



Transport
for NSW

Financier Direct Agreement

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

[Operator]

[Financier]

[Pro forma version dated October 2018]

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- (b) where the Financier Bus Lease does not grant the Operator an entitlement to acquire or receive a transfer of the relevant Bus, the amount negotiated between TfNSW and the Financier 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 Services Contract means the

dated _____ between the Operator and TfNSW.

Default means:

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

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

- (a) penalty;
- (b) discount to the rate of interest provided for in the Financier 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 Financier Bus Lease, other than the Financier'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 Financier 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 Bus Services Contract or any TfNSW Security.

Facility Agreement means any facility agreement or other documentation or arrangement 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, including in respect of a Contract Bus described in Schedule 2 (as amended from time to time). For the avoidance of doubt, a Facility Agreement does not include any Financier Bus Lease.

Financier Bus Lease means any Bus Lease under which a Contract Bus is leased to the Operator by the Financier, including in respect of a Contract Bus described in Schedule 2 (as amended from time to time).

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

Financing Arrangement means any Facility Agreement or any Financier Bus Lease.

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 Financing Arrangement, an arrangement whereby TfNSW pays amounts owing to the Operator under the Bus Services Contract (or a Successor Operator or Interim Operator under any replacement metropolitan bus services contract or other similar arrangement with TfNSW) and which the Financier notifies TfNSW in writing as being referable to that Financing Arrangement, into an account with a Bank nominated by, and directly accessible to, the Financier for the purposes of satisfying some or all of the Operator's (or Successor Operator's) obligations under the relevant Financing Arrangement. For the avoidance of any doubt, TfNSW will not be obliged to pay any amounts into the relevant account in excess of either:

- (a) the amounts owing in respect of the Operator's (or Interim Operator's or Successor Operator's) obligations under the relevant Financing Arrangement; or
- (b) the amount due and payable to the Operator (or Interim Operator or Successor Operator) under the Bus Services Contract (including after allowing for any withholding, deduction or set-off in accordance with the terms of the Transaction Documents).

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

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

Option Right means the rights afforded to TfNSW in accordance with clause 5.3.

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

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

Priority Obligation means:

- (a) the obligations of the Operator and the Powers of TfNSW under clauses 15 (Dealing with Operator Assets), 29 (Step-in for Operator Breach) and 33 (End of Contract Transfer Provisions) of the Bus Services Contract; and
- (b) the obligations of the Financier and the Powers of TfNSW under clause 5.3, 6.2, 6.3 or 7 of this Agreement.

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 Financier Security and the TfNSW Security and **Security** means either of them.

Security Holder means the Financier and TfNSW.

Systems and Equipment means any:

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

State Asset means a Contract Bus or Contract Depot leased or licensed to the Operator or to which the Operator is otherwise given access by the State of New South Wales, TfNSW, an Associate of either of them or a Government Agency.

TfNSW 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 from the Operator in favour of an Enforcing Party.

1.2 Interpretation

- (a) A term defined in the Bus Services Contract, and not defined in this Agreement, has the same meaning when used in this Agreement.
- (b) Clause 1.2 to 1.8 (other than Clause 1.3) of the Bus Services Contract apply to this Agreement as if set out in full and all references to "this Agreement" were references to this Agreement and all acknowledgments by the Operator were given (severally) by the Operator and the Financier.

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.

1.4 Priority of this Agreement

Where there is an inconsistency, ambiguity or discrepancy between this Agreement and any other Transaction Document, or within or between any of the Transaction Documents (excluding this Agreement), then the following order of precedence applies:

- (a) this Agreement; and
- (b) subject to paragraph (a) above, the order of precedence set out in Clause 1.3 of the Bus Services Contract.

1.5 State Assets

Notwithstanding anything in any Financing Arrangement, a Financier Security or this Agreement:

- (a) the Financier may not take any action or exercise or enforce any right or Power (whether under or in connection with a Financing Arrangement, a Financier Security or at law) with respect to any State Asset;
- (b) TfNSW, the State, each Governmental Agency and their respective Associates may exercise or enforce any right or Power with respect to any State Asset (whether under or in connection with a Transaction Document, a TfNSW Security or at law) without the consent or approval of the Financier; and
- (c) the Order of Priorities does not apply to, and the Financier has no right to share or participate in any proceeds of any enforcement action or the exercise by TfNSW, the State, each Governmental Agency and their respective Associates of any right or Power with respect to, a State Asset.

The obligations and agreements in this clause 1.5 are continuing and survive termination of this document.

2 Consent, acknowledgements 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 (or the arrangements secured by that Security).

2.2 Consent to Transaction Documents

The Financier consents and agrees to the:

- (a) execution by the Operator of (and performance of its obligations under) each of the Transaction Documents required by TfNSW to be executed by the Operator;
- (b) creation of any TfNSW 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.

2.3 Acknowledgement

The Financier acknowledges and agrees that:

- (a) **no Default:** none of the matters or things set out in Clauses 2.1 or 2.2 above, nor the exercise of any of TfNSW's Powers under the TfNSW Security or the Bus Services Contract will of itself contravene or constitute a Default under the Financing Arrangements or the Financier Security or entitle the Financier to exercise any Power (including termination) under the Financing Arrangements or the Financier Security and to the extent that any Financing Arrangement or the Financier Security provides to the contrary, any such Default is hereby waived;
- (b) **not liable:** without limiting the liability of the Operator (who continues to be responsible for the performance of its obligations under the Financing Arrangements and the Financier Security), no Enforcing Party will be liable, or taken to have assumed liability, for any obligation of the Operator under the Financing Arrangements or the Financier Security by reason only of:
 - (i) the creation of any TfNSW Security;
 - (ii) the exercise of any of TfNSW's Powers under any TfNSW Security; or
 - (iii) the exercise of any of TfNSW's Powers, or the performance of any of its obligations, under the Bus Services Contract or this Agreement;
- (c) **no adoption:** without limiting Clause 2.3(b), nothing in this Agreement requires an Enforcing Party to adopt or accept the obligations of the Operator, in whole or in part, under the Financing Arrangements or the Financier Security; and
- (d) **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.

2.4 Priority

Subject to the rights of TfNSW under this Agreement, in respect to any asset subject to both a TfNSW Security and a Financier Security:

- (a) the Security Holders agree that the Securities rank in the following order of priority:
 - (i) the Financier Security ranks first for payment and satisfaction of the Secured Obligations of the Financier; and
 - (ii) after payment or satisfaction in full of the Financier's Secured Obligations, the TfNSW Security ranks second for payment and satisfaction of the Secured Obligations of TfNSW; and
- (b) TfNSW agrees that the TfNSW Security is subject to and ranks subsequent in priority for all purposes to the Financier Security and is postponed to the rights of the Financier under the Financier Security, other than as provided in this Agreement.

2.5 Continuation of Priority

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

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

3 General Undertakings

3.1 Undertakings of the Financier - General

Unless TfNSW otherwise agrees in writing, the Financier must:

- (a) **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 Financing Arrangements, the Financier Security, the Contract Buses, the Contract Depots or the State Assets in favour of any person, other than in favour of TfNSW or as contemplated by and subject to this Agreement or to a counterparty which enters into an agreement in favour of TfNSW on terms substantially the same as this Agreement; and

- (b) **New Financing Arrangements:** promptly provide TfNSW with details of any Financing Arrangement entered into after the date of this Agreement.

3.2 Undertakings of the Financier – Financier Bus Leases

Unless TfNSW otherwise agrees in writing, the Financier must:

- (a) **Amendments:** not materially amend or supplement, or consent to any material amendment or supplement of, any Financier Bus Lease;

- (b) **Assignment:** not, except as required by this Agreement, consent to the assignment, transfer or novation by the Operator of any Financier Bus Lease;
- (c) **Termination, release, etc:** not, except as permitted by this Agreement:
 - (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, any Financier Bus Lease; and
- (d) **Copy:** promptly provide a copy to TfNSW of any notice given or received by it terminating, or suspending the performance of any obligations under, any Financier Bus Lease.

3.3 Undertakings of TfNSW

Unless the Financier otherwise agrees in writing, TfNSW must:

- (a) **Extension:** give the Financier a copy of any notice given to the Operator extending the term of the Bus Services Contract, promptly after that notice is given to the Operator; and
- (b) **Early Termination:** give the Financier a copy of any notice given to the Operator terminating the Bus Services Contract, promptly after that notice is given to the Operator.

3.4 Undertakings of the Operator

Unless TfNSW otherwise agrees in writing, the Operator must promptly provide TfNSW with details of any additional Contract Buses which become subject to a Financing Arrangement or a Bus Lease with the Financier after the date of this Agreement.

4 Defaults

4.1 Notice of Defaults

Each Security Holder agrees to:

- (a) **Notice of default:** notify the other Security Holder of:
 - (i) any Default; or
 - (ii) any breach or default under or in connection with its Security (including, in respect of the Financier, under or in connection with any Financing Arrangement) in respect of which notice of default or requiring remedy has been given to the Operator,

in each case where such 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 Financing Arrangement or Security). Nothing in this Clause 4.1(a) prevents a Security Holder from notifying the other Security Holder of any default referred to in paragraphs (i) or (ii) at an earlier time (including, in respect of the Financier, for the purposes of Clause 6.2(a)(i)); and
- (b) **Potential Default:** use its reasonable endeavours to notify the other Security Holder of a Potential Default within a reasonable period after becoming aware of that Potential Default.

4.2 Potential Default

- (a) Within 10 Business Days following receipt of a notice of Potential Default under Clause 4.1(b), the Financier 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 Financier 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 4.1(a) or Clause 4.1(b).

4.3 Cure rights

Without limiting Clause 6.3, the relevant Security Holder may, on receipt of a notice referred to in Clause 4.1(a), elect to cure the relevant default. If the Security Holder receiving such notice 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 20 Business Days after:

- (a) the expiration of any unexpired grace period that applies to the default under the relevant Security, Financing Arrangement or Bus Services Contract; and
- (b) the Security Holder has provided the notification referred to in Clause 4.1(a).

Nothing in this Clause obliges a Security Holder to cure a default.

5 Enforcement of Security

5.1 Application to Financier Bus Leases

This Clause 5:

- (a) does not apply to any Financier Security which is a Financier Bus Lease; and
- (b) does not limit Clause 1.5.

5.2 Enforcement of Securities

- (a) TfNSW must not enforce the TfNSW Security in respect to any asset subject to the Financier Security, except:
 - (i) to prevent a breach of or to exercise or enforce or preserve its rights with respect to a Priority Obligation; or
 - (ii) after first obtaining the written consent of the Financier.
- (b) Subject to Clauses 4.1(a), 4.3 and 5.3, the Financier is not required to obtain the consent or approval of TfNSW before enforcing or attempting to enforce the Financier Security.
- (c) Notwithstanding any other provision of this Agreement or any Security, but subject to Clauses 5.3 and 5.4, if the Financier, pursuant to any enforcement action taken under the Financier Security, sells or otherwise disposes of any asset subject to the TfNSW Security as permitted by this Agreement or notifies TfNSW that it will do so, TfNSW must unconditionally and irrevocably release the relevant asset from the TfNSW Security as soon as possible and in any event on the later of:
 - (i) the date of completion of the relevant sale or disposal; and
 - (ii) 5 Business Days of receipt of a written notice from the Financier requiring it to do so.

5.3 TfNSW's Option Right

- (a) The Financier may not, in taking any enforcement action under the Financier 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) purchase the Contract Bus; or
 - (ii) take a novation of the Bus Lease,

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 each such Contract Bus is a "Transfer Out Contract Bus", "Sale Bus" and/or "Novation Bus" (as relevant) for the purposes of those paragraphs.
- (b) TfNSW may exercise an option under Clause 5.3(a) by providing written notice to the Financier within 20 Business Days of receiving a notice under Clause 5.3(a). If TfNSW does not exercise an option within such period, the relevant option will lapse and not be capable of being exercised unless otherwise agreed in writing by the Financier, acting reasonably.
- (c) Where TfNSW exercises an option under Clause 5.3(a) in respect to a Contract Bus or Bus Lease, TfNSW must or must procure a TfNSW Lessor or the Successor Operator to:
 - (i) in the case where TfNSW has received a notice from the Financier under Clause 4.1(a), distribute the Vehicle Termination Payment (if any) in respect of the Contract Bus or Bus Lease in accordance with the Order of Priorities; and
 - (ii) in each other case, pay the Vehicle Termination Payment (if any) to the Operator.

5.4 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 Financier must irrevocably release the Transfer Out Contract Buses and any Bus Leases in respect of the Transfer Out Contract Buses from the Financier 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 Financier under Clause 4.1(a), 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.

6 Termination and suspension of Financier Bus Leases

6.1 Application to Financier Bus Leases

This Clause 6:

- (a) only applies to Financing Arrangements that are Financier Bus Leases; and
- (b) does not limit Clause 1.5.

6.2 Termination or suspension for default

- (a) Without limiting Clause 6.2(b), the Financier may only terminate, or suspend the performance of its obligations under, a Financier Bus Lease as a result of a Default in accordance with the terms of the relevant Financier Bus Lease and if:
- (i) the Financier 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 20 Business Days of the later of:
 - I the expiration of any unexpired grace period that applies to the Default under the Financier Bus Lease; and
 - II the date on which the Default Notice is given to TfNSW and the Operator, or
 - (B) if the Default is not capable of remedy, all of the obligations of the Operator under the Financier 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 20 Business Days of the later of:
 - I the expiration of any unexpired grace period that applies to the Default under the Financier Bus Lease; and
 - II the date on which the Default Notice is given to TfNSW and the Operator or such longer period as is allowed under the Financier Bus Lease.
- (b) The Financier must not terminate, or suspend the performance of its obligations under, a Financier Bus Lease as a result of a Default if:
- (i) TfNSW has notified the Financier that it is entitled to exercise its Step in Rights or its rights under Clause 6.3 or the TfNSW Security has become enforceable; and
 - (ii) an Enforcing Party is performing all of the obligations of the Operator under the relevant Financier 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 Financier under Clause 6.2(a).
- (c) Clauses 6.2(a) and 6.2(b) do not prejudice the Financier's rights against the Operator in respect of remedies other than termination of a Financier Bus Lease or suspension of the performance by the Financier of its obligations under Financier Bus Lease.
- (d) Clauses 6.2(a) and 6.2(b) do not prejudice the rights of the Financier on expiry of the scheduled term of any Financier Bus Lease.

6.3 Cure rights

- (a) On becoming aware of any Default under a Financier Bus Lease, 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 Financier Bus Lease.

- (b) To the extent reasonably requested by an Enforcing Party for the purpose of exercising its Powers under this Agreement, the Financier must promptly provide the Enforcing Party with any information in its possession (including details of any steps which the Financier 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 the Financier Bus Lease), provided that this Clause will not require the Financier 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.

6.4 Application of Clauses

Clauses 6.2 to 6.3 apply despite anything in a Financier Bus Lease or any other document and whether or not TfNSW has exercised any Power under any TfNSW Security or the Bus Services Contract.

7 Novation of Financier Bus Leases

7.1 Novation under the Bus Services Contract

The Operator must novate all Financier 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 Financier, which consent must not, subject to Clause 7.4, be withheld; and
- (b) as required by TfNSW.

7.2 Notice

TfNSW must give the Financier 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).

7.3 Consent

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

- (a) where the Financier consents to the novation of the Financier Bus Lease to the TfNSW Lessor or Successor Operator, confirming that consent; or
- (b) where the Financier withholds its consent to the novation of the Financier 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 7.4 on which the Financier has relied in order to withhold its consent.

7.4 Withholding consent

- (a) The Financier may refuse to grant its consent to a novation of a Financier Bus Lease to a TfNSW Lessor or Successor Operator if and only if the novation would cause the Financier to contravene any applicable laws or the requirements of any relevant regulatory agency.
- (b) If the Financier fails or refuses to provide TfNSW with the notice contemplated in Clause 7.3 within the period prescribed in Clause 7.3 or purports to withhold or refuse its consent where the grounds set out in Clause 7.4(a) are not satisfied, the Financier will be deemed to have irrevocably consented to the novation of the Financier Bus Lease from the Operator to the TfNSW Lessor or Successor Operator.

7.5 Novation

- (a) Subject to this Clause 7, the Financier, 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 not more than 10 Business Days after the Financier consents or is deemed to have consented to the novation of the Financier Bus Lease under this Clause 7.
- (b) For the avoidance of doubt, nothing in this Clause 7 releases or affects the Operator's obligations under the Financier 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 7.

7.6 Costs and expenses

TfNSW must procure the TfNSW Lessor or Successor Operator pays to the Financier on demand the Financier's reasonable costs and expenses (including legal costs and expenses) of the preparation, negotiation and execution of the Novation Deed contemplated by this Clause 7.

7.7 Early termination of Financier Bus Lease

- (a) If the Financier withholds its consent to the novation of a Financier Bus Lease and the relevant Financier Bus Lease is a Finance Lease, TfNSW may, by notice to the Operator and Financier, require that:
 - (i) the Operator and the Financier terminate the Financier Bus Lease;
 - (ii) the Operator pay to the Financier 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 Financier 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 Financier 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 Financier 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 7.7(a), and Clause 7.7(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 Financier in satisfaction of the Operator's obligations under Clause 7.7(a)(iii)).

- (c) Where a Financier Bus Lease terminated under Clause 7.7(a)(i) does not grant the Operator an entitlement to acquire the relevant Bus on termination of the Finance Bus Lease, TfNSW and the Financier 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 7.7(a)(iv) will not apply to such Bus and Financier Bus Lease.

7.8 Release of Surety

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

7.9 Use Prior to Novation

- (a) If the Operator fails to novate any Financier 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 7.1, the Financier 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 Financier Bus Lease is novated to the TfNSW Lessor or the Successor Operator.
- (b) During the period referred to in Clause 7.9(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 15 of the PT Act 2014;
 - (ii) if required by the terms of a Financier Bus Lease, insure the relevant Novation Bus with insurers, and on terms, consistent with the requirements of the Financier Bus Lease or as otherwise approved by the Financier;
 - (iii) comply with the terms of the Financier Bus Lease; and
 - (iv) indemnify the Financier in respect of any Losses (other than Consequential Losses or indirect Losses) that may be incurred or sustained by the Financier in respect of or arising from the operation of the Novation Bus during that period, other than to the extent caused or contributed to by any fraudulent, negligent, reckless, unlawful or malicious act or omission of or breach of this Agreement by the Financier or its associates.

8 Locked Box Arrangements

- (a) TfNSW will, if requested by the Financier, implement and maintain a Locked Box Arrangement in respect of a Financing Arrangement where:
 - (i) the Financier has provided TfNSW with a notice under Clause 4.1(a) in respect of that Financing Arrangement;

- (ii) in respect of a Financing Arrangement which is a Financier Bus Lease, such Financier Bus Lease has been novated to a Successor Operator under Clause 7 as a result of the early termination of the Bus Services Contract by TfNSW; or
 - (iii) the Operator has provided its written consent to that arrangement.
- (b) The Financier must ensure that any Locked Box Arrangement under Clause 8(a)(i) will endure only for so long as the relevant Default is in existence and remains unremedied. The Financier must notify TfNSW promptly when the Default ceases to subsist. TfNSW will not be required to maintain a Locked Box Arrangement after it receives such a notice, unless and until the Financier gives TfNSW a new notice in accordance with Clause 4.1(a). TfNSW may rely on any notice given by the Financier under Clause 4.1(a) or for the purposes of this Clause 8 and will not be liable in any respect to any person for:
- (i) acting in accordance with any notice given or purported to be given by a Financier under Clause 4.1(a) or for the purposes of this Clause 8; or
 - (ii) any failure or delay by the Financier in giving a notice when required under Clause 4.1(a) or for the purposes of this Clause 8.
- (c) The Operator hereby consents to the implementation and maintenance of any Locked Box Arrangement under Clause 8(a)(i).
- (d) TfNSW will ensure that any Successor Operator consents to the implementation and maintenance of any Locked Box Arrangement under Clause 8(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 Financing Arrangement.
- (f) The Financier agrees to meet TfNSW's reasonable costs of implementing and maintaining any Locked Box Arrangement under this Clause 8.
- (g) The Financier 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 Financing Arrangement.

9 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 and which may be subject to a Financing Arrangement or Financier Security;
 - (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 Bus Services Contract; 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.
-

10 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.
-

11 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.

12 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.

13 Assignment by TfNSW

- (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 prior written consent of the other Security Holder.
- (b) TfNSW may assign all of its rights or obligations under this Agreement in accordance with the Bus Services Contract.
- (c) The Operator may not assign or otherwise transfer any of its rights or obligations under this Agreement except in accordance with the Bus Services Contract and with the consent of the Financier.

14 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 (if any is specified) 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: Manager, Bus Contracts

- (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.

15 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.

16 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.

17 Amendment

- (a) Subject to clause 17(b), no amendment or variation of this Agreement is valid or binding on a party unless made in writing and executed by all parties.
- (b) TfNSW may, upon receipt of a notification from the Operator or the Financier, amend Schedule 2 to include details of any additional Contract Buses, or changes to Contract Buses already listed in Schedule 2, by providing a revised Schedule 2 to the Operator and the Financier. Any amendment to Schedule 2 pursuant to this clause will be valid and binding on all parties.

18 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.

19 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.

20 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.

21 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.

22 Counterparts

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

Execution

Executed as an agreement

TfNSW Execution

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 the authorised representative

Name of witness (please print)

Operator Execution

Financier Execution

Schedule 1
Novation Deed

[Clause 5.5(a)]

Novation Deed

This Deed is made on

Between

of **(Financier)** ;

of **(Operator)** ; and

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



Recitals

- A The Operator has entered into the Bus Leases with the Financier
- B The Operator, the Financier 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 Financier

With effect from the Effective Date, the Financier 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, other than to the extent caused or contributed to by any act or omission of the Operator at any time before 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; or
 - (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 Financier 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]

[Financier 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 Financier 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]**

Schedule 2

Bus details

[Please complete Word version of Schedule 2 to include details of any additional Contract Buses and then replace this page with the completed version]