



Transport
for NSW

Operator Bus Lease Direct Agreement

Transport for NSW on behalf of the State of
New South Wales

[Name of Lessor]

[Name of Operator]

[Pro forma version dated September 2013]

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Date [date of execution by Transport for NSW]

Parties **Transport for NSW**, a corporation constituted under the *Transport Administration Act 1988* (NSW), on behalf of the State of New South Wales (TfNSW) of 18 Lee Street, CHIPPENDALE NSW 2008

[insert name and address of Operator] (Operator)

[insert name and address of Lessor] (Lessor)

Recitals

- A TfNSW and the Operator have entered into the OSMBSC, under which the Operator has agreed to provide certain bus services and other related services.
- B. The Operator has entered into the Bus Leases with the Lessor under which the Lessor leases the Operator certain Contract Buses used by the Operator to provide the Contract Bus Services.
- C. The Operator has agreed, pursuant to the terms of the OSMBSC, to grant TfNSW certain step in rights in respect of its business.
- D. The Operator has agreed to grant to TfNSW certain rights over its assets on or prior to the termination or expiry of the OSMBSC.
- E. To secure performance by the Operator of its obligations under the OSMBSC, the Operator has procured the provision of a Performance Bond in favour of TfNSW and may in the future also provide security over its assets in favour of TfNSW.
- F. This Agreement acknowledges the Lessor’s consent to the Operator’s execution of the Transaction Documents, the creation of the Operator Security Documents, the procurement by the Operator of any Performance Bond and sets out the parties' agreement as to how TfNSW may exercise its step in rights and other relevant matters between the parties.

Operative Provisions

1 Definitions and interpretation

1.1 Definitions

In this Agreement, unless the context requires another meaning:

Acquisition Value means:

- (a) where the Bus Lease grants the Operator an entitlement to acquire or receive a transfer of the relevant Bus on termination of the Bus Lease, any amount required to acquire the Bus on the terms of the Bus Lease; and
- (b) where the Bus Lease does not grant the Operator an entitlement to acquire or receive a transfer of the relevant Bus on termination of the Bus Lease, an amount negotiated between TfNSW and the Lessor for the acquisition of the relevant Bus.

Bank means an authorised deposit taking institution authorised by the Australian Prudential Regulation Authority to carry on banking business under the *Banking Act 1959* (Cth).

Bus Lease means any Operating Lease or Finance Lease under which any Contract Bus is leased by the Operator from the Lessor and including any chattel mortgage by which the Operator assigns legal title in the relevant Contract Bus to the Lessor subject to an equity of redemption being, as at the date of this Agreement, the leases set out in Schedule 1.

Default means:

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

Early Termination Amount means any amount payable by the Operator to the Lessor as a result of the termination of a Bus Lease, as calculated under the terms of the relevant Bus Lease, but specifically excluding (notwithstanding anything contained in that Bus Lease to the contrary) any:

- (a) penalty;
- (b) discount to the rate of interest provided for in the Bus Lease and used to calculate the net present value of any unpaid rent instalments;
- (c) additional amount arising or payable due to money being paid earlier than originally agreed in the relevant Bus Lease, other than the Lessor's reasonable costs and expenses of repossessing, storing, valuing and insuring the relevant Bus, repairing and restoring the Bus to any minimum standard required by the Bus Lease and selling (or attempting to sell) the relevant Bus (if relevant); and
- (d) Acquisition Value (if relevant).

Enforcing Party means TfNSW, a Step-in Party, receiver or receiver and manager appointed or acting under or in connection with the OSMBSC or any Operator Security.

Guarantee means a guarantee, indemnity, letter of credit, performance bond, letter of comfort or other assurance or assumption of responsibility, however described, given for a debt or liability of another person or the solvency or financial condition of another person.

Locked Box Arrangement means, in respect of any Bus Lease, an arrangement whereby TfNSW pays amounts owing to the Operator under the OSMBSC (or a Successor Operator or Interim Operator under any replacement metropolitan bus services contract or other similar arrangement with TfNSW) and which TfNSW considers are referable to that Bus Lease, into an account with a Bank nominated by, and directly accessible to, the Lessor for the purposes of satisfying some or all of the Operator's (or Successor Operator's) obligations under the relevant Bus Lease. For the avoidance of any doubt, TfNSW will not be obliged to pay any amounts into the relevant account in excess of the amounts owing in respect of the Operator's (or Successor Operator's) obligations under the relevant Bus Lease.

Novation Bus means any Contract Bus which is subject to a Bus Lease, but excluding any Contract Bus which is subject to a Bus Lease where that Contract Bus is an Existing Bus.

Novation Deed means an agreement in the form set out in Annexure 1.

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

OSMBSC means the Outer Sydney Metropolitan Bus Service Contract dated [x] between the Operator and TfNSW.

Panel means the potential Successor Operators specified in Schedule 2 and any other potential Successor Operators notified by TfNSW to the Lessor from time to time.

Potential Default means any event or circumstance that, in the reasonable opinion of the relevant party, indicates a material risk of Default.

Replacement Bus Lease means a Bus Lease entered into by the Operator pursuant to Clause 15.3 of the OSMBSC on the expiry or termination of a Bus Lease over a Contract Bus.

Systems and Equipment means any:

- (a) New Systems and Equipment; and
- (b) Existing Systems and Equipment.

1.2 Interpretation

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

1.3 Determination, Statement and Certificate conclusive

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

2 Consent, acknowledgements and agreements

2.1 Consent

The Lessor consents and agrees to the:

- (a) execution by the Operator of each of the Transaction Documents required by TfNSW to be executed by the Operator;
- (b) creation of any Operator Security or any other Security Interest in accordance with the Transaction Documents; and
- (c) procurement by the Operator of any Performance Bond in favour of TfNSW.

2.2 Acknowledgement

The Lessor acknowledges and agrees that:

- (a) **no Default:** none of the matters or things set out in Clause 2.1 above, nor the exercise of any of TfNSW's Powers under the Operator Security or the OSMBSC will of itself contravene or constitute a Default under the Bus Leases or entitle the Lessor to exercise any Power

- (including termination) under the Bus Leases and to the extent that any Bus Lease provides to the contrary, any such Default is hereby waived;
- (b) **enforcement:** any Enforcing Party may, at any time after TfNSW has given notice to the Lessor stating that:
- (i) any Operator Security has become enforceable; or
 - (ii) a Step-in Party is entitled to exercise the Step-in Rights under the OSMBSC, exercise all or any of the Powers, and perform all or any of the obligations, of the Operator under or in relation to the Bus Leases as if it were the Operator to the exclusion of the Operator;
- (c) **not liable:** without limiting the liability of the Operator (who continues to be responsible for the performance of its obligations under the Bus Leases), no Enforcing Party will be liable, or taken to have assumed liability, for any obligation of the Operator under the Bus Leases by reason only of:
- (i) the creation of any Operator Security;
 - (ii) the exercise of any of TfNSW's Powers under any Operator Security; or
 - (iii) the exercise of any of TfNSW's Powers, or the performance of any of its obligations, under the OSMBSC;
- (d) **no adoption:** without limiting Clause 2(c), nothing in this Agreement requires an Enforcing Party to adopt or accept the obligations of the Operator, in whole or in part, under the Bus Leases; and
- (e) **Transaction Documents:** it has:
- (i) been provided with execution copies of all of the Transaction Documents entered into by the Operator; and
 - (ii) reviewed and approved the terms of each Transaction Document.

3 General Undertakings

3.1 Undertakings of the Lessor

Unless TfNSW otherwise agrees in writing, the Lessor must:

- (a) **Amendments:** not materially amend or supplement, or consent to any material amendment or supplement of, the Bus Leases;
- (b) **Termination, release, etc:** not, except as permitted by Clause 4:
 - (i) avoid, release, surrender, terminate, rescind, discharge (other than by performance) or accept the repudiation of; or
 - (ii) suspend the performance of any of its obligations under, the Bus Leases;
- (c) **Assignment:** not:
 - (i) create or allow to exist any Security Interest over; or

- (ii) in any other way assign, dispose of, part with possession of, create or allow any interest in, or otherwise deal with,

its rights under or interest in the Bus Leases in favour of any person, other than in favour of TfNSW or as contemplated by this Agreement or to a counterparty which enters into an agreement in favour of TfNSW on terms substantially the same as this Agreement;

- (d) **Default:** notify TfNSW of any Default where the Default remains unremedied by the Operator for more than 30 days (or any lesser period afforded the Operator to remedy such Default under the relevant Bus Lease). Nothing in this Clause 3.1(d) prevents the Lessor from notifying TfNSW of any Default at an earlier time;
- (e) **Potential Default:** use its reasonable endeavours to notify TfNSW of a Potential Default within a reasonable period after becoming aware of that Potential Default;
- (f) **Copy:** promptly provide a copy to TfNSW of any notice given or received by it terminating, or suspending the performance of any obligations under, the Bus Leases; and
- (g) **New Bus Leases:** promptly provide TfNSW with details of any:
 - (i) New Bus or Growth Bus subject to a Bus Lease and entered into after the date of this Agreement;
 - (ii) Bus subject to a Replacement Bus Lease entered into after the date of this Agreement; or
 - (iii) other Contract Bus TfNSW, the Lessor and the Operator agree to be a Novation Bus for the purposes of this Agreement,

3.2 Undertakings of TfNSW

Unless the Lessor otherwise agrees in writing, TfNSW must:

- (a) **Extension:** give the Lessor a copy of any notice given to the Operator extending the term of the OSMBSC, promptly after that notice is given to the Operator;
- (b) **Early Termination:** give the Lessor a copy of any notice given to the Operator terminating the OSMBSC, promptly after that notice is given to the Operator; and
- (c) **Potential Default:** use its reasonable endeavours to notify the Lessor of a Potential Default within a reasonable period after becoming aware of that Potential Default.

3.3 Potential Default

- (a) Within 10 Business Days following receipt of a notice of Potential Default under Clause 3.1(e) or Clause 3.2(c), the Lessor and TfNSW must meet to discuss the Potential Default and any steps that either of them may consider reasonably necessary in the circumstances. Neither TfNSW nor the Lessor will be obligated to take any action or agree to any arrangement as a consequence of a Potential Default.
- (b) The parties acknowledge that they will have no rights against any party for failing to provide a notice required under Clause 3.1(e) or Clause 3.2(c).

4 Termination or Suspension of Bus Leases

4.1 Termination or suspension for default

- (a) Subject to Clause 4.1(b), the Lessor may only terminate, or suspend the performance of its obligations under, a Bus Lease as a result of a Default in accordance with the terms of the relevant Bus Lease and if:
 - (i) the Lessor has given notice (a **Default Notice**) to TfNSW and the Operator setting out the Default; and
 - (ii) either:
 - (A) if the Default is capable of remedy, the Default has not been remedied within 30 days of the date on which the Default Notice is given to TfNSW and the Operator or such longer period as is allowed for remedy of the Default under the relevant Bus Lease; or
 - (B) if the Default is not capable of remedy, all of the obligations of the Operator under the Bus Lease, other than Defaults existing and obligations incurred by the Operator as at the date of the Default Notice, do not commence and continue to be performed within 30 days of the date on which the Default Notice is given to TfNSW and the Operator or such longer period as is allowed under the Bus Lease.
- (b) The Lessor must not terminate, or suspend the performance of its obligations under, a Bus Lease as a result of a Default if:
 - (i) TfNSW has notified the Lessor that it is entitled to exercise its Step-in Rights or the Security has become enforceable; and
 - (ii) an Enforcing Party is performing all of the obligations of the Operator under the relevant Bus Lease. For the avoidance of doubt "*all of the obligations of the Operator*" excludes any Defaults existing and obligations accrued as at the date of a Default Notice issued by the Lessor under Clause 4.1(a).
- (c) Clauses 4.1(a) and (b) do not prejudice the Lessor's rights against the Operator in respect of remedies other than termination of a Bus Lease or suspension of the performance by the Lessor of its obligations under a Bus Lease.
- (d) Clauses 4.1(a) and (b) do not prejudice the rights of the Lessor on expiry of the scheduled term of any Bus Lease.

4.2 Cure rights

- (a) On becoming aware of any Default, an Enforcing Party may take steps to:
 - (i) remedy, or procure the remedy of, the Default; or
 - (ii) if the Default is not capable of remedy, commence and continue to perform the obligations of the Operator under the relevant Bus Lease.
- (b) To the extent reasonably requested by an Enforcing Party for the purpose of exercising its Powers under this Agreement, the Lessor must promptly provide the Enforcing Party with any information in its possession (including details of any steps which the Lessor considers appropriate to be taken to, remedy a Default or, if a Default is not capable of remedy, to commence and continue to perform all of the obligations of the Operator under a Bus Lease), provided that this Clause will not require the Lessor to breach any duty of confidence or privacy imposed by law or any agreement or to breach the provisions of any statute, including statutes with respect to privacy.

4.3 Application of Clauses

Clause 4.1 applies despite anything in the Bus Leases or any other document and whether or not TfNSW has exercised any Power under any Operator Security or the OSMBSC.

5 Novation

5.1 Novation under the OSMBSC

The Operator must novate all Bus Leases in respect of Novation Buses to a TfNSW Lessor or Successor Operator on or within the period of 30 days immediately preceding the Termination Date:

- (a) with the prior consent of the Lessor, which consent must not, subject to Clause 5.4, be withheld; and
- (b) as required by TfNSW.

5.2 Notice

TfNSW must give the Lessor on or within the period of 30 days immediately preceding the Termination Date a written notice (**Novation Notice**) which:

- (a) specifies the Termination Date;
- (b) identifies the TfNSW Lessor or Successor Operator (as relevant); and
- (c) is accompanied by the latest audited financial statements of the Successor Operator (if relevant).

5.3 Consent

The Lessor must provide TfNSW with a notice within 10 Business Days of receiving a Novation Notice:

- (a) where the Lessor consents to the novation of the Bus Lease to the TfNSW Lessor or Successor Operator, confirming that consent; or
- (b) where the Lessor withholds its consent to the novation of the Bus Lease to the TfNSW Lessor or Successor Operator, a notice:
 - (i) advising that consent has been withheld; and
 - (ii) specifying the grounds referred to in Clause 5.4 on which the Lessor has relied in order to withhold its consent.

5.4 Withholding consent

- (a) The Lessor may refuse to grant its consent to a novation of a Bus Lease to a TfNSW Lessor or Successor Operator if and only if:
 - (i) the novation would cause the Lessor to contravene any applicable laws or the requirements of any relevant regulatory agency; or
 - (ii) if the proposed novation is to a Successor Operator:
 - (A) the Successor Operator is not a member of the Panel; or
 - (B) the Lessor has not had a reasonable opportunity to formulate and notify any risk exposure limits for the Successor Operator to TfNSW since being given notice that that Successor Operator was a member of the Panel.

- (b) If the Lessor fails or refuses to provide TfNSW with the notice contemplated in Clause 5.3 within the period prescribed in Clause 5.3, the Lessor will be deemed to have irrevocably consented to the novation of the Bus Lease from the Operator to the TfNSW Lessor or Successor Operator.

5.5 Novation

- (a) Subject to this Clause 5, the Lessor, the Operator and the TfNSW Lessor or Successor Operator must (and TfNSW must procure the TfNSW Lessor or Successor Operator to) enter into a Novation Deed.
- (b) For the avoidance of doubt, nothing in this Clause 5 releases or affects the Operator's obligations under the Bus Lease, and the Operator must continue to perform those obligations, unless and until those obligations are novated to the TfNSW Lessor or Successor Operator to the exclusion of the Operator in accordance with this Clause 5.

5.6 Costs and expenses

TfNSW must procure the TfNSW Lessor or Successor Operator pays to the Lessor on demand the Lessor's reasonable costs and expenses (including legal costs and expenses) of the preparation, negotiation and execution of the Novation Deed contemplated by this Clause 5.

5.7 Early termination

- (a) If the Lessor withholds its consent to the novation of a Bus Lease on the grounds set out in Clause 5.4(a), and the relevant Bus Lease is a Finance Lease, TfNSW may, by notice to the Operator and Lessor, require that:
 - (i) the Operator and the Lessor terminate the Bus Lease;
 - (ii) the Operator pay to the Lessor the Early Termination Amount in full satisfaction of its obligations under the Bus Lease;
 - (iii) where paragraph (a) of the definition of "*Acquisition Value*" applies, the Operator pay to the Lessor the Acquisition Value in return for the transfer of the relevant Bus to the TfNSW Lessor or Successor Operator, free of any Security Interest, in its then present state and condition and without any representation or warranty by the Lessor as to its title, fitness for purpose or otherwise; and
 - (iv) where paragraph (b) of the definition of "*Acquisition Value*" applies, the TfNSW Lessor or Successor Operator pay to the Lessor the Acquisition Value in return for the transfer of the relevant Bus to the TfNSW Lessor or Successor Operator, free of any Security Interest, in its then present state and condition and without any representation or warranty by the Lessor as to its title, fitness for purpose or otherwise.
- (b) If TfNSW issues a notice under clause 5.7(a), and Clause 5.7(a)(iii) applies, it must procure that the TfNSW Lessor or Successor Operator pays to the Operator the Acquisition Value for such Bus (or, at the direction of the Operator, pays the Acquisition Value direct to the Lessor in satisfaction of the Operator's obligations under Clause 5.7(a)(iii)).
- (c) Where a Bus Lease terminated under Clause 5.7(a)(i) does not grant the Operator an entitlement to acquire the relevant Bus on termination of the Bus Lease, TfNSW and the Lessor must negotiate an amount for the acquisition of the relevant Bus by the TfNSW Lessor or Successor Operator for the purposes of paragraph (b) of the definition of "*Acquisition Value*". TfNSW will not be obliged to agree any value exceeding the residual value of the relevant Bus and if no agreement is reached, Clause 5.7(a)(iv) will not apply to such Bus and Bus Lease.

5.8 Release of Surety

Where a Guarantee has been provided in support of a Bus Lease, the Lessor will release the guarantor from its obligations under the Guarantee, but only with respect to obligations incurred under the Bus Lease after the date of novation of the Bus Lease.

6 Use Prior to Novation

- (a) If the Operator fails to novate any Bus Lease in respect of a Novation Bus to a TfNSW Lessor or Successor Operator on or within the period of 30 days immediately preceding the Termination Date in accordance with Clause 5.1, the Lessor consents to a Successor Operator and any Interim Operator using any Novation Bus for the provision of the Contract Bus Services from the Termination Date until the date that such Bus Lease is novated to the TfNSW Lessor or the Successor Operator.
- (b) During the period referred to in Clause 6(a), TfNSW must procure that the Successor Operator and any Interim Operator agree to:
 - (i) maintain each Novation Bus in accordance with the degree of skill, diligence, prudence and practice that would ordinarily be exercised by a skilled and experienced bus operator operating bus services comparable to the size, scope and complexity of the Contract Bus Services and in accordance with all applicable laws, including section 7 of the PT Act;
 - (ii) if required by the terms of a Bus Lease, insure the relevant Novation Bus with insurers, and on terms, approved by the Lessor;
 - (iii) comply with the terms of the Bus Lease; and
 - (iv) indemnify the Lessor in respect of any Losses that may be incurred or sustained by the Lessor in respect of or arising from the operation of the Novation Bus during that period.

7 Locked Box Arrangements

- (a) TfNSW will, if requested by the Lessor, implement and maintain a Locked Box Arrangement in respect of a Bus Lease where:
 - (i) the Lessor has provided TfNSW with a Default Notice under Clause 4.1(a)(i) in respect of that Bus Lease;
 - (ii) the relevant Bus Lease has been novated to a Successor Operator under Clause 5 as a result of the early termination of the OSMBSC by TfNSW; or
 - (iii) the Operator has provided its written consent to that arrangement.
- (b) A Locked Box Arrangement under Clause 7(a)(i) will endure only for so long as the relevant Default is in existence and remains unremedied.
- (c) The Operator hereby consents to the implementation and maintenance of any Locked Box Arrangement under Clause 7(a)(i).
- (d) TfNSW will ensure that any Successor Operator consents to the implementation and maintenance of any Locked Box Arrangement under Clause 7(a)(ii).

- (e) Nothing in this Clause will be construed as a guarantee by TfNSW of the performance by an Operator or Successor Operator of its obligations under a Bus Lease.
- (f) The Lessor agrees to meet TfNSW's reasonable costs of implementing and maintaining any Locked Box Arrangement under this Clause 7.
- (g) The Lessor acknowledges that any proceeds it draws from a Locked Box Arrangement will, to the extent of such drawing, be applied in reduction of the obligations of the Operator under the relevant Bus Lease.

8 Systems and Equipment

Each party (other than TfNSW) acknowledges and agrees:

- (a) that TfNSW:
 - (i) may introduce or may have introduced Systems and Equipment on a Contract Bus which is subject to a Bus Lease;
 - (ii) owns any Systems and Equipment, including any Intellectual Property in the Systems and Equipment, unless TfNSW agrees otherwise in writing;
 - (iii) may use any data collected by Systems and Equipment (if any) as the property of the State; and
 - (iv) reserves the right for the State to use the data as it sees fit, including providing other authorised service providers with access to data relating to their services;
- (b) that it must co-operate with TfNSW in facilitating the installation, testing and ongoing maintenance of Systems and Equipment. This co-operation includes, without limitation, doing all of the things contemplated under Clause 12.2(b) of the OSMBSC; and
- (c) that it must allow TfNSW or TfNSW's Associates access to:
 - (i) replace, remove, repair or alter Systems and Equipment on or from a Contract Bus; and
 - (ii) any other premises or property on which any Contract Bus may be located, on reasonable notice from TfNSW.

9 Equitable Relief

- (a) Each party to this Agreement acknowledges that damages may not be an adequate remedy for any breach of, or failure by it to comply with, this Agreement.
- (b) Each party to this Agreement agrees that, without limiting any other right, remedy or action it has in connection with any actual or threatened breach of, or failure to comply with, this Agreement by the other party, it is entitled to seek equitable relief (including specific performance or injunctive or declaratory relief) to restrain any actual or threatened breach of, or failure to comply with, this Agreement by the other party and the other party must not oppose the granting of such relief on the basis that the party seeking such relief has not or will not sustain any actual loss or damage.

10 GST

- (a) A reference in this Clause to a term defined or used in the GST Act is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Any amount referred to in this Agreement which is relevant in determining a payment to be made by one of the parties to the other is exclusive of any GST unless indicated otherwise.
- (c) If GST is imposed on a supply made under or in connection with this Agreement, the consideration provided for that supply is increased by the rate at which that GST is imposed. The additional consideration is payable at the same time as the consideration to which it relates.
- (d) If one of the parties is entitled to be reimbursed for an expense or outgoing incurred in connection with this Agreement, the amount of the reimbursement will be net of any Input Tax Credit which may be claimed by the party being reimbursed in relation to that expense or outgoing.

11 Assignment by TfNSW

TfNSW may assign or transfer all or any of its rights or obligations under this Agreement to another Government Agency.

12 Notices

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

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be delivered to the intended recipient by prepaid post (if posted to an address in another country, by registered airmail) or by hand or fax to the address or fax number below or the address or fax number last notified by the intended recipient to the sender:

- (i) Transport for NSW:

[PO Box K659

HAYMARKET NSW

Attention: Director, Bus and Ferry Services Contracts

Fax No: (02) 9891 8999]

- (ii) to the Lessor:

[#]

Attention: [#]

Fax No: [#]

- (iii) to the Operator:

[#]

Attention: [#]

Fax No: [#]; and

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

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

13 Entire Agreement

This Agreement contains the entire agreement between the Lessor, the Operator and TfNSW with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with it.

14 No waiver

No failure to exercise or any delay in exercising any right, power or remedy by a party operates as a waiver. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

15 Amendment

- (a) Subject to clause 14(b), no amendment or variation of this Agreement is valid or binding on a party unless made in writing executed by all parties.
- (b) TfNSW must amend Schedule 1 to include details of any new Bus Lease notified under clause 3.1(g) and provide a revised Schedule 1 to the Operator and the Lessor. Any amendment to Schedule 1 pursuant to this clause will be valid and binding on all parties.

16 Further assurances

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

17 Costs

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

18 Severability of provisions

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

19 Governing law and jurisdiction

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

20 Counterparts

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

Executed as an agreement in Sydney.

Execution

Transport for NSW

Signed for and on behalf of TfNSW, by)
..... [insert name])
a duly authorised delegate for TfNSW)
)

In the presence of:

Signature of delegate

Print name of Witness

Signature of Witness

[Operator execution clause]

[Lessor execution clause]

Schedule 1

Tranche: _____ **Buses:** _____ **of**

Bus Leases

Schedule 2

Panel of Potential Successor Operators

Annexure 1

Novation Deed

[Clause 5.5(a)]

Novation Deed

This Deed is made on [*insert date*]

Between

[**Lessor**] of [address] (the *Lessor*)

[**Operator**] of [address] (the *Operator*)

[**Transport for NSW / TfNSW Lessor / Successor Operator**] of [address] (the [*TfNSW Lessor/Successor Operator*])

Recitals

- A The Operator has entered into the Bus Leases with the Lessor
- B The Operator, the Lessor and the [TfNSW Lessor/Successor Operator] wish to novate the Bus Leases.

Operative provisions:

1 Definitions

1.1 Definitions

In this Novation Deed:

Authorisation means:

- (a) any authorisation, approval, license, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them; and
- (b) for anything which a Government Agency may prohibit or restrict within a specified period, the expiry of that period without intervention or other action by that Government Agency.

Business Day means any day other than a Saturday, Sunday or public holiday in New South Wales.

Effective Date means the date specified as such in the Schedule to this Novation Deed.

Government Agency means any government or any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity (wherever created or located).

Bus Leases means the bus leases listed in the Schedule to this Novation Deed.

2 Novation and release

2.1 Novation from Effective Date

By way of novation and with effect from the Effective Date:

- (a) the [TfNSW Lessor/Successor Operator] is substituted for the Operator under the Bus Leases as if named as an original party to the Bus Leases in place of the Operator;
- (b) the [TfNSW Lessor/Successor Operator] assumes all of the obligations of the Operator under the Bus Leases arising on or after the Effective Date;
- (c) all of the rights and benefits of the Operator under the Bus Leases are conferred on the [TfNSW Lessor/Successor Operator]; and
- (d) every reference in the Bus Leases to "*the Lessee*" is to be read as if it were a reference to the [TfNSW Lessor/Successor Operator].

2.2 Release by the Lessor

With effect from the Effective Date, the Lessor releases the Operator from all its obligations and liabilities under the Bus Leases arising on or after the Effective Date.

3 Amendments to Bus Leases

3.1 Amendments to Bus Leases

The Bus Leases are amended with effect from the Effective Date as set out in the Schedule to this Novation Deed.

3.2 Construction of Bus Leases

Subject to the provisions of this Novation Deed, this Novation Deed and the Bus Leases will be read and construed as one document.

4 Indemnities

4.1 Operator indemnity

The Operator unconditionally and irrevocably indemnifies the [TfNSW Lessor/Successor Operator] against any liability, cost, damages, debt, expense, tax or loss incurred or payable by the [TfNSW Lessor/Successor Operator] as a result of any suit, action, demand, cause of action or proceeding against the [TfNSW Lessor/Successor Operator] under or in respect the Bus Leases which relates to any act or omission of the Operator at any time before the Effective Date.

4.2 [TfNSW Lessor/Successor Operator indemnity]

The [TfNSW Lessor/Successor Operator] unconditionally and irrevocably indemnifies the Operator against any liability, cost, damages, debt, expense, tax or loss incurred or payable by the Operator as a result of any suit, action, demand, cause of action or proceeding against the Operator under or in respect the Bus Leases which relates to any act or omission of the [TfNSW Lessor/Successor Operator] at any time on or after the Effective Date.

5 Representations and warranties

5.1 Representations and warranties

Each of the parties represents and warrant to the other parties that:

- (a) it is properly incorporated under the laws of the place of its incorporation;
- (b) it has full power and authority to enter into and perform its obligations under this Novation Deed and it has taken all corporate and other action necessary to authorise the execution, delivery and performance of this Novation Deed;
- (c) it benefits by entering into this Novation Deed;
- (d) this Novation Deed has created valid and binding obligations enforceable against it in accordance with its terms;
- (e) the execution of this Novation Deed and the performance by it of its obligations or the exercise of its rights under this Novation Deed does not and will not:
 - (i) contravene its constitution;
 - (ii) contravene a law or Authorisation or require that any Authorisation be obtained;
 - (iii) contravene any agreement or obligation binding on it or applicable to its assets, revenues or business;
 - (iv) exceed any limits on its powers or the powers of its directors;
- (f) in entering this Novation Deed, it is not acting as a trustee of any trust; and
- (g) no application or order has been made for winding-up or liquidation of it, no action has been taken to seize or take possession of its assets, there are no unsatisfied judgments against it and it is able to pay its debts as they fall due.

5.2 Repetition

The representations and warranties in this Novation Deed are made on the date of this Novation Deed and are repeated on the Effective Date.

5.3 Reliance

Each party acknowledges that the other parties have entered into this Novation Deed in reliance on the representations and warranties in Clause 5.1.

6 Costs, expenses and duties

6.1 Costs and expenses

Subject to Clause 6.2, the parties will bear their own expenses of agreeing and executing this Deed.

6.2 Other duties

The [TfNSW Lessor/Successor Operator] must pay all registration, financial institutions, bank account debit and other duties and taxes (including fines and penalties) which may be payable or determined to be payable in relation to the execution, delivery, registration, performance, enforcement or attempted performance or otherwise in respect of this Novation Deed or any payment or receipt or other transaction contemplated by this Novation Deed.

7 Notices

- (a) All notices and other communications made, permitted or required to be given under this Novation Deed will be deemed given on receipt when sent by post, by personal delivery or by facsimile:
 - (i) in the case of the Lessor or the Operator, to the respective addresses for those parties which are (or which but for the amendment in Clause 7(b) would be) set out in the Bus Leases; and
 - (ii) in the case of the [TfNSW Lessor/Successor Operator], to the address set out in paragraph 2(c) of the Schedule to this Novation Deed.
- (b) The Bus Leases will be deemed amended by deleting the Operator's billing address set out in the Bus Leases and inserting in its place the address set out in paragraph 2(c) of the Schedule to this Novation Deed.

8 General provisions

8.1 Invalid or unenforceable provisions

If a provision of this Novation Deed is invalid or unenforceable in a jurisdiction:

- (a) it is to be read down or severed in that jurisdiction to the extent of the invalidity or unenforceability; and
- (b) that fact does not affect the validity or enforceability of:
 - (i) that provision in another jurisdiction; or
 - (ii) the remaining provisions.

8.2 Counterparts

This Novation Deed may be signed in counterparts and all counterparts taken together constitute one document.

8.3 Further assurances

Each party to this Novation Deed must, at its own expense, whenever requested by another party, promptly do or cause to be done anything that that other party considers necessary or desirable to:

- (a) give full effect to this Novation Deed; or
- (b) more fully secure the rights, remedies and powers of that other party under this Novation Deed or to enable that other party to exercise those rights, remedies and powers;

including signing and delivering documents.

8.4 Moratorium legislation

To the extent permitted by law, a provision of a law is excluded if it does or may, directly or indirectly:

- (a) lessen or vary in any other way the obligations of any party under this Novation Deed; or
- (b) delay, curtail or prevent or adversely affect in any other way the exercise by a party of any of its rights, remedies or powers under this Novation Deed.

9 Governing law and jurisdiction

9.1 Governing law

This Novation Deed is governed by the laws of New South Wales.

9.2 Jurisdiction

The parties irrevocably and unconditionally:

- (a) submit to the non-exclusive jurisdiction of the courts of New South Wales;
- (b) waive, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum; and
- (c) agree that a document required to be served in proceedings about this Novation Deed may be served by being delivered to or left at its address for service of notices under Clause 7 or in any other way permitted by law.

Executed as a deed in Sydney.

Execution

[Operator execution clause]

[Lessor execution clause]

[[TfNSW Lessor/Successor Operator] execution clause]

Schedule

1. Terms and expressions defined in the Novation Deed have the same meaning when used in this Schedule.

2. For the purpose of the Novation Deed:

(a) the Bus Lease(s) are:

[List the Bus Leases between the Lessor and Operator and relevant details necessary to identify each Bus Lease];

(b) the Effective Date is **[insert date]**; and

(c) the address, attention details and facsimile number for notices to the [TfNSW Lessor/Successor Operator] are:

Address: **[[TfNSW Lessor's/Successor Operator's] address for notices]**

Attention: **[Officer to receive notices for [TfNSW Lessor/Successor Operator]]**

Facsimile no: **[[TfNSW Lessor's/Successor Operator's] fax number]**