working or materials used in performing PPP Co's Activities but, without limiting RailCorp's rights under clause 52 (End of Contract Term arrangements), not including any PPP Co Intellectual Property Rights in or used in the plant, equipment, machinery, tooling and jigs that are used to manufacture any Deliverable.

- (b) **(Third Party Intellectual Property Rights):** PPP Co must:

- (i) procure that each owner of Third Party Intellectual Property Rights in or used in:
- A. any of the Deliverables; or
- B. methods of working or materials used in performing PPP Co's Activities but, without limiting RailCorp's rights under clause 52 (End of Contract Term arrangements), not including any Third Party Intellectual Property Rights in or used in the plant, equipment, machinery, tooling and jigs that are used to manufacture any Deliverable,

grants to RailCorp and its Related Bodies Corporate, and does all things necessary to give effect to the grant to RailCorp and its Related Bodies Corporate of, an irrevocable, non-exclusive, perpetual, transferable (on the terms of clause 41.1 (Assignment by RailCorp)), royalty-free licence (including the right of sub-licence) to use and exercise (for the Project Purposes) all or any of those Third Party Intellectual Property Rights; or

- (ii) if PPP Co is unable to procure the grant of a licence referred to in clause 37.2(b)(i), promptly:

- A. notify RailCorp that it has been unable to procure the licence of the relevant Third Party Intellectual Property Rights; and
 - B. at the cost of PPP Co:
 - 1) procure an alternative licence of the same or similar rights to those Third Party Intellectual Property Rights that it has been unable to procure and make any consequential changes that are necessary as a result of RailCorp having to use such alternative licence; or
 - 2) develop a design workaround reasonably acceptable to RailCorp.
- (c) **(Project Purposes):** In this clause 37.2, references to use or exercise for the Project Purposes mean use for the purposes of:
- (i) the design, manufacture and commissioning of the Cars and/or the Simulators and the maintenance, repair and alteration of the Cars and/or the Simulators:
 - A. in the exercise of RailCorp's rights under the RailCorp Project Agreements (including its step-in-rights under clause 48 (Step-in)); and
 - B. if RailCorp exercises its option to acquire any Cars (or the Project Works relating to any Cars), after the Contract Term;
 - (ii) the operation of the Cars:
 - A. during the Contract Term; and
 - B. if RailCorp exercises its option to acquire any Cars (or the Project Works relating to any Cars), after the Contract Term;
 - (iii) the design, construction and commissioning of the Maintenance Facility and the operation, maintenance, repair and alteration of the Maintenance Facility:
 - A. in the exercise of RailCorp's rights under the RailCorp Project Agreements (including its step-in-rights under clause 48); and
 - B. after the Contract Term;
 - (iv) the design, manufacture, construction, operation, maintenance, repair and alteration of infrastructure, systems and other things which interface with the Cars, the Maintenance Facility and/or the Simulators during and after the Contract Term; and
 - (v) such other Project related purposes as PPP Co may consent to in writing (such consent not to be unreasonably withheld).
- (d) **(Sub-licensing):** Prior to sub-licensing any of the Intellectual Property Rights granted under this clause 37.2, RailCorp must ensure (and must procure that its Related Bodies Corporate ensure) that the sub-licensee is made aware of the restrictions on the use of the relevant Intellectual Property Rights, and that the sub-licensee complies with these restrictions.

37.3 Licence to use Intellectual Property Rights for Non-Project Purposes

Without limiting clause 37.2:

(a) **(PPP Co Intellectual Property Rights):** PPP Co:

- (i) hereby grants to RailCorp and its Related Bodies Corporate; and
- (ii) must do all things necessary to give effect to the grant to RailCorp and its Related Bodies Corporate of,

an irrevocable, non-exclusive, perpetual, transferable (on the terms of clause 41.1 (Assignment by RailCorp)), royalty-free licence (including the right of sub-licence) to use and exercise for Non-Project Purposes all or any of the PPP Co Intellectual Property Rights (whether owned by PPP Co or not) in or used in:

- (iii) the physical surface layout, dimensions and surface appearance of the Driver's cab, the Guard's cab and the detrainment device, and to the extent necessary for the purposes set out in paragraph (v) below, the surface appearance of the Cars and Sets (not including "behind the scenes" functionality or other elements not evident to an operator or passenger);
- (iv) without limiting paragraph (iii), the appearance, method of use and functionality of the Train Operating System screens, passenger information displays and interfaces (not including "behind the scenes" functionality or other elements not evident to an operator or passenger); and
- (v) any item which RailCorp reasonably wishes to use to the extent necessary to ensure that:
 - A. so far as reasonably possible the information provided to, and the experience of, a passenger or a crew member is substantially the same whether the passenger or crew member is in a Set or in any other existing or future train within the RailCorp fleet; or
 - B. a person who is able to operate a Set is able to also operate any other existing or future train within the RailCorp fleet in generally the same way as he or she operates a Set; or
 - C. so far as reasonably possible the operation and functionality of the systems on any other existing or future train within the RailCorp fleet used in connection with:
 - 1) surveillance of passengers and crew members;
 - 2) train safety; or
 - 3) emergency situations,have the same "look and feel" as in the Sets, being similar in appearance and operator use to those features on the Sets;

(b) **(Third Party Intellectual Property Rights):** PPP Co must:

(i) procure that each owner of Third Party Intellectual Property Rights in or used in:

A. the physical surface layout, dimensions and surface appearance of the Driver's cab, the Guard's cab and the detrainment device, and, to the extent necessary for the purposes set out in paragraph C below, the surface appearance of the Cars and Sets (not including "behind the scenes" functionality or other elements not evident to an operator or passenger);

B. without limiting paragraph A, the appearance, method of use and functionality of the Train Operating System screens, passenger information displays and interfaces (not including "behind the scenes" functionality or other elements not evident to an operator or passenger); and

C. any item which RailCorp reasonably wishes to use to the extent necessary to ensure that:

1) so far as reasonably possible the information provided to, and the experience of, a passenger or a crew member is substantially the same whether the passenger or crew member is in a Set or in any other existing or future train within the RailCorp fleet; or

2) a person who is able to operate a Set is able to also operate any other existing or future train within the RailCorp fleet in generally the same way as he or she operates a Set; or

3) so far as reasonably possible the operation of the systems on any other existing or future train within the RailCorp fleet utilised in connection with:

a) surveillance of passengers and crew members;

b) train safety; or

c) emergency situations,

have the same "look and feel" as in the Sets, being similar in appearance and operator use to those features on the Sets,

grants to RailCorp and its Related Bodies Corporate, and does all things necessary to give effect to the grant to RailCorp and its Related Bodies Corporate of, an irrevocable, non-exclusive, perpetual, transferable (on the terms of clause 41.1(Assignment by RailCorp)), royalty-free licence (including the right of sub-licence) to use and exercise (for the Non-Project Purposes) all or any of those Third Party Intellectual Property Rights; or

(ii) if PPP Co is unable to procure the grant of a licence referred to in clause 37.3(b)(i), promptly:

- A. notify RailCorp that it has been unable to procure the licence of the relevant Third Party Intellectual Property Rights; and
 - B. at the cost of PPP Co:
 - 1) procure an alternative licence of the same or similar rights to those Third Party Intellectual Property Rights that it has been unable to procure and make any consequential changes that are necessary as a result of RailCorp having to use such alternative licence; or
 - 2) develop a design workaround reasonably acceptable to RailCorp; and
- (c) **(Non-Project Purposes):** in this clause 37.3, references to use or exercise for the Non-Project Purposes mean use as part of or for the purposes of:
- (i) the design, manufacture and commissioning of railway cars or simulators (other than the Cars and Simulators) anywhere in the world, and thereafter operating in the RailCorp Territory, maintaining and repairing in Australia and altering anywhere in the world those railway cars and/or simulators, during and after the Contract Term; and
 - (ii) the alteration of existing or future railway cars or simulators anywhere in the world and thereafter the operation in the RailCorp Territory, maintenance and repair in Australia and alteration of those cars and/or simulators anywhere in the world, during and after the Contract Term,
- provided that:
- (iii) insofar as this clause 37.3 applies to software nothing in this clause will entitle RailCorp to reproduce any Source Code or Object Code which is used to create an electronic interface; and
 - (iv) nothing in this clause will entitle RailCorp to substantially replicate the appearance of the exterior of a Set or of a Car when taken as a whole; and
- (d) **(Sub-licensing):** prior to sub-licensing any of the Intellectual Property Rights granted under this clause 37.3, RailCorp must ensure (and must procure that its Related Bodies Corporate ensure) that the sub-licensee is made aware of the restrictions on the use of the relevant Intellectual Property Rights, and that the sub-licensee complies with these restrictions.

37.4 Assigned Intellectual Property Rights

- (a) RailCorp will own all of the Assigned Intellectual Property Rights, and PPP Co must deliver to RailCorp all documents, materials and other things necessary for RailCorp to enjoy the use and exercise of the Assigned Intellectual Property Rights.
- (b) In order to effect RailCorp's ownership of the Assigned Intellectual Property Rights, PPP Co hereby assigns to RailCorp all of the Assigned Intellectual Property Rights (including all future rights) and will, without limiting its obligations under clause 47 (Disclosure, confidentiality and publicity), keep such Assigned Intellectual Property Rights and the Deliverables to which they relate confidential to the extent that such Assigned Intellectual Property Rights or Deliverables are confidential (as determined under clause 47.3) and procure that its Associates do likewise and will:

- (i) co-operate with RailCorp, execute all documents (including documents required in relation to patent applications) and do all things; and
- (ii) procure that its Associates co-operate with RailCorp, execute all documents (including documents required in relation to patent applications) and do all things,

that RailCorp or its Related Bodies Corporate may reasonably require to perfect such ownership.

- (c) Without limiting clauses 37.4(a) or 37.4(b), to the extent that any of the Assigned Intellectual Property Rights are owned by a party other than PPP Co, PPP Co may satisfy its obligations under this clause 37.4 by:
 - (i) procuring that the owner of the relevant Assigned Intellectual Property Rights assigns directly to RailCorp all of that owner's present and future right, title and interest in and to the Assigned Intellectual Property Rights; and
 - (ii) without limiting its obligations under clause 47 (Disclosure, confidentiality and publicity), procuring that the owner of the Assigned Intellectual Property Rights and its Associates keep such Assigned Intellectual Property Rights and the Deliverables to which they relate confidential the extent that such Assigned Intellectual Property Rights or Deliverables are confidential (as determined under clause 47.3); and
 - (iii) procuring that the owner of the Assigned Intellectual Property Rights and its Associates will co-operate with RailCorp, execute all documents (including documents required in relation to patent applications) and do all things that RailCorp or its Related Bodies Corporate may reasonably require to perfect such ownership.

37.5 Deliverables and Source Code

- (a) **(Deliverables):** Without limiting PPP Co's other obligations under this Contract with respect to the delivery of any Deliverables, PPP Co will provide, and procure that its Associates and third parties provide, all documentation, information and assistance as RailCorp may reasonably require in connection with RailCorp's:
 - (i) use and enjoyment of the Deliverables; and
 - (ii) use and exercise of the Intellectual Property Rights in such Deliverables,
 in accordance with and as contemplated by this Contract.
- (b) **(Mandatory Relevant Source Code):** Within 10 Business Days of Financial Close PPP Co will deposit with the Original Source Code Escrow Agent on the terms of the Original Source Code Escrow Agreement a copy of all Mandatory Relevant Source Code existing at the date of this Contract and will thereafter, within 10 Business Days of each Quarter End during the Contract Term, update the Mandatory Relevant Source Code deposited with the Original Source Code Escrow Agent by depositing with the Original Source Code Escrow Agent a copy of all Mandatory Relevant Source Code which has been created during that quarter (including any Mandatory Relevant Source Code to which Modifications have been made) to ensure that the Mandatory Relevant Source Code deposited with the Original Source Code Escrow Agent is current as at the Quarter End.

- (c) **(Warranties regarding rights to Relevant Source Code):** Subject to clause 37.5(b) PPP Co warrants at Financial Close that:
- (i) it has used its reasonable endeavours to possess a copy of all Relevant Source Code existing at Financial Close;
 - (ii) it has used its reasonable endeavours to secure a right to acquire during the Contract Term:
 - A. a copy of all Relevant Source Code for each Deliverable, promptly upon acquisition by PPP Co of that Deliverable; and
 - B. an updated copy of all Relevant Source Code for each Deliverable which includes any Modification to the Relevant Source Code, promptly upon the Modification being made; and
 - (iii) it has the right to deposit a copy of all the Relevant Source Code it possesses or acquires under clauses 37.5(c)(i) or 37.5(c)(ii) with the Original Source Code Escrow Agent on the terms of the Original Source Code Escrow Agreement.
- (d) **(Initial deposit with Original Source Code Escrow Agent):** Within 10 Business Days of:
- (i) Financial Close; and
 - (ii) the date of any Sub-contract entered into after Financial Close,
- PPP Co must deposit with the Original Source Code Escrow Agent on the terms of the Original Source Code Escrow Agreement a copy of all Relevant Source Code in its possession.
- (e) **(Updates):** Within 10 Business Days of each Quarter End during the Contract Term PPP Co must update the Relevant Source Code deposited by PPP Co with the Source Code Escrow Agent, on the terms of the Source Code Escrow Agreement, by depositing with the Source Code Escrow Agent a copy of all Relevant Source Code which has been created by PPP Co or has come into PPP Co's possession during the relevant quarter (including any Relevant Source Code to which Modifications have been made and any Core Contractor Source Code and/or Sub-contractor Source Code which has been released to PPP Co under an Approved Escrow Deed), to ensure that the Relevant Source Code deposited with the Source Code Escrow Agent is current as at the Quarter End.
- (f) **(Warranties regarding other Core Contractor Source Code):** PPP Co warrants that to the extent PPP Co does not, despite the endeavours referred to in clause 37.5(c) obtain each of the rights referred to in clause 37.5(c)(i), 37.5(c)(ii) and 37.5(c)(iii) in respect of any Core Contractor Source Code, it has entered into an Approved Escrow Deed (Core Contractors).
- (g) **(Initial deposit with Approved Escrow Agent):** Within 10 Business Days of Financial Close PPP Co must procure the deposit with the Approved Escrow Agent, on the terms of the Approved Escrow Deed (Core Contractors), of a copy of all Core Contractor Source Code which PPP Co has not already deposited with the Original Source Code Escrow Agent under clause 37.5(d)(i).
- (h) **(Updates):** Within 10 Business Days of each Quarter End during the term of the relevant Core Contract PPP Co must procure that the Core Contractor updates the

Core Contractor Source Code deposited with the Approved Escrow Agent, on the terms of the Approved Escrow Deed (Core Contractors), by depositing with the Approved Escrow Agent a copy of all Core Contractor Source Code which has been created by the Core Contractor or has come into the Core Contractor's possession during the relevant quarter (including any Core Contractor Source Code to which Modifications have been made), to ensure that the Core Contractor Source Code deposited with the Approved Escrow Agent is current as at the Quarter End.

- (i) **(Procuring rights to Relevant Source Code from Sub-contractors):** PPP Co will procure that before the date of any relevant Sub-contract, the relevant Deliverable Recipient uses reasonable endeavours to secure a right to:
- (i) acquire during the term of the relevant Sub-contract a copy of all Relevant Source Code for each Deliverable under that Sub-contract, promptly upon acquisition by the Deliverable Recipient of that Deliverable;
 - (ii) acquire during the term of the relevant Sub-contract an updated copy of all Relevant Source Code for each Deliverable under that Sub-contract which includes any Modification to the Relevant Source Code, promptly upon the Modification being made; and
 - (iii) deliver to PPP Co (via the relevant Core Contractor and, if applicable, any interposing Deliverable Recipients) any relevant Source Code acquired under clauses 37.5(i)(i) and 37.5(i)(ii) for deposit by PPP Co with the Original Source Code Escrow Agent on the terms of the Original Source Code Escrow Agreement.
- (j) **(Warranties regarding Sub-contractor Source Code):** PPP Co warrants that to the extent PPP Co does not, despite:
- (i) the endeavours referred to in clause 37.5(c) obtain each of the rights referred to in clauses 37.5(c)(i), 37.5(c)(ii) and 37.5(c)(iii); or
 - (ii) the obligations referred to in clause 37.5(i), procure that the Deliverable Recipient obtains the rights referred to in clause 37.5(i),
- in respect of any Sub-contractor Source Code, it will:
- (iii) procure within 10 Business Days of the date of the relevant Sub-contract that the Sub-contractor and the Deliverable Recipient enter into an Approved Escrow Deed (Sub-contractors); and
 - (iv) use its reasonable endeavours to ensure that the Approved Escrow Deed (Sub-contractors) is on substantially the same terms as the proforma contained in schedule 11 with appropriate amendments having regard to the identities of the parties.
- (k) **(Approved Escrow Deed (Sub-contractors)):** An Approved Escrow Deed (Sub-contractors) complies with this clause 37.5(k) if it is an Approved Escrow Deed (Sub-contractors) to which the Sub-contractor, the Deliverable Recipient, PPP Co and RailCorp are parties, and under which, among other terms:
- (i) the Approved Escrow Agent will hold a copy of the Sub-contractor Source Code on the terms of the Approved Escrow Deed (Sub-contractors);

- (ii) within 10 Business Days of the date of the relevant Sub-contract the Sub-contractor must deposit with the Approved Escrow Agent on the terms of the Approved Escrow Deed (Sub-contractors) a copy of all Sub-contractor Source Code in the possession of the Sub-contractor;
- (iii) within 10 Business Days of each Quarter End during the term of the Sub-contract, the Sub-contractor must update the Sub-contractor Source Code deposited with the Approved Escrow Agent, on the terms of the Approved Escrow Deed (Sub-contractors), by depositing with the Approved Escrow Agent a copy of all Sub-contractor Source Code which has been created by the Sub-contractor or has come into the Sub-contractor's possession during the relevant quarter (including any Sub-contractor Source Code to which Modifications have been made), to ensure that the Sub-contractor Source Code deposited with the Approved Escrow Agent is current as at the Quarter End;
- (iv) RailCorp has a right to have a copy of any Sub-contractor Source Code released to it in the event:
 - A. RailCorp exercises its step-in rights under clause 48 as a direct or indirect result of (in RailCorp's reasonable opinion):
 - 1) a breach by the Sub-contractor of the relevant Sub-contract; or
 - 2) the occurrence of an event affecting or involving the Sub-contractor analogous to an event referred to in clause 50.1 of this Contract,

and access to any part of the Sub-contractor Source Code is needed by RailCorp to perform the relevant obligation; or
 - B. this Contract is terminated by RailCorp under clause 50.2, as a direct or indirect result of (in RailCorp's reasonable opinion):
 - 1) a breach by the Sub-contractor of the relevant Sub-contract; or
 - 2) the occurrence of an event affecting or involving the Sub-contractor analogous to an event referred to in clause 50.1 of this Contract,
- (v) PPP Co has a right to have a copy of any Sub-contractor Source Code released to it in the event:
 - A. PPP Co exercises its step-in rights under a Core Contract as a direct or indirect result of:
 - 1) a breach by the Sub-contractor of the relevant Sub-contract; or
 - 2) the occurrence of an event affecting or involving the Sub-contractor analogous to an event referred to in clause 50.1 of the relevant Core Contract,

and access to any part of the Sub-contractor Source Code is needed by PPP Co to perform the relevant obligation; or

- B. a Core Contract is terminated under clause 50.2, of the relevant Core Contract as a direct or indirect result of:
 - 1) a breach by the Sub-contractor of the relevant Sub-contract; or
 - 2) the occurrence of an event affecting or involving the Sub-contractor analogous to an event referred to in clause 50.1 of the relevant Core Contract;
- (vi) if the Sub-contractor Source Code is released to it, PPP Co has the right to deposit a copy of the Sub-contractor Source Code with the Original Source Code Escrow Agent on the terms of the Original Source Code Escrow Agreement;
- (vii) the Deliverable Recipient has a right to have a copy of any Sub-contractor Source Code released to it in the event:
 - A. the Deliverable Recipient exercises any step-in rights it may have under the relevant Sub-contract and access to that Sub-contractor Source Code is needed to perform any relevant obligation; or
 - B. the relevant Sub-contract is terminated by the Deliverable Recipient as a result of a breach by the Sub-contractor of the relevant Sub-contract or an event affecting or involving the Sub-contractor analogous to an event referred to in clause 50.1 of this Contract; and
- (viii) if the Sub-contractor Source Code is released to it, the Deliverable Recipient has the right to deposit a copy of the Sub-contractor Source Code with the Approved Escrow Agent with whom the Deliverable Recipient's Relevant Source Code has been deposited on the terms of the relevant Approved Escrow Deed; and
- (ix) if any event occurs which allows or may allow PPP Co or the Deliverable Recipient to have a copy of any Sub-contractor Source Code released to either PPP Co or the Deliverable Recipient, PPP Co will immediately notify RailCorp and, if so directed by RailCorp, will exercise its right, or procure that the Deliverable Recipient exercises its right, to have such Sub-contractor Source Code released to it under the Approved Escrow Deed (Sub-contractors).
- (l) **(Warranties regarding Approved Escrow Deeds):** PPP Co warrants that it has used and will continue to use its reasonable endeavours (and has procured and will procure that the Core Contractors use their reasonable endeavours) to ensure:
 - (i) that the Approved Escrow Agent for each Approved Escrow Deed (Sub-contractors) will be the Original Source Code Escrow Agent; and
 - (ii) that the total number of Approved Escrow Deeds (Sub-contractors) will not exceed 10.
- (m) **(Initial deposit with Approved Escrow Agent):** Within 10 Business Days of the date of a relevant Sub-contract, PPP Co must procure, and must procure that the Core Contractors procure, the deposit with the Approved Escrow Agent, on the terms of the Approved Escrow Deed (Sub-contractors), of a copy of all Sub-contractor Source Code in existence and in the Sub-contractor's possession which

PPP Co has not already deposited with the Original Source Code Escrow Agent under clause 37.5(d).

- (n) **(Updates):** Within 10 Business Days of each Quarter End during the term of the relevant Sub-contract, PPP Co must procure, and must procure that the Core Contractors procure, that the Sub-contractor updates the Sub-contractor Source Code deposited with the Approved Escrow Agent, on the terms of the Approved Escrow Deed (Sub-contractors), by depositing with the Approved Escrow Agent a copy of all Sub-contractor Source Code which has been created by the Sub-contractor or has come into the Sub-contractor's possession during the relevant quarter (including any Sub-contractor Source Code to which Modifications have been made), to ensure that the Sub-contractor Source Code deposited with the Approved Escrow Agent is current as at the Quarter End.
- (o) **(Access to PPP Co Source Code on termination):** If this Contract is terminated under clauses 50.2, 50.5, 33.11 or 36.12 and RailCorp wishes to have access to any Relevant Source Code held in escrow under the Original Source Code Escrow Agreement which is not released to RailCorp under that agreement, in order to perform (by itself or any third party) any obligations which PPP Co was required to perform under this Contract, then RailCorp may notify PPP Co in writing of that wish, and upon receipt of such notice PPP Co must negotiate with RailCorp in good faith the terms on which RailCorp may be granted access to the Relevant Source Code, having regard to:
- (i) the fair market value of the Relevant Source Code; and
 - (ii) any amount paid or payable to PPP Co under this Contract upon termination of this Contract.
- (p) **(Access to Source Code of Core Contractors and Sub-contractors on termination):** PPP Co must use its best endeavours to procure that if:
- (i) any Core Contract or Sub-contract is terminated for reasons equivalent to those set out in clauses 50.2, 50.5, 33.11 or 36.12;
 - (ii) RailCorp, PPP Co or any Deliverable Recipient wishes to have access to any Relevant Source Code held in escrow under the relevant Approved Escrow Deed which is not released to RailCorp, PPP Co or the Deliverable Recipient (as the case may be) under that deed, in order to:
 - A. perform (by itself or any third party) any obligations which the Core Contractor or the Sub-contractor (as the case may be) was required to perform under the Core Contract or Sub-contract (as the case may be);
 - B. perform (by itself or any third party) any obligations which the Deliverable Recipient was required to perform under any Sub-contract; or
 - C. perform PPP Co's obligations under this Contract; and
 - (iii) RailCorp, PPP Co or the Deliverable Recipient notifies the Core Contractor or Sub-contractor (as the case may be) in writing of that wish, the Core Contractor or the Sub-contractor (as the case may be) will upon receipt of such notice negotiate with RailCorp, PPP Co or the Deliverable Recipient (as the case may be) in good faith the terms on which RailCorp, PPP Co or the Deliverable

Recipient (as the case may be) may be granted access to the Relevant Source Code, having regard to:

- (iv) the fair market value of the Relevant Source Code; and
- (v) any amount paid or payable to the Core Contractor or the Sub-contractor (as the case may be) under the relevant Core Contract or Sub-contract upon termination of the relevant Core Contract or Sub-contract.

37.6 Licence back of RailCorp Intellectual Property Rights

- (a) RailCorp grants PPP Co a perpetual non-exclusive, transferable (on the terms of clause 41), royalty-free licence to use and exercise the Assigned Intellectual Property Rights as necessary for:
 - (i) the purposes of the Project;
 - (ii) the design, manufacture, delivery, supply, use and enjoyment of the Deliverables in accordance with or as contemplated by this Contract; and
 - (iii) the performance of PPP Co's Activities; and
 - (iv) its own purposes.
- (b) PPP Co may sub-license its rights under clause 37.6(a) to its Core Contractors and Associates for:
 - (i) the purposes of the Project; and
 - (ii) their own purposes, but only where the Core Contractor or Associate is the original party that assigned the Assigned Intellectual Property Rights to RailCorp.
- (c) RailCorp grants PPP Co a non-exclusive, transferable (on the terms of clause 41), royalty-free licence to use and exercise the RailCorp Intellectual Property Rights (excluding the RailCorp Trade Marks) for the duration of the Contract Term as necessary for:
 - (i) the purposes of the Project;
 - (ii) the design, manufacture, delivery, supply, use and enjoyment of the Deliverables in accordance with or as contemplated by this Contract; and
 - (iii) the performance of PPP Co's Activities.
- (d) PPP Co may sub-license its rights under clause 37.6(c) to its Core Contractors and Associates for the purposes of the Project.

37.7 Indemnities

- (a) PPP Co must defend, and indemnify RailCorp and its Associates from and against, all IPR Claims in accordance with and subject to the terms of this clause 37.
- (b) PPP Co must indemnify RailCorp and its Associates against any Loss or Claim brought against, suffered or incurred by RailCorp or any of its Associates arising out of or in connection with any infringement, violation, alleged infringement or alleged violation by PPP Co or its Associates of any Intellectual Property Rights, moral rights or other protected rights of any person.

- (c) PPP Co must indemnify RailCorp and its Associates against any and all Losses or Claims arising from any breach of the warranties set out in clause 37.1 (Warranties).
- (d) PPP Co will pay any Loss incurred by RailCorp and its Associates in connection with any IPR Claim brought against RailCorp or any of its Associates in respect of use or enjoyment by RailCorp or its Associates of any Deliverable as delivered by PPP Co to RailCorp herein or as modified by PPP Co (but not by RailCorp or third parties engaged by RailCorp except as directed or approved in writing by PPP Co) in accordance with or as contemplated by this Contract, provided that:
 - (i) PPP Co may conduct any defence and/or settlement in any such IPR Claim;
 - (ii) RailCorp will (at PPP Co's expense) fully cooperate with such defence; and
 - (iii) PPP Co receives written notice from RailCorp of the IPR Claim (to the extent that the IPR Claim comes to the attention of RailCorp before it comes to the attention of PPP Co).
- (e) If an IPR Claim substantially interferes with RailCorp's (or an Associate's or RailCorp sub-licensee's) use or enjoyment of a Deliverable or if PPP Co reasonably believes in consultation with RailCorp that an IPR Claim may substantially interfere with such use, PPP Co will use its best endeavours to:
 - (i) replace the Deliverable, without additional charge with a non-infringing product or service of at least equivalent functionality and performance;
 - (ii) modify the Deliverable to overcome the infringement without additional charge and without materially impeding functionality or performance; or
 - (iii) obtain a licence for RailCorp (and its Associates and sub-licensees) to continue use and enjoyment of the Deliverable and pay any additional fee required for such licence.
- (f) PPP Co's liability under the indemnities in this clause 37.7 will be reduced to the extent that the relevant Loss, IPR Claim or other Claim arises as a result of:
 - (i) a breach by RailCorp of any RailCorp Project Agreement;
 - (ii) a Deliverable being modified or used by RailCorp other than in accordance with, or as reasonably contemplated by, this Contract;
 - (iii) the wrongful (including negligent) act or omission of RailCorp, its Associates or sub-licensees;
 - (iv) use of RailCorp Materials or RailCorp Intellectual Property Rights in accordance with this Contract; or
 - (v) any unauthorised modification of the relevant Deliverable.
- (g) Neither RailCorp's rights nor PPP Co's liabilities or obligations, whether under this Contract or otherwise according to law, in respect of Intellectual Property Rights or IPR Claims, will be limited by the terms of this clause 37.7.

37.8 Moral rights

If PPP Co, in the course of performing PPP Co's Activities, including in relation to the design, manufacture, delivery, supply, use or enjoyment of any Deliverable, includes or makes use of any work or other subject matter in which copyright subsists, PPP Co must use all reasonable efforts to procure from every person (whether a subcontractor or an officer, employee or consultant of PPP Co or of a subcontractor) who is an author of that work or subject matter a written consent signed by that person for the benefit of RailCorp and PPP Co, under which (to the maximum extent permitted by law) that person irrevocably and unconditionally:

- (a) consents to RailCorp, PPP Co, their respective Associates and sub-licensees:
 - (i) using, disclosing, reproducing, transmitting, exhibiting, communicating, adapting, publishing or otherwise exercising its rights in relation to that work or subject matter anywhere in the world in whatever form RailCorp or PPP Co thinks fit (including the making of any distortions, additions or alterations to that work or subject matter or any adaptation thereof, or to any part of that work or subject matter or of any such adaptation in a manner which but for the consent, infringes or may infringe that person's moral rights in the work or other subject matter); and
 - (ii) using, disclosing, reproducing, transmitting, exhibiting, communicating, adapting, publishing or otherwise exercising its rights in relation to that work or subject matter or any adaptation thereof (or any part of that work or subject matter or of any such adaptation) anywhere in the world without making any identification of that person in relation thereto; and
- (b) waives, to the extent permitted by law, all and any moral rights to which that person may be entitled anywhere in the world in relation to any Deliverable.

In procuring such consents and waivers, PPP Co will not (and must not encourage or permit anyone else to) apply any duress to any person or make a statement to any person knowing that the statement is false or misleading in a material particular, or knowing that a matter or thing has been omitted from the statement without which the statement is false or misleading in a material particular.

37.9 Survival of rights

The rights granted pursuant to clauses 37.2, 37.3, 37.4 and 37.8 will survive:

- (a) rescission, termination or expiration of this Contract; and
- (b) works being taken out of the hands of PPP Co pursuant to the exercise of RailCorp's step-in-rights under clause 48 (Step-in).

37.10 RailCorp Trade Marks

- (a) PPP Co must not use, nor permit any of its Associates to use, the RailCorp Trade Marks without RailCorp's prior consent.
- (b) Where RailCorp grants its consent under clause 37.10(a) in respect of one or more RailCorp Trade Marks, PPP Co will:
 - (i) use the relevant RailCorp Trade Marks only:
 - A. in accordance with the RailCorp Train Performance Specification;

- B. in accordance with the guidelines for use of RailCorp Trade Marks (or any updated guidelines) as may be provided by RailCorp to PPP Co from time to time (including guidelines as to the form, colours and/or size for the representations of the RailCorp Trade Marks);
 - C. for the purposes approved by RailCorp; and
 - D. in accordance with any conditions specified by RailCorp in granting its consent under clause 37.10(a);
- (ii) observe any directions given by RailCorp to PPP Co from time to time in relation to the use of the relevant RailCorp Trade Marks (including directions as to any wording or symbols to accompany the representations of the RailCorp Trade Marks);
 - (iii) use each of the relevant RailCorp Trade Marks at all times in a manner which is in keeping with and seeks to maintain its distinctiveness and reputation; and
 - (iv) if it learns of any infringement or threatened infringement, passing off of, any other misleading or deceptive conduct by any third party or any claim regarding any such acts in relation to any of the relevant RailCorp Trade Marks, immediately notify RailCorp giving particulars and will provide all such information and assistance to RailCorp as RailCorp may reasonably request if RailCorp elects to commence or defend proceedings.
- (c) PPP Co will not:
- (i) use, register or record, or apply to register or record, any mark, sign or name the same or substantially or confusingly similar to any of the RailCorp Trade Marks with any Authority as a trade mark, domain name, e-mail address, business or company name in any place in the world unless the prior written approval of RailCorp is obtained; or
 - (ii) do any act which would or might:
 - A. invalidate or dispute RailCorp's title to all or any of the RailCorp Trade Marks;
 - B. oppose any application for registration of all or any of the RailCorp Trade Marks;
 - C. support an application to remove all or any of the RailCorp Trade Marks as a registered trade mark;
 - D. cause any Registrar of Trade Marks to require a disclaimer of a monopoly in all or any of the RailCorp Trade Marks, nor assist any other person directly or indirectly in any disclaimer of that nature; or
 - E. be an application in the name of PPP Co for, or provide support to any third party application for, registration of all or any of the RailCorp Trade Marks.

- (d) PPP Co acknowledges that:
 - (i) any goodwill arising in respect of any of the RailCorp Trade Marks (whether by advertising or otherwise) is exclusively the property of RailCorp; and
 - (ii) nothing contained in this Contract gives PPP Co any interest in any of the RailCorp Trade Marks or makes PPP Co an authorised user for the purposes of the *Trade Marks Act 1995* (Cth).

37.11 Advertising and PPP Co marks

PPP Co must not apply to the Cars, or permit its Associates to apply to the Cars, in any place which is visible to the Crew or to the public:

- (a) any advertising material; or
 - (b) any word or symbol which identifies PPP Co or any of its Associates,
- without RailCorp's prior written consent.

38. Representations and warranties

38.1 RailCorp representations and warranties

RailCorp represents and warrants for the benefit of PPP Co that:

- (a) it is a statutory body validly constituted and existing under the Transport Administration Act;
- (b) it has or will have in full force and effect all authorisations necessary under its constituent legislation to enter into and perform its obligations under each RailCorp Project Agreement (or will have them in full force and effect at the time the obligation is to be performed);
- (c) each RailCorp Project Agreement constitutes a valid and legally binding obligation of it in accordance with its terms; and
- (d) the execution, delivery and performance of each RailCorp Project Agreement does not violate any law, or any document or agreement to which it is a party or which is binding on it or its assets.

38.2 PPP Co representations and warranties

PPP Co represents and warrants for the benefit of RailCorp that:

- (a) the Trustee is duly registered and remains in existence;
- (b) the execution, delivery and performance of each Project Agreement to which it is a party does not violate any law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
- (c) it has taken all corporate and other action required to enter into any Project Agreement to which it is a party and to authorise the execution and delivery of that Project Agreement and the satisfaction of its obligations under it;
- (d) each Project Agreement to which it is a party constitutes a valid and legally binding obligation of it in accordance with its terms;

- (e) it subsists and is properly constituted;
- (f) except as contemplated by the Equity Documents, the Trustee is not the trustee or responsible entity of any trust, nor does it hold any property subject to or impressed by any trust;
- (g) neither the Trust nor PPP Co has any subsidiaries other than PPP Co Finance Co;
- (h) except as disclosed in writing to RailCorp prior to the date of this Contract, it is not a member of any consolidated group for purposes of the *Income Tax Assessment Act 1997* (Cth);
- (i) no PPP Co Events of Default or PPP Co Termination Events have occurred or are subsisting;
- (j) it is not in default of its material obligations under any RailCorp Project Agreement;
- (k) it has not traded since its incorporation other than for the purposes of entering into the Project Agreements to which it is a party and has no liabilities other than those that have arisen in connection with entering into those Project Agreements;
- (l) except as contemplated by the Debt Finance Side Deed, subject to laws from time to time, its obligations under the RailCorp Deed of Charge will rank ahead of, and its obligations under each RailCorp Project Agreement (other than the RailCorp Deed of Charge) will rank at least equally with, all its present and future unsecured obligations;
- (m) it does not have immunity from the jurisdiction of a court or from legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise);
- (n) there has been no material change in the financial condition of PPP Co (since the creation of the Trust) or the Core Contractors (since the date of their last audited accounts) which would prejudice the ability of PPP Co to perform its obligations under the Project Agreements;
- (o) the most recently published financial statements of the Core Contractors have been prepared on a basis consistently applied and using accounting principles which are generally accepted and give a true and fair view of the financial condition of the Core Contractors and are unqualified for the period in question;
- (p) PPP Co is not aware of any material facts or circumstances that have not been disclosed to RailCorp and which might, if disclosed, materially adversely affect the decision of a prudent person considering whether or not to enter into this Contract with PPP Co;
- (q) it has provided to RailCorp all material documents relating to the financing of the Project;
- (r) the Trustee has power to enter into and perform its obligations under each Project Agreement to which it is expressed to be a party in its capacity as trustee of the Trust to carry out the transactions which those agreements contemplate will be carried out by it and to carry on its business in its capacity as trustee of the Trust and to charge the property of the Trust as provided in the RailCorp Deed of Charge. There is no restriction on or condition of doing so under the terms of the Trust and the entry into of each such agreement is a proper exercise of power under the terms of the Trust;

- (s) the Trust has been validly created and is in existence at the date of this Contract;
- (t) the Trustee has been validly appointed as trustee of the Trust and is the sole trustee of the Trust;
- (u) the Trust is solely constituted by the Trust Deed, a true and complete copy of which has been provided to RailCorp before the date of this Contract;
- (v) the Trust has not been terminated, nor has any event for the vesting of the assets of the Trust occurred;
- (w) no litigation, arbitration, mediation, conciliation, criminal or administrative procedures are current, pending or to its knowledge, threatened, which, if adversely determined, would or could have a material adverse effect on the business, assets or financial condition of the Trust, the Trustee's ability as trustee of the Trust to perform its financial or other obligations under any Project Agreement to which PPP Co is expressed to be a party or its trusteeship of the Trust;
- (x) the Trustee has not done, or failed to do, any act whereby any assets of the Trust have been acquired by any other person, no assets of the Trust are presently registered in the name of any other person, and no person other than the beneficiaries of the Trust in their capacity as unit holders of the Trust has acquired any right of any kind whether vested or contingent in any asset of the Trust;
- (y) it is to the commercial benefit of the Trust that the Trustee:
 - (i) enters into the Project Agreements to which it is expressed to be a party in its capacity as trustee of the Trust; and
 - (ii) charges the property of the Trust as provided in the RailCorp Deed of Charge;
- (z) the Trustee, in its capacity as trustee of the Trust, has valid rights of indemnity and exoneration against the assets of the Trust, which rights are available for satisfaction of all liabilities and other obligations incurred by it under the Project Agreements to which PPP Co is expressed to be a party;
- (aa) there is no subsisting circumstance or other thing which has or could have the effect of prejudicing or diminishing the Trustee's right of indemnity and exoneration against the assets of the Trust in any way and without limiting the generality of the foregoing, the Trustee has not released, disposed of or charged such rights;
- (bb) the rights of the beneficiaries of the Trust relating to, and their interests in, the property of the Trust are subject to the prior rights and interests of the Trustee in the property of the Trust pursuant to its right of indemnity and exoneration to which RailCorp may from time to time be subrogated in accordance with the RailCorp Deed of Charge;
- (cc) the Trust Deed complies with all applicable laws; and
- (dd) the Trustee has complied with its obligations and duties under the Trust Deed and at law and no one has alleged to it that it has not so complied.

38.3 Repetition of representation and warranties

Except for the representations and warranties contained in clauses 38.2(h), 38.2(i), 38.2(j), 38.2(k), 38.2(n), 38.2(o), 38.2(p) and 38.2(w), each representation and warranty contained in this Contract:

- (a) is made on the date of this Contract; and
 - (b) will be deemed to be repeated each day during the Contract Term,
- with reference to the facts and circumstances then subsisting.

38.4 Trust covenants by PPP Co

The Trustee will:

- (a) immediately notify RailCorp in writing if it ceases to be the trustee of the Trust and procure that any new trustee executes in favour of RailCorp any documents, guarantees and Security Interests (as defined in the RailCorp Deed of Charge) which RailCorp requires, provided that these are not any more onerous than those required or obtained by the Chargee under or in relation to the Project Agreements to which the Trustee is expressed to be a party;
- (b) notify RailCorp immediately in writing if the Trust is determined or for any reason ceases to exist, or if it is required or directed by any of the beneficiaries of the Trust to do any act or thing in relation to the Trust or the trust funds of the Trust;
- (c) procure that no distribution of any of the capital of the Trust is made where prohibited under the Debt Financing Documents;
- (d) not without the prior written consent of RailCorp and until the satisfaction of all the Obligations (as defined in the RailCorp Deed of Charge), exercise in its own favour personally any right of indemnification, reimbursements, recoupment, lien or charge to which it might be entitled personally against any beneficiary of the Trust or against or in respect of money or other assets forming part of the Trust;
- (e) not cause or permit any property of the Trust to be mixed with any other property;
- (f) not default in the performance of its obligations and duties as trustee of the Trust;
- (g) promptly remedy any failure by it to comply with its obligations and duties as trustee of the Trust;
- (h) not release, dispose of or otherwise prejudice:
 - (i) its rights of indemnity against the property of the Trust or any right of indemnity against the beneficiaries of the Trust;
 - (ii) its rights of exoneration; or
 - (iii) its equitable lien over the property of the Trust,and it will at RailCorp's request:
 - (iv) exercise its indemnity against, and rights of exoneration in respect of and equitable lien over the property of the Trust and any indemnity against the beneficiaries of the Trust in relation to the Secured Money (as defined in the RailCorp Deed of Charge); and
 - (v) assign to RailCorp those indemnities, that right of exoneration and that equitable lien and otherwise facilitate the subrogation of RailCorp to those indemnities and that equitable lien in relation to the Secured Money (as defined in the RailCorp Deed of Charge); and

- (i) not consent to or register the transfer of any units in the Trust or cancel, repurchase or redeem any units in the Trust if to do so would breach clause 42 (Share Capital Dealings) in respect of the Trust.

39. PPP Co to inform itself

39.1 No representations from RailCorp

PPP Co acknowledges and agrees that, except as expressly set out in this Contract, RailCorp makes no representation, and gives no warranty, in respect of:

- (a) any of the Project Agreements;
- (b) any transaction or arrangement contemplated under any Project Agreement; or
- (c) any other matter relevant to PPP Co's decision to enter into the Project Agreements.

39.2 Warranties by PPP Co

PPP Co warrants that it has done, and will be deemed to have done, everything which would be expected of:

- (a) a leading world expert in the design, manufacture and maintenance of rolling stock and rolling stock simulators using the most modern technology and methodology; and
- (b) a prudent and competent contractor experienced in the design, construction and maintenance of facilities similar to the Maintenance Facility Works on land similar to the Maintenance Site,

in:

- (c) assessing the risks which it is assuming under this Contract; and
- (d) accepting and dealing with those risks having regard to its payment entitlement under this Contract.

Without limiting the foregoing, PPP Co warrants that it has, and will be deemed to have:

- (e) visited and examined the Maintenance Site, the Associated Work Sites and their surroundings and done everything possible to inform itself fully as to the Site Conditions and obtained all necessary information as to risks, contingencies or other circumstances which could have an effect on the performance and cost of carrying out PPP Co's Activities;
- (f) informed itself completely as to the nature of the work and materials necessary for the carrying out of PPP Co's Activities and the risks, contingencies and other circumstances which might have an effect on the performance and cost of PPP Co's Activities;
- (g) informed itself as to the means of access to, and facilities at, the Maintenance Site and Associated Work Sites, and transport facilities for deliveries to or from the Maintenance Site and Associated Work Sites;
- (h) informed itself as to the availability and cost of labour including the costs of complying with the obligations imposed by any agreement between the relevant industry unions and employers relating to the carrying out of PPP Co's Activities nationally and in New South Wales;

- (i) informed itself of all requirements of all relevant Authorities in relation to the carrying out of PPP Co's Activities generally and, without limitation, in relation to measures necessary to protecting the Environment from any adverse effect or damage arising from the carrying out of PPP Co's Activities;
- (j) informed itself of the rail infrastructure of the New South Wales electrified heavy rail system;
- (k) satisfied itself as to the completeness, correctness and sufficiency of its proposal (including sufficiency of the TLS Payment and Milestone Payments) and the costs of complying with all obligations under this Contract and of all matters and things necessary for the due and proper performance and completion of PPP Co's Activities; and
- (l) obtained all appropriate professional and technical core advice on all matters and circumstances in respect of the matters referred to in clauses 39.2(e) to (k) prior to submitting its tender.

39.3 Information Documents

Without limiting clause 39.1 or 39.4 or the warranties or acknowledgements in the Deeds of Disclaimer and Confidentiality, PPP Co:

- (a) acknowledges and agrees that:
 - (i) the Existing Information Documents were provided by RailCorp; and
 - (ii) any Future Information Documents will be provided by RailCorp,
 for the information only of PPP Co;
- (b) warrants that it has not in any way relied upon:
 - (i) the Existing Information Documents; or
 - (ii) the accuracy, adequacy, suitability or completeness of the Existing Information Documents,
 for the purpose of entering into this Contract;
- (c) warrants that it will not rely upon:
 - (i) any Future Information Documents; or
 - (ii) the accuracy, adequacy, suitability or completeness of the Future Information Documents,
 for the purpose of performing PPP Co's Activities;
- (d) acknowledges and agrees that:
 - (i) RailCorp (or anyone on its behalf) has not and does not warrant, guarantee, assume any duty of care or other responsibility for, or make any representation about, the accuracy, adequacy, suitability or completeness of the Information Documents;
 - (ii) the Information Documents do not form part of this Contract; and

- (iii) insofar as is permitted by law, RailCorp will not be liable upon any Claim by PPP Co arising out of or in any way in connection with:
 - A. the Information Documents; or
 - B. a failure by RailCorp to provide any information to PPP Co.

39.4 Non reliance

PPP Co:

- (a) warrants that it did not in any way rely upon:
 - (i) any information, data, representation, statement or document made, or provided to PPP Co, by RailCorp or anyone on behalf of RailCorp or any other information, data, representation, statement or document for which RailCorp is responsible or may be responsible, whether or not obtained from RailCorp or anyone on behalf of RailCorp; or
 - (ii) the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,for the purposes of entering into this Contract;
- (b) warrants that it enters into this Contract based on its own investigations, interpretations, deductions, information and determinations; and
- (c) acknowledges that it is aware that RailCorp has entered into this Contract relying upon the warranties, acknowledgements and agreements in clauses 39.1, 39.2, 39.3, 39.4(a) and 39.4(b) and in the Deeds of Disclaimer and Confidentiality.

39.5 Release and indemnity

PPP Co releases and indemnifies RailCorp from and against:

- (a) any Claim against RailCorp by, or liability of RailCorp to, any person; or
- (b) without being limited by clause 39.5(a), any Loss suffered or incurred by RailCorp, arising out of or in any way in connection with:
 - (c) the provision of, or the purported reliance upon, or use of, the Information Documents by PPP Co, an Associate of PPP Co or any other person to whom the Information Documents are disclosed by PPP Co, an Associate of PPP Co or any person on PPP Co or the Associate's behalf;
 - (d) any breach by PPP Co of this clause 39; or
 - (e) the Information Documents being relied upon or otherwise used by PPP Co, an Associate of PPP Co or any other person to whom the Information Documents are disclosed by PPP Co, an Associate of PPP Co or any person on PPP Co or the Associate's behalf in the preparation of any information or document, including any Information Document which is "misleading or deceptive" or "false and misleading" (within the meaning of those terms in sections 52 and 53 (respectively) of the *Trade Practices Act 1974* (Cth) or any equivalent provision of State or Territory legislation).

39.6 Superseded Information Documents

RailCorp and PPP Co acknowledge and agree that where a Reference Document has, in part or in full, replaced or superseded an Information Document, the status or purpose of that document (or the relevant part of it) as a Reference Document will not be affected.

39.7 Information and Reference Document Repository

- (a) By 31 March 2007 or such other date as the parties may agree, RailCorp and PPP Co must complete the Information and Reference Document Repository.
- (b) The Information and Reference Documents Repository must contain all Existing Information Documents and all Reference Documents.
- (c) The Information and Reference Document Repository is complete when:
 - (i) a register listing the contents of the Information and Reference Documents Repository (including version numbers and other identifying details) has been agreed and signed by the parties; and
 - (ii) each party has been provided with a copy (hard copy or CD) of the Information and Reference Documents Repository.
- (d) The parties acknowledge and agree that once a document has been included in the Information and Reference Document Repository, any changes to that document, including its replacement or removal from the Information and Reference Document Repository, must be agreed between the parties.

40. Restrictions on PPP Co

40.1 Restrictions on business

PPP Co must not conduct any business other than the Project and the performance of its obligations and the exercise of its rights under the Project Agreements without RailCorp's prior consent.

40.2 Restrictions on revenue

- (a) **(PPP Co):** PPP Co may only derive revenue or other returns from:
 - (i) payments received from RailCorp under the RailCorp Project Agreements;
 - (ii) interest or other returns on monies held by or on behalf of PPP Co;
 - (iii) surplus funds in the Insurance Proceeds Account after application in accordance with clause 36.15(e);
 - (iv) other activities contemplated by this Contract or any other Project Agreement; and
 - (v) activities approved by RailCorp.

- (b) **(Significant Contractors):** PPP Co must ensure that, after the date of this Contract, none of its Significant Contractors derive revenue or other returns from the Project other than revenue or returns derived:
 - (i) directly or indirectly from payments made by PPP Co or otherwise contemplated by a Project Agreement; or
 - (ii) under an arrangement approved by RailCorp (such approval not to be unreasonably withheld if the arrangement is on arms length commercial terms).

40.3 Restrictions on acquisition of property and liabilities being incurred

PPP Co must not acquire or hold any property, or incur any liability, other than for purposes of the Project without RailCorp's prior consent.

40.4 Ring fencing

- (a) **(Prohibition):** Subject to clauses 43.2 (Significant Contracts) and 43.3 (Subcontracting), PPP Co must not:
 - (i) enter into contracts with;
 - (ii) assume, permit or suffer any liability in favour of; or
 - (iii) buy, sell or dispose of assets to,

a Core Contractor, the Equity Investors, or any of their respective Associates, without RailCorp's prior consent.
- (b) **(Consent where arms length transaction):** RailCorp must not unreasonably withhold its consent if the contract, liability, purchase or disposal of assets is on arms length commercial terms.
- (c) **(Tax consolidation):** PPP Co must not become a member of a consolidated group for the purposes of the *Income Tax Assessment Act 1997* (Cth) without RailCorp's prior consent.

41. Assignment, security, ownership of Cars and restrictions on dealings

41.1 Assignment by RailCorp

- (a) Subject to clause 41.1(b), RailCorp may assign, novate, transfer or otherwise deal with its interest in, or obligations under, the RailCorp Project Agreements without PPP Co's prior approval, provided the transferee is:
 - (i) responsible for the operation and delivery of the Sydney metropolitan rail passenger business; and
 - (ii) supported by a guarantee from the State on terms no less favourable than those contained in the PAFA Act Guarantee.
- (b) RailCorp may assign, novate, transfer or otherwise deal with its interest in the Maintenance Facility to any entity without PPP Co's prior approval provided:
 - (i) if the Maintenance Site Lease has not yet been granted, the transferee grants an option to lease in the same form as the Call Option Deed; and

- (ii) consequential amendments are made to the RailCorp Project Agreements as may be reasonably required by PPP Co to ensure that PPP Co's rights, obligations or liabilities under the RailCorp Project Agreements are not materially worse compared with the respective rights, obligations and liabilities of PPP Co immediately before such assignment, novation, transfer or dealing is effected.
- (c) PPP Co must not unreasonably withhold any approval required under this clause 41.1.

41.2 Assignment by PPP Co

Except as expressly permitted by this Contract, the Debt Finance Side Deed or the RailCorp Deed of Charge, PPP Co must not assign, novate, transfer, mortgage, charge or otherwise deal with its interest in, or obligations under, any of the Project Agreements, without RailCorp's prior approval (which must not be unreasonably withheld).

41.3 Financier's Securities

PPP Co may, after execution of the Debt Finance Side Deed, mortgage or charge its interest under the Project Agreements to secure obligations to any Debt Financier (or trustee or agent for any Debt Financier) under the Debt Financing Documents, if, and for so long only as, the Debt Financier (or the trustee or agent for the Debt Financier) is a party to the Debt Finance Side Deed.

41.4 Ownership of Cars

As between RailCorp and PPP Co, PPP Co will retain ownership of the Cars (and the applicable Project Works relating to a Car in their then state and condition) at all times unless PPP Co is required to transfer ownership to RailCorp pursuant to clause 25 (Decommissioning of Sets) or clause 51 (Option to acquire Cars following termination).

41.5 Ownership of Simulators

Ownership of the Simulators will pass to RailCorp on the Date of Practical Completion of the Simulators, to the extent ownership has not passed to RailCorp by operation of law before that date.

41.6 Restrictions on dealings

PPP Co must not:

- (a) create, permit or suffer any security interest over;
- (b) lease, licence, transfer, sell, part with possession of, or otherwise deal with; or
- (c) operate or use, or permit any other person to operate or use,

the Cars, the Maintenance Site or the Maintenance Facility, except as expressly permitted under the RailCorp Project Agreements, the Debt Finance Side Deed or the Debt Financing Documents or as otherwise approved by RailCorp.

42. Share Capital Dealings

42.1 Initial status of ownership

PPP Co represents and warrants that as at Financial Close:

- (a) the Trustee, the Holding Trustee, the Trust and the Holding Trust will be indirectly and beneficially owned and controlled as set out below:
 - (i) Downer EDI - 49%;
 - (ii) AMP Capital - 25.5%;
 - (iii) ABN AMRO - 12.75%;
 - (iv) Babcock & Brown - 12.75%,
 (each an "**Ultimate Equity Investor**");
- (b) the Trust and the Trustee will be directly and beneficially wholly owned and controlled by PPP Co Holding Co;
- (c) the Trustee has not issued or agreed to issue any additional share capital or units or warrants or options over unissued units in the Trust, except to PPP Co Holding Co; and
- (d) the Holding Trust Equity Investors are each directly or indirectly and beneficially wholly owned and controlled respectively by the relevant Ultimate Equity Investors.

42.2 Restrictions on Share Capital Dealings

Subject to clause 42.4 (Permitted Share Capital Dealings), PPP Co undertakes not to:

- (a) at any time during the Contract Term:
 - (i) redeem, repurchase, defuse, retire or repay any units in the Trust or share capital in the Trustee (as the case may be) or resolve to do so;
 - (ii) issue any units in the Trust or share capital in the Trustee, except to PPP Co Holding Co;
 - (iii) issue or agree to issue any warrants or options over any unissued units in the Trust or unissued share capital in the Trustee, except to PPP Co Holding Co;
 - (iv) permit or suffer any change to (or transfer of) the issued units in the Trust which results in the 100% of the units in the Trust ceasing to be directly and beneficially wholly owned and controlled by PPP Co Holding Co;
 - (v) permit or suffer any change to (or transfer of) the share capital in the Trustee which results in the Trustee ceasing to be directly and beneficially wholly owned and controlled by PPP Co Holding Co; or
 - (vi) permit or suffer any act which causes PPP Co Holding Co to cease to have the rights and powers, directly or indirectly, to exercise its unitholder rights or shareholder rights to the extent permitted prior to that act;
- (b) allow PPP Co Holding Co, at any time during the Contract Term, to:
 - (i) redeem, repurchase, defuse, retire or repay any units in the Holding Trust or share capital in the Holding Trustee (as the case may be) or resolve to do so;

- (ii) issue any units in the Holding Trust or share capital in the Holding Trustee (as the case may be) to any person, except to the Equity Investors on a pro rata basis;
 - (iii) issue or agree to issue any warrants or options over any unissued units in the Holding Trust or unissued share capital in the Holding Trustee (as the case may be), except to the Equity Investors on a pro rata basis;
 - (iv) permit or suffer any change to (or transfer of) the issued units in the Holding Trust or share capital in the Holding Trustee (as the case may be) which changes the percentage of issued units or share capital owned (legally and/or beneficially) by the Equity Investors;
 - (v) permit or suffer any act which causes the Equity Investors to cease to have the rights and powers, directly or indirectly, to exercise their respective unitholder rights or shareholder rights to the extent permitted prior to that act;
 - (vi) permit the transfer of unitholder or shareholder loans (or other loans in the nature of equity funding) to a party other than one wholly owned and controlled by the same party that wholly owns and controls the party which is the relevant unitholder in the Holding Trust and shareholder of the Holding Trustee; or
 - (vii) permit or suffer any change to (or transfer of) the issued units or other rights in the Holding Trust which would result in that change not resulting in the equivalent change in the share capital or other rights in the Holding Trustee; or
- (c) permit or suffer any act, matter or thing which causes the ultimate holding company (as defined in the Corporations Act) of, or ultimate holding trust of, or ultimate holder of the entire limited partner's interest in, an Equity Investor to cease to own (legally or beneficially) directly or indirectly 100% of the issued share capital of, or as the case may be the entire limited partner's interest in, the relevant Equity Investor, other than as a result of the acquisition of securities which are publicly traded on a stock exchange,

(each a "Share Capital Dealing") without RailCorp's prior consent.

42.3 RailCorp's right to withhold consent

- (a) Subject to clauses 42.3(b), 42.3(c) and 42.4, RailCorp may only withhold its consent to a proposed Share Capital Dealing if RailCorp is of the reasonable opinion that:
 - (i) the new Equity Investor or Equity Investors (or any direct or indirect holding company of the new Equity Investor or Equity Investors):
 - A. is or are not solvent and reputable; or
 - B. has or have an interest or duty which conflicts or may conflict in a material way with the interests of RailCorp; or
 - (ii) the proposed Share Capital Dealing:
 - A. is against the public interest;

- B. would adversely affect RailCorp's Accreditation or PPP Co's Accreditation;
 - C. would adversely affect the ability or capability of PPP Co to perform its obligations under any Project Agreement;
 - D. would have a material adverse effect on the Project or RailCorp's passengers; or
 - E. would increase the liability of, or risks accepted by, RailCorp under the RailCorp Project Agreements or in any other way in respect of the Project.
- (b) Subject to clauses 42.3(c) and 42.4, RailCorp's consent to a Share Capital Dealing may be given or withheld, or may be given subject to any conditions, as RailCorp (in its absolute discretion) thinks fit if the Share Capital Dealing:
- (i) will occur during the Delivery Phase and:
 - A. involves the transfer, redemption or surrender by Downer EDI Holding Trust Equity Investor of any of its units in the Holding Trust and its share capital in the Holding Trustee;
 - B. involves the transfer, redemption or surrender by Downer EDI of any of its unitholder or shareholder loans (or other loans in the nature of equity funding) to or for the benefit of the PPP Co Holding Co; or
 - C. causes Downer EDI to cease to own (legally or beneficially) directly 100% of the issued share capital in Downer EDI Holding Trust Equity Investor; or
 - (ii) is of the kind referred to in clause 42.2(a).
- (c) Subject to clause 42.4, Downer EDI may reduce its beneficial or economic interest in the Project:
- (i) to no less than 35% after Final Completion of Set 6;
 - (ii) to no less than 12.5% after Final Completion of Set 72; and
 - (iii) to any percentage (including zero) after the Final Maturity Date of the Bank Debt Facilities,

with RailCorp's prior consent to the proposed Share Capital Dealing to effect the above reductions (which consent will not be unreasonably withheld).

42.4 Permitted Share Capital Dealing

PPP Co may effect a Permitted Share Capital Dealing at any time during the Contract Term without RailCorp's prior consent, provided that PPP Co informs RailCorp of the Permitted Share Capital Dealing as soon as reasonably practicable and, in any event, not less than 5 Business Days prior to the Permitted Share Capital Dealing.

42.5 Consent

RailCorp must advise PPP Co, within 10 Business Days (or such longer period as RailCorp reasonably requests given the nature of the proposed Share Capital Dealing) of receiving PPP Co's request for consent pursuant to clause 42.2, that:

- (a) it consents to the Share Capital Dealing;
- (b) subject to clause 42.3, the Share Capital Dealing is unacceptable to it and (except where clause 42.3(b) applies) the reasons why the Share Capital Dealing is unacceptable; or
- (c) it requires further information from PPP Co regarding the Share Capital Dealing. If so, PPP Co must provide the additional information sought by RailCorp within a further period of 10 Business Days, after which RailCorp must respond in terms of clauses 42.5(a) or (b) within 10 Business Days.

43. Contracts and dealings with contractors and third parties

43.1 Amendments to Project Agreements

- (a) **(No amendment without consent):** PPP Co must not:
 - (i) subject to clause 43.1(b), make or permit any amendment to, replacement of or waiver of a provision of or any supplement or agreement collateral to;
 - (ii) terminate, surrender, rescind or accept repudiation of;
 - (iii) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in; or
 - (iv) enter into any agreement or arrangement which affects the operation or interpretation of,any Project Agreement ("**Amendment**") without RailCorp's prior consent.
- (b) **(Permitted Amendment):** RailCorp's prior consent is not required for an Amendment that is:
 - (i) necessary in order to give effect to a Permitted Share Capital Dealing or a Share Capital Dealing for which consent has been obtained under clause 42 (Share Capital Dealings);
 - (ii) the surrender or return of any guarantee, letter of credit, performance bond or other form of credit support in accordance with the terms of the Significant Contract pursuant to which the credit support was required to be provided; or
 - (iii) permitted without RailCorp's prior consent under clause 44 or where RailCorp's consent has been obtained under clause 44,**("Permitted Amendment").**

- (c) **(Notice of Permitted Amendment):** If PPP Co makes or permits an Amendment that is a Permitted Amendment referred to in clause 43.1(b), PPP Co must:
- (i) within 5 Business Days of the occurrence of that Permitted Amendment, give notice to RailCorp of that Permitted Amendment, including details of that Permitted Amendment; and
 - (ii) within 10 Business Days of receipt of a request from RailCorp, provide any further information reasonably requested by RailCorp regarding the Permitted Amendment, including copies of any document relevant to the Amendment.
- (d) **(Notice of intended Amendment):** If PPP Co desires an Amendment that is not a Permitted Amendment, it must submit a notice to RailCorp seeking its consent. In such a notice, PPP Co must set out:
- (i) the Amendment and the relevant reasons for the Amendment;
 - (ii) the response or anticipated response of any other party (other than RailCorp) to the relevant documents regarding the Amendment;
 - (iii) the response or anticipated response of any assignee of, or person holding a Security Interest in, the relevant documents to the Amendment;
 - (iv) the impact or potential impact of the Amendment on:
 - A. the performance of PPP Co's Activities;
 - B. RailCorp's Accreditation or PPP Co's Accreditation, or any Accreditation required to be held by PPP Co's Associates to carry out PPP Co's Activities;
 - C. the financial structure or business of PPP Co; and
 - D. RailCorp's interest under or in respect of the Project Agreements; and
 - (v) copies of any documents relevant to PPP Co's request.
- (e) **(Consent):** Unless RailCorp is a party to the relevant Project Agreement, RailCorp must advise PPP Co, within 10 Business Days (or such longer period as RailCorp reasonably requests given the nature of the Amendment) of receiving PPP Co's notice under clause 43.1(d), that:
- (i) it consents to the Amendment;
 - (ii) subject to clauses 43.1(f) and 43.1(g), the Amendment is unacceptable to it and the reasons why the Amendment is unacceptable; or
 - (iii) it requires further information from PPP Co regarding the Amendment. If so, PPP Co must provide the additional information sought by RailCorp within a further period of 10 Business Days, after which RailCorp must respond in terms of sub paragraphs (i) or (ii) within 10 Business Days.
- (f) **(Consent not to be withheld):** Unless RailCorp is a party to the relevant Project Agreement, RailCorp must not withhold or delay its consent to the Amendment if

the Amendment is an amendment to, or replacement or waiver of, a provision of a Project Agreement that is not material.

- (g) **(Consent not to be unreasonably withheld):** Unless RailCorp is a party to the relevant Project Agreement or clause 43.1(f) applies, RailCorp must not unreasonably withhold or delay its consent to the Amendment if PPP Co demonstrates to the reasonable satisfaction of RailCorp that the effect of the Amendment will not directly or indirectly:
- (i) adversely affect the capacity of PPP Co to perform PPP Co's Activities;
 - (ii) adversely affect RailCorp's Accreditation or PPP Co's Accreditation, or any Accreditation required to be held by PPP Co's Associates to carry out PPP Co's Activities;
 - (iii) adversely affect the ability of RailCorp to enforce its rights under the Project Agreements;
 - (iv) decrease the value or amount of any interest of RailCorp under the Project Agreements;
 - (v) increase any liability or potential liability of RailCorp or its Associates in connection with the Project, including the amount or potential amount of any Termination Payment or of any liability of the State in respect of any Variation;
 - (vi) make it more likely that RailCorp will be called upon to pay any Termination Payment or make any payment in respect of a Variation; or
 - (vii) adversely affect use of the Cars by RailCorp.

43.2 Significant Contracts

- (a) **(RailCorp consent required):** Subject to clause 43.1 (Amendments to Project Agreements), PPP Co must not, and must ensure that the Core Contractors do not:
- (i) enter into;
 - (ii) make or permit any amendment to, or replacement of or waiver of a provision of;
 - (iii) terminate, surrender, rescind or accept repudiation of (or give the relevant Significant Contractor an entitlement to terminate, surrender, rescind or accept repudiation of);
 - (iv) permit the novation, assignment or substitution of any counterparty's right, obligation or interest in; or
 - (v) enter into any agreement or arrangement which affects the operation or interpretation or relates to the subject matter of,
- a Significant Contract without obtaining RailCorp's prior consent (which consent must not be unreasonably withheld or delayed).

- (b) **(Definition of Significant Contract):** A Significant Contract is any contract entered into by PPP Co or a Core Contractor that relates to PPP Co's Activities which, unless otherwise agreed by RailCorp in its absolute discretion:
- (i) has a contract sum exceeding:
 - A. if it relates to the Delivery Phase Activities, \$10 million (CPI Indexed); or
 - B. if it relates to the TLS Phase Activities, \$2 million (CPI Indexed);
 - (ii) requires the provision of services or works for a period exceeding 3 years (including any options to renew or extend); or
 - (iii) is for the design, manufacture, supply or installation of one or more of the following systems of the Cars:
 - A. bodyshell;
 - B. braking system;
 - C. traction propulsion system;
 - D. auxiliary supply system;
 - E. air supply system;
 - F. bogies, wheels and axles;
 - G. doors;
 - H. couplers;
 - I. heating, ventilation and airconditioning (HVAC) system;
 - J. lighting;
 - K. drivers' safety systems;
 - L. Train Operating System (TOS); and
 - M. communications systems,

and includes the Rolling Stock Manufacture Contract, the TLS Contract and the Maintenance Facility Construction Contract.
- (c) **(Subcontracting terms and conditions):** PPP Co must ensure that each Significant Contract contains provisions:
- (i) which satisfy the requirements of clause 56(c) (Civil Liability Act);
 - (ii) recognising RailCorp's rights under clause 48 (Step in) and clause 52 (End of Contract Term arrangements);
 - (iii) requiring the Significant Contractor to provide all information required by PPP Co to comply with its obligations under this Contract, including its obligations under the Contract Management Requirements;

- (iv) requiring the Significant Contractor to implement a contract management and quality assurance system which complies with the Compliance Management Plan and is otherwise appropriate for the work under the contract; and
 - (v) enabling PPP Co to comply with its novation obligations under clauses 52.5 and 52.8(a)(i).
- (d) **(Qualifications):** PPP Co must:
- (i) use its best endeavours to ensure that each Significant Contractor:
 - A. is reputable and has sufficient experience and expertise in successfully performing the relevant activities;
 - B. has arrangements in place for ensuring the availability of the appropriate skills, resources and Accreditation to perform its obligations to the standards required by this Contract; and
 - C. is of suitably high financial and commercial standing to enable it to perform its obligations to the standards required by this Contract;
 - (ii) immediately upon becoming aware that a Significant Contractor does not satisfy the requirements of clause 43.2(d)(i), use its best endeavours to:
 - A. cause the Significant Contractor to do whatever is necessary to promptly satisfy the requirements of clause 43.2(d)(i); or
 - B. promptly find another person that satisfies the requirements of clause 43.2(d)(i) to perform the obligations that were to be performed by that Significant Contractor, and subject to clause 43.2(e), where another such person is found, terminate the appointment of that Significant Contractor; and
 - (iii) provide RailCorp with prior written details (including details of the matters referred to in clause 43.2(d)(i)) of the Significant Contractor and the terms and conditions of its appointment, which appointment must be on commercial terms negotiated on an arms length basis having regard to the obligations of PPP Co under this Contract and in form and substance approved by RailCorp. PPP Co will not, however, be required to disclose to RailCorp any pricing information in respect of any such appointment.
- (e) **(Termination of appointment):** PPP Co must not terminate the appointment of any Significant Contractor (or replace any Significant Contractor upon resignation or removal of the Significant Contractor) unless:
- (i) another person is appointed to perform the obligations which were to be performed by that Significant Contractor and that other person satisfies the requirements of clause 43.2(d)(i); or
 - (ii) RailCorp otherwise gives its prior consent (which consent must not be unreasonably withheld or delayed).

- (f) **(Monitoring of Significant Contracts):** PPP Co must:
- (i) ensure that each Significant Contractor complies with all applicable laws, Approvals and quality standards in carrying out the work under a Significant Contract;
 - (ii) give RailCorp notice of termination of, or default in respect of, any Significant Contract, immediately upon a PPP Co becoming aware of such termination or default; and
 - (iii) if requested by RailCorp ensure that each Significant Contractor enters into such written instruments in form and substance approved by RailCorp (acting reasonably) and which RailCorp reasonably considers are equivalent to the Rolling Stock Manufacture Contract Side Deed, the TLS Contract Side Deed, or the Maintenance Facility Construction Contract Side Deed (as appropriate) or such equivalent agreement which is appropriate for the contract which the Significant Contractor has entered into with PPP Co or a Core Contractor (as applicable), and containing obligations no less stringent than those placed on the Core Contractors in their agreements with PPP Co.

43.3 Subcontracting

- (a) **(Subcontracting to Core Contractors):** Subject to clause 43.1 (Amendments to Project Agreements) and clause 43.2 (Significant Contracts), PPP Co may subcontract the performance of some or all of its obligations:
- (i) in relation to the design, manufacture and commissioning of the Cars and the Simulators to the Original Rolling Stock Manufacturer;
 - (ii) in relation to the design and construction of the Maintenance Facility Works, to the Original Maintenance Facility Contractor; and
 - (iii) in relation to the maintenance and repair of the Maintenance Facility (other than the Returned Facilities), the Cars and the Simulators, to the TLS Contractor.
- (b) **(Access to subcontracts):** Without limiting clause 43.2(d)(iii), PPP Co must:
- (i) promptly notify RailCorp of any proposed or executed Significant Contract in respect of PPP Co's Activities; and
 - (ii) if RailCorp requires, give RailCorp:
 - A. a copy of any proposed or executed Significant Contract, excluding any details of the price payable for the works or services provided under that contract; and
 - B. access to any other proposed or executed contract in respect of PPP Co's Activities.
- (c) **(Liability for acts of PPP Co's Contractors):** PPP Co will be vicariously liable to RailCorp for the acts and omissions of PPP Co's Contractors as if such acts or omissions were acts or omissions of PPP Co. Subcontracting by PPP Co of any obligation under the RailCorp Project Agreements will not relieve PPP Co of, or otherwise affect, any obligation or liability it has to RailCorp under the RailCorp Project Agreements.

44. Refinancings²⁹

44.1 Restriction on Refinancing

PPP Co must not, and must ensure that the PPP Co Finance Co does not, enter into a Refinancing other than:

- (a) in the case of a Refinancing (other than an Assumed Refinancing), with the prior consent of RailCorp under clause 44.4; or
- (b) in the case of an Assumed Refinancing, in accordance with clause 44.6.

44.2 Initial information

In the period when a Refinancing is being developed and before a notice is given under clause 44.3, PPP Co must provide RailCorp with notice as soon as reasonably practicable (and in any event not less than 10 Business Days before PPP Co submits a notice under clause 44.3) that a Refinancing is being developed together with copies of working draft term sheets, models and other material information relevant to the Refinancing progressively and as soon as practicable after they are produced or updated by or made available to PPP Co or any person negotiating or developing the Refinancing on behalf of it.

44.3 Notice of intended Refinancing

If PPP Co intends to undertake, or allow the PPP Co Finance Co to undertake, any Refinancing, PPP Co must submit a notice to RailCorp seeking its consent (or, in the case of an Assumed Refinancing, giving RailCorp not less than 10 Business Days notice that PPP Co intends to implement the Refinancing) at least 30 Business Days (or, in the case of a Rescue Refinancing, 10 Business Days) prior to the proposed Refinancing. In that notice or notification, PPP Co must set out:

- (a) full details as to the terms of the proposed Refinancing (including copies of all relevant draft contractual and security documentation in the form proposed to be signed by all relevant parties);
- (b) its good faith and detailed view of the impact or potential impact of the proposed Refinancing on RailCorp's liabilities, rights or obligations under the Project Agreements;
- (c) in the case of a Refinancing (other than an Assumed Refinancing):
 - (i) the reasons why PPP Co wishes to implement the Refinancing;

²⁹ [Under the RailCorp Consent Deed, dated 3 February 2012, the parties acknowledged that: \(a\) the consents given by RailCorp under clause 2.1\(a\) of the RailCorp Consent Deed do not affect the requirements of clause 44 of the Project Contract, so PPP Co will still need to comply with the requirements of clause 44 of the Project Contract, and obtain any consent from RailCorp which may be required under clause 44 of the Project Contract, in connection with all future Refinancings, including the Refinancing of the First Refinanced Debt; and \(b\) notwithstanding paragraph \(a\), if the State provides to RailCorp a notice stating that the conditions in clause 3.1 of the Capital Commitment Deed have been, or will on any Refinancing be, satisfied \(or waived\) and Subscription Completion under the Capital Commitment Deed will take place, then: \(i\) the Refinancing pursuant to that transaction shall be deemed to be an Assumed Refinancing for the purposes of clause 44.6 of the Project Contract; and \(ii\) notwithstanding the last paragraph of clause 44.6 of the Project Contract, RailCorp is entitled to its share of or, failing agreement, 50% of any Refinancing Gain \(as calculated in accordance with the Refinancing Assumptions and the Base Case Financial Model as at the date of Financial Close\) generated by that Refinancing.](#)

- (ii) its good faith and detailed view of the impact or potential impact of the proposed Refinancing on:
 - A. provision of the Project by PPP Co;
 - B. performance by PPP Co of its obligations under the RailCorp Project Agreements;
 - C. the financial structure or business of PPP Co;
 - D. RailCorp's interest under or in respect of the RailCorp Project Agreements; and
 - E. the Equity Return and Distributions;
- (iii) a proposed mechanism for determining any Refinancing Gain and paying RailCorp's share of the Refinancing Gain to RailCorp;
- (iv) all other material information in respect of the Refinancing which it believes in good faith is relevant to RailCorp's decision to give or withhold its consent to the Refinancing; and
- (v) copies of any documents and models relevant to PPP Co's request; and
- (d) in the case of an Assumed Refinancing:
 - (i) confirmation that PPP Co considers the Refinancing is an Assumed Refinancing;
 - (ii) its good faith and detailed view on whether the requirements of clause 44.7(a) and 44.7(b) are satisfied; and
 - (iii) detailed information to enable RailCorp to verify:
 - A. that the relevant Refinancing Assumptions will not be contravened; and
 - B. whether the requirements of clause 44.7(a) and 44.7(b) are satisfied.

44.4 RailCorp consent to Refinancing (other than an Assumed Refinancing)

Except in the case of an Assumed Refinancing, RailCorp must advise PPP Co within 20 Business Days of receiving PPP Co's notice under clause 44.3 (or, in the case of a Rescue Refinancing, within 10 Business Days) that:

- (a) it consents to the proposed Refinancing;
- (b) the proposed Refinancing is unacceptable to it and the reasons why this is the case; or
- (c) it requires further information from PPP Co regarding the proposed Refinancing. If so, PPP Co must provide the additional information reasonably sought by RailCorp within a further period of 10 Business Days (or, in the case of a Rescue Refinancing, within 5 Business Days), after which RailCorp must respond in terms of clauses 44.4(a), 44.4(b) or 44.4(c) within 20 Business Days (or, in the case of a Rescue Refinancing, within 5 Business Days) of receiving the further information.

44.5 Consent not to be unreasonably withheld

RailCorp must not unreasonably withhold or delay its consent to a proposed Refinancing (other than an Assumed Refinancing) if RailCorp is reasonably satisfied:

- (a) that the purpose of a proposed Refinancing is:
 - (i) to cure an actual or potential event of default under the Debt Financing Documents;
 - (ii) to enable the Security Trustee to exercise rights under the Debt Finance Side Deed; or
 - (iii) to enable the Debt Financiers to waive a cash lock up or funding restrictions under the Debt Finance Documents in order to make payments as they fall due to RailCorp or Core Contractors,

provided that to the extent that additional funding is raised as a consequence of the Refinancing, that amount must not be taken into account in any determination of the Debt Termination Amount under schedule 14; or

- (b) in respect of each proposed Refinancing (other than an Assumed Refinancing or a Rescue Refinancing), as to each of the following:
 - (i) the requirements of clause 44.7 are, or will be, satisfied;
 - (ii) to the extent that an incoming financier has future or undrawn commitments to the Project, the incoming financier has the Required Rating;
 - (iii) the Refinancing is effected on an arms length basis;
 - (iv) PPP Co has complied with clauses 44.2, 44.3 and where applicable 44.4(c);
 - (v) the Refinancing would not result in the credit rating (if any) of PPP Co being downgraded below investment grading;
 - (vi) the Refinancing would not result in any of RailCorp's rights, obligations or liabilities under the RailCorp Project Agreements being worse than they would have been if the Refinancing did not occur; and
 - (vii) the calculation of any Refinancing Gain and the basis on which RailCorp is to be paid its share of the Refinancing Gain has been agreed or otherwise determined in accordance with clause 44.10.

44.6 No further consent required for Assumed Refinancing

PPP Co may implement an Assumed Refinancing without the need to obtain RailCorp's prior consent if:

- (a) the requirements of clause 44.5(b)(i), 44.5(b)(ii) and 44.5(b)(iv) are satisfied; and
- (b) the terms and conditions of the financing documentation relating to the Refinancing other than:
 - (i) the terms and conditions of the financing documentation which are the same as the terms and conditions of the Debt Financing Documents in their form immediately before the Assumed Refinancing is effected; and

- (ii) terms and conditions to the extent they provide for the relevant Refinancing Assumptions,

would not result in RailCorp's rights, obligations or liabilities under the RailCorp Project Agreements being materially worse compared with the respective rights, obligations or liabilities of RailCorp under the RailCorp Project Agreements immediately before the Assumed Refinancing is effected.

If the requirements of clause 44.6(a) or 44.6(b) are not satisfied, PPP Co must obtain RailCorp's prior written consent to the Assumed Refinancing (which consent must not be unreasonably withheld or delayed).

RailCorp may request further information from PPP Co regarding a proposed Assumed Refinancing, in which event PPP Co must provide the additional information reasonably sought by RailCorp within 10 Business Days of RailCorp's request.

RailCorp will not be entitled to share in any Refinancing Gain generated by an Assumed Refinancing.³⁰

44.7 Incoming financier's obligation

For any Refinancing:

- (a) the incoming financiers (or their agent or trustee) and PPP Co must execute a deed substantially in the form of the Debt Finance Side Deed; and
- (b) the incoming financiers must receive no greater security than is held by the Debt Financiers.

44.8 Cost of RailCorp review

PPP Co must pay RailCorp's reasonable costs (including any reasonable legal or financial advisers' fees incurred by RailCorp) in reviewing and, if approved, implementing any Refinancing proposal.

44.9 Execution of agreements and provision of revised model

In the event of a Refinancing that is permitted or consented to by RailCorp under this clause 44:

- (a) RailCorp must promptly, at the request of PPP Co, execute a deed substantially in the form of the Debt Finance Side Deed, and otherwise on terms reasonably acceptable to RailCorp with the incoming financiers (or their agents or trustees) and PPP Co; and
- (b) PPP Co must provide RailCorp with:
 - (i) certified copies of all executed documentation in relating to the Refinancing; and
 - (ii) a printed copy and an electronic copy of the revised Base Case Financial Model,

within 10 Business Days of the Refinancing being implemented.

³⁰ [See footnote 29 above.](#)

44.10 Refinancing Gain

RailCorp and PPP Co will use their respective reasonable endeavours to agree the Refinancing Gain and the manner and timing of paying of RailCorp's share of the Refinancing Gain to RailCorp. For these purposes, PPP Co must provide RailCorp with all information concerning the Refinancing, the Distributions and the Project that RailCorp may require to calculate the Refinancing Gain.

If the parties fail to agree the Refinancing Gain or the manner or timing of payment of RailCorp's share of the Refinancing Gain to RailCorp, either party may require that the matter be determined in accordance with clause 53 (Dispute resolution).

For these purposes the parties must require any expert or arbitrator to make his or her determination on the basis that RailCorp is to receive 50% of any Refinancing Gain and that RailCorp is to be paid its share of the Refinancing Gain no later than any Equity Investor receives its share of the Refinancing Gain. The parties must also require the expert or arbitrator to determine any necessary changes to the Financial Model and the Base Case Financial Model to reflect the Refinancing.

45. Financial Model³¹

45.1 Changes to Financial Model

PPP Co must:

- (a) update the Financial Model as reasonably necessary (which will be at least every 12 months) to reflect actual results and outcomes and other circumstances; and
- (b) obtain the prior approval of RailCorp (which approval must not be unreasonably withheld or delayed) to any change in the Financial Model (other than in relation to historic measurable data incorporated under clause 45.2 or in accordance with clause 45.3).

45.2 Financial Model to incorporate data

PPP Co must ensure that the assumptions book for the Financial Model (and consequently the Financial Model itself) incorporates relevant and accurate data (including actual data when available) when operated, or to be provided to RailCorp from time to time, for the purposes of, or in connection with, this Contract.

45.3 Checking and revising Financial Models

PPP Co must ensure that:

- (a) such persons as may from time to time be nominated by RailCorp are given such access to the Financial Model as that person considers necessary in order to enable the person to check whether the obligations concerning those models under this Contract have been observed (including technical assistance and information as to structure and operation or so as to allow the person to establish an operating version of the model on that person's computer system), provided that RailCorp will only

³¹ [Under clause 2.3 of the RailCorp Consent Deed, dated 3 February 2012, the parties acknowledged that that the financial models provided under clause 2\(b\)\(i\) of the Restructure Co-Ordination Deed and clause 3.1\(a\) of the Capital Commitment Deed do not constitute the Base Case Financial Model, or the Financial Model, under the Project Contract. Clause 2.3 of the RailCorp Consent Deed does not affect PPP Co's obligations under the Project Contract with respect to the Base Case Financial Model and the Financial Model.](#)

nominate such a person if it reasonably considers the person to be skilled in the operation and/or audit of computer models and has informed the person of the confidentiality of the contents of the Financial Model; and

- (b) revisions to the Financial Model specified by such a person by notice to PPP Co are promptly effected unless PPP Co by notice to RailCorp promptly disputes the reasonableness, accuracy or relevance of any such revisions. In that event, in the absence of agreement by the parties, PPP Co may promptly refer the dispute for dispute resolution in accordance with clause 53 (Dispute resolution).

46. Records and reporting obligations

46.1 Accounting records

- (a) PPP Co must keep, and ensure that the PPP Co Finance Co keeps, proper books of account and all other records it has relating to the Project at its registered office.
- (b) PPP Co and the PPP Co Finance Co must have its accounts audited annually.
- (c) PPP Co must ensure the books of account and records of PPP Co and PPP Co Finance Co are available to RailCorp and its nominees at all reasonable times during the Contract Term for examination, audit, inspection, transcription and copying.
- (d) Without limiting PPP Co's obligations under clause 52 (End of Contract Term arrangements), if this Contract is terminated, PPP Co must give RailCorp and its Associates access to all books of account and records necessary for continued design, construction, operation and Through Life Support of the Maintenance Facility and, if RailCorp exercises its option to acquire any Sets (or any Project Works relating thereto), for the continued design, manufacture, operation and Through Life Support of those Sets.
- (e) RailCorp must give PPP Co access to any books of account or records given to RailCorp by PPP Co for 7 years after the date on which they are given.

46.2 Cost to complete information

PPP Co must give RailCorp the same information required to be given to any Debt Financier under the Debt Financing Documents in relation to the costs to complete the manufacture of the Sets and construction of the Maintenance Facility Works, at such times as are required under the Debt Financing Documents.

46.3 Financial statements

- (a) Not later than 31 October in each year, PPP Co must give RailCorp:
 - (i) unconsolidated audited financial statements for the previous financial year for PPP Co and PPP Co Finance Co; and
 - (ii) the audited financial statements for the previous financial year of any consolidated entity of which PPP Co or PPP Co Finance Co forms part.
- (b) Not later than 30 days after end of each quarter, PPP Co must give RailCorp cashflow and profit and loss statements for that quarter for PPP Co and the PPP Co Finance Co certified by a director of PPP Co or the PPP Co Finance Co as the case may be.

46.4 Financial Model information

- (a) Not later than 31 October in each year, PPP Co must give RailCorp certified copies of:
- (i) a printout of the Financial Model (and an electronic copy on which the Financial Model is encoded) updated in accordance with clause 45.2 (Financial Model to incorporate data) showing the actual performance of PPP Co in the previous financial year and cumulatively since the date of Financial Close and the then current performance projections for the remaining years of the Contract Term (assuming no, or no further, extension);
 - (ii) a statement in such detail as RailCorp may reasonably require reconciling the information in the printout and the electronic copy of the Financial Model provided under clause 46.4(a)(i) with the audited financial statements of PPP Co and PPP Co Finance Co for the same period and the Base Case Financial Model; and
 - (iii) a statement in such detail as RailCorp may reasonably require reconciling the information in the printout and electronic copy of the Financial Model provided under clause 46.4(a)(i) with any financial information or Financial Model information provided for or utilised for the purposes of the Debt Financing Documents.
- (b) Without limiting clause 46.4(a), PPP Co must ensure RailCorp is provided with the results from the operation of the Financial Model, in a form reasonably satisfactory to RailCorp, as and when requested by RailCorp.
- (c) PPP Co acknowledges that:
- (i) RailCorp owes no duty to PPP Co to review the Financial Model; and
 - (ii) no review of the Financial Model will in any way:
 - A. indicate RailCorp's acceptance of the Financial Model for purposes of this Contract; or
 - B. otherwise affect either party's rights and obligations under this Contract or otherwise at law.

46.5 Maintenance costs

Without limiting PPP Co's other obligations under this clause 46, PPP Co must give RailCorp such information relating to the cost of maintaining and repairing the Sets as RailCorp may reasonably require from time to time.

46.6 Notices under Project Agreements

PPP Co must give RailCorp as soon as practicable certified copies of all notices of default, breach or dispute given or received by it under the Project Agreements from any of its co-contracting parties.

46.7 Advice on rights of third parties under Project Agreements

PPP Co undertakes to advise RailCorp as soon as practicable after an event has occurred which, to PPP Co's actual knowledge, could in any way materially prejudice RailCorp's rights

under the RailCorp Project Agreements by reason of the exercise of rights available to third parties arising from the Project Agreements.

46.8 Other information

PPP Co must:

- (a) **(ASIC and ASX information):** give RailCorp, as soon as practicable, copies of:
 - (i) all notices and other documents given or received by a PPP Co Group member to or from the Australian Securities and Investments Commission or the Australian Stock Exchange Limited; and
 - (ii) all notices and other documents given or received by an Equity Investor to or from the Australian Securities and Investments Commission which a reasonable person would expect RailCorp to have an interest in;
- (b) **(Termination Payments):** give RailCorp, if RailCorp is, or is likely to become, liable to pay a Termination Payment under clause 50.9 (Termination Payments) or clause 51.2(b) (If option to acquire Cars following termination is exercised), reasonable details of each component of that amount and the way in which the component was calculated, promptly after being requested to do so by RailCorp;
- (c) **(Counterparty Details):** give RailCorp details of any changes to the Counterparty Details within 20 Business Days after the change; and
- (d) **(Other):** promptly give RailCorp such other information relating to the Project as RailCorp may reasonably require from time to time.

47. Disclosure, confidentiality and publicity

47.1 Disclosure by RailCorp

RailCorp may publish or disclose (on the internet or otherwise):

- (a) the terms and conditions of this Contract or any other Project Agreement; and
- (b) any document or information arising under, out of or in connection with this Contract or any other Project Agreement or relating to the performance of this Contract or any other Project Agreement,

except for the information which is specified in schedule 13 (Confidential Information) and the disclosure of which is not otherwise within the scope of clause 47.2 or 47.4.

47.2 Public disclosure

- (a) PPP Co acknowledges and agrees that disclosures regarding the Project by RailCorp, the State or any Authority may be required:
 - (i) under the *Freedom of Information Act 1989* (NSW);
 - (ii) to satisfy the disclosure requirements of the Auditor General and to satisfy the requirements of Parliamentary accountability,

("Public Disclosure Obligations").
- (b) PPP Co must, at its own cost and expense, use all reasonable endeavours to assist RailCorp, the State or an Authority in meeting its Public Disclosure Obligations.

47.3 Confidentiality

Subject to clause 47.4, no party will, at any time, whether before or after the expiration or sooner determination of the Contract Term, without the consent of each other party, divulge or suffer or permit its servants, consultants or agents to divulge to any person (other than to the parties to the Project Agreements and their officers, employees, consultants, advisers and agents to the extent they require the relevant information to enable them properly to carry out their duties):

- (a) any of the documents (or parts of documents) or information which are specified in schedule 13 (Confidential information);
- (b) any information relating to the negotiations concerning the same; or
- (c) any information which may have come to a party's knowledge in the course of such negotiations or otherwise (including after the date of this Contract) concerning the operations, dealings, transactions, contracts, Intellectual Property Rights, commercial or financial arrangements or affairs of any other party which the other party has identified as confidential or which the first identified party ought reasonably know should be treated as confidential.

47.4 Exceptions

The restrictions imposed by clause 47.3 will not apply to the disclosure of any information:

- (a) which is now or after the date of this Contract comes into the public domain or which is obtainable with no more than reasonable diligence from sources other than the parties;
- (b) which is required to be disclosed by law or the listing rules of any recognised stock exchange (if applicable);
- (c) required by a House of Parliament, by a Committee of a House of Parliament or for any legitimate government purpose or process;
- (d) pursuant to the contract summary required to be published in accordance with Premier's Memorandum No. 2000-11 dated 27 April 2000 and the New South Wales Government "Working with Government Guidelines for Privately Financed Projects" November 2001;
- (e) to a court, arbitrator or administrative tribunal in the course of proceedings before it, him or her to which the disclosing party is a party or to an expert in the course of any determination by it, him or her to which the disclosing party is a party; or
- (f) which, in the reasonable opinion of PPP Co or RailCorp (as the case may be), is required to be disclosed to:
 - (i) any actual or prospective investor in or Debt Financier to (or assignee or novatee of a Debt Financier to) PPP Co;
 - (ii) any actual or prospective insurer in respect of the Project;
 - (iii) any person to whom disclosure is reasonably necessary to enable that person to comply with the Project Agreements to which it is a party; or
 - (iv) any rating agency.

47.5 Publicity

Subject to clauses 47.3 and 47.4 and except for notices which PPP Co is required to disclose to any recognised stock exchange, PPP Co must:

- (a) not make any public announcements or statements in relation to the Project (including by posting any information relating to the Project on any website) without RailCorp's prior consent;
- (b) use reasonable endeavours to agree with RailCorp the wording and timing of all public announcements and statements by it or a Significant Contractor relating to the Project before the relevant announcement or statement is made;
- (c) give RailCorp a draft of any proposed media release relating to the Project and obtain RailCorp's approval of the media release before distributing it;
- (d) give RailCorp a copy of any announcement or media release as soon as practicable after it is made or distributed; and
- (e) ensure that all Significant Contractors comply with the requirements referred to in this clause 47.5.

48. Step-in

48.1 Notice from RailCorp

If PPP Co is in breach of an obligation under a RailCorp Project Agreement, RailCorp may give PPP Co notice:

- (a) stating that it is a notice under this clause 48.1; and
- (b) requiring PPP Co to remedy the breach.

48.2 Right to step-in

If:

- (a) PPP Co has not, within a reasonable time after receipt of RailCorp's notice under clause 48.1 taken steps to remedy the breach;
- (b) PPP Co, having taken such steps, fails to remedy the breach within a reasonable time (being the Applicable Cure Period in the case of a breach the subject of an Approved Cure Plan), or
- (c) clause 49.10(a) applies,

then RailCorp may step-in by taking such action as may be necessary to remedy the breach provided that RailCorp will not initiate or effect a Variation.

Upon RailCorp exercising any of its step in rights under this clause 48.2, PPP Co's obligations under this Contract are suspended to the extent and for such period as PPP Co is prevented from performing such obligations by RailCorp's exercise of its step-in rights.

48.3 PPP Co to assist RailCorp

If RailCorp elects to exercise its step-in right under clause 48.2, PPP Co must assist RailCorp wherever and however possible to ensure RailCorp is able to exercise its step-in right

effectively and expeditiously, including giving RailCorp or its nominees access to the Maintenance Site and any land upon which PPP Co's Activities are being carried out.

48.4 Cessation of step-in rights

If RailCorp exercises its step-in right, RailCorp may, after giving reasonable prior notice to PPP Co, cease to exercise that right and, in any event, will cease to exercise its step-in right once the relevant breach has been remedied.

48.5 RailCorp not required to remedy breach

PPP Co acknowledges and agrees that RailCorp is not obliged to remedy any breach, or to overcome or mitigate any risk or risk consequences, in respect of which RailCorp exercises its step-in right.

48.6 PPP Co to compensate RailCorp

Any Loss suffered or incurred by RailCorp arising out of or in connection with the exercise of its step-in right under this clause 48 will be a debt due and payable from PPP Co to RailCorp.

48.7 Payments during step-in

- (a) Subject to clause 48.7(b), RailCorp will have no liability to PPP Co, and PPP Co will not be entitled to make any Claim against RailCorp, arising out of or in connection with the exercise by RailCorp of its step-in rights under this clause 48.
- (b) To the extent and for such period as PPP Co is prevented from performing its obligations under clause 22.1(a) as a result of RailCorp exercising any of its step in rights under clause 48.2, RailCorp must pay to PPP Co an amount equal to the aggregate of:
 - (i) the Availability Payment and KPI Payment that PPP Co would have received during that period if RailCorp had not exercised its step in rights under clause 48.2 (based on the average performance of PPP Co for the 6 months immediately prior to RailCorp exercising such step in rights);
 - (ii) the Volume Adjustment based on the average number of kilometres travelled by Operational Sets during that month (AVKM) being 8,333 km; and
 - (iii) the Interest Payment Adjustment for the period,less the reasonable costs incurred by RailCorp of remedying the relevant PPP Co breach and otherwise procuring the performance of PPP Co's obligations which have been suspended as a result of RailCorp exercising its step in rights.

48.8 No limitation on other rights

The exercise (or failure to exercise) by RailCorp of its step-in rights under this clause 48 will not limit RailCorp's rights against PPP Co under this Contract or otherwise according to law, including its rights under clause 49 (Default) and clause 50 (Termination) in respect of the breach by PPP Co of the obligation which entitled RailCorp to exercise its step in rights under this clause 48.

49. Default

49.1 Unacceptable Availability Notice

- (a) RailCorp may issue an Unacceptable Availability Notice to PPP Co if, after the Commencement Period (as defined below):
- (i) less than 80% of the Required Availability is provided in any 1 Availability Period;
 - (ii) less than 90% of the Required Availability is provided in any 12 consecutive Availability Periods; or
 - (iii) less than 95% of the Required Availability is provided in any 20 Availability Periods in any calendar year.

For the purposes of this clause 49.1(a):

- (iv) **"Commencement Period"** means the period commencing on the Date of Practical Completion of Set 1 and ending on the date that is 30 months after that date, provided that such period will be extended for (without double counting) the aggregate of:
 - A. the period during which the occurrence of an event which gives rise to an event described in clause 15.10, a deemed Availability under clause 22.6 or suspension under clause 33.4 of PPP Co's obligation to provide the Required Availability has the consequence of 50% or more of the Operational Sets being deemed Available under clause 22.6 or not being able to be made Available; and
 - B. the period from the date which is 21 weeks after the Date of Practical Completion of Set 1 until the earlier of the events described in clauses 15.11(a)(iv), 15.11(a)(v) and 15.11(a)(vi);
 - (v) an Available Set will be taken to have been provided if it is Available at the commencement of an Availability Period and is not cancelled when it is due to enter into service for the reasons referred to in paragraphs (i), (ii) or (iv) of clause 3.3(b) of schedule 7, even if it is subsequently cancelled during the Availability Period; and
 - (vi) the Required Availability will not include any Additional Required Availability which applies in accordance with clause 22.8 (Additional Required Availability for special events).
- (b) An Unacceptable Availability Notice must:
- (i) state that it is an Unacceptable Availability Notice;
 - (ii) identify which of the events in clause 49.1(a) has occurred; and
 - (iii) state that the issue of 6 or more Unacceptable Availability Notices in any rolling 2 year period may result in termination of this Contract.
- (c) RailCorp may only issue one Unacceptable Availability Notice in respect of any particular Availability Period.

- (d) An Unacceptable Availability Notice must not be issued in respect of a particular event or occurrence which:
- (i) has been the subject of a prior Unacceptable Availability Notice; or
 - (ii) is caused by or constitutes a PPP Co Event of Default which is the subject of a current Approved Cure Plan or Approved Prevention Plan which PPP Co is diligently implementing.

This does not, however, prevent RailCorp from issuing an Unacceptable Availability Notice in respect of a separate event or occurrence which is of the same type as an event or occurrence which has been the subject of a prior Unacceptable Availability Notice.

49.2 Unacceptable Reliability Notice

- (a) RailCorp may issue an Unacceptable Reliability Notice to PPP Co if:
- (i) after the Date of Practical Completion of Set 7, the average number of PPP Co Related Incidents (other than a PPP Co Related Incident identified in paragraph (d) of the definition of PPP Co Related Incident), in respect of Qualifying Sets (as defined in clause 49.2(b)) in any one calendar month exceeds 1 PPP Co Related Incident in 10,000 Set kilometres; and
 - (ii) the aggregate distance travelled by the Qualifying Sets:
 - A. exceeds 75,000 kilometres in that month; or
 - B. would have exceeded 75,000 kilometres in that month but for:
 - 1) cancellations for the reasons referred to in clause 3.3(b) of schedule 7; or
 - 2) the Set being withheld or withdrawn from service by PPP Co, and PPP Co not achieving the Required Availability as a result.
- (b) A "**Qualifying Set**" is a Set in respect of which either:
- (i) more than 6 months has expired since its Date of Final Completion; or
 - (ii) more than 24 months (as extended for any periods for which the Set is deemed Available under clause 22.6 or PPP Co's obligation to make the Set Available is suspended under clause 33.4) has expired since its Date of Practical Completion.
- (c) An Unacceptable Reliability Notice must:
- (i) state that it is an Unacceptable Reliability Notice; and
 - (ii) identify:
 - A. the month and year which it relates to; and
 - B. RailCorp's calculation of the average number of PPP Co Related Incidents per 10,000 Set kilometres for that month; and

- C. state that the issue of 4 or more Unacceptable Reliability Notices in any rolling 2 year period may result in termination of this Contract.
- (d) Only one Unacceptable Reliability Notice may be issued in respect of any calendar month.
- (e) An Unacceptable Reliability Notice must not be issued in respect of a particular event or occurrence which is caused by or constitutes a PPP Co Event of Default which is the subject of a current Approved Cure Plan or Approved Prevention Plan which PPP Co is diligently implementing.

49.3 Persistent Breach

- (a) RailCorp may issue a Persistent Breach Notice to PPP Co, if a breach of the same PPP Co obligation under this Contract or any other RailCorp Project Agreement (excluding any breach of PPP Co's obligation to provide the Required Availability or the occurrence of any PPP Co Related Incidents) occurs more than twice in any 2 year period.
- (b) A Persistent Breach Notice must:
 - (i) state that it is a Persistent Breach Notice;
 - (ii) identify the breach;
 - (iii) not relate to a PPP Co Event of Default which is the subject of a current Approved Cure Plan or Approved Prevention Plan which PPP Co is diligently implementing; and
 - (iv) state that, if the breach continues beyond 30 days or recurs within the 12 month period commencing 30 days (or such longer period as RailCorp reasonably determines having regard to the nature of the breach) after the date of service of the Persistent Breach Notice, it may result in RailCorp becoming entitled to terminate this Contract.
- (c) If, following the issue of a Persistent Breach Notice, the breach specified in the Persistent Breach Notice has continued beyond 30 days (or such longer period determined by RailCorp under clause 49.3(b)(iv)) or recurred within the 12 month period commencing 30 days after the date of service of the Persistent Breach Notice, then RailCorp may issue a Final Persistent Breach Notice.
- (d) A Final Persistent Breach Notice must:
 - (i) state that it is a Final Persistent Breach Notice;
 - (ii) identify the breach;
 - (iii) state that the breach has been the subject of a Persistent Breach Notice served within the period of 12 months and 30 days (or such longer period determined by RailCorp under clause 49.3(b)(iv)) prior to the date of the service of the Final Persistent Breach Notice; and
 - (iv) state that if the breach continues beyond 30 days (or such longer period as RailCorp reasonably determines having regard to the nature of the breach) or recurs 3 or more times within the 6 month period after the date of service of the Final Persistent Breach Notice, RailCorp will become entitled to terminate this Contract.

49.4 Frequent Breaches

- (a) RailCorp may issue a Frequent Breaches Notice to PPP Co if PPP Co commits frequent breaches of this Contract (excluding any breach by PPP Co of its obligation to provide the Required Availability or the occurrence of any PPP Co Related Incidents) which, in aggregate:
- (i) substantially frustrate the objects of this Contract;
 - (ii) significantly impair RailCorp's ability to fulfil any of its objectives under the Transport Administration Act;
 - (iii) otherwise have a material adverse effect on RailCorp, its passengers or the use of the RailCorp Network by Third Party Operators; or
 - (iv) indicate that PPP Co does not intend to be or does not regard itself as being bound by this Contract,

whether or not such breaches are of the same type or class ("**Frequent Breaches**").

- (b) A Frequent Breaches Notice must:
- (i) state that it is a Frequent Breaches Notice;
 - (ii) identify the Frequent Breaches; and
 - (iii) not relate to a PPP Co Event of Default which is the subject of a current Approved Cure Plan or Approved Prevention Plan which PPP Co is diligently implementing; and
 - (iv) state that, if Frequent Breaches continue to occur, they may result in RailCorp becoming entitled to terminate this Contract.
- (c) If, following the issue of a Frequent Breaches Notice, Frequent Breaches continue to occur during the 12 month period commencing 30 days after the date of service of a Frequent Breaches Notice, RailCorp may issue a Final Frequent Breaches Notice to PPP Co.
- (d) A Final Frequent Breaches Notices must:
- (i) state that it is a Final Frequent Breaches Notice;
 - (ii) identify the Frequent Breaches;
 - (iii) state that Frequent Breaches have been the subject of a Frequent Breach Notice served within the period of 12 months and 30 days prior to the date of service of the Final Frequent Breaches Notice; and
 - (iv) state that if Frequent Breaches continue to occur at any time in the 6 month period after the date of service of the Final Frequent Breaches Notice, RailCorp will become entitled to terminate this Contract.

49.5 PPP Co Events of Default

Each of the following events is a PPP Co Event of Default:

- (a) **(Abandonment):** PPP Co wholly or substantially abandons the Project;

- (b) **(Failure to commence):** following Financial Close, PPP Co fails to commence within 20 Business Days the performance of the Delivery Phase Activities relating to the Cars, the Maintenance Facility Works or the Simulators;
- (c) **(Failure to progress):** PPP Co fails to regularly and diligently progress the Delivery Phase Activities relating to the Cars, the Maintenance Facility Works or the Simulators as required under clause 15.2(b), provided that this clause 49.5(c) will not apply:
 - (i) in circumstances where this clause 49.5(c) applies as a result of the circumstances contemplated by clause 49.5(e); and
 - (ii) for so long as PPP Co is diligently pursuing the replacement of the Core Contractor or Core Contractor Guarantor (as applicable) in accordance with clause 49.5(e) and the 30 Business Day period referred to in clause 49.5(e) (as that period may be extended in accordance with clause 49.5(e)) has not expired;
- (d) **(Fraud or misleading conduct):** there is any fraud or false, misleading or deceptive conduct on the part of PPP Co or its Core Contractors in the performance of any of PPP Co's Activities (including any fraud or intentionally false, misleading or deceptive reporting discovered during any audit under clause 26.7 (Audits));
- (e) **(Insolvency of contractor or guarantor):** an Event of Insolvency occurs in relation to a Core Contractor or a Core Contractor Guarantor whether or not PPP Co is then in breach of this Contract, and either:
 - (i) that Core Contractor or Core Contractor Guarantor is not replaced within 30 Business Days (or such longer period not exceeding 120 Business Days during which PPP Co is at all times diligently pursuing the replacement of that Core Contractor or Core Contractor Guarantor (as applicable)), by a person that:
 - A. satisfies the requirements of clause 43.2(d)(i) (Significant Contracts - Qualifications); or
 - B. is otherwise acceptable to RailCorp (acting reasonably); or
 - (ii) where the Event of Insolvency occurs in relation to the TLS Contractor, PPP Co fails to appoint a receiver in respect of the TLS Contractor within 30 Business Days or, following the appointment of the receiver within the 30 Business Day period, the receiver fails to perform, or procure the performance of, the material obligations of the Core Contractor under the Project Agreements,

provided that this clause 49.5(e) does not apply to a Core Contractor or a Core Contractor Guarantor where such entity does not have any actual or contingent obligation to PPP Co in respect of the Project;
- (f) **(Guarantee invalid):** a guarantee given to PPP Co by a Core Contractor Guarantor is invalid or unenforceable or ceases to be valid or enforceable and such invalidity or unenforceability is not rectified within 30 Business Days;
- (g) **(Funding cancelled or suspended):** the obligation of a Debt Financier or an Equity Investor to provide funding under the Debt Financing Documents or the Equity Documents, respectively is cancelled or suspended due to an event of default under a Debt Financing Document or an Equity Document (as applicable), or a Debt

Financier or Equity Investor fails (in whole or in part) to provide funding as contemplated by the Financial Model;

- (h) **(Assignment etc):** PPP Co breaches its obligations under clause 41 (Assignment, security, ownership of Cars and restriction on dealings);
- (i) **(Subcontracting):** PPP Co breaches its obligations under clause 43.2 (Significant Contracts) or clause 43.3 (Subcontracting);
- (j) **(Failure to provide Bonds):** PPP Co fails to provide RailCorp with a Bond required under this Contract, within the time period required under this Contract;
- (k) **(Failure to insure):** PPP Co fails to effect and maintain (or cause to be effected and maintained) the Insurances (subject to clause 36.12 (Uninsurable risks));
- (l) **(Failure to reinstate):** PPP Co fails to comply with its reinstatement obligations under clause 34 (Restatement of loss or damage);
- (m) **(Failure to pay):** PPP Co fails to pay an amount that is due under any RailCorp Project Agreement when it is due and the failure is not remedied with 20 Business Days of a written demand from RailCorp;
- (n) **(Failure to report):** PPP Co fails to comply with its reporting obligations under this Contract, or a report from PPP Co contains a material inaccuracy;
- (o) **(Refinancing):** PPP Co breaches its obligations under clause 44.1 (Restrictions on Refinancing);
- (p) **(Restrictions on dealing with share capital):** PPP Co breaches its obligations under clause 42.2 (Restrictions on dealings with share capital);
- (q) **(Lack of or breach of Accreditation):** PPP Co or a Core Contractor:
 - (i) undertakes any of PPP Co's Activities which require Accreditation without being Accredited to do so; or
 - (ii) breaches (as determined by ITSRR) the terms of its Accreditation in carrying out PPP Co's Activities;
- (r) **(Threatened suspension or cancellation of RailCorp's Accreditation):** an act or omission of PPP Co or its Associates in carrying out PPP Co's Activities results in ITSRR notifying RailCorp that it proposes to suspend or cancel RailCorp's Accreditation;
- (s) **(Suspension of Accreditation):** ITSRR suspends:
 - (i) under section 29 of the Rail Safety Act, any Accreditation required by PPP Co to perform PPP Co's Activities; or
 - (ii) any Accreditation required by a Core Contractor to perform PPP Co's Activities;
- (t) **(Incorrect representation or warranty):** a representation or warranty made or given by PPP Co in this Contract or any other RailCorp Project Agreement is found to be incorrect or misleading when made or given and this:
 - (i) substantially frustrates the objects of this Contract;

- (ii) significantly impairs RailCorp's ability to fulfil any of its objectives under the Transport Administration Act; or
 - (iii) otherwise has a material adverse effect on RailCorp, its passengers or the use of the RailCorp Network by Third Party Operators; and
- (u) **(Other breach):** any other breach by PPP Co of an obligation under this Contract or any other RailCorp Project Agreement which:
- (i) substantially frustrates the objects of this Contract;
 - (ii) significantly impairs RailCorp's ability to fulfil any of its objectives under the Transport Administration Act; or
 - (iii) otherwise has a material adverse effect on RailCorp, its passengers or Third Party Operators.

49.6 Default Notice

If a PPP Co Event of Default occurs, RailCorp may give PPP Co a notice (the "**Default Notice**"):

- (a) stating that it is a notice under this clause 49.6; and
- (b) specifying the nature of the PPP Co Event of Default.

49.7 Cure Plan

- (a) If:
 - (i) a Default Notice has been given; and
 - (ii) the PPP Co Event of Default is capable of being Remedied,

PPP Co must, within 10 Business Days after receipt of the Default Notice:

 - (iii) Remedy the PPP Co Event of Default; or
 - (iv) prepare and submit to RailCorp a draft plan describing the actions and measures which PPP Co will diligently pursue to Remedy the PPP Co Event of Default (including the proposed cure period) ("**Draft Cure Plan**").
- (b) Within 10 Business Days after receipt of the Draft Cure Plan, RailCorp must either:
 - (i) approve the Draft Cure Plan by notifying PPP Co; or
 - (ii) reject the Draft Cure Plan by notifying PPP Co and providing reasons to PPP Co for its rejection.
- (c) If RailCorp approves a Draft Cure Plan pursuant to clause 49.7(b)(i) (the "**Approved Cure Plan**"):
 - (i) the period of time in the Approved Cure Plan to Remedy the PPP Co Event of Default is the cure period (the "**Applicable Cure Period**"); and
 - (ii) PPP Co must comply with and implement the Approved Cure Plan (or otherwise diligently pursue the Remediation of the PPP Co Event of

Default) and Remedy the PPP Co Event of Default within the Applicable Cure Period.

- (d) If RailCorp rejects a Draft Cure Plan pursuant to clause 49.7(b)(ii), PPP Co, in consultation in good faith with RailCorp, must amend the Draft Cure Plan to meet RailCorp's reasonable requirements and submit the amended Draft Cure Plan to RailCorp for its approval, in which case this clause 49.7 will apply to the amended Draft Cure Plan as if it were originally submitted under clause 49.7(a).
- (e) The parties acknowledge and agree that an Applicable Cure Period (including any extension to an Applicable Cure Period under clause 49.8) will not take into account any period of time in which the performance of the relevant obligations by PPP Co is suspended by operation of clause 33.4.

49.8 Extension to Cure Period

- (a) If PPP Co reasonably determines that it requires an extension to an Applicable Cure Period it may (no later than the expiration of the then Applicable Cure Period) submit in writing to RailCorp:
 - (i) evidence that PPP Co has diligently pursued and is continuing to diligently pursue the Remediation of the applicable PPP Co Event of Default but that the PPP Co Event of Default cannot, despite such diligence, be Remedied within the Applicable Cure Period; and
 - (ii) the reasonable period of time proposed by PPP Co to be the extended Applicable Cure Period for the applicable Approved Cure Plan.
- (b) RailCorp will not unreasonably refuse to grant an extension of the Applicable Cure Period for the applicable Approved Cure Plan if PPP Co satisfies the requirements of clause 49.8(a).
- (c) If RailCorp grants an extension of the Applicable Cure Period in accordance with clause 49.8(b):
 - (i) PPP Co must comply with and implement the applicable Approved Cure Plan (or otherwise diligently pursue the Remediation of the PPP Co Event of Default); and
 - (ii) such extended period of time will be the Applicable Cure Period.
- (d) PPP Co may only apply once for an extension of the Applicable Cure Period in respect of a particular PPP Co Event of Default, unless RailCorp otherwise agrees in writing in RailCorp's absolute discretion.

49.9 Prevention Plan

- (a) If:
 - (i) a Default Notice has been given; and
 - (ii) the PPP Co Event of Default is not capable of being Remedied,

PPP Co must, within 10 Business Days after receipt of the Default Notice prepare and submit to RailCorp a draft plan describing the actions and measures which PPP Co will diligently pursue to prevent the PPP Co Event of Default from recurring, ("**Draft Prevention Plan**").

- (b) Within 10 Business Days after receipt of the Draft Prevention Plan, RailCorp must either:
 - (i) approve the Draft Prevention Plan by notifying PPP Co; or
 - (ii) reject the Draft Prevention Plan by notifying PPP Co and providing reasons to PPP Co for its rejection.
- (c) If RailCorp approves a Draft Prevention Plan pursuant to clause 49.9(b)(i) (the "**Approved Prevention Plan**"), PPP Co must comply with and implement the Approved Prevention Plan.
- (d) If RailCorp rejects a Draft Prevention Plan pursuant to clause 49.9(b)(ii), PPP Co, in consultation in good faith with RailCorp, must amend the Draft Prevention Plan to meet RailCorp's reasonable requirements and submit the amended Draft Prevention Plan to RailCorp for its approval, in which case this clause 49.9 will apply to the amended Draft Prevention Plan as if it were originally submitted under clause 49.9(a).

49.10 Remedies for PPP Co Events of Default

- (a) If a Default Notice has been given and PPP fails to:
 - (i) if the PPP Co Event of Default is capable of being Remedied:
 - A. Remedy the PPP Co Event of Default, or submit a Draft Cure Plan, in accordance with clause 49.7(a);
 - B. if RailCorp rejects a Draft Cure Plan pursuant to clause 49.7(b)(ii), amend the Draft Cure Plan to meet RailCorp's requirements and submit the amended Draft Cure Plan in accordance with clause 49.7(d); or
 - C. comply with and implement the Approved Cure Plan (or otherwise diligently pursue the Remediation of the PPP Co Event of Default); or
 - (ii) if the PPP Co Event of Default is not capable of being Remedied:
 - A. submit a Draft Prevention Plan in accordance with clause 49.9(a);
 - B. if RailCorp rejects a Draft Prevention Plan pursuant to clause 49.9(b)(ii), amend the Draft Prevention Plan to meet RailCorp's requirements and submit the amended Draft Prevention Plan in accordance with clause 49.9(d); or
 - C. comply with and implement the Approved Prevention Plan,
- RailCorp may:
- (iii) require PPP Co, at PPP Co's cost, to replace any Core Contractor performing the obligations of PPP Co to which the PPP Co Event of Default relates with a person that:
 - A. satisfies the requirements of clause 43.2(d)(i) (Significant Contracts - Qualifications); or
 - B. is otherwise acceptable to RailCorp (acting reasonably);

- (iv) exercise any rights pursuant to any security held by RailCorp; or
 - (v) exercise its step-in rights under clause 48.
- (b) In addition to the remedies specified in clause 49.10(a), if PPP Co fails to:
- (i) if the PPP Co Event of Default is capable of being Remedied:
 - A. Remedy the PPP Co Event of Default, or submit a Draft Cure Plan, in accordance with clause 49.7(a);
 - B. if RailCorp rejects a Draft Cure Plan pursuant to clause 49.7(b)(ii), amend the Draft Cure Plan to meet RailCorp's reasonable requirements and submit the amended Draft Cure Plan in accordance with clause 49.7(d); or
 - C. comply with and implement the Approved Cure Plan (or otherwise diligently pursue the Remediation of the PPP Co Event of Default); or
 - (ii) if the PPP Co Event of Default is not capable of being Remedied:
 - A. submit a Draft Prevention Plan in accordance with clause 49.9(a);
 - B. if RailCorp rejects a Draft Prevention Plan pursuant to clause 49.9(b)(ii), amend the Draft Prevention Plan to meet RailCorp's reasonable requirements and submit the amended Draft Prevention Plan in accordance with clause 49.9(d); or
 - C. comply with and implement the Approved Prevention Plan,

RailCorp may give PPP Co a notice:

 - (iii) stating that it is a notice under this clause 49.10(b); and
 - (iv) specifying such failure and requiring the failure to be rectified within such period specified in the notice.

49.11 No prejudice to other remedies

Nothing in this clause 49 prejudices or limits RailCorp from:

- (a) exercising its other rights, whether under this Contract, any other RailCorp Project Agreement or otherwise according to law, and whether against PPP Co or otherwise, in relation to a PPP Co Event of Default, Persistent Breaches, Frequent Breaches or any other default by PPP Co, including:
 - (i) its rights pursuant to any security held by RailCorp;
 - (ii) its step-in rights under clause 48; or
 - (iii) its rights to terminate this Contract under clause 50; or
- (b) suing PPP Co, or exercising any other rights against PPP Co, whether under this Contract or otherwise according to law, in relation to a PPP Co Event of Default, Persistent Breaches, Frequent Breaches or any other default by PPP Co.

50. Termination

50.1 PPP Co Termination Events

Each of the following events is a PPP Co Termination Event:

- (a) **(Unacceptable Availability):** RailCorp has issued 6 or more Unacceptable Availability Notices to PPP Co in any rolling 2 year period;
- (b) **(Unacceptable Reliability):** RailCorp has issued 4 or more Unacceptable Reliability Notices to PPP Co in any rolling 2 year period;
- (c) **(Persistent Breach):** RailCorp has issued a Final Persistent Breach Notice and the relevant breach has continued beyond 30 days (or such longer period determined by RailCorp under clause 49.3(d)(iv)) or recurred 3 or more times within the 6 month period after the date of service of the Final Persistent Breach Notice;
- (d) **(Frequent Breaches):** RailCorp has issued a Final Frequent Breaches Notices and Frequent Breaches continue to occur at any time in the 6 month period after the date of service of the Final Frequent Breaches Notice;
- (e) **(Failure to Remedy):** a failure by PPP Co to Remedy a PPP Co Event of Default which is capable of being Remedied within the Applicable Cure Period;
- (f) **(Failure to prevent):** a failure by PPP Co to prevent the recurrence of a PPP Co Event of Default which is the subject of an Approved Prevention Plan;
- (g) **(Failure to comply with notice):** a failure by PPP Co to comply with a notice given by RailCorp under clause 49.10(b);
- (h) **(Insolvency of PPP Co):** an Event of Insolvency occurs in relation to PPP Co, whether or not PPP Co has been in breach of this Contract;
- (i) **(Suspension or cancellation of PPP Co's Accreditation):** ITSRR suspends (other than a suspension not exceeding 28 days under section 29 of the Rail Safety Act) or cancels any Accreditation required by PPP Co to perform PPP Co's Activities;
- (j) **(Suspension or cancellation of RailCorp's Accreditation):** an act or omission of PPP Co or its Associates in carrying out PPP Co's Activities results in ITSRR suspending or cancelling RailCorp's Accreditation; or
- (k) **(Major safety breach):**
 - (i) a Set is involved in a collision or derailment whilst the Set is in service which causes death to any person; and
 - (ii) such death is found to be principally attributable to the negligence of any one or more of PPP Co or PPP Co's Contractors.

50.2 Termination for PPP Co Termination Event

If a PPP Co Termination Event occurs and is subsisting, RailCorp may terminate this Contract by written notice to PPP Co, which states the PPP Co Termination Event in respect of which the notice is given, with effect from the date stated in the notice (which must not precede and be no more than 90 Business Days after the date the notice is received by PPP Co), without any cure period being given to PPP Co.

50.3 RailCorp Termination Events

Each of following events is a RailCorp Termination Event :

- (a) **(Failure to pay):** RailCorp fails to comply with its payment obligations under clause 27 (Payment provisions) and the failure is not remedied within 20 Business Days of a written demand from PPP Co;
- (b) **(Final Court Decision):** a court makes a Final Court Decision which makes it impossible for PPP Co to construct the Maintenance Facility Works at the Maintenance Site for a continuous period of 2 months (except where the Final Court Decision results from a breach or other wrongful act or omission by PPP Co or its Associates);
- (c) **(Change in State Law):** a change in a Law of the State makes it impossible for PPP Co to:
 - (i) construct the Maintenance Facility Works at the Maintenance Site; or
 - (ii) maintain the Cars at the Maintenance Facility,for a continuous period of 2 months (except where the change in Law of the State results from a breach or other wrongful act or omission by PPP Co or its Associates);
- (d) **(Resumption by NSW Authority):** a NSW Government Authority resumes any part of the Maintenance Site which makes it impossible for PPP Co to:
 - (i) construct the Maintenance Facility Works on the balance of the Maintenance Site; or
 - (ii) maintain the Cars at the Maintenance Facility,for a continuous period of 2 months;
- (e) **(Failure to provide construction access to Maintenance Site):** RailCorp fails to provide PPP Co with access to the Maintenance Site in accordance with clause 11.1 and this breach makes it impossible for PPP Co to construct the Maintenance Facility Works at the Maintenance Site for a continuous period of 2 months; or
- (f) **(Material breach):** a breach by RailCorp of its obligations under this Contract or any other RailCorp Project Agreement which prevents PPP Co from performing all or a substantial part of its obligations under this Contract for a continuous period of 2 months after PPP Co has given RailCorp notice of such breach.

50.4 Termination for RailCorp Termination Event

- (a) If a RailCorp Termination Event occurs, PPP Co may give RailCorp 30 Business Days' notice of its intention to terminate this Contract.
- (b) If PPP Co gives a notice under clause 50.4(a), RailCorp may suspend PPP Co's right to terminate by giving a suspension notice within 30 Business Days of receipt of PPP Co's notice.
- (c) RailCorp's suspension of PPP Co's right to terminate expires on the earliest of:
 - (i) RailCorp notifying PPP Co that it is ending the suspension period;

- (ii) in the case of the RailCorp Termination Event referred to in clause 50.3(a) (Failure to pay), 30 Business Days after the date of PPP Co's notice under clause 50.4(a);
 - (iii) in the case of any other RailCorp Termination Event, 24 months after the date of PPP Co's notice under clause 50.4(a); and
 - (iv) when the relevant RailCorp Termination Event has been remedied (or its effects overcome).
- (d) If RailCorp's suspension of PPP Co's right to terminate expires:
- (i) under clause 50.4(c)(i), 50.4(c)(ii) or 50.4(c)(iii), PPP Co may immediately terminate this Contract by notice to RailCorp; and
 - (ii) under clause 50.4(c)(iv), this Contract will continue in force.
- (e) PPP Co must continue to perform its obligations under this Contract while its right to terminate is suspended, to the extent that it is lawful and practicable to do so.
- (f) If RailCorp does not give a suspension notice under clause 50.4(b) and the relevant RailCorp Termination Event has not been remedied (or its effects overcome) within 30 Business Days of receipt of PPP Co's notice under clause 50.4(a), PPP Co may, if the RailCorp Termination Event is still subsisting, immediately terminate this Contract by notice to RailCorp.
- (g) If RailCorp issues a notice to PPP Co under clause 50.4(b):
- (i) RailCorp must pay PPP Co monthly an amount sufficient to place PPP Co in the net after tax position it would have been in had the relevant RailCorp Termination Event not occurred, from the date RailCorp issues a notice under clause 50.4(b) until the end of the period of suspension; and
 - (ii) RailCorp will not be entitled to give any notice under clauses 49.1 (Unacceptable Availability Notice) or 49.2 (Unacceptable Reliability Notice) to the extent the occurrence or circumstance which would otherwise entitle RailCorp to give such a notice results from the relevant RailCorp Termination Event.

50.5 Voluntary termination by RailCorp

Without prejudice to any of RailCorp's other rights or entitlements under this Contract, RailCorp may:

- (a) at any time for its sole convenience and without giving reasons terminate this Contract by written notice to PPP Co with effect from the date stated in the notice (which date must not precede the date the notice is received by PPP Co); and
- (b) thereafter either itself or by third parties complete the uncompleted part of the Project (if RailCorp elects to do so).

50.6 Termination for Force Majeure Event

Subject to clause 33.12 (Suspension of PPP Co's right to terminate), either party may terminate this Contract pursuant to clause 33.11 (Termination for Force Majeure Event).

50.7 Termination for Uninsurable Risk

RailCorp may terminate this Contract pursuant to clause 36.12 (Uninsurable Risks).

50.8 Consequences of termination

Upon termination of this Contract, the rights and obligations of the parties under this Contract, the Maintenance Site Lease and the Maintenance Facility Licence will cease except for:

- (a) any accrued rights and obligations under this Contract; and
- (b) any rights and obligations which are expressed to continue after termination of this Contract, including those referred to in clause 57.3 (Survival of certain provisions; no merger).

50.9 Termination Payments

- (a) If, before the Original Expiry Date, this Contract is terminated under this clause 50 or clauses 33.11 (Termination for Force Majeure Event) or 36.12 (Uninsurable Risks) and RailCorp does not exercise its option under clause 51 (Option to acquire Cars following termination), RailCorp must pay to PPP Co:
 - (i) if this Contract is terminated under clause 50.2 (Termination for PPP Co Termination Event), the Termination Payment determined in accordance with clause 2 of schedule 14 (Termination Payments) by the date for payment specified in clause 2 of schedule 14;
 - (ii) if this Contract is terminated under clause 50.4 (Termination for RailCorp Termination Event) or clause 50.5 (Voluntary termination by RailCorp), the Termination Payment calculated in accordance with clause 3 of schedule 14 (Termination Payments) within 30 days after the amount of that Termination Payment has been agreed, or determined in accordance with clause 53 (Dispute resolution);
 - (iii) if this Contract is terminated under clause 33.11 (Termination for Force Majeure Event) or 36.12 (Uninsurable Risks), the Termination Payment calculated in accordance with clause 4 of schedule 14 (Termination Payments) within 30 days after the amount of that Termination Payment has been agreed, or determined in accordance with clause 53 (Dispute resolution).
- (b) In the calculation of Termination Payments under schedule 14 (Termination Payments), there will not be any double counting of any costs or other amounts payable, whether such costs or other amounts are referred to in schedule 14 (Termination Payments) or elsewhere in this Contract.
- (c) Payment of the relevant Termination Payment will be full and final settlement of PPP Co's rights against RailCorp for breach and/or termination of this Contract and the Project Agreements. On termination of this Contract PPP Co will not be entitled to make a Claim against RailCorp for any amount other than for payment of the Termination Payment (except for any liability which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in the relevant Termination Payment).
- (d) RailCorp is not required to make any Termination Payment to PPP Co if this Contract is terminated after the Original Expiry Date.

- (e) As soon as practicable following payment of any Termination Payment, and subject to compliance with any obligation under clause 52, RailCorp must release the RailCorp Deed of Charge.

50.10 Waiver

If this Contract is terminated, PPP Co waives any right it might otherwise have to pursue a claim of restitution of any kind, including a claim of unjust enrichment or quantum meruit and PPP Co's only entitlement in these circumstances will be in respect of its rights under clause 50.9 (Termination Payments) or clause 51.2(b) (If option to acquire Cars following termination is exercised).

50.11 No other termination rights

Despite any rule of law or equity to the contrary, this Contract may not be terminated other than as provided for in this Contract.

51. Option to acquire Cars following termination

51.1 RailCorp's option to acquire Cars following termination

If this Contract is terminated under clause 50 (Termination), clause 33.11 (Termination for Force Majeure Event) or clause 36.12 (Uninsurable Risk), and the option in clause 27.10 (Early payment option for cost of Sets and Simulators) has not been exercised, RailCorp may, within 30 days of the date of termination, give PPP Co a notice specifying:

- (a) that it is exercising its option to acquire one or more Cars (or the Project Works relating to one or more Cars); and
- (b) the Cars (or the related Project Works) which it wishes to acquire.

51.2 If option to acquire Cars following termination is exercised

If RailCorp gives PPP Co a notice under clause 51.1 (RailCorp's option to acquire Cars following termination):

- (a) PPP Co must as soon as practicable give RailCorp (or its nominee) possession of the Cars (or the Project Works relating to the Cars) specified in RailCorp's notice;
- (b) RailCorp must pay PPP Co as the sale price for the relevant Cars (or the Project Works relating to the Cars):
 - (i) if this Contract is terminated before the Original Expiry Date under clause 50.2 (Termination for PPP Co Termination Event), the Termination Payment determined in accordance with clause 2 of schedule 14 (Termination Payments) by the date for payment specified in clause 2 of schedule 14 (Termination Payments);
 - (ii) if this Contract is terminated before the Original Expiry Date under clause 50.4 (Termination for RailCorp Termination Event) or clause 50.5 (Voluntary termination by RailCorp), the Termination Payment calculated in accordance with clause 3 of schedule 14 (Termination Payments) within 30 days after the amount of that Termination Payment has been agreed, or determined in accordance with clause 53 (Dispute resolution);
 - (iii) if this Contract is terminated before the Original Expiry Date under clause 33.11 (Termination for Force Majeure Event) or 36.12

(Uninsurable Risks), the Termination Payment calculated in accordance with clause 4 of schedule 14 (Termination Payments) within 30 days after the amount of that Termination Payment has been agreed, or determined in accordance with clause 53 (Dispute resolution); and

- (iv) if this Contract is terminated after the Original Expiry Date, nil; and
- (c) title in and ownership of the relevant Cars or Project Works (including all of PPP Co's rights, title and interest in them) is transferred to RailCorp (or its nominee) free from any encumbrances with effect from the date PPP Co receives the relevant payment under clause 51.2(b) (or, where RailCorp is not obliged to make any payment under clause 51.2(b), with effect from the date of RailCorp's notice under clause 51.1) and PPP Co must do all things necessary to perfect this transfer.

In the calculation of Termination Payments under schedule 14 (Termination Payments), RailCorp will be entitled to deduct an amount (if any) which would be required to be expended to bring the condition of the relevant Cars to the condition they would have been in had PPP Co complied with its obligations under this Contract, provided that there will not be any double counting of any costs or other amounts payable whether such costs or other amounts are referred to in schedule 14 (Termination Payments) or elsewhere in this Contract.

Payment of the relevant Termination Payment will be full and final settlement of PPP Co's rights against RailCorp for breach and/or termination of this Contract and the Project Agreements. On termination of this Contract PPP Co will not be entitled to make a Claim against RailCorp for any amount other than payment of the Termination Payment (except for any liability which arose prior to the Termination Date (but not from the termination itself) that has not already been taken into account in the relevant Termination Payment).

52. End of Contract Term arrangements

52.1 Maintenance Facility condition assessments

- (a) If required by RailCorp, PPP Co and RailCorp must carry out joint inspections of the Maintenance Site, the Maintenance Facility (other than the Returned Facilities), the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials at least 5, 3 and 1 years before the Original Expiry Date.
- (b) Following each inspection, the parties must use their reasonable endeavours to agree on:
 - (i) the rectification, maintenance and remediation works (if any) required to be carried out by PPP Co before the expiry of the Original Contract Term to:
 - A. bring the condition of the Maintenance Site, the Maintenance Facility (other than the Returned Facilities), the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials to the condition it would have been in had PPP Co complied with its obligations under this Contract; and
 - B. to ensure that on expiry of the Original Contract Term, the Maintenance Site, the Maintenance Facility (other than the Returned Facilities), the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials comply with the Return Conditions (fair wear and tear excepted);
 - (ii) a program for the carrying out of those works by PPP Co (if any); and

- (iii) an estimate of the total cost of carrying out those works (including an appropriate margin for risks and contingencies being not less than 10% of the estimate of the total cost without that margin or contingency added) determined in accordance with industry best practice.
- (c) If the parties do not reach agreement on all of the matters referred to in clause 52.1(b) within 20 Business Days after the date of the inspection, either party may refer those aspects of the matter in dispute for dispute resolution under clause 53 (Dispute resolution).

52.2 Completion of rectification works

Without limiting PPP Co's obligations under clauses 12 (Environmental issues) and 23 (Through Life Support), PPP Co must carry out the rectification, maintenance and remediation works, and implement the program, agreed or determined under clause 53.

52.3 Return Condition Bond

- (a) If:
 - (i) following an inspection under clause 52.1(a) it is agreed or determined that rectification, maintenance or remediation works are required; and
 - (ii) RailCorp requests PPP Co to provide a bond as security for the performance of those works,

PPP Co must provide to RailCorp a bond ("**Return Condition Bond**"):

- (iii) for an amount equal to the estimated total cost of carrying out the rectification, maintenance and remediation works, as agreed or determined under clause 53; and
- (iv) which satisfies the requirements of clause 5.3 (Requirements of Bonds).
- (b) If RailCorp requests the Return Condition Bond pursuant to clause 52.3(a) and PPP Co fails to provide RailCorp with the Return Condition Bond, RailCorp will be entitled to deduct the required amount of the Return Condition Bond from the TLS Payments and retain such moneys as security for the performance of the works. RailCorp must repay such moneys in return for a Return Condition Bond:
 - (i) for an amount equal to the amount repaid; and
 - (ii) which satisfies the requirements of clause 5.3 (Requirements of Bonds).
- (c) If requested by PPP Co, RailCorp must release any Return Condition Bond provided under clause 52.3(a) or 52.3(b) in return for a replacement bond for an amount equal to the estimated cost of carrying out the works remaining to be carried out at the time of the request, as agreed or determined under clause 53 (Dispute resolution).

52.4 Return of Maintenance Facility

At the end of the Contract Term, PPP Co must:

- (a) surrender and return to RailCorp (or its nominee), the Maintenance Facility (including any fixed plant and equipment) and the Maintenance Site;

- (b) deliver to RailCorp or its nominee:
 - (i) all Unfixed Maintenance Plant and Equipment; and
 - (ii) all Maintenance Parts and Materials,

and transfer all of PPP Co's rights, title and interest in the Maintenance Facility (other than the Returned Facilities), the Maintenance Site, the Unfixed Maintenance Plant and Equipment and the Maintenance Parts and Materials to RailCorp (or its nominee):

- (c) free from any encumbrances; and
- (d) in a state and condition which complies with the Return Conditions (fair wear and tear excepted).

52.5 Novation of Contracts

During the TLS Phase, PPP Co must procure the novation to RailCorp or its nominee of any agreement, sublease or licence relating to PPP Co's Activities of the Project which RailCorp may nominate (in its absolute discretion), with effect from the end of the Contract Term or such other date as RailCorp may agree.

52.6 Contract Documentation

At the end of the Contract Term, PPP Co must deliver to RailCorp all copies of Contract Documentation then held by PPP Co.

52.7 Insurance proceeds

At the end of the Contract Term, PPP Co must:

- (a) pay to RailCorp or its nominee any insurance proceeds from any Insurances for the reinstatement of the Maintenance Facility Works or the Maintenance Facility to the extent not already reinstated, and to the extent required for the reinstatement; and
- (b) assign to RailCorp or its nominee any rights available to PPP Co under those Insurances.

52.8 If the Delivery Phase Activities have not been completed

- (a) If this Contract is terminated during the Delivery Phase then, in addition to the other requirements of this clause 52, RailCorp may require PPP Co to do any or all of the following:
 - (i) procure a novation to RailCorp or its nominee of any Significant Contract;
 - (ii) give, and require any Core Contractor to give, to RailCorp or its nominee possession of the plant, equipment, materials, temporary works and tools being used in the Project Works and other things on or in the vicinity of the Project Site, in each case which are owned by PPP Co or any Core Contractor and are reasonably required to facilitate completion of the Project Works;
 - (iii) deliver, and require Core Contractors to deliver, to RailCorp or its nominee true copies of the books of account and all other records and documents relating to the Project; and

- (iv) do all other acts and things reasonably required to enable RailCorp or its nominee to undertake the Project including:
 - A. grant, and require any Core Contractor to grant, to RailCorp or its nominee a non-exclusive licence to use any PPP Co Intellectual Property Rights; and
 - B. procure the grant to RailCorp or its nominee of a non-exclusive licence to use any Third Party Intellectual Property Rights,

in the plant, equipment, materials, temporary works and tools referred to in subclause 52.8(a)(ii) for the purpose of completion of the Project Works.

- (b) If RailCorp or its nominee takes possession of the plant, equipment, materials, temporary work and tools in accordance with clause 52.8(a)(ii), then RailCorp must use reasonable endeavours to procure the proper use and maintenance of them and, when the equivalent of Practical Completion of the last Set, the Maintenance Facility Works or the Simulators (as applicable) is achieved, to procure the handover to PPP Co or the relevant Core Contractor of that plant, equipment, materials, temporary works and tools which have not been consumed or incorporated in the Cars, the Maintenance Facility Works or the Simulators (as applicable) and are not required for the operation or maintenance of the Cars, the Maintenance Facility or the Simulators (as applicable).

52.9 Assistance in securing continuity

PPP Co must, before the end of the Contract Term, do all things reasonably required by RailCorp to ensure the smooth and orderly transmission of responsibility for the Through Life Support of the Maintenance Facility (other than the Returned Facilities) and the Simulators (and, if RailCorp has exercised or proposes to exercise its option to acquire any Cars, the Cars) to RailCorp or its nominee including:

- (a) meeting with RailCorp and such other persons notified by RailCorp's Representative to discuss the Through Life Support of the Maintenance Facility (other than the Returned Facilities) and the Simulators (and, if applicable, the Cars);
- (b) providing access to its operations for managers and supervisors of RailCorp or its nominee for the purpose of familiarisation; and
- (c) providing sufficient information to RailCorp or its nominee to determine the status and condition of the Maintenance Facility (other than the Returned Facilities) and the Simulators (and, if applicable, the Cars) and any works programs in progress at the time.

PPP Co must ensure that competent personnel having experience with the Through Life Support of the Maintenance Facility (other than the Returned Facilities) and the Simulators (and, if RailCorp exercises its option to acquire any Cars, the Cars) continue to be available at RailCorp's request to advise RailCorp or its nominee on any aspect of the Through Life Support of the Maintenance Facility (other than the Returned Facilities) and the Simulators (and, if applicable, the Cars) for 12 months following the expiry of the Contract Term.

52.10 Non-frustration of handover

PPP Co must not do or omit to do anything which avoids or materially prejudices or frustrates the handover of the Maintenance Facility (other than the Returned Facilities) (and, if RailCorp exercises its option to acquire any Cars, the Cars) as a going concern to RailCorp.

52.11 Power of attorney

PPP Co irrevocably appoints, with effect from the expiry of the Contract Term, 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 any agreement or novation contemplated by this clause 52.

52.12 All other acts

PPP Co must do all other acts and things reasonably required to enable RailCorp or its nominee to be in a position to complete the Project Works and operate, maintain and repair the Maintenance Facility (and, if RailCorp exercises its option to acquire any Cars, the Cars).

53. Dispute resolution

53.1 Procedure for resolving disputes

- (a) Any dispute between RailCorp and PPP Co arising out of or in connection with this Contract or PPP Co's Activities (including questions concerning this Contract's existence, meaning, validity or termination) ("**Disputes**") must be resolved in accordance with the procedures set out in this clause 53.
- (b) The sequential procedure that is to be followed to resolve a Dispute is as follows:
 - (i) (**Negotiation**): firstly, the Dispute must be negotiated in accordance with clause 53.2;
 - (ii) (**Expert determination**): secondly, if the Dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 53.2(c) and the Dispute is one of the following:
 - A. a Dispute as to whether an Accreditation Variation Document complies with the documents referred to in clause 8.2(c)(i)-(iv) or ITSRR's reasonable requirements for the Accreditation Variation Document;
 - B. a Dispute as to whether a Project Plan complies with, or has been updated in accordance with, the requirements of this Contract;
 - C. a Dispute arising out of or in connection with clause 11.5(c);
 - D. a Dispute as to whether any Design Documentation complies with the requirements of this Contract, or whether changes to the Design Documentation proposed by RailCorp's Representative are required to make the Design Documentation comply with the requirements of this Contract;
 - E. a Dispute in relation to an instruction by RailCorp's Representative under clause 13.8(e);
 - F. a Dispute as to whether the Cars or the Simulators are being (or have been) manufactured, or the RailCorp Enabling Works or the Maintenance Facility Works are being (or have been) constructed, in accordance with the requirements of this Contract;

- G. a Dispute as to:
 - 1) the reasonableness of a test to be carried out pursuant to clause 14.6; or
 - 2) the results of a test carried out pursuant to clause 14.6;
- H. a Dispute as to whether RailCorp is entitled to suspend the carrying out of all or part of the Delivery Phase Activities by PPP Co under clause 14.7(a);
- I. a Dispute as to whether the Integrated Test Plan prepared by PPP Co complies with the requirements of this Contract;
- J. a Dispute as to whether there is a Defect in the Returned Facilities under clause 17B.1(c);
- K. a Dispute as to whether Practical Completion of a Set, the Maintenance Facility Works, a RailCorp Enabling Works Package or the Simulators has been achieved;
- L. a Dispute as to whether Final Completion of a Set has been achieved;
- M. a Dispute as to any increase to the cost of performing PPP Co's Activities as a result of a change referred to in clause 22.11 (Change to Minimum Operating Standards for Available Sets and RailCorp Policies, Rules or Procedures);
- N. a Dispute as to the costs payable by RailCorp to PPP Co under clause 24.3(b)(ii) (If option to extend is exercised);
- O. a Dispute relating to:
 - 1) the Performance Monitoring System or the output thereof (including imposition of any Reliability and Disruption Adjustments, or loss of KPI Score);
 - 2) any matter arising from any Performance Report or any payment claim (including the calculation of any TLS Payment); or
 - 3) the calculation of any Interest Payment Adjustment;
- P. a Dispute in relation to a matter determined by RailCorp's Representative under clause 30.4 (Instruction to proceed) or clause 30.11 (RailCorp may direct PPP Co to proceed pending outcome of dispute resolution process);
- Q. a Dispute in relation to a matter set out in PPP Co's Variation Notice;
- R. a Dispute as to the manner or timing of the payment of any Variation Savings;

- S. a Dispute arising out of or in connection with clause 32 (Change in law);
- T. a Dispute under clause 34.1 (Reinstatement of Cars) as to whether or not it is practicable to repair or replace a Car which has been damaged or destroyed;
- U. a Dispute as to whether a risk has become an Uninsurable Risk;
- V. a Dispute arising out of or in connection with clause 36.13 (Changes in insurance costs);
- W. a Dispute as to the amount of any Refinancing Gain or the manner or timing of payment of RailCorp's share of the Refinancing Gain;
- X. a Dispute as to the reasonableness, accuracy or relevance of any revision to the Base Case Financial Model under clause 44.9(b)(ii) (Execution of agreements and provision of revised model) following the implementation of a Refinancing;
- Y. a Dispute as to the reasonableness, accuracy or relevance of any revision to the Financial Model specified by a person nominated by RailCorp under clause 45.3 (Checking and revising Financial Models);
- Z. a Dispute in relation to the amount of any Termination Payment payable under clause 50.9 (Termination Payments) or clause 51.2(b) (If option to acquire Cars following termination is exercised);
- AA. a Dispute as to a matter referred to in clause 52.1(b) (Maintenance Facility condition assessments);
- BB. a Dispute as to the matters to be agreed under clause 7(b) of schedule 7;
- CC. a Dispute arising out of or in connection with clause 2 of annexure 6 of schedule 7;
- DD. a Dispute arising out of or in connection with schedule 19;
- EE. a Dispute as to the determination of Deemed Action Times under clause 1 of schedule 21; or
- FF. a Dispute as to the review of Deemed Action Problems or Deemed Action Times under clause 2(d)(ii) of schedule 21,

then the dispute must be referred to expert determination in accordance with clauses 53.3-53.8 (inclusive); and

(iii) **(Arbitration):** thirdly, if:

- A. the dispute remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 53.2(c) and the Dispute is not one of those referred to in clause 53.1(b)(ii); or

- B. the Dispute has been referred to expert determination and:
- 1) a determination is not made by the expert within 60 days after the expert's acceptance of appointment (or such other period as the parties may agree); or
 - 2) a notice of dissatisfaction is given under clause 53.6(a),

then the Dispute must be referred to arbitration in accordance with clauses 53.9-53.11 (inclusive).

- (c) It is a condition precedent to a party being entitled to refer a Dispute to arbitration in accordance with clauses 53.9-53.11 (inclusive) that the procedures referred to in clause 53.1(b)(i) and clause 53.1(b)(ii) (as applicable) first be complied with.

53.2 Negotiation

- (a) If a Dispute arises then a party may give notice to each other party requesting that the Dispute be referred for resolution by negotiation between the chief executive officers of RailCorp and PPP Co or their appropriate nominees ("**Representatives**").
- (b) A notice under clause 53.2(a) must:
- (i) state that it is a notice under this clause 53.2; and
 - (ii) include or be accompanied by reasonable particulars of the matters the subject of the Dispute.
- (c) If a Dispute is referred for resolution by negotiation under clause 53.2(a), the Representatives must meet and use reasonable endeavours acting in good faith to resolve the Dispute (in whole or in part) within 15 Business Days of the date on which the notice under clause 53.2(a) is received (or such later date as the parties may agree). The joint decision (if any) of the Representatives will be reduced to writing and executed by the parties in a manner which is contractually binding on the parties.
- (d) The meeting referred to in clause 53.2(c) may take place via telephone, video conference or other form of instantaneous communication, if the Representatives agree.

53.3 Expert determination

- (a) If:
- (i) a Dispute which has been referred to the Representatives for negotiation pursuant to clause 53.2 remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 53.2(c); and
 - (ii) the Dispute is one of those referred to in clause 53.1(b)(ii),
- then any party may by giving notice to the other party in accordance with clause 53.3(b) require that those parts of the Dispute which remain unresolved be referred to an expert for determination in accordance with clauses 53.4 to 53.8 (inclusive).

- (b) A notice under clause 53.3(a) must:
 - (i) be given within 60 Business Days after the expiry of the period for negotiation referred to in clause 53.2(c);
 - (ii) state that it is a notice under this clause 53.3; and
 - (iii) include or be accompanied by reasonable particulars of those parts of the Dispute which remain unresolved.
- (c) The parties acknowledge and agree that expert determination proceedings under this clause 53 may be attended by any Core Contractor or the Security Trustee (or their advisers or representatives) as an observer of the proceedings with the prior consent of RailCorp (such consent not to be unreasonably withheld or delayed).

53.4 Expert Panel³²

- (a) Disputes which are referred to expert determination under clause 53.3 will be determined by a single Expert from the Expert Panel on a rotational basis in the order in which the Experts are appointed to the Expert Panel (unless the parties agree otherwise). In the event that an Expert advises the parties that he or she is not available to determine the Dispute, the Dispute will be determined by the next Expert from the Expert Panel in the order in which the Experts are appointed to the Expert Panel (unless the parties agree otherwise). If that Expert advises the parties that he or she is not available to determine the Dispute, the Dispute will be determined by the remaining Expert from the Expert Panel (unless the parties agree otherwise). If that Expert advises the parties that he or she is not available to determine the Dispute either party may notify the other that it requires the Dispute to be referred to arbitration.³³
- (b) If an Expert terminates the determination process because the Expert becomes aware of:
 - (i) any relationship or interest which the Expert has with a party or its officers, employees, consultants or agents;
 - (ii) any interest the Expert has in a Dispute which has been referred to the Expert; or
 - (iii) any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially in relation to a Dispute which has been referred to the Expert,

the Dispute must be referred to the Expert who is due to determine the next Dispute referred to expert determination.
- (c) By 31 January 2007 or such other date as the parties may agree, RailCorp and PPP Co will agree on 3 persons who have the appropriate skills having regard to the nature of the matters referred to in clauses 53.1(b) (and each Expert's power to

³² cf. Letter RC00145 from RailCorp to Reliance Rail dated 30 March 2007, signed and returned by Reliance Rail on 4 April 2007. This letter acts to modify the operation of clause 53 pursuant to 53.4(a) which expressly contemplates that the parties may agree an alternative manner for selecting the Expert who will determine the Dispute. Accordingly, this letter does not constitute a variation to the Project Contract and does not require the consent of the Security Trustee under clause 10.2 of the Debt Finance Side Deed.

³³ The text added here derives from the letter referenced in the above footnote.

engage his or her own advisors and consultants to assist the Expert in making his or her own determination) to be appointed to the Expert Panel.

- (d) If RailCorp and PPP Co cannot agree on 1 or more of the persons to be appointed to the Expert Panel, they must within 5 Business Days of the date referred to in clause 53.4(c) (or such other date as the parties have agreed) procure the Secretary-General of the Australian Centre for International Commercial Arbitration to nominate a person or persons, as the case may be, to be appointed to the Expert Panel by RailCorp and PPP Co.
- (e) Any Expert appointed to the Expert Panel may be replaced with another expert from time to time by agreement between the parties.
- (f) Within 7 Business Days after the resignation or death of an Expert, RailCorp and PPP Co must exchange written lists of 3 persons who, if appointed, would satisfy the requirements described in clause 53.4(c), from whom the expert is to be chosen to replace the retiring or deceased Expert, in order of preference.
- (g) Subject to clause 53.4(h), any person that appears on both lists under clause 53.4(f) will be appointed as the expert to replace the retiring or deceased Expert.
- (h) If no person appears on both lists or if more than one person appears on both lists, the parties must procure the Secretary-General of the Australian Centre for International Commercial Arbitration to nominate a person to replace the retiring or deceased Expert.
- (i) Neither party will be entitled to challenge the appointment of an Expert under this clause 53.4 on the basis that the Expert does not satisfy the requirements described in clause 53.4(c).
- (j) Each Expert will be appointed by RailCorp and PPP Co on the terms of schedule 16 (Expert Determination Agreement) or such other reasonable terms as RailCorp, PPP Co and the replacement expert may agree. The replacement expert will be taken to have been appointed at the same time as the Expert which he or she replaces for the purposes of clause 53.4(a).
- (k) Any agreement for expert determination under this Contract will not constitute an "arbitration agreement" for the purposes of the *Commercial Arbitration Act* 1984 (NSW).

53.5 Rules of expert determination

The expert determination process will be administered, and the Expert will be required to act, in accordance with the terms of the Expert Determination Agreement between RailCorp, PPP Co and the relevant Expert.

53.6 Expert finding

- (a) The determination of the Expert must be in writing and, following the expiry of the period of time allowed for a request for amendment under clause 53.6(b), will be final and binding on RailCorp and PPP Co unless within:
 - (i) 10 Business Days of receipt of the determination; or
 - (ii) 5 Business Days of the receipt of the determination amended under clause 53.6(b) or the notification by the Expert that no amendment will be made to the determination,

a party gives notice to the other party of its dissatisfaction and intention to refer the matter to arbitration pursuant to clauses 53.9-53.11 (inclusive). If a notice of dissatisfaction is given under this clause 53.6(a), the Expert's determination will be binding on the parties and must be given effect until it is overturned or varied by the determination of the arbitrator.

- (b) A party may request the Expert to amend the determination with 5 Business Days of the receipt of the determination, and following such a request by any party, the Expert may amend the determination to correct:
- (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
 - (iv) a defect in form.

If a request for amendment to a determination is made by any party under this clause 53.6(b), the Expert must amend the determination or notify the parties that no amendment will be made (as is applicable) within 5 Business Days of the request.

- (c) Any determination of an Expert which is final and binding will be determinative only of the matters in Dispute which were referred to the Expert and will not be binding on the parties in respect of a Dispute in respect of any other matter (including related matters). In particular, but without limiting the preceding sentence, a determination of an Expert in respect of any of the matters referred to in clauses 53.1(b)(ii)D, 53.1(b)(ii)F, 53.1(b)(ii)K or 53.1(b)(ii)L will not after the Date of Practical Completion of any Set be binding on the parties in any Dispute as to whether or not the Set complies with the requirements of this Contract.

53.7 Liability of expert

The Expert will not be liable in respect of the expert determination, except in the case of fraud on the part of the Expert. RailCorp and PPP Co agree to indemnify the Expert from and against all claims, except in the case of fraud on the part of the Expert, which may be made against him or her by any person in respect of the Expert's appointment to determine the Dispute or the determination itself.

53.8 Costs

RailCorp and PPP Co must bear their own costs in connection with the expert determination proceedings and must pay an equal portion of the cost of the Expert.

53.9 Arbitration

- (a) If:
- (i) a Dispute which has been referred to the Representatives for negotiation pursuant to clause 53.2 remains unresolved (in whole or in part) after the expiration of the period for negotiation referred to in clause 53.2(c) and the Dispute is not one of those referred to in clause 53.1(b)(ii); or

- (ii) in the case of a Dispute which is referred to expert determination:
 - A. a determination is not made within 60 days of the expert's acceptance of the appointment (or such other period as the parties may agree); or
 - B. a notice of dissatisfaction is given under clause 53.6(a),

RailCorp or PPP Co may notify the other that it requires the Dispute to be referred to arbitration.

- (b) Upon receipt by the other party of a notice under clause 53.9(a) the Dispute will then be referred to arbitration.
- (c) The arbitrator will have power to grant all legal, equitable and statutory remedies and to open up, review and substitute any determination of an Expert under clause 53.6.

53.10 Identity of arbitrator

Any arbitration under clause 53.9 must be conducted by a single arbitrator to be agreed between the parties or, failing such agreement within 20 Business Days after referral of the Dispute to arbitration under clause 53.9(b), by an arbitrator to be nominated by the Secretary-General of the Australian Centre for International Commercial Arbitration.

53.11 Rules for conduct of arbitration

- (a) Subject to clause 53.11(b), except as otherwise expressly provided in this clause 53, an arbitration under this clause will be conducted in accordance with the ACICA Arbitration Rules current at the date of the reference of the Dispute to arbitration.
- (b) If the arbitration is in respect of a matter which has been the subject of an Expert determination under this clause 53, the arbitrator must hand down the final award in respect of that Dispute within 3 months of the appointment of the arbitrator unless the parties agree that the Dispute is complex, in which event the arbitrator must hand down the final award in respect of that Dispute within 6 months of the appointment of the arbitrator.

53.12 Place of expert determination or arbitration

The place of any expert determination or arbitration will be Sydney and the language will be English.

53.13 Continue to perform

Notwithstanding the existence of a Dispute, each Party must continue to perform its obligations under this Contract.

54. Notices and time bar

54.1 Notices³⁴

Subject to clause 54.5, each communication (including each notice, consent, approval, request and demand) under or in connection with this Contract:

³⁴ [As amended by Deed of Variation No 2, 15 February 2008.](#)

- (a) must be in writing; and
- (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](#)³⁵
~~[Level 6, 18 Lee Street,](#)~~
~~[Chippendale, New South Wales](#)~~
Fax: +61 2 9379 4378
Email: pppnotices@railcorp.nsw.gov.au
For the attention of: RailCorp's Representative (Rolling Stock PPP)

PPP Co

Name: Reliance Rail Pty Limited
Address: ~~[Level 6, ABN AMRO Tower](#)~~ [Suite 2, Level 9, 333 George Street](#)
~~[88 Phillip Street,](#)~~ Sydney, New South Wales
Fax: +61 2 ~~9087 4000~~ [8339 9333](#)
Email: correspondence@rr.incite.com.au
For the attention of: PPP Co's Representative

- (c) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;

- (d) must be:

- (i) ~~delivered or posted by prepaid post to the address;~~ ~~or~~
- (ii) sent by fax to the number; or
- (iii) sent by email in the form of a .pdf file of a letter (with or without attachments) to the email address,

of the addressee, in accordance with clause 54.1(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;
- (iii) (in the case of email) at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient specified in [clause 54.1\(b\)](#); and

³⁵ [RailCorp's updated address for service pursuant to clause 54.1\(b\) was notified to Reliance Rail by letter referenced RC00616 and dated 14 November 2007.](#)

~~(iii)~~(iv) (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)~~(v) 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)~~(vi) 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.

With respect to communications sent by email:

(f) only the letter in .pdf format attached to the email and, subject to paragraph (g), any attachments to such letter which are referred to in the letter, will form part of the communication under this clause 54.1. Any text in the body of the email or the subject line will not form part of the communication;

(g) an attachment to an email referred to in clause 54.1(d)(iii) will only form part of a communication under this clause 54.1 if it is in .pdf, .xls, .doc, .vsd, .mpp, .mdb, .xer or .ppt format, or such other format as may be agreed between the parties from time to time; and

(h) the parties agree, with respect to any communications under or in connection with this Contract:

(i) to ensure that their respective firewall and/or mail server (as applicable):

A. allows messages of up to 100 MB to be received;

B. does not trap any messages in the spam filter which:

1) in the case of notices sent by RailCorp to PPP Co have been sent from the railcorp.nsw.gov.au domain; and

2) in the case of notices sent by PPP Co to RailCorp, have been sent from the rr.incite.com.au domain; and

C. automatically sends a receipt notification to the sender upon receipt of a message; and

(ii) to use reasonable endeavours to ensure that their respective systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

54.1A Formal and informal communications³⁶

RailCorp and PPP Co wish to distinguish formal communications from informal communications.

³⁶ Inserted by Deed of Variation No 2, 15 February 2008.

A formal communication is one which complies with the requirements of clause 54.1. An informal communication is one which does not comply with the requirements of clause 54.1. Examples of informal communications include:

- (a) oral communications, whether made during meetings, discussions, over the phone or otherwise; and
- (b) communications sent by email which are not formal communications (for example, an email which does not attach a .pdf file of a signed letter).

Formal communications will have effect as communications under or in connection with this Contract. Informal communications, on the other hand, will not be treated as communications under or in connection with this Contract. Informal communications will not affect RailCorp's or PPP Co's rights or obligations under or in connection with this Contract, and cannot be relied upon.

54.2 Notices of claims

Subject to any provisions of this Contract containing specific notice requirements, RailCorp will not be liable for any Loss of, or upon any Claim by, PPP Co arising out of or in any way in connection with any direction, instruction, notice or any other act or omission of RailCorp or any other fact, matter or thing, under, arising out of, or in connection with the Project or PPP Co's Activities unless PPP Co gives RailCorp the notices required by clause 54.3 and, if applicable, clause 54.4.

54.3 Prescribed notices

The notices referred to in 54.2 are:

- (a) a written notice from PPP Co which must be given to RailCorp's Representative within the earlier of:
 - (i) 15 Business Days of when PPP Co first became aware of the events on which the Loss or Claim is based; or
 - (ii) 45 Business Days of the first occurrence of the event on which the Loss or Claim is based (provided that, if PPP Co reasonably demonstrates that the event is not something of which it ought reasonably to have been aware within that 45 Business Day Period, the period for submission of the notice will be extended to 15 Business Days after PPP Co first became aware of, or ought reasonably to have become aware of, that event),in which PPP Co states that it intends to submit a Claim and the event upon which the Claim will be based; and
- (b) a written Claim by PPP Co to be given to RailCorp's Representative within 20 Business Days of giving notice under clause 54.3(a) and which must include:
 - (i) reasonable particulars of the facts on which the Claim is based;
 - (ii) the legal basis for the Claim whether based on a term of this Contract or otherwise, and if based on a term of this Contract, clearly identifying the specific term;
 - (iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and

- (iv) details of the amount claimed and how it has been calculated, including any Loss.

54.4 Continuing events

If the events upon which the Claim under clause 54.3(b) is based or the consequences of the events are continuing, PPP Co must continue to give information required by clause 54.3(b) within 14 days after the end of each calendar month after the written claim under clause 54.3(b) was submitted, until the events or consequences have ceased.

54.5 Deemed notification

Where RailCorp publishes details of standards, procedures or other similar information which is not specific to PPP Co or this Contract on a website maintained by RailCorp which is accessible by PPP Co, RailCorp will be deemed to have notified PPP Co of such standards, procedures or other similar information in accordance with the requirements of clause 54.1.

55. Governing law and jurisdiction

55.1 Governing law

This Contract is governed by and must be construed according to the laws in force in New South Wales.

55.2 Jurisdiction

Without prejudice to the operation of the dispute resolution provisions contained in clause 53, 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 Contract; 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 an inconvenient forum, if that venue falls within clause 55.2(a).

56. Civil Liability Act

- (a) It is agreed that to the extent permitted by law the operation of Part 4 of the *Civil Liability Act 2002 (NSW)* is excluded in relation to all and any rights, obligations and liabilities under this Contract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.
- (b) Without limiting the generality of clause 56(a) it is further agreed that the rights, obligations and liabilities of RailCorp and PPP Co with respect to proportionate liability are as specified in this Contract and not otherwise whether such rights, obligations and liabilities are sought to be enforced by a claim in contract, tort or otherwise.
- (c) PPP Co further agrees that:
 - (i) in each subcontract into which it enters for the carrying out of PPP Co's Activities, it will include provisions that, to the extent permitted by law, effectively exclude the operations of Part 4 of the *Civil Liability Act 2002 (NSW)* in relation to all rights, obligations or liabilities under each

subcontract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or in tort or otherwise; and

- (ii) it will require and ensure that each subcontractor will include in any further contract that it enters into with others for the carrying out of PPP Co's Activities, provisions that, to the extent permitted by law, each such further contract will include provisions that effectively exclude the operation of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all rights, obligations or liabilities under such further contract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract, in tort or otherwise.

57. Miscellaneous

57.1 Entire agreement

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

- (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.

57.2 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 a RailCorp Project Agreement.

57.3 Survival of certain provisions; no merger

- (a) Without limiting clause 57.10(a), clauses 5 (Security Bonds), 6.1 (RailCorp as an Authority), 6.2 (Other Authorities), 6.3 (RailCorp's Representative), 27.12 (Interest), 27.13 (Set off), 35 (Indemnity and limitation on liability), 37 (Intellectual Property Rights), 46.1 (Accounting records), 47 (Disclosure, confidentiality and publicity), 50.9 (Termination Payments), 50.10 (Waiver), 51 (Option to acquire Cars following termination), 52 (End of Contract Term arrangements), 53 (Dispute resolution), 54 (Notices and time bar), 55 (Governing law and jurisdiction), 56 (Civil Liability Act), this clause 57.3 and any other provisions which are expressed to survive termination (together, the "**Surviving Clauses**") will survive rescission, termination or expiration of this Contract.
- (b) Without limiting clause 57.10(a), if this Contract is rescinded or terminated, no party will be liable to any other party except:
 - (i) under the Surviving Clauses; or
 - (ii) subject to clause 50.9(c) (Termination Payments) and 51.2 (If option to acquire Cars following termination is exercised), in respect of any breach of this Contract occurring before such rescission or termination.
- (c) No right or obligation of any party will merge on completion of any transaction under this Contract. All rights and obligations under this Contract survive the execution and delivery of any transfer or other document which implements any transaction under this Contract.

57.4 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 Contract 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 a RailCorp Project Agreement.
- (b) A waiver or consent given by a party under a RailCorp Project Agreement 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 a term of a RailCorp Project Agreement operates as a waiver of another breach of that term or of a breach of any other term of that RailCorp Project Agreement.

57.5 Consents

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

57.6 Amendments

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

57.7 Expenses

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

57.8 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 Contract, except for representations or inducements expressly set out in this Contract.
- (b) Each party acknowledges and confirms that it does not enter into this Contract 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 Contract.

57.9 Counterparts

This Contract 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.

57.10 Indemnities

- (a) Each indemnity in a RailCorp Project Agreement is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of that RailCorp Project Agreement.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by a RailCorp Project Agreement.
- (c) A party must pay on demand any amount it must pay under an indemnity in a RailCorp Project Agreement.

57.11 Moratorium legislation

To the fullest extent permitted by law, the provisions of all laws which at any time operate directly or indirectly to lessen or affect in favour of PPP Co any obligation under a RailCorp Project Agreement, or to delay or otherwise prevent or prejudicially affect the exercise by RailCorp of any right, power or remedy under a RailCorp Project Agreement or otherwise, are expressly waived.

57.12 No agency

Except as expressly permitted or contemplated by a RailCorp Project Agreement, PPP Co must not act as or represent itself to be the servant or agent of RailCorp.

57.13 Contract Documents to be in English

All Contract Documentation (excluding computer programs) must be written in the English language.

57.14 Vienna convention

The UN Convention on Contracts for the International Sale of Goods (1980) does not apply to this Contract.

58. Additional trains and simulator option

58.1 RailCorp's right to require good faith negotiations

RailCorp may, but is not obliged to, at any time prior to the date which is 18 months before the then anticipated Date of Final Completion of the last Set, by written notice to PPP Co, require PPP Co, at PPP Co's election, to either:

- (a) negotiate in good faith with RailCorp; or
 - (b) procure the relevant Core Contractor to negotiate in good faith with RailCorp,
- for, at RailCorp's election:
- (c) the manufacture of up to 20 additional trains and, if required by RailCorp, the provision of through life support for the additional trains; and/or
 - (d) the manufacture of additional simulators and, if required by RailCorp, the provision of through life support for the additional simulator,

on the basis set out in this clause 58.

58.2 RailCorp's notice

RailCorp's notice under clause 58.1 must specify:

- (a) that it is a notice under clause 58.1;
- (b) the number of additional trains (if any) which RailCorp requires PPP Co or the relevant Core Contractor to manufacture;
- (c) the number of additional simulators (if any) which RailCorp requires PPP Co or the relevant Core Contractor to manufacture;

- (d) whether RailCorp requires PPP Co or the relevant Core Contractor to provide through life support for the additional trains and/or the additional simulator and, if so, the period of through life support for the additional trains and/or the additional simulator required by RailCorp; and
- (e) the extent to which RailCorp requires PPP Co or the relevant Core Contractor to finance the:
 - (i) manufacture of the additional trains;
 - (ii) provision of through life support in respect of the additional trains (where applicable);
 - (iii) manufacture of the additional simulator; and/or
 - (iv) provision of through life support in respect of the additional simulator (where applicable).

58.3 Additional Trains and/or Simulators Proposal

- (a) Within 3 months of the issue of RailCorp's notice under clause 58.1, PPP Co must provide, or procure the relevant Core Contractor to provide (as applicable), a proposal for:
 - (i) the manufacture of the number of additional trains nominated by RailCorp in its notice under clause 58.1 and, where applicable, the provision of through life support for the additional trains for the period nominated by RailCorp in its notice under clause 58.1 by PPP Co or the relevant Core Contractor (as applicable); and/or
 - (ii) the manufacture of the additional simulator nominated by RailCorp in its notice under clause 58.1 and, where applicable, the provision of through life support for the additional simulator for the period nominated by RailCorp in its notice under clause 58.1 by PPP Co or the relevant Core Contractor (as applicable),

on terms (including pricing) which are referable to the terms (including pricing) of this Contract (with any appropriate adjustments) ("**Additional Trains and/or Simulators Proposal**").

- (b) If RailCorp, acting reasonably, believes that the Additional Trains and/or Simulators Proposal is not on terms (including pricing) which are referable to the terms (including pricing) of this Contract (with any appropriate adjustments), RailCorp may give PPP Co a notice to this effect, whereupon PPP Co must within 20 Business Days resubmit, or procure the relevant Core Contractor to resubmit, as applicable, the Additional Trains and/or Simulators Proposal in accordance with clause 58.3(a).

58.4 Meeting

Within 20 Business Days of the submission or resubmission (if relevant) of the Additional Trains and/or Simulators Proposal:

- (a) PPP Co and RailCorp must meet; or
- (b) PPP Co must procure the relevant Core Contractors to meet with RailCorp,

(as applicable), to negotiate in good faith any parts of the Additional Trains and/or Simulators Proposal issued or reissued (if relevant) which are not acceptable by RailCorp with a view to reaching an agreement.

58.5 No Claim

PPP Co will not be entitled to make any Claim against RailCorp arising out of or in connection with a failure by RailCorp to exercise its rights under this clause 58 or a failure by the parties to reach an agreement.

59. Maintenance of Millennium Trains

59.1 RailCorp's Notice

RailCorp may at any time issue to PPP Co a notice titled "Millennium Proposal" requiring that PPP Co negotiate in good faith with RailCorp for the provision of maintenance and other through life support services in respect of the Millennium Trains at the Maintenance Facility by PPP Co through a subcontract with either the TLS Contractor or a Related Body Corporate of the TLS Contractor.

59.2 PPP Co's Proposal

As soon as practicable and in any event within 3 months after receipt of a Millennium Proposal (or such longer period as may be requested by PPP Co and approved by RailCorp (acting reasonably)), PPP Co must provide RailCorp with a proposal ("**PPP Co's Proposal**") setting out detailed particulars of:

- (a) the reasonable costs, expenses, losses and liabilities which it and the TLS Contractor or a Related Body Corporate of the TLS Contractor (as applicable) will incur as a result of the proposed Millennium Proposal;
- (b) the time within which the proposed Millennium Proposal can be implemented; and
- (c) the effects which the proposed Millennium Proposal will have on:
 - (i) PPP Co's Activities;
 - (ii) PPP Co's ability to provide the Required Availability;
 - (iii) the Maintenance Facility;
 - (iv) any Accreditation held or required by RailCorp, PPP Co or the TLS Contractor;
 - (v) RailCorp's Facilities;
 - (vi) PPP Co's ability to:
 - A. satisfy any warranty given by PPP Co under this Contract; or
 - B. perform any of its other obligations under this Contract.

59.3 PPP Co's Proposal requirements

PPP Co's Proposal must be prepared:

- (a) so as to avoid, as far as practicable, the need for a new Approval or a modification to an existing Approval for the implementation of the Millennium Proposal;

- (b) on the basis of reasonable prices and rates (including a reasonable allowance for additional interface risks and overheads and margin for subcontractors, but not including any payment to PPP Co for the use of the Maintenance Facility);
- (c) on an open book basis (and to this end PPP Co must allow RailCorp to review and audit PPP Co's records to verify that PPP Co's Proposal has been prepared on an open book basis);
- (d) assuming PPP Co is a willing, efficient and competent provider of the Millennium Proposal in an efficient and competitive market;
- (e) in a manner which is consistent with the requirements of RailCorp for the implementation of the Millennium Proposal;
- (f) having regard to minimising the disruption to railway operations; and
- (g) in a manner so that there is no double counting.

59.4 Election by RailCorp

Within 60 Business Days after receipt of PPP Co's Proposal, RailCorp may either:

- (a) accept PPP Co's Proposal and if PPP Co's Proposal contains any options, nominate which option RailCorp accepts;
- (b) reject PPP Co's Proposal;
- (c) withdraw the proposed Millennium Proposal; or
- (d) seek an extension of time for the consideration of PPP Co's Proposal, consent for which must not be unreasonably withheld by PPP Co.

59.5 RailCorp accepts PPP Co's Proposal

If RailCorp accepts PPP Co's Proposal in accordance with clause 59.4(a):

- (a) PPP Co must proceed to implement the Millennium Proposal on the basis of PPP Co's Proposal (as accepted by RailCorp); and
- (b) PPP Co will be relieved of its obligations under this Contract to the extent specified in PPP Co's Proposal (as accepted by RailCorp) and this Contract will be otherwise amended as required to implement the Millennium Proposal, including payment of the reasonable costs, expenses, losses and liabilities of PPP Co and the TLS Contractor or Related Body Corporate of the TLS Contractor (as applicable) in implementing the Millennium Proposal.