



**Transport
for NSW**

**Operator General Financier Direct
Agreement**

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

[Name of Financier]

[Name of Operator]

[Pro forma version dated August 2012]

Contents

Clause Number	Heading	Page
1	Definitions and interpretation	1
2	Consent, priority and agreements	2
3	Systems and Equipment	5
4	Dispute resolution	6
5	GST	6
6	Assignment	6
7	Notices	6
8	Entire agreement	7
9	No waiver	8
10	Amendment	8
11	Further assurances	8
12	Costs	8
13	Severability of provisions	8
14	Governing law and jurisdiction	8
15	Counterparts	8

Date

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 Financier] (Financier)

[insert name and address of Operator] (Operator)

Recitals

- A TfNSW and the Operator have entered into the SMBSC, under which the Operator has agreed to provide certain bus services and other related services.
- B. To secure performance by the Operator of its obligations under the SMBSC, the Operator has procured the provision of a Performance Bond in favour of TfNSW.
- C. To further secure performance by the Operator of its obligations under the SMBSC, the Operator may in the future also provide security over its assets in favour of TfNSW.
- D. The Operator and the Financier have entered into a facility agreement under which the Financier has made, or will in the future make, advances to the Operator.
- E. To better secure repayment of advances made under the facility agreement, the Operator has provided security over its assets in favour of the Financier.
- F. This Agreement acknowledges TfNSW's end of term rights over the assets of the Operator and the parties' consent to the Securities and Transaction Documents. It also sets out the parties' agreement as to how the priority will be regulated between any Securities (that may exist) 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:

Default means any event or circumstance which, alone or with the giving of notice or passage of time or both, would entitle a Security Holder to enforce its Security.

Facility Agreement means any facility agreement or other documentation under or in connection with which the Financier has made or provided (or may in the future make or provide) any advance or financial accommodation to the Operator.

First Security means any Security Interest granted, or purported to be granted, by the Operator (whether before or after the date of this Agreement) in favour of the Financier.

First Security Holder means the Financier.

Order of Priorities means the order of priorities between the First Security and the Second Security set out in Clause 2.4.

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

Second Security means any Security Interest granted, or purported to be granted, by the Operator (whether before or after the date of this Agreement) in favour of TfNSW.

Second Security Holder means TfNSW.

Secured Obligations means, for a Security Holder, all money, obligations and liabilities (actual or contingent) of any kind the payment, repayment or satisfaction of which is, or may in the future become, secured by that Security Holder's Security or which are, or may in the future become, due, owing or payable to that Security Holder under its Security.

Securities means the First Security and the Second Security and **Security** means either of them.

Security Holder means the First Security Holder and the Second Security Holder, or either of them.

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

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 SMBSC, and not defined in this Agreement, has the same meaning when used in this Agreement.
- (b) Clauses 1.2 to 1.8 of the SMBSC 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, priority and agreements

2.1 Consent to Security

Each Security Holder:

- (a) consents to the creation and execution by the Operator of the Security in favour of the other Security Holder; and
- (b) agrees that the creation or existence of that Security does not constitute a breach by the Operator of any covenant or condition of the Security in its own favour.

2.2 Transaction Documents

The First Security Holder acknowledges and agrees that it has:

- (a) been provided with execution copies of all of the Transaction Documents entered into by the Operator; and
- (b) reviewed and approved the terms of each Transaction Document.

2.3 Consent to Transaction Documents

The First Security Holder consents and agrees to the:

- (a) execution by the Operator of (and performance of its obligations under) each of the Transaction Documents that TfNSW requires the Operator to execute;
- (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.

2.4 Priority

- (a) The Security Holders agree that the Securities rank in the following order of priority:
 - (i) the First Security ranks first for payment and satisfaction of the Secured Obligations of the First Security Holder; and
 - (ii) after payment or satisfaction in full of that First Security Holder's Secured Obligations, the Second Security ranks second for payment and satisfaction of the Secured Obligations of the Second Security Holder.
- (b) The Second Security Holder agrees that its Second Security is subject to and ranks subsequent in priority for all purposes to the First Security and is postponed to the rights of the First Security Holder under the First Security.

2.5 Continuation of Priority

The Order of Priorities continues to apply, in respect of assets subject to a Security, until either:

- (a) the First Security Holder's Secured Obligations owed to the holder of the First Security over those assets have been paid or satisfied in full and that First Security is released or discharged; or
- (b) this Agreement is terminated by agreement in writing between the Security Holders.

2.6 Notice of default

Each Security Holder agrees to notify the other Security Holder of the occurrence of:

- (a) any monetary default under or in connection with its Security (including, in respect of the First Security Holder, under or in connection with any Facility Agreement); and
- (b) any other default under or in connection with its Security (including, in respect of the First Security Holder, under or in connection with any Facility Agreement) in respect of which notice of default or requiring remedy has been given to the Operator,

where that 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 Security or any Facility Agreement). Nothing in this Clause prevents a Security Holder from notifying the other Security Holder of any default referred to in paragraphs (a) or (b) at any earlier time.

2.7 Security Holder's cure rights

- (a) A Security Holder may, on receipt of a notice referred to in Clause 2.6, elect to cure the relevant default. If the Security Holder elects to cure the default, the Security Holder providing the notice agrees not to exercise its rights to enforce its Security prior to the later of:
 - (i) the expiration of any unexpired grace period that applies to the default under the relevant Security; and
 - (ii) 20 Business Days after the Security Holder has provided the notification referred to in Clause 2.6.
- (b) Nothing in this Clause obliges a Security Holder to cure a default.

2.8 Enforcement of Securities

- (a) The Second Security Holder must not enforce its Second Security without first obtaining the written consent of the First Security Holder.
- (b) Subject to Clauses 2.6, 2.7 and 2.9, the First Security Holder is not required to obtain the consent or approval of the Second Security Holder before enforcing or attempting to enforce its First Security.
- (c) Notwithstanding any other provision of this Agreement or any Security, but subject to Clauses 2.9 and 2.10, if the First Security Holder, pursuant to any enforcement action taken under its First Security, sells or otherwise disposes of any asset subject to the Second Security or notifies the Second Security Holder that it will do so, the Second Security Holder must unconditionally and irrevocably release the relevant asset from its Second Security as soon as possible and in any event within 5 Business Days of receipt of a written notice from the First Security Holder requiring it to do so.

2.9 TfNSW's Option Right

- (a) The First Security Holder may not, in taking any enforcement action under its First Security, procure the sale, novation or other disposal of any Contract Bus or Bus Lease in respect of a Contract Bus without first providing TfNSW with written notice offering TfNSW or its nominee the right to (as relevant):
 - (i) acquire the Contract Bus; or
 - (ii) novate the Bus Lease in respect of the Contract Bus,
from the Operator, on the same terms as set out in paragraphs 5.1 and 5.2 of the Contract Buses and Contract Depots Schedule and paragraph 4.7 of the Payment Schedule and as if:
 - (iii) each such Contract Bus is a "Transfer Out Contract Bus", "Sale Bus" and/or "Novation Bus" (as relevant) for the purposes of those paragraphs; and
 - (iv) the "CC_n" for the Contract Bus is the Initial Capital Value for that Contract Bus.
- (b) TfNSW may exercise an option under Clause 2.9 by providing written notice to the First Security Holder within 20 Business Days of receiving a notice under Clause 2.9. If TfNSW does not exercise an option within such period, the relevant option will lapse and not be capable of being exercised.

2.10 TfNSW's Rights to Transfer Out Contract Buses

- (a) Notwithstanding any other provision of this Agreement or any Security, on or within the period of 30 days immediately preceding the Termination Date:
 - (i) the First Security Holder must irrevocably release the Transfer Out Contract Buses and any Bus Leases in respect of the Transfer Out Contract Buses from its Security; and
 - (ii) TfNSW must or must procure a TfNSW Lessor or the Successor Operator to:
 - (A) in the case where TfNSW has received a notice from the First Security Holder under Clause 2.6(a) of this Agreement, distribute the Vehicle Termination Payment (if any) in respect of each Transfer Out Contract Bus in accordance with the Order of Priorities; and
 - (B) in each other case, pay the Vehicle Termination Payment (if any) to the Operator.

2.11 Potential Default

- (a) Each Security Holder must use its reasonable endeavours to give the other Security Holder notice of a Potential Default within a reasonable period after becoming aware of that Potential Default.
- (b) Within 10 Business Days following receipt of a notice of Potential Default under Clause 2.11(a), the Security Holders must meet to discuss the Potential Default and any steps that either of them may consider reasonably necessary in the circumstances. Neither Security Holder will be obligated to take any action or agree to any arrangement as a consequence of a Potential Default.
- (c) Each Security Holder acknowledges that it will have no rights against the other Security Holder for failing to provide a notice required under Clause 2.11(a).

3 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, in a Contract Depot or in the Operator's premises;
 - (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 SMBSC; 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 or Contract Depot; and
 - (ii) any other premises or property on which any Contract Bus may be located, on reasonable notice from TfNSW.
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4 Dispute resolution

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

5 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.
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6 Assignment

- (a) Subject to paragraph (b), a Security Holder may assign or transfer all or any of his or her rights or obligations under this Agreement with the written consent of the other Security Holder.
 - (b) TfNSW may assign all of its rights or obligations under this Agreement in accordance with the SMBSC.
 - (c) The Operator may not assign or otherwise transfer any of its rights or obligations under this Agreement except in accordance with the SMBSC and with the consent of the Financier.
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7 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) to Transport for NSW:
[GPO Box 1620
Sydney NSW 2001

- Attention: Director, Contracts and Compliance
 - Fax No: (02) 9891 8950]

- (ii) to the Financier:

- [#]
 - 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.

8 Entire agreement

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

9 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.

10 Amendment

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

11 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.

12 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.

13 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.

14 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.

15 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.

Transport for NSW

Signed sealed and delivered

by the authorised representative of Transport
for NSW for and on behalf of the **State**
Government of New South Wales
in the presence of:

Signature of witness

Signature of authorised representative

Name of witness (please print)

[Financier execution clause]

[Operator execution clause]