



Eastern Distributor

Summary of contracts

September 1998



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This *Summary of Contracts* was written, edited, designed and produced for the New South Wales Roads and Traffic Authority (RTA) by Catalyst Communications, Suite 101A, 75 Archer Street, Chatswood, NSW 2067 (phone 61 2 9413 1497, fax 61 2 9415 1027, e-mail sandy@catalyst.com.au). The assistance of Blake Dawson Waldron, Airport Motorways Limited, Conybeare Morrison & Partners and officers of the RTA and the Audit Office of NSW is gratefully acknowledged. All responsibility for the contents of this *Summary of Contracts* is accepted by the RTA. In particular, and without limiting this acceptance of responsibility by the RTA, Catalyst Communications makes no representations or warranties, express or implied, as to the accuracy or completeness of sections 1.2 to 1.6 of this report, for which original source documentation has not been sighted.

I Introduction

This report summarises the main contracts, from a public sector perspective, for the Eastern Distributor motorway.

It has been prepared by the Roads and Traffic Authority of New South Wales (RTA) in accordance with the public disclosure provisions of the NSW Government's *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*, and has been submitted to the Auditor-General for review and certification prior to tabling in Parliament.

In line with the *Guidelines*, this report focuses on those contracts to which the Minister for Roads and/or the RTA are parties, or which otherwise have a potentially substantive impact on public sector risks or benefits. Other contracts between private sector organisations (as shown in *Figure 3* in this report) are referred to only to the extent necessary to explain the public sector's exposure.

1.1 The project

The Eastern Distributor motorway* will provide a high-quality road link between the Cahill Expressway at Woolloomooloo and Southern Cross Drive at Zetland (*Figure 1*).

The motorway is being funded and built by a private sector consortium at an estimated financing, development, design, construction, fitout and commissioning cost of \$680 million. It will be opened for traffic in 2000, and will then be operated, maintained and repaired by the consortium until 2048, when it will revert to the public sector.

The Eastern Distributor will form part of the emerging Sydney orbital road network (*Figure 2*), which ultimately will comprise the M2 motorway, an M2-Gore Hill link, the Gore Hill freeway, the Warringah freeway, Sydney Harbour Bridge and Tunnel, the Cahill Expressway, the Eastern Distributor, Southern Cross Drive, General Holmes Drive, the M5 East freeway, the M5 motorway and the Western Sydney Orbital.

* Throughout this report, unless the context indicates otherwise, the term "Eastern Distributor" refers only to the motorway to be built and operated by the private sector for 48 years. This is in contrast with the wider definition adopted in some other reports, such as the 1996 Eastern Distributor *Environmental Impact Statement*, in which the term was also used to encompass works by the RTA to upgrade and widen Southern Cross Drive and improve the intersection of Mill Pond Road, Botany Road and General Holmes Drive in Botany.

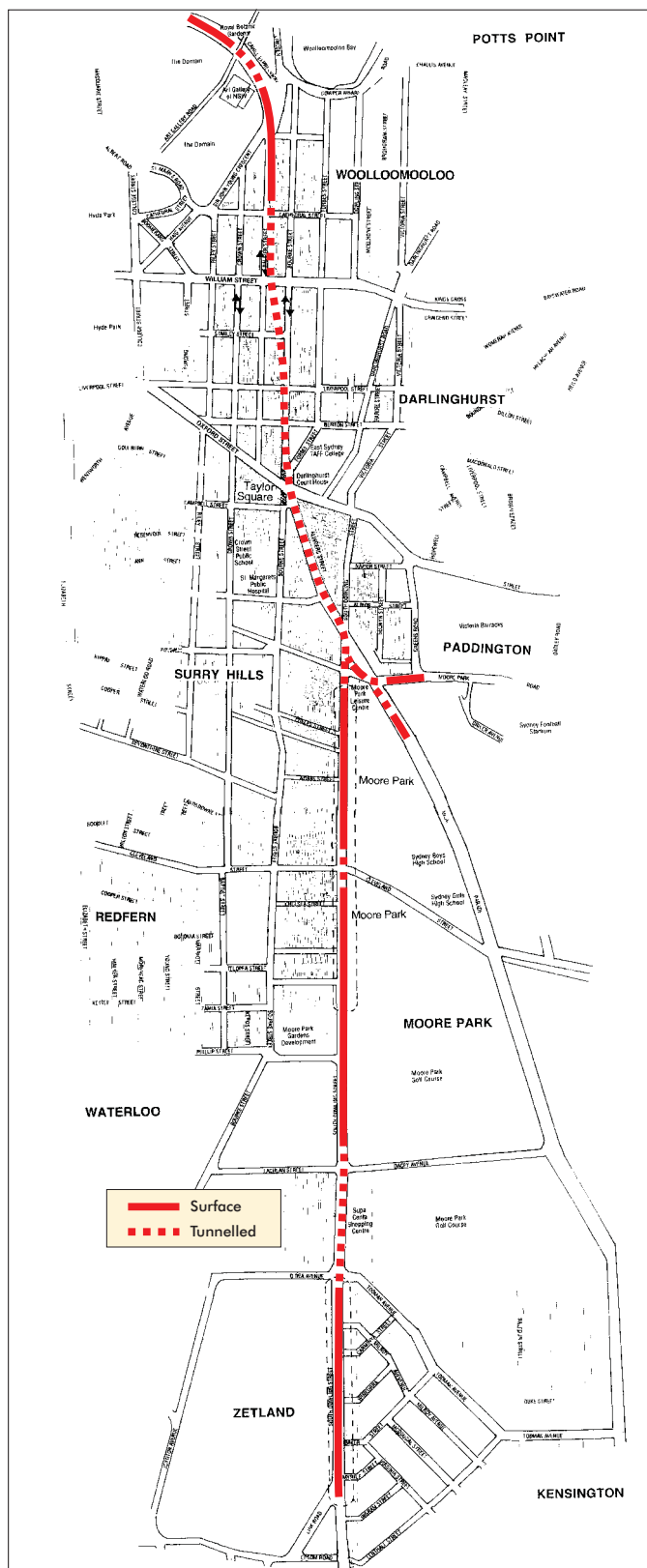


Figure 1. Route of the Eastern Distributor

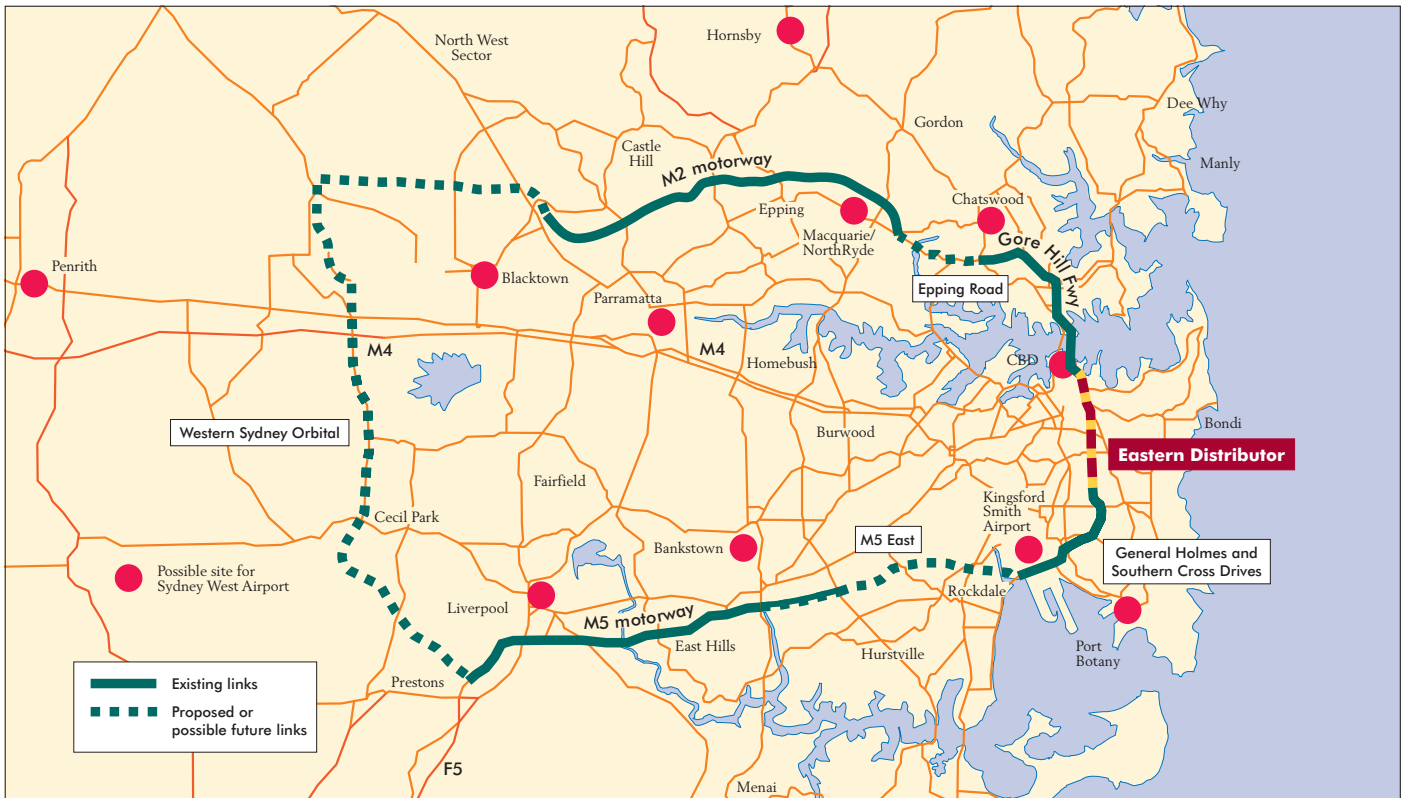


Figure 2. The Eastern Distributor will form part of the "Sydney Orbital" route.

Features of the Eastern Distributor, from north to south, will include:

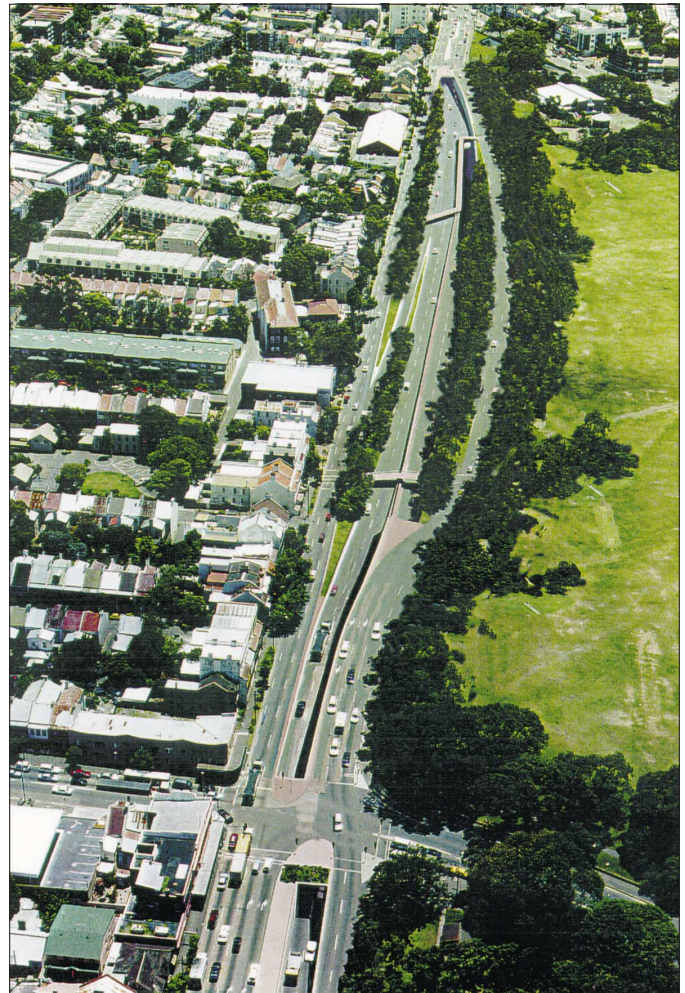
- A cover over the Cahill Expressway from Art Gallery Road to the eastern side of the Art Gallery building,
- Grade separation of the Cahill Expressway/Sir John Young Crescent intersection in Woollahroomooloo,

reuniting parts of the Domain and providing almost a hectare of additional parkland.



Artist's impression of the main toll plaza and the landscaped canopy being built over the Eastern Distributor next to the Art Gallery

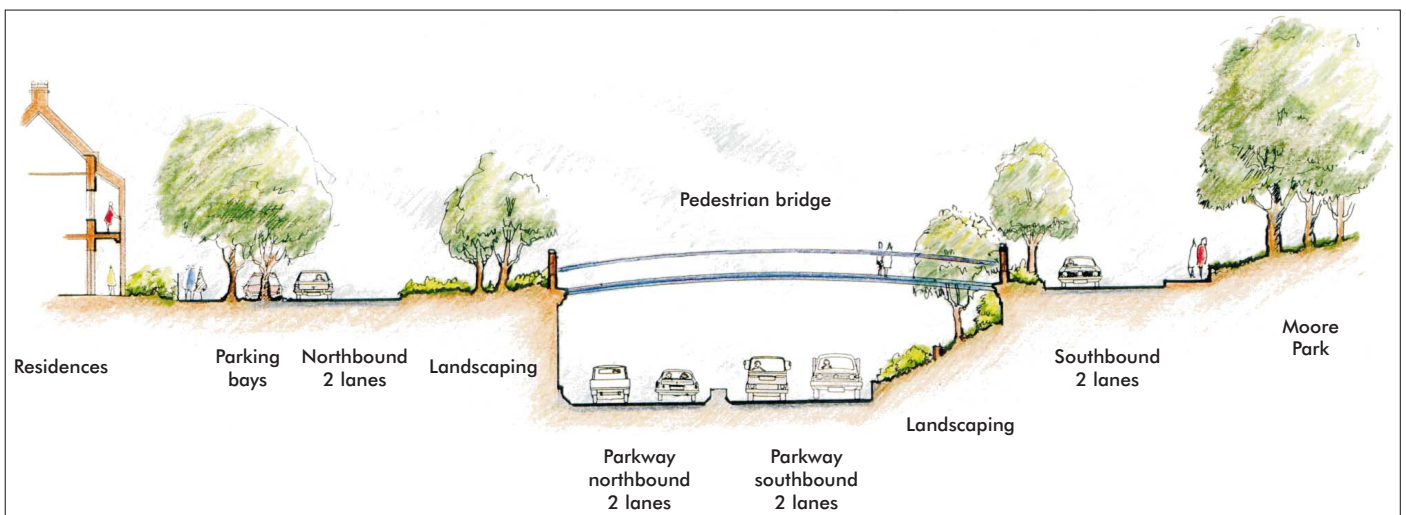
- Two tunnels, passing under Taylor Square and providing three road lanes each way, from north of Cathedral Street in Woolloomooloo to portals to and from Anzac Parade, Moore Park Road and South Dowling Street near their intersection at Drivers Triangle in Moore Park.
- The re-opening of Cathedral Street, which is now closed at Palmer Street, to improve access between Woolloomooloo and the city.
- Connections between the Eastern Distributor and William Street, Woolloomooloo, via a northbound ramp (with a toll plaza) from the motorway to William Street and an untolled southbound ramp from William Street to the motorway.
- The closure of Bourke Street at Taylor Square, cutting traffic congestion and dramatically improving pedestrian safety and amenity in the area.
- The creation of new dedicated bus lanes in Oxford and Flinders Streets, improving the speed and reliability of public transport services for major sporting events and the eastern and southeastern suburbs.
- The upgrading of South Dowling Street from Drivers Triangle to Southern Cross Drive, with two freeway-standard lanes in each direction, two other lanes in each direction, several access ramps and extensive landscaping on both sides of the street. Between Fitzroy and Maddison Streets, the freeway lanes will be in a lowered, landscaped “parkway”, generally 4 to 5 metres below the existing road level. Freeway underpasses will be provided at Cleveland Street and from Dacey Avenue to Todman Avenue.



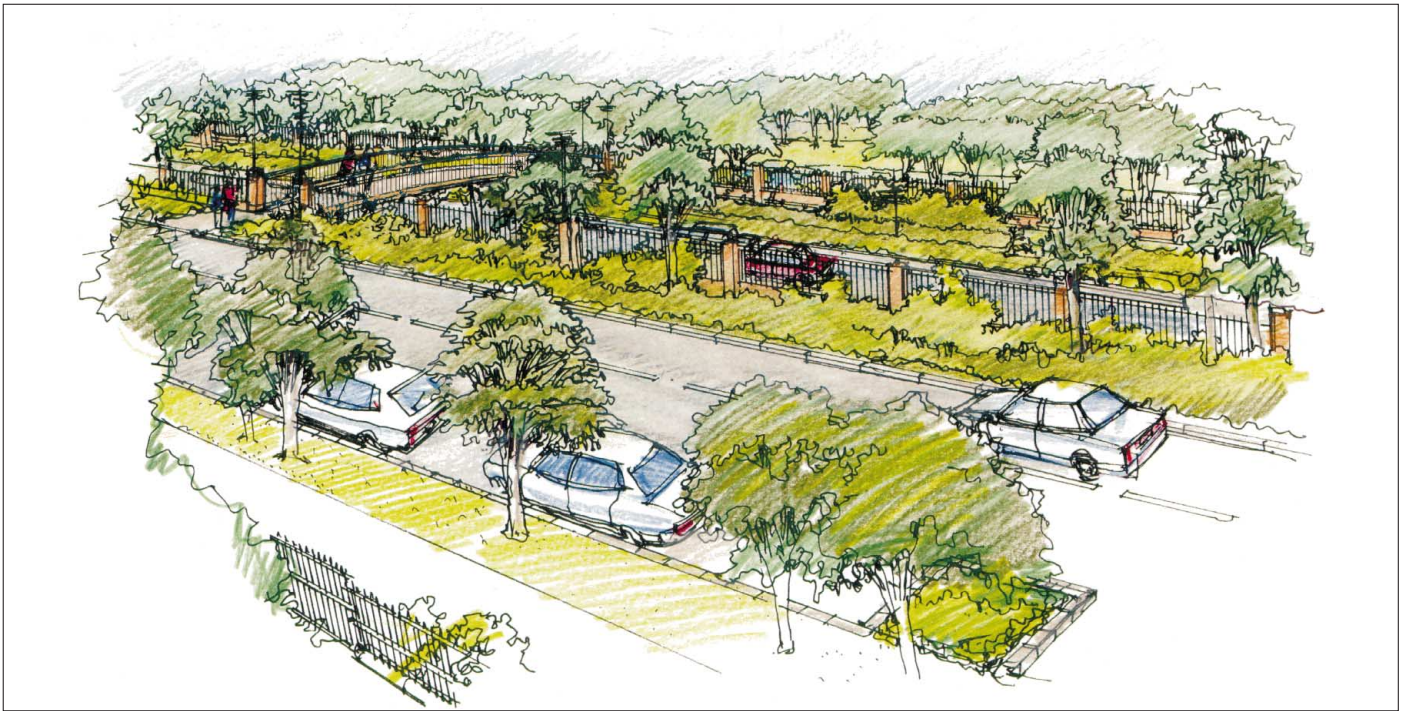
Artist's impression of the Eastern Distributor “parkway” along South Dowling Street, looking north towards the tunnel entrances near Drivers Triangle, with Moore Park on the right. The tunnels under Cleveland Street are in the foreground.

Tolls will apply for traffic using the northbound tunnel from Moore Park to Woolloomooloo, including traffic exiting at the northbound William Street ramp. Southbound traffic will not be tolled. The initial toll charges will be \$3 for cars and motor cycles and \$6 for heavy vehicles (June 2000 \$). No tolls will apply for Government buses.

The main toll plaza will be at the northern end of the motorway, immediately south of the parkland canopy to be built east of the Art Gallery and adjacent to Sir John Young Crescent. Another toll plaza will be located on the northbound ramp from the Eastern Distributor to William Street. Electronic tolling may be introduced in the future.



Cross-section of South Dowling Street, showing the extensively landscaped “parkway” to be built 4–5 m below the existing roadway level.



South Dowling Street, looking east to Moore Park across two northbound lanes at the current road level, four lowered, freeway-standard "parkway" lanes and two southbound lanes at the existing road level, with a pedestrian bridge across the parkway at left. Extensive landscaping will be carried out.



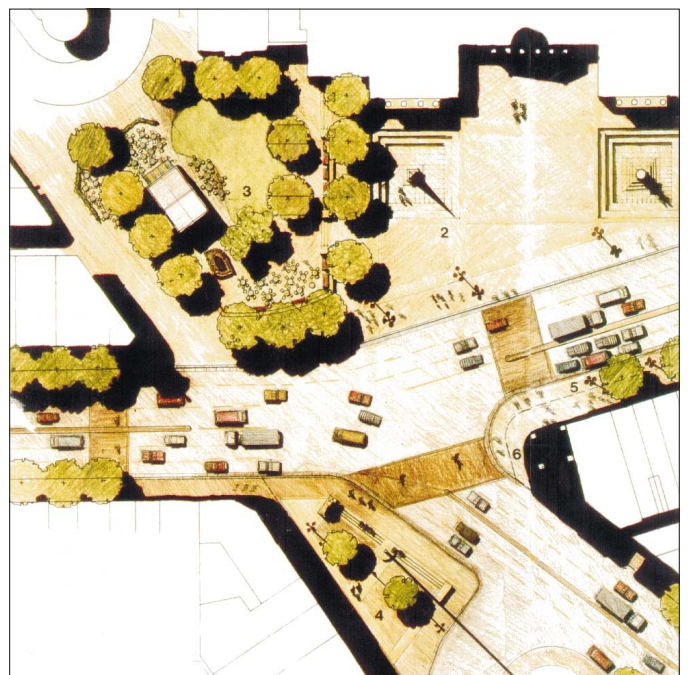
Artist's impression of the re-opened Cathedral Street, Woolloomooloo, looking west at its intersection with Palmer Street



Above and below: indicative concepts for the development of new pedestrian areas at Taylor Square, following the closure of Bourke Street north and south of this heavily trafficked intersection



South Dowling Street outside the ACI building, looking north



1.2 Why the Eastern Distributor is being built

The area between Sydney's Central Business District and Sydney Airport has developed as one of the most important transport corridors in the city. This broad corridor links Sydney's major ports of Port Botany and Port Jackson, and also forms a critical part of more general links within the city's major eastern commercial "crescent", stretching from the Central Industrial Area in the south through the Sydney Central Business District to North Sydney/St Leonards/Chatswood.

Most of the existing road network in the corridor consists of a series of congested, narrow roads that are unable to cater for the increasing volumes of traffic passing through the area. This is leading to frequent traffic delays, increased traffic on local streets, greater air and noise pollution and a diminished quality of life for local residents, workers and visitors.

Traffic congestion is also hindering the expansion and improvement of road-based public transport services in the area and increasing business costs. The commercial sector is impeded by the inefficient movement of freight and poor access and service delivery to the business districts along the corridor.

Traffic predictions clearly indicate that the corridor will become even more congested in the future unless action is taken.

The New South Wales Government's objectives for the Eastern Distributor are to relieve this important road corridor of its myriad traffic problems, reduce traffic on local streets and improve the area's visual and environmental amenity.

The Eastern Distributor and the RTA's concurrent upgrading of Southern Cross Drive will also create a defined and efficient road entranceway from Sydney Airport to the Sydney CBD, thus creating a series of urban design and tourism opportunities.

1.3 The history of proposals for an Eastern Distributor

When the Eastern Distributor was first proposed, in the County of Cumberland Scheme of 1951, it was envisaged as part of a ring road system around the city centre, designed to collect through traffic from freeways radiating from the centre and "distribute" it in various directions, by-passing city streets.

In the early 1970s a major review of Sydney's transport, the Sydney Area Transportation Study (SATS), envisaged the Eastern Distributor as a surface freeway with underpasses at William Street and Taylor Square. While many of



Artist's impression of an entrance ramp to the northbound Eastern Distributor tunnel from Moore Park Road or Anzac Parade, at Drivers Triangle, Moore Park

the inner urban freeway corridors in the County of Cumberland Scheme and SATS were abandoned after the Urban Transport Advisory Committee's review of SATS, the Government retained the Eastern Distributor as a key proposed bypass of the city centre.

Between the 1950s and the 1970s there had been a considerable change in the nature of the transport and traffic problems on the eastern side of the city centre. The Cahill Expressway was in operation and there had been an upgrading of regional roads, including Southern Cross Drive. With the general growth in car ownership and traffic volumes, the result was greatly increased traffic on local roads between the Harbour Bridge/Cahill Expressway and areas south and southeast of the inner eastern suburbs of Woolloomooloo, Darlinghurst, East Sydney, Surry Hills and East Redfern.

When the Eastern Distributor was considered again in the late 1970s, the focus had therefore shifted to address the effects of this traffic on local roads between the Cahill Expressway and Southern Cross Drive. The City of Sydney's *Strategic Plan* of 1980, for example, pressed for early construction of the Eastern Distributor to restrict through traffic in residential areas of East Sydney and Surry Hills.

In 1984, the Department of Main Roads (DMR), which later became part of the RTA, proposed the construction of the Eastern Distributor, much as had been envisaged by SATS, as a major roadway with underpasses at William and Oxford Streets. There was a strong negative response to this proposal, which would have had serious adverse impacts on visual and other amenity and would have displaced hundreds of residents.

Accordingly, in 1985 the DMR exhibited an *Environmental Impact Statement* for an amended scheme to place the Eastern Distributor in tunnels from north of William Street to Drivers Triangle (the intersections of South Dowling Street, Moore Park Road and Anzac Parade). Stage

1 of this scheme, a tunnel under William Street, was opened in December 1987, but stages 2 and 3, involving full-length tunnels in each direction, were not constructed.

Since the EIS of 1985 a number of factors have exacerbated the traffic problems of the inner eastern suburbs or highlighting the arguments for an Eastern Distributor in other ways:

- The completion of the Sydney Harbour Tunnel in 1992 has further increased traffic through the inner eastern suburbs and further affected amenity on local and arterial roads.
- The completion of the third runway at Sydney Airport, substantial increases in domestic and overseas air travel and the number of international visitors to Australia and the globalisation of the Australian and Sydney economies have all increased the significance of the route from the city centre (and the North Shore and Eastern Suburbs) to the airport.
- The emergence of the “crescent” between Chatswood and the airport /Central Industrial Area/Port Botany as the principal focus of Sydney’s post-industrial economy has placed added pressures on the Eastern Distributor corridor and its environs.
- There has been increased interest in re-populating the inner suburbs, taking advantage of existing and prospective infrastructure investments. The availability of obsolete industrial sites in South Sydney and the construction of the New Southern Railway will lead to significant increases in the residential population of the Eastern Distributor corridor.
- There is increased community awareness of environmental issues, matched by increasing reluctance to tolerate high volumes of traffic on local residential streets or the absence of specific provisions for pedestrians, cyclists and public transport on main routes.

These factors were influential in a study for the RTA early in 1994 that investigated the feasibility and desirability of constructing and operating the Eastern Distributor as a tollroad. This study concluded that while there were many issues of detail to be resolved, there was generally wide support for an Eastern Distributor and a level of willingness by motorists to pay for the travel benefits it would provide.

1.4 The inviting of private sector proposals and selection of a preferred proponent

On 23 May 1994, the Capital Works Committee of Cabinet approved the issuing by the RTA of invitations to the private sector to submit preliminary proposals to finance, design, construct, operate and maintain an Eastern Distributor

tollroad. *Guidelines for Proponents* issued by the RTA in September 1994 described the project as:

“Twin two lane tunnels and approaches connecting the Cahill Expressway to South Dowling Street, Moore Park Road and Anzac Parade, as shown on an attached plan, with grade separated interchanges at:

- Sir John Young Crescent (north facing ramps as a minimum)
- William Street (north and south facing ramps)
- Connection(s) to Anzac Parade and Moore Park Road.

“A tolling facility located within the length of the project for collection of tolls from northbound traffic using the tunnel [northbound traffic from Sir John Young Crescent was not to be tolled].”

Proponents were also invited to submit supplementary proposals for improvements to South Dowling Street to provide for uninterrupted traffic flows.

Five preliminary proposals were received by the closing date of 20 December 1994. Four of the proponents submitted supplementary proposals for the upgrading of South Dowling Street.

On 3 March 1995, the then Premier approved an RTA proposal to invite three shortlisted proponents to develop and submit detailed proposals to finance, design, construct, operate and maintain an Eastern Distributor tollroad.

The RTA’s 15 May 1995 *Invitation for Detailed Proposals* sought proposals involving no Government contribution for:

- An upgraded connection from the Cahill Expressway at the Domain to South Dowling Street, Moore Park, including a 1.5 km tunnel from William Street to Anzac Parade, Moore Park Road and South Dowling Street, and
- The upgrading of South Dowling Street to provide uninterrupted traffic flows.

The *Invitation for Detailed Proposals* stated that the RTA would:

- Exhibit an *Environmental Impact Statement* based on the scheme proposed by the preferred proponent for the works outlined above, and
- Negotiate with the preferred proponent in relation to the cost of any changes to its proposals resulting from the environmental assessment process, prior to any decision to proceed.

The RTA also undertook to:

- Widen Southern Cross Drive from four to six lanes prior to the completion of the proposed Eastern Distributor, and

- Pursue strategies to progress the development of the M5 East and the provision of eight lanes through the General Holmes Drive airport tunnel.

In assessing the detailed proposals received from the three shortlisted proponents, the RTA was assisted by advisers from Blake Dawson Waldron (legal issues), UBS Australia (financial issues) and Bovis McLachlan (technical issues).

The RTA's assessment and selection processes, for both the preliminary proposals and the subsequent detailed proposals, were monitored by a probity auditor from Coopers & Lybrand. The probity auditor also provided advice on specific probity issues as they arose. On 23 November 1995 he reported that the processes adopted by the RTA, and its appointed Evaluation Panel in particular, had been fair and equitable.

In December 1995, with the New South Wales Government about to announce its preferred proponent for the Eastern Distributor tollroad, the then Federal Government announced that tax concessions would no longer be available for infrastructure borrowings for urban tollroads.

This announcement had a major impact on the viability of all three detailed proposals, as they had all assumed that these concessions would continue to be available.

On 24 June 1996, the new Federal Government reversed its predecessor's announcement about tax concessions on infrastructure borrowings for urban tollways.

The RTA was then in a position to resume negotiations with the preferred proponent, Airport Motorway Limited (AML), a company backed by a consortium of Leighton Contractors and Macquarie Bank. Before doing so, the RTA obtained advice from the Independent Commission Against Corruption (ICAC) that this was an appropriate course of action.

On 13 August 1996, the NSW Cabinet endorsed AML as the preferred proponent for the Eastern Distributor. Among other things, this approval was subject to:

- Planning approval for the project being granted by the Minister for Urban Affairs and Planning after an *Environmental Impact Statement* based on AML's proposal had been prepared and exhibited, and
- Detailed negotiations between the RTA and AML in relation to the contracts for the project.

AML's status as the preferred proponent was announced by the Government on 13 August 1996 and confirmed by the RTA in writing on 5 September 1996.

AML's proposal, as structured at this stage, involved a northbound toll and a 38-year concession term.

The project as proposed by AML was considered likely to generate sufficient income to fund all of the works from the Cahill Expressway to Moore Park and the upgrading of

South Dowling Street, plus works by the RTA to the value of \$163 million, including:

- The widening of Southern Cross Drive from four to six lanes
- The widening of General Holmes Drive from six to eight lanes between Botany Road and the M5 (south of the airport tunnel), and
- An estimated \$65 million contribution towards the construction of the M5 East.

As indicated earlier, these three RTA projects, to be constructed, operated and maintained by the RTA, had not originally been intended to be privately funded. The availability of the project funds forecast to be generated by AML's proposal led to the inclusion of the Southern Cross Drive and General Holmes Drive works in the 13 August 1996 Government announcement concerning the Eastern Distributor, and the contribution to the M5 East was similarly included in a 3 November 1996 announcement concerning the toll-free M5 East.

Under AML's proposal, the exact amount of project funding that would be available depended on a number of benchmark interest rates. In terms of the benefits it stood to gain from the proposal, the Government would be exposed to the risk of interest rate fluctuations until "financial close".

Accordingly, and on advice from T-Corp and Treasury, a hedging agreement was negotiated by the RTA and AML, with the assistance of T-Corp, and was then approved by the Treasurer on 27 March 1997 and signed on 2 April 1997.

Under this agreement, all the risks associated with interest rate movements from 2 April 1997 until the date of "financial close", including any movements associated with the issuing of a parcel of indexed bonds as part of the financing of the project, were transferred to AML for a one-off fee of \$5 million paid by the RTA to Airport Motorway Custodians Pty Limited.

As discussed below, the actual use of the project funds has had to be changed, compared with the uses foreshadowed in the Government's announcements of 13 August and 3 November 1996, because of major modifications to the Eastern Distributor project as a result of the community consultation and environmental impact assessment process.

In essence, the additional costs of the modifications made to the Eastern Distributor itself, described below, have meant that the funds previously allocated to the RTA projects to widen Southern Cross and General Holmes Drives and build the M5 East have had to be redirected to help fund the changes to the Eastern Distributor itself.

1.5 Environmental impact assessment and planning approval

An *Environmental Impact Statement* (EIS) for the proposed AML Eastern Distributor and RTA upgradings from the Cahill Expressway to Mill Pond Road in Botany was prepared for the RTA by Rust PPK Environmental Consultants and exhibited for public comment from 15 November to 16 December 1996. Representations were received until 24 December 1996.

Before the EIS was prepared, the RTA made a number of changes to the AML's proposal, the most significant of which were tunnel extensions at Moore Park Road, to improve safety and access to the nearby sporting stadiums, and tunnel extensions near Dacey Avenue, to minimise the amount of Moore Park land required and avoid having to amend the layout of Moore Park golf course.

In response to the submissions received in response to the EIS, further modifications were made to the project to improve its urban design and mitigate its environmental impacts. These modifications included:

- *Near the Domain and Art Gallery:*
 - ◻ The landscaped cover over the Cahill Expressway from Art Gallery Road to the eastern side of the Art Gallery building, reuniting parts of the Domain
 - ◻ Relocation and redesign of the toll administration and control building
 - ◻ Improved pedestrian access to Woolloomooloo and the CBD.
- *Near Cathedral Street:*
 - ◻ Relocation of the tunnel portals to north of Cathedral Street, reducing severance of Woolloomooloo
 - ◻ Reopening of Cathedral Street along its length, improving access between the CBD and Woolloomooloo.
- *Near Drivers Triangle and along South Dowling Street:*
 - ◻ The adoption of a "parkway" design for the up-grading of South Dowling Street, with a freeway-standard road 4 to 5 metres below the existing road level between Fitzroy and Maddison Streets. This parkway will be bordered by a vertical wall topped by landscaping to the west and by extensive landscaping to the east. Two other lanes on each side of the parkway will be at the existing road level.
- *Along Dowling Street between Link Road and Todman Avenue:*
 - ◻ Extension of the southbound carriageway of the underpass under Dacey Avenue to south of Todman Avenue

- ◻ Extension of the service road in front of residences on the east side of Dowling Street from Milroy Avenue to Todman Avenue
- ◻ Provision of a landscaped noise wall up to 4 metres high along the western edge of this service road
- ◻ Redesign of the northwestern corner of the O'Dea Avenue/Dowling Street intersection to eliminate impacts on an adjacent property.

On 26 June 1997, the Minister for Urban Affairs and Planning granted planning approval, under section 115B(2) of the Environmental Planning and Assessment Act, for the Eastern Distributor and the RTA's upgrading works south to Mill Pond Road, subject to 151 conditions.

In announcing his decision, the Minister for Urban Affairs and Planning stated that, in planning terms, the key benefits of the project would include:

- The elimination of some of Sydney's major pedestrian and traffic safety "black spots", and some of its worst traffic gridlock areas, by tunnelling under Taylor Square
- Greatly improved east-west access to and from the city through overbridges and tunnelling under major intersections (Taylor Square, Cleveland Street, Dacey and Todman Avenues)
- Local traffic improvements through the enhancement of north-south traffic flows
- Improved public transport efficiency, through the removal of traffic from local roads and bus routes
- The complementing of the New Southern Railway to Sydney airport
- The development of an integrated public transport plan to deal with public transport for major events, and
- Significant economic benefits of more than \$3 billion, through (among other things) improved efficiency of freight movements.

1.6 Negotiations between the RTA and the preferred proponent

The RTA was assisted in its negotiations with AML by Blake Dawson Waldron (legal advisers), UBS Australia (financial advisers) and Evans and Peck Management (technical advisers). The negotiation processes were overseen by a probity auditor from Coopers & Lybrand.

When AML received confirmation of its status as the preferred proponent on 5 September 1996, it was reminded that the RTA's May 1995 invitation to submit a detailed proposal had stated that:

- The effect on AML's detailed offer of any modifications required as a result of the environmental impact assessment would be subject to negotiation and would need to be resolved before the contracts were executed, and

- The final negotiated arrangements would not differ in any material respects from AML's detailed offer.

The modifications to the project made by the RTA — including those made prior to exhibition of the EIS and subsequently in response to comments and submissions received — could not be fully financed from the originally forecast project funds, even with the RTA's Southern Cross Drive, General Holmes Drive and M5 East works no longer receiving any funding from the project.

Accordingly, in the detailed negotiations between the RTA and AML it was agreed that the toll would be increased from \$2.50 to \$3.00 for cars (on opening in the year 2000) and that the concession term would be increased from 38 to 48 years. It was estimated that these measures would raise an additional \$43 million for the project. These estimates have been verified by the RTA's financial advisers, UBS Australia.

Because of the scale of the project modifications, the RTA sought to maintain the probity of its nominated process by:

- Commissioning a technical audit, by Evans and Peck Management, of AML's original project cost estimates and its estimates for the project modifications, to ensure the compatibility of their risk and performance assumptions
- Examining forecasts of traffic diversions from the tollroad as a result of the higher toll charge, to ensure comparability with the traffic assumptions and projections in AML's detailed offer and the EIS
- Commissioning a review by UBS Australia of AML's revised financial model with the amended traffic and toll charges, to ensure its consistency with the detailed offer.

The RTA also requested ICAC's advice on whether it was acceptable, from a probity viewpoint, for the RTA to negotiate the project modifications arising from the environmental assessment process with AML.

ICAC advised the RTA on 20 May 1997 that the RTA's proposal to proceed was consistent with its original intention to modify the works as a result of the EIS, as advised to the preferred proponents, and concluded, "As the course of action we have reviewed shows a commitment to obtaining value for money through an impartial process, we consider that the RTA is entitled to take the view that it should proceed, without further competition."

The probity auditor advised the RTA on 23 May 1997 that he had no concerns about the probity issues that had been raised with ICAC, and that he agreed with ICAC's response.

On 26 June 1997, the Cabinet Standing Committee on the Budget:

- Approved the modifications to the Eastern Distributor behind the Art Gallery, near Cathedral Street at Woolloomooloo and along South Dowling Street, Surry Hills.
- Approved the deletion of tollroad funding of the RTA's upgrading of General Holmes Drive and the deletion of the proposed \$65 million contribution from the tollroad's originally projected funds towards the RTA's construction of the M5 East.
- Approved a financial contribution by the RTA of \$20 million towards the project. (This RTA contribution of up to \$20 million, or about half the cost of the Art Gallery canopy modifications, was agreed to because of the significance of the Domain as a public area and to ensure the canopy modifications will occur. It has taken the form of part of the agreed reallocation of the project's originally projected funds.)
- Approved the RTA's entering into the Project Deed summarised in this report, following the Treasurer's approval of the joint financing arrangements under the Public Authorities (Financial Arrangements) Act.

The main contracts summarised in this report were signed on 27 June, 28 July and 15 August 1997. They were subject to a number of conditions precedent, as discussed in section 2.3 below, and became fully effective and unconditionally binding on 18 August 1997, when all the conditions precedent had been satisfied.

1.7 The structure of this report

Section 2 of this report summarises the structuring of the Eastern Distributor project and explains the inter-relationships of the various agreements between the public and private sector parties.

Sections 3, 4 and 5 summarise the main features of the key agreements affecting public sector rights and liabilities and the sharing of the project's benefits and risks.

Section 6 summarises the project's economic benefits and costs.

2 Overview of the project's contracts

2.1 The participants in the project

The public sector parties to the Eastern Distributor contracts are:

- The **Minister for Roads, Minister for Ports and Minister for Public Works and Services**, for and on behalf of the State of New South Wales, and
- The **Roads and Traffic Authority** of New South Wales (RTA).

The RTA is constituted under Part 6 of the Transport Administration Act 1988. Its powers in relation to the Eastern Distributor project arise from the Transport Administration Act, which empowers the RTA to enter into contracts or arrangements for the carrying out of works and the performance of services, and the Roads Act 1993.

Under the Roads Act the Minister for Roads may declare tollways, the RTA and its agents and contractors may carry out road works and the RTA may lease land it owns. Under the Transport Administration Act, the RTA may do any of these things, and exercise any of its other functions, either in its own right or in a partnership, joint venture or other association with others.

The private sector parties to the contracts to which the Minister for Roads and the RTA are also parties (*Figure 3*) are:

- **Airport Motorway Limited** (“AML”), which is 100% owned by Airport Motorway Holdings Pty Limited, the shares in which are held by Trust Company of Australia Limited, as trustee for the Infrastructure Trust of Australia (II) (68.4%), Leighton Motorway Investments Pty Limited (16.6%), UniSuper Limited, as trustee for the superannuation scheme for Australian universities (10.0%), and the Motor Traders Association of Australia (5.0%).
- **Airport Motorway Custodians Pty Limited** (“the Trustee”), in its capacity as trustee of the **Airport Motorway Trust** established by an Airport Motorway Trust Deed, dated 27 June 1997, between the Trustee and **AMT Management Limited**, the manager of the trust. The unitholders in the Airport Motorway Trust are Trust Company of Australia Limited (as trustee for the Infrastructure Trust of Australia (II)), Leighton Motorway Investments Pty Limited, UniSuper Limited and the Motor Traders Association of Australia, with each of their units in the trust being “stapled” to one of their shares in AML.

- **National Australia Bank Limited**, acting both as **agent** for the financiers providing debt finance to the Airport Motorway Trust under a Project Facility Agreement (“the Agent”) and as **security trustee** for securities granted by AML and the Trustee to secure the performance of their obligations under the Project Facility Agreement and a series of other debt financing documents (“the Security Trustee”).

Money for the project (*Figure 3*) is coming from:

- Private sector debt financing, including term debt under the Project Facility Agreement and the issuing of infrastructure bonds
- The three private sector equity investors in AML and the Airport Motorway Trust
- Tolls paid by Eastern Distributor users
- Other sources that may be utilised in the future, as set out in the project contracts and summarised in this report.

In addition, as indicated earlier, the RTA:

- Has paid the Trustee \$5 million under an April 1997 hedging agreement to protect the RTA against the consequences of adverse interest rate movements, including any associated with the issuing of indexed bonds as part of the financing of the project.
- Will contribute up to \$20 million to the project, through an agreed reallocation of the Eastern Distributor’s funds, in order to ensure the Art Gallery landscaped canopy can be constructed.

To help it meet its contractual obligations to the RTA and the Minister for Roads, AML contracted with **Leighton Contractors Pty Limited** on 7 August 1997 for the design and construction of the Eastern Distributor (under the D&C Contract) and for its operation, maintenance and repair (under the O&M Contract).

2.2 Contractual structure

The contractual structure of the project — inasmuch as the contracts affect or potentially affect public sector rights and obligations — is summarised in *Figure 3*.

The core contract is the **Eastern Distributor Project Deed** between the Minister for Roads, the RTA, AML and the Trustee. This agreement sets out the terms under which AML and the Trustee are obliged to:

- Finance, design and construct the Eastern Distributor, using its best endeavours to complete construction

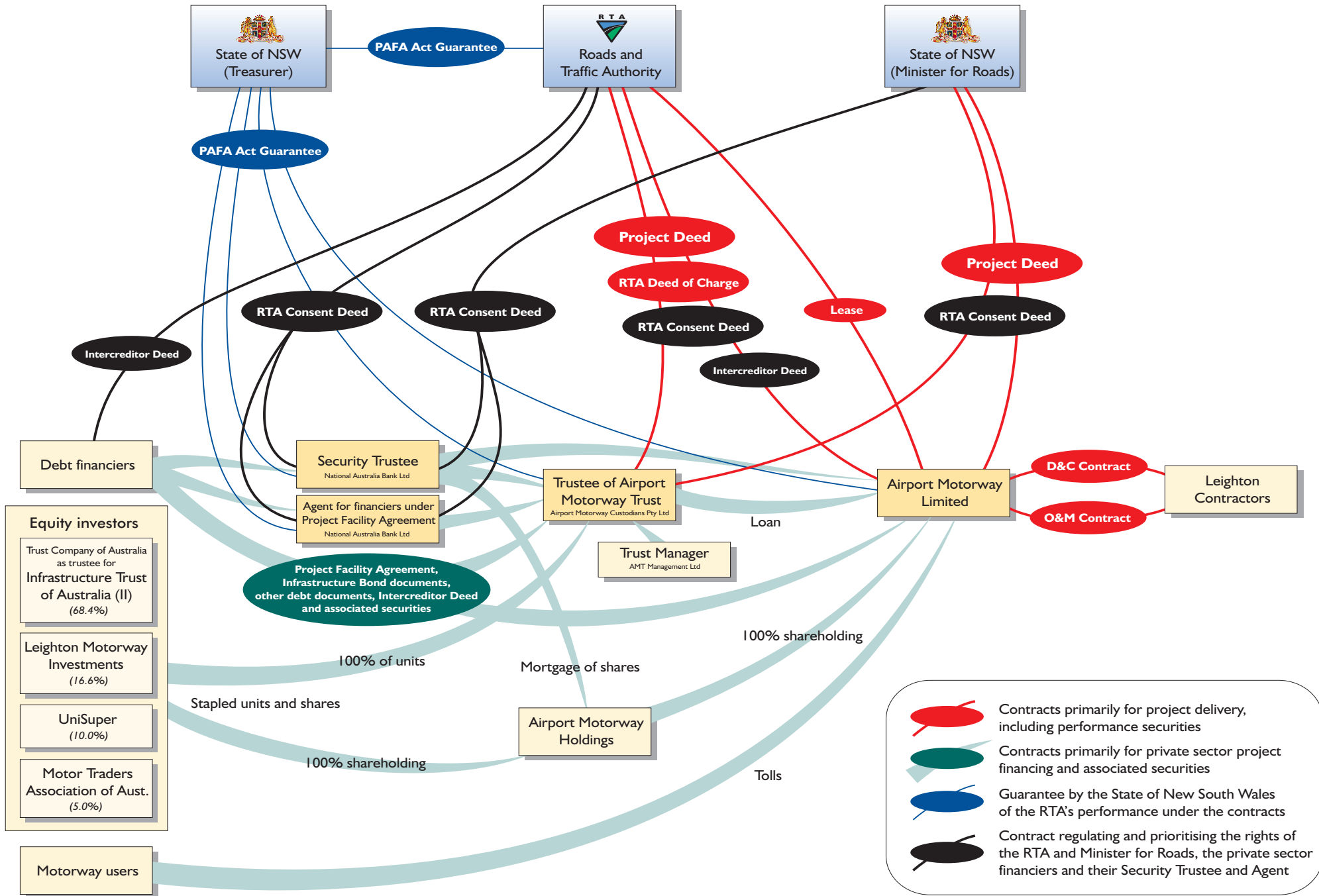


Figure 3. Contractual structure of the Eastern Distributor project.

within 40 months of the Project Facility Agreement's becoming binding (i.e. by 18 December 2000) and to open all of the project apart from the William Street ramps for traffic within 36 months, in time for the Sydney 2000 Olympics.

AML and the Trustee will satisfy their design and construction obligations under the Project Deed through the performance by Leighton Contractors of its obligations to AML under the **D&C Contract**.

- Operate, maintain and repair the Eastern Distributor for the following 48 years, and pay concession fees to the RTA.

AML and the Trustee will satisfy their operation, maintenance and repair obligations under the Project Deed through the performance by Leighton Contractors of its obligations to AML under the **O&M Contract**.

- Give up possession of the Eastern Distributor to the RTA at the end of this concession term, or upon any earlier termination of the Project Deed.

A **Lease**, the form of which must be the same as a draft lease annexed to the Project Deed, will be granted to AML by the RTA for the 48-year concession term.

Under the **RTA Deed of Charge** AML and the Trustee have granted the RTA fixed and floating charges over their undertakings, assets and rights, ranking second only to securities held by their debt financiers, so as to secure their obligations to the RTA under the Project Deed, the Lease, the RTA Deed of Charge and the **RTA Consent Deed**.

The **RTA Consent Deed** records the RTA's consent to the securities held by the Security Trustee on behalf of the private sector debt financiers, sets out the relative priorities of these securities and the RTA Deed of Charge, and regulates some of the rights of the RTA and Minister for Roads under the Project Deed and other project contracts, including their rights to enforce securities they hold under these contracts.

The RTA's powers under the RTA Deed of Charge are subject to the prior rights of the debt financiers under the RTA Consent Deed and the prior rights of four infrastructure bond issuers under the **Intercreditor Deed** between the RTA, AML, National Australia Bank, Macquarie Bank and the infrastructure bond issuers and under other infrastructure bond documents.

The **Public Authorities (Financial Arrangements) Act Deed of Guarantee** provides a Crown guarantee of the RTA's performance of its obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

2.3 Conditions precedent

Under its terms, the Project Deed did not become binding until:

- The Treasurer approved the RTA's entering into the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, in accordance with section 20(1) of the Public Authorities (Financial Arrangements) Act 1987. This condition precedent was satisfied on 27 June 1997.
- The Minister for Roads declared specified parts of the Eastern Distributor as a tollway, under section 52 of the Roads Act 1993, and directed the RTA to assume responsibility for this tollway in accordance with section 63 of the Roads Act. This condition precedent was satisfied on 4 July 1997.
- The Treasurer executed a Public Authorities (Financial Arrangements) Act Deed of Guarantee, under section 22B of that Act, on terms satisfactory to AML and the Trustee. This condition precedent was satisfied on 14 August 1997.
- The RTA Deed of Charge and RTA Consent Deed were executed. These conditions precedent were satisfied on 28 July and 15 August 1997, respectively.
- The RTA received evidence that the Project Facility Agreement of 7 August 1997 had become binding. This occurred on 18 August 1997, the date of "financial close", when all the conditions precedent to that agreement, including the receipt of a tax ruling from the Australian Taxation Office on the private sector's financing arrangements, had been satisfied.

Accordingly, the Project Deed became binding on 18 August 1997, thus giving substance to the RTA Deed of Charge and the RTA Consent Deed from the same date.

2.4 Limits on the Trustee's liabilities

The Project Deed, the RTA Deed of Charge and the RTA Consent Deed all contain standard provisions limiting the scope of the Trustee's liabilities.

These provisions stipulate that the Trustee has entered into the contracts solely in its capacity as trustee of the Airport Motorway Trust, and that if it breaches any of these agreements it will be liable only to the extent of its right to be indemnified out of the assets of that trust, except in the case of fraud, negligence, breach of trust or breach of duty by the Trustee.

3 The Project Deed and the Lease

Key features of the Eastern Distributor Project Deed of 27 June 1997, as amended and supplemented by the RTA Consent Deed of 15 August 1997, are summarised below.

Other features of the RTA Consent Deed are summarised in section 4.2.

3.1 Policy objectives

The policy of the NSW Government in entering into the Project Deed, as stated in that deed, is to ensure value for money in the provision of essential infrastructure, including private sector participation in the management of the NSW road system.

The objectives of this policy are described in the Project Deed as being to:

- Welcome private sector participation, provided there are real public benefits in doing so
- Explore alternative and innovative ways of creating infrastructure and delivering services to the community
- Maximise private investment in infrastructure, to the extent that this brings net benefits to the community beyond those from public provision of infrastructure
- Promote an efficient risk allocation between the public and private sectors, with risks being allocated to the parties best able to manage them
- Provide a service normally provided by the Government by creating an asset through financing and controlling ownership by the private sector.

The explicitly stated intention of the parties in entering into the Project Deed for the Eastern Distributor is to meet these policy objectives more quickly than would otherwise be economically feasible for the Government, through a combination of debt, equity, toll and other funding, as set out in the Project Deed, aimed at providing equity investors with a return on their investments and assisting repayment of the project debt.

3.2 General obligations on and acceptance of risks by AML and the Trustee

The main obligations on AML and the Trustee under the Project Deed are to:

- Finance, design and construct the Eastern Distributor and associated ancillary works, using its best endeavours

to complete construction within 40 months of “financial close” (i.e. by 18 December 2000) and to open all of the project apart from the William Street ramps for traffic within 36 months, in time for the Sydney 2000 Olympics.

- Operate, maintain and repair the Eastern Distributor and its ancillary works for the following 48 years, and pay concession fees to the RTA.
- Give up possession of the Eastern Distributor (and associated ancillary works, plant and equipment) to the RTA at the end of this concession term, or upon any earlier termination of the Project Deed.

Subject to specific terms in the Project Deed discussed below and in sections 3.3 to 3.8, AML and the Trustee accept all the risks associated with the project, including the risks that:

- The cost of the project may be greater than they have estimated,
- AML’s revenue from the project may be less than they have estimated,
- Traffic volumes may be less than they have estimated, and
- Any other assumptions made in their “base case” financial model may have been incorrect or inaccurate.

The Project Deed makes it clear, however, that AML and the Trustee are not required to assume all the risks relevant to the costs of the project and the revenue it generates in all possible future circumstances. Some specific risks are allocated to the RTA, as discussed in sections 3.3 to 3.8 below, and if certain specified circumstances arise the parties must renegotiate the project’s contracts with the aim of achieving a series of specified objectives, as described in section 3.7 below.

The Project Deed expressly acknowledges that the RTA and the Minister for Roads have made no representations or promises about traffic volumes on the Eastern Distributor.

The RTA, AML and the Trustee have also explicitly acknowledged that except as provided in the Project Deed (see section 3.5 below), their commitment to the Eastern Distributor does not constrain the development of other road or public transport projects, or future changes in the road network or public transport arrangements.

3.3 Design and construction

Scope of AML's works

The works to be designed and constructed by AML comprise:

- The Eastern Distributor itself, both on land within the declared boundaries of the tollway (*Figure 4*) and on public roads and three defined land parcels within defined maintenance areas. (This will be the land that will become the subject of the Lease for the 48-year concession period.)
- Ancillary works on other land, including rock anchors, ground anchors, pumping stations and works on drainage basins and related watercourses.

AML must design and construct these works in accordance with detailed *Scope of Works and Technical Criteria* documents exhibited to the Project Deed. An attachment to the *Scope of Works and Technical Criteria* allocates responsibilities for compliance by AML and the RTA with the conditions of the project's planning approval.

The *Scope of Works and Technical Criteria* sets out a series of stringent standards to be met by AML, including "fitness for purpose" requirements and compliance with RTA and Austroads guidelines and Australian and international standards.

AML has also undertaken to design its works with "the appropriate level of professional care" and to construct them "with good workmanship and materials".

Changes in the scope of works

AML and the RTA may agree to change the *Scope of Works and Technical Criteria*.

If the scope of the works to be carried out is increased, the cost of the change is to be met by an extension of the operating term for the Eastern Distributor, and/or a payment by the RTA to the Trustee and/or AML, and/or an adjustment of the rights and obligations of the RTA and AML under the Project Deed, including the tolls that may be charged.

If the scope of works is decreased, the RTA and AML must negotiate in good faith to equitably share any cost savings in a way that benefits both the project and the parties.

The Project Deed expressly acknowledges that the development of detailed designs for the project may present opportunities for enhancing the project's economic, technical or social aspects, and that AML may request a change to the *Scope of Works and Technical Criteria* in the light of these opportunities. Any resultant agreement to change the *Scope of Works and Technical Criteria* must take account of any "reasonable and necessary" requirements for a public

participation process, as well as the need to comply with all relevant laws affecting the change.

The Project Deed also expressly acknowledges that any changes to the *Scope of Works and Technical Criteria* negotiated in association with other improvements to the Sydney road network — except for the upgrading of General Holmes Drive south of Mill Pond Road, the M5 East and a possible east–west cross-city tunnel under the Sydney CBD — must take account of any demonstrable enhancement to the Eastern Distributor project's performance as a result of these improvements. In these circumstances the parties must negotiate in good faith to ensure the benefits and costs to the Eastern Distributor project are equitably shared, taking account of the capacity of each party to bear and finance the costs.

Under the RTA Consent Deed, the RTA and the Minister for Roads may not amend the *Scope of Works and Technical Criteria* or any other part of the Project Deed without the prior consent of the project debt financiers' Agent. This consent may not be unreasonably withheld or delayed.

Intellectual property

AML has warranted to the RTA that it owns or is entitled to use the project's design documentation and anything else it will use for the project that is subject to intellectual property rights. It has granted the RTA an irrevocable, non-exclusive licence to use these materials for the project and for conferences on similar projects.

Construction access

The RTA must give AML and its contractors access to specified parcels of land according to a land acquisition schedule exhibited to the Project Deed, and must give access to other land required for construction works as soon as reasonably possible. AML has paid the RTA \$10 for each grant of a right of access, licence or easement required, and must use its best endeavours to ensure its works are confined to this land, or if this is not possible to immediately adjacent land or land owned by the NSW Government or a NSW public sector authority.

In the case of Moore Park land, licences will be issued to the RTA from time to time on terms and conditions agreed by the Minister for Roads and the Minister for the Environment, in accordance with sections 15D(1), 15H(1) and 15I(1) and (2) of the Centennial Park and Moore Park Trust Act 1983. The RTA must then either sub-licence this land or assign the licences to AML, on terms sufficient to allow AML to perform its obligations under the Project Deed and without imposing any licence obligations on AML that differ materially from its obligations under the Project Deed.

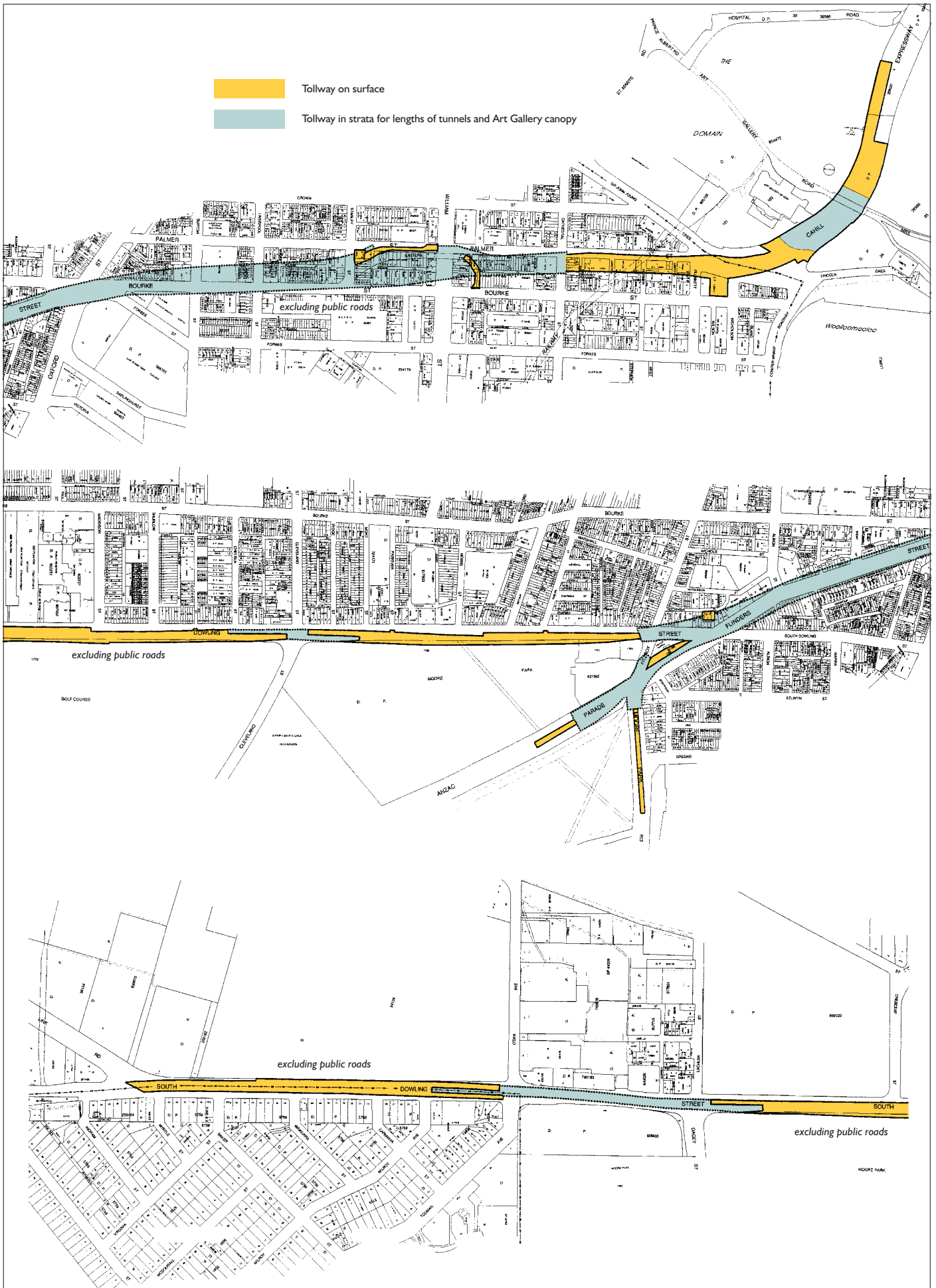


Figure 4. The Eastern Distributor tollway as declared by the Minister for Roads on 4 July 1997 under section 52 of the Roads Act 1993.

Similarly, for other land not originally owned by the RTA the RTA was obliged to negotiate with the owners for access, and may not “pass on” any resultant access conditions that differ materially from AML’s obligations under the Project Deed.

Before disposing of any “surplus” land among the land parcels identified in the Project Deed, or using it for another purpose that would make it unavailable to the project, the RTA must notify AML and consult with it if requested.

If AML requires additional land access, licences or easements to construct, operate or maintain the Eastern Distributor or its ancillary works, it must notify the RTA and negotiate an access schedule for these additional areas. The RTA is to use its best endeavours to grant the requested access, on the basis that it represents a reasonable and cost-effective engineering solution, and must comply with any agreed access schedule.

Provided the RTA complies with any such schedule, AML and the Trustee are to bear all the risks of integrating the additional land access (or any access to any previously “surplus” land) into the project’s design and construction requirements, and the RTA will have no liability for any delays, additional costs or other effects on the project associated with access by AML, the Trustee or their contractors to this land.

Latent conditions

AML has accepted all risks associated with the present condition of all the land it will use for the project — including any contaminants and all surface and sub-surface soil conditions (including acid sulfate soils) — and the present condition of all structures on this land, except for the existing Art Gallery Road bridge, the Eastern Suburbs Railway viaduct, the existing William Street underpass and a privately funded pedestrian overbridge to be constructed across South Dowling Street and the Eastern Distributor between Maddison and Crescent Streets in Surry Hills. (The RTA and persons authorised by the RTA are to continue to have access to these excepted structures to maintain and repair them. The RTA has indemnified AML and its employees, agents and contractors for any damage or losses they might incur as a result, except for any damages or losses caused by a wrongful act or omission by AML or its employees, agents or contractors.)

The Project Deed acknowledges that the RTA has made no representations or promises concerning the condition of the land or its structures, apart from the above exceptions.

Services

AML is responsible for the provision of services necessary for the project and for the relocation or adjustment of services, at its own cost. The RTA is to facilitate the reloca-

tion and adjustment of services, and is liable to pay for any service relocations by any government authority requested by the RTA before the Project Deed was signed, but the Project Deed expressly acknowledges that the RTA has made no representations or promises concerning the location or availability of services on the land.

Environmental requirements

As indicated above, the responsibilities of AML and the RTA for ensuring the RTA complies with the conditions of the project’s planning approval are allocated in an attachment to the *Scope of Works and Technical Criteria*. If AML does not comply with its allocated responsibilities, the RTA is entitled to comply with these responsibilities and recover all its costs in doing so from AML as a debt.

AML has undertaken to assist the RTA to meet its obligations under the Centennial Park and Moore Park Trust Act to conduct and report on an annual review of environmental issues relating to the Eastern Distributor.

The RTA may require AML to comply with any recommendation made to the RTA under the community liaison process established under the project’s planning approval. If this requirement is in addition to the requirements of the *Scope of Works and Technical Criteria*, as amended, the RTA must indemnify AML for its costs in complying with the recommendation.

Heritage and threatened species

The RTA has indemnified AML and the Trustee for any damage, loss or liability arising from:

- Items of Aboriginal or European heritage, or threatened species, populations or ecological communities (as defined in the Threatened Species Conservation Act 1995), on the land, or
- A failure by a determining authority to assess a project activity under Part 5 of the Environmental Planning and Assessment Act

if this causes the Eastern Distributor (apart from its William Street ramps) to be completed later than 36 months after “financial close”, despite all reasonable measures, including acceleration measures, having been taken by AML and its contractors to meet this deadline.

Traffic diversions and control during construction

If AML reasonably believes it must interfere with traffic flows on existing roads in order to perform its work, it must propose traffic diversion and control arrangements to the RTA, obtain the RTA’s approval, give the public sufficient notice of the arrangements and (as the RTA’s agent) implement the approved arrangements. The RTA is to use its best endeavours to assist AML in this, including liaison with relevant authorities.

The Project Deed expressly anticipates that traffic diversions will be necessary:

- Through Moore Park, along South Dowling Street
- From Cowper Wharf Roadway in Woolloomooloo, via Bourke Street and Plunkett Street, and
- For northbound traffic on South Dowling Street in Zetland, via O’Dea Avenue, Bourke Street and Crescent Street.

Project construction program, plans, reports, surveys and certificates

AML was obliged to provide the RTA with a detailed construction program for the project by 27 September 1997. It must report to the RTA, at least every month, on its progress against this program and on the progress of any works being undertaken by any government authority to relocate services for the project. The RTA may inspect the works at any time, provided it does not unnecessarily inconvenience AML.

AML must prepare and implement a quality assurance system in accordance with the *Scope of Works and Technical Criteria*, and provide the RTA with at least monthly quality assurance reports.

Explosives and blasting materials may be used only with the prior approval of all relevant authorities and the RTA.

A complete set of “as constructed” drawings must be provided to the RTA within six months of the opening of all of the Eastern Distributor to traffic, and a detailed survey and an engineer’s certificate of compliance with the project’s planning approval, the *Scope of Works and Technical Criteria* and the requirements of government authorities are required within 180 days of that date. If the survey shows any works are not located as required by the *Scope of Works and Technical Criteria*, as amended, and these works do not comply with a government authority’s requirements, or the RTA reasonably considers they need to be relocated for safety reasons, or the parties agree that relocation is otherwise desirable, AML must make any alteration to the works reasonably required by the RTA, so that they are located as set out in the *Scope of Works and Technical Criteria* or in another agreed location.

Challenges to planning approval

If there is a legal challenge to:

- The project’s environmental impact assessment process and/or the planning approval granted by the Minister for Urban Affairs and Planning on 26 June 1997,
- Any work carried out by AML in accordance with the *Scope of Works and Technical Criteria*, as amended, the basis for the challenge being that the work does not comply with the project’s planning approval, or

- State Environmental Planning Policy 51,

AML must continue to comply with its obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed unless it is ordered not to by a court or the RTA.

The RTA has indemnified AML and the Trustee for all damage, losses or liability resulting from such an order, including additional or wasted project costs to AML if the project is delayed.

The RTA has also indemnified AML and the Trustee for all damage, losses or liability resulting from any third party claims against them for economic loss concerning the Government’s decision to proceed with the project, the existence or location of the Eastern Distributor and its ancillary works, or the existence or location of the traffic diversions and traffic control measures discussed above.

Completion

AML must use its best endeavours to:

- Complete the cover over the Cahill Expressway from Art Gallery Road to the eastern side of the Art Gallery building by 31 December 1998.
- Open all of the Eastern Distributor except the William Street ramps to traffic within 36 months of the date of “financial close” (i.e. by 18 August 2000), in time for the Sydney 2000 Olympics.
- Open the William Street ramps to traffic within 40 months of the date of “financial close” (i.e. by 18 December 2000).

The Project Deed expressly acknowledges the NSW Government’s requirement that the Eastern Distributor is to be completed “well before” the Olympics, and commits the parties to a co-operative approach to project issues to achieve this objective.

If it becomes apparent that AML may not be able to open the Eastern Distributor (except for the William Street ramps) well before the Olympics, and any of the parties to the Project Deed notifies the others to this effect, AML must promptly inform all the parties on the degree of completion it expects to achieve and the parties must meet to consider all possible measures to ensure that:

- Eastern Distributor construction activities will not impede traffic flows in the vicinity immediately before and during the Olympics, and
- The appearance of the construction areas will be consistent with the Government’s expectations for the successful presentation of the Olympics.

3.4 Operation, maintenance and repair

AML's general obligations

AML must operate the Eastern Distributor, and maintain and repair the Eastern Distributor and its ancillary works and maintenance areas, in accordance with the *Scope of Works and Technical Criteria* and an operation, maintenance and repair manual that is to be prepared by AML and accepted by the RTA before all of the Eastern Distributor has been opened to traffic.

These obligations apply during the 48-year term of the Lease, which must be granted by the RTA and accepted by AML in the form of a draft lease annexed to the Project Deed. This term will commence on the date on which all of the Eastern Distributor is open to traffic. If (as expected) most of the Eastern Distributor is opened to traffic before then, AML must operate and maintain the opened part in accordance with the *Scope of Works and Technical Criteria*.

The *Scope of Works and Technical Criteria* may be amended by agreement between AML and the RTA, as discussed in section 3.3 above.

AML must keep the Eastern Distributor open to traffic unless the RTA otherwise agrees, or unless it is necessary to close the Eastern distributor because of:

- The requirements of a government authority
- A *force majeure* event of a type defined in the Project Deed, as discussed in section 3.7 below.
- A material threat to users' health or safety, or
- Maintenance and repair works in accordance with the *Scope of Works and Technical Criteria*.

At the end of the term of the Lease, AML must surrender the Eastern Distributor and its ancillary works to the RTA in a condition consistent with AML's maintenance and repair obligations under the Project Deed, which include:

- Regular inspections
- The notification of any material damage, defects or disrepair and proposed corrective actions
- The notification of all accidents involving material damage or injury
- Six-monthly reports to the RTA
- Compliance with RTA directions for corrective works
- The submission of annual maintenance and repair budgets
- Periodic maintenance and capital works, including significant maintenance projects (e.g. pavement resurfacing), other maintenance works, upgrading of the capacity of the toll plazas and the replacement of capital equipment, so as to comply with standards specified in the *Scope of Works and Technical Criteria*.

If the RTA considers there is a threat to the safety of Eastern Distributor users or other members of the public, it may take any action it considers appropriate, after notifying AML and giving it a reasonable time to deal with the threat. AML has indemnified the RTA against any damage, expense, loss or liability it incurs in exercising this right, apart from any caused by negligence or wilful default by the RTA or its contractors.

The Lease

The Project Deed sets out procedures for AML and the RTA to identify final boundaries, undertake surveys and prepare plans so that the Lease may be registered. Under the RTA Consent Deed, the RTA expressly acknowledges the importance to the project's debt financiers of the Lease's being granted and registered as soon as practicable, and agrees that if the RTA fails to perform these Project Deed obligations the debt financiers' Security Trustee may seek an order for specific performance.

Under the draft Lease exhibited to the Project Deed, the RTA will grant AML exclusive possession of the finally defined land for 48 years from the date on which all the Eastern Distributor is open to traffic, in return for a nominal rent of \$1 per year. (As discussed in section 3.6 below, quite separately from the Lease, the RTA will be receiving significant revenue from AML in the form of "concession fees" over the same period.)

The RTA will be entitled to enter the leased land to determine whether AML is complying with the terms of the Project Deed and the Lease, but may not cause unnecessary inconvenience to AML or Eastern Distributor users in doing so. The RTA will also be entitled to grant easements over the land, and/or make similar arrangements, with AML's consent, which may not be unreasonably withheld or delayed.

Under an agreement dated 28 August 1997 between the RTA and the Royal Botanic Gardens and Domain Trust, the RTA has undertaken to procure AML to grant this Trust a sub-lease of the landscaped canopy over the motorway next to the Art Gallery, as soon as possible after the Lease has been granted to AML by the RTA. This sub-lease must be substantially in the form of a draft sub-lease annexed to this agreement, with the Trust paying AML a nominal rent of \$12 per year and AML taking out specified public liability and property insurance policies for the canopy. The RTA has also undertaken to the Trust to procure AML to agree to the Trust's occupation of the canopy, on the terms of the sub-lease, as soon as the canopy has been completed and is ready for use, pending the commencement of the sub-lease.

The Lease will terminate automatically if the Project Deed is terminated (see section 3.8 below). Under the RTA

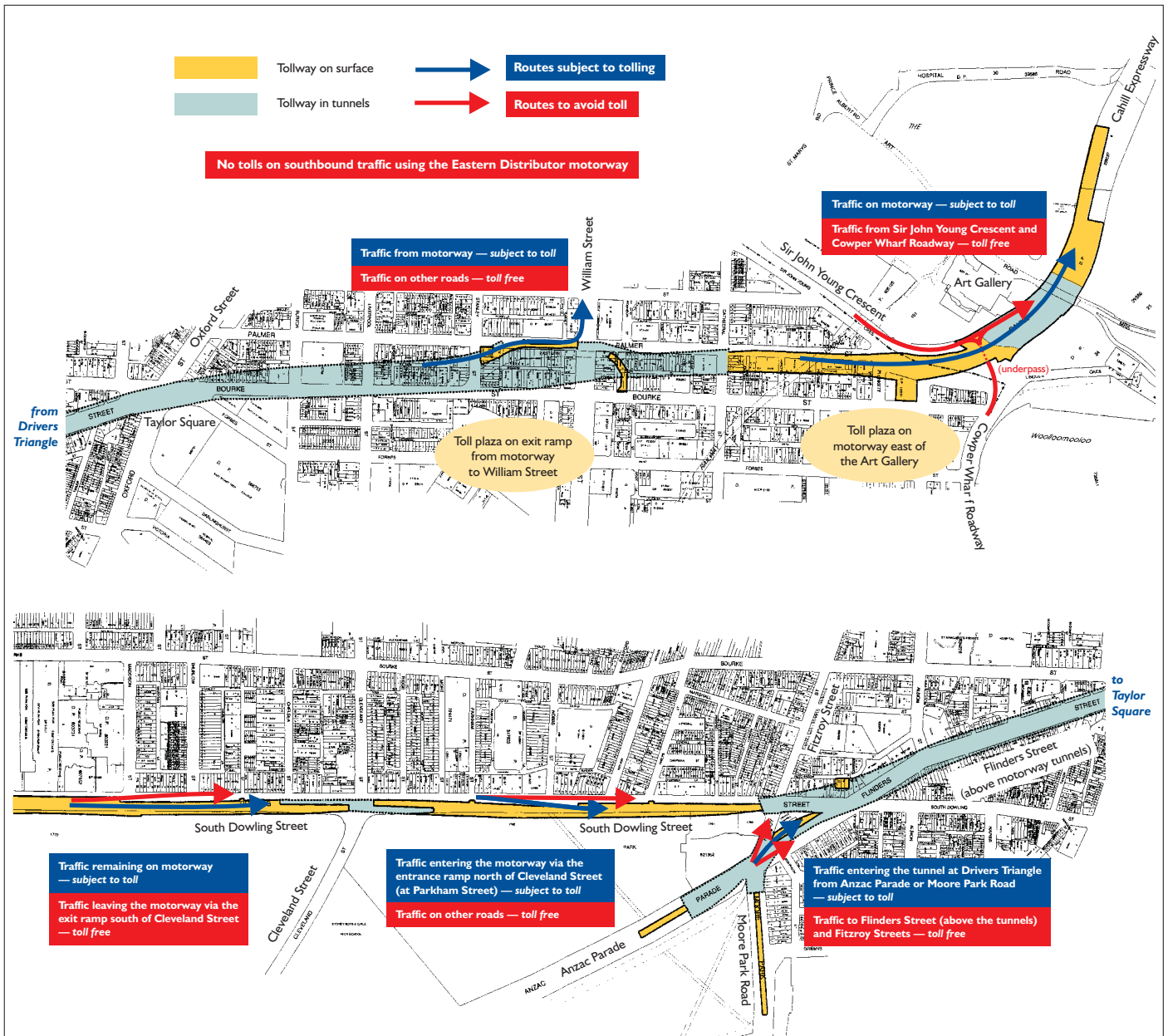


Figure 5. Northbound Eastern Distributor routes subject to tolls.

Consent Deed, the RTA may not otherwise terminate the Lease.

Tolls

AML may levy tolls on northbound Eastern Distributor tunnel users once part or all of the Eastern Distributor has been opened to traffic, in accordance with a toll calculation schedule to the Project Deed. This schedule stipulates that there will be no tolls for buses operated by the State Transit Authority (or its equivalent) or for non-motorised cyclists (the RTA intends not to permit non-motorised cyclists to use the tunnels).

The only routes through the northbound tunnel of the Eastern Distributor, and hence the only routes subject to tolls levied by AML, will be those shown in *Figure 5*.

As already indicated, the main toll plaza will be at the northern end of Eastern Distributor, immediately south of

the parkland canopy to be built east of the Art Gallery and adjacent to Sir John Young Crescent. When the William Street ramps have been completed, tolls will also be collected on the northbound exit ramp from the Eastern Distributor to William Street, and other toll plaza locations may be agreed between AML and the RTA. If an east-west cross-city road tunnel is constructed under the Sydney CBD and connected to the Eastern Distributor, AML will be entitled to collect tolls from northbound Eastern Distributor tunnel users before they enter this tunnel.

The project's debt financing arrangements and the RTA Consent Deed foreshadow the possible future introduction of an automatic vehicle identification system to electronically toll vehicles using the Eastern Distributor. This would supplement or partly replace the original toll booths.

Under the Project Deed's toll calculation schedule, the initial tolls prior to the opening of the William Street ramps

may be no more \$3.00 for cars and motor cycles and \$6.00 for other motor vehicles (other than toll-free buses operated by the STA or its equivalent).

Once the William Street ramps have been opened, the tolls will be \$3.00 for cars and motor cycles and \$6.00 for other motor vehicles, adjusted for quarterly movements after June 2000 in the consumer price index (37.5% weighting) and average weekly earnings (62.5% weighting), or for a 1% increase per quarter, whichever is greater.

These tolls will be rounded to the nearest 50 cents, so there will be no toll increase for cars and motor cycles until the “theoretical” indexed toll calculated this way reaches \$3.25, when AML will be permitted to increase the actual toll to \$3.50. The actual toll may then be no higher than this \$3.50 until the calculated indexed toll reaches \$3.75, when the actual toll may be increased to \$4.00, and so on.

If a goods and services tax or any similar tax is imposed on AML, and also if the rate of such a tax is subsequently changed, AML may increase the “base” tolls of \$3.00 and \$6.00 by up to the amount of this tax, effective from the date the tax is imposed.

If this means the “base toll” for motor vehicles other than cars and motor cycles is no longer twice the “base toll” for cars and motor cycles, AML may apply for the former to be increased so as to restore this relativity, but such a change may only be agreed to if the RTA is reasonably satisfied that its purpose and effect would be to enhance project revenue and not to diminish use of the Eastern Distributor by vehicles other than cars and motor cycles.

3.5 RTA traffic management and road network development obligations

As indicated earlier, under the Project Deed the RTA, AML and the Trustee have explicitly acknowledged that except as provided in that deed (e.g. under the RTA undertakings listed below and the contract renegotiation provisions described in section 3.7), their commitment to the Eastern Distributor does not constrain the development of other road or public transport projects, or future changes in the road network or public transport arrangements.

AML and the Trustee have also explicitly agreed that the RTA may engage in a competitive tendering process, or any other process, for any future extension of the Eastern Distributor.

Within this framework, the RTA has:

- Undertaken to manage the Sydney metropolitan traffic system so as to “recognise” —
 - The importance of the Eastern Distributor in the traffic system and the importance of maintaining free traffic flows on the Eastern Distributor,

- The importance of other roads connecting to the Eastern Distributor, the timely maintenance of these roads and ensuring free traffic flows along these roads, and
- The importance of the Eastern Distributor as “the principal north–south road corridor for the eastern areas of Sydney” and as part of the “Sydney orbital” route.
- Promised that if its maintenance or repair of any roads providing alternative access to the eastern areas of Sydney involves upgrading of these roads, the RTA will have regard to the importance of the Eastern Distributor as “the principal north–south road corridor for the eastern areas of Sydney”.
- Promised that if it is considering any upgrading of the “southern arterial route” between Cleveland Street and Joyce Drive/Qantas Drive from an intersection-based road (e.g. by introducing freeway-standard intersection flyovers), it will consult with AML and the Trustee and ensure the Eastern Distributor remains “the principal north–south road corridor for the eastern areas of Sydney” and part of the Sydney orbital route.
- Promised to consult with AML and the Trustee before carrying out any “widespread or significant” changes to the NSW road system, including any roads providing access to the eastern areas of Sydney, if these could materially alter the status of the Eastern Distributor as “the principal north–south road corridor for the eastern areas of Sydney”.
- Agreed to the implementation of an agreed series of traffic management measures, comprising —
 - The introduction of two-way traffic in Crown Street, primarily for local access,
 - Bus priority lanes on both sides of Oxford Street between College Street and Taylor Square and on Flinders Street between Taylor Square and Fitzroy Street,
 - The maintenance of northbound access from the western end of the Cahill Expressway onto Sydney Harbour Bridge, in accordance with a management plan that is described in a schedule to the Project Deed (among other things, there will be a new dedicated northbound bus lane on the southern approach to the bridge)
 - The maintenance of single lane northbound access from the Domain Tunnel onto the Cahill Expressway over Circular Quay, and
 - The closure of Bourke Street at Taylor Square.

3.6 Miscellaneous general provisions of the Project Deed

Rates, levies and taxes

AML must pay all rates, charges and land taxes levied by any government authority on the project, up to a limit of \$50,000 per year (1995 dollars, annually indexed to the consumer price index), with the RTA being liable to reimburse AML for any total liability above this amount.

AML and the Trustee are liable for stamp duties and other fees associated with the execution of the Project Deed, and also for all sales tax, excise duty and similar imposts associated with construction, including taxes and duties on equipment, materials and supplies.

If the NSW Government imposes a rate, tax, levy, charge or other requirement on AML, Leighton Contractors, the Eastern Distributor, its land or tolls or any other amounts payable under the Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed, and this discriminates against AML or Leighton Contractors in relation to the Eastern Distributor, or more generally against private toll-road operators, the RTA must reimburse AML for its increased costs in paying the rate, tax, levy or charge or in meeting the cost of the requirement.

Loss or damage and insurance

Under the Project Deed AML is responsible for the care of the Eastern Distributor, its ancillary works, its land and associated licence areas and easements. Subject to the project renegotiation provisions discussed in section 3.7 below, AML must promptly make good any loss or damage at its own cost, except in the case of loss or damage directly caused by a negligent act or omission by the RTA, without any fault or omission by AML or its contractors.

Before commencing construction, AML must effect specified insurance policies, including contract works insurance for at least \$500 million, public liability insurance for at least \$150 million, workers' compensation insurance, professional indemnity insurance for at least \$50 million for any one claim and in aggregate, third party property insurance for all plant and vehicles for at least \$10 million, and any other insurance reasonably required by the RTA.

Similarly, before opening any part of the Eastern Distributor to traffic AML must insure the Eastern Distributor and its ancillary works for their reinstatement cost and must also effect public liability insurance for at least \$150 million, workers' compensation insurance, third party property insurance for all plant and vehicles for at least \$10 million, and any other insurance reasonably required by the RTA.

- Promised to formulate bus priority measures as required under the project's planning approval, obtain the agreement of the Bus Priority Task Force to these measures before any part of the Eastern Distributor is opened to traffic, implement the bus priority measures within three months of opening (or a later time if the Minister for Urban Affairs and Planning agrees), and indemnify AML for any damage, expense, loss or liability it incurs if the RTA fails to comply with these obligations.
- Promised that in connecting other roads to the Eastern Distributor, the RTA will ensure that:
 - ◻ No untolled northbound use of the Eastern Distributor between Drivers Triangle and the Domain Tunnel will result
 - ◻ Access capacity and demand for northbound traffic to the Eastern Distributor tunnel is not reduced
 - ◻ Connections south of Drivers Triangle are not tolled
 - ◻ The RTA will give AML reasonable notice of its proposals and will co-operate with AML to minimise the connections' impacts on the operation and use of the Eastern Distributor and to maintain the Eastern Distributor's traffic-carrying capacity, and
 - ◻ The RTA will co-ordinate all activities associated with the connections.
- Promised to use its best endeavours to ensure the Minister for Roads declares all currently undeclared parts of the Eastern Distributor as a tollway, under section 52 of the Roads Act 1993, and directs the RTA to assume responsibility for the entire tollway in accordance with section 63 of the Roads Act, in both cases until the end of the 48-year operational term.
- Promised to take or procure "any lawful action" to remove any road blockade or other form of civil disobedience that hinders or prevents unfettered access to or along the Eastern Distributor by the public, AML or its contractors.
- Undertaken to complete the widening of Southern Cross Drive to three lanes in each direction between Link Road and Mill Pond Road by the time the Eastern Distributor is opened to traffic.
- Promised to ensure the M5 East is open to traffic by 31 December 2004. If it is not, because of an RTA breach of this undertaking, the RTA will be liable to pay AML and the Trustee, jointly, liquidated damages of \$1.5 million.

All these insurance policies must be with insurers approved by the RTA and on terms approved by the RTA. Except for the workers' compensation, professional indemnity and third party property policies, they must be in the joint names of the RTA, AML and the Trustee. Prior to repayment of the project debt, the debt financiers' Security Trustee is to be joint loss payee for the contract works and works reinstatement insurance policies. After that date, the RTA, AML and the Trustee will be joint loss payees for these policies.

The level of public liability insurance after the Eastern Distributor has been opened to traffic must be reviewed and increased by amounts agreed by the RTA and AML every five years, taking account of contemporary liability caps for Australian projects of a similar nature and scale. If the RTA and AML cannot agree on these increases, either may refer the matter for binding expert determination, as discussed below.

If the Eastern Distributor is damaged or destroyed, AML must:

- Take immediate steps to clear debris and begin initial repairs
- Consult with the RTA on prompt repair and replacement works, to ensure compliance with the *Scope of Works and Technical Criteria* and minimise disruption to the Eastern Distributor
- Continue to comply with its contractual obligations to the RTA, to the greatest extent possible.

These obligations will apply even if the RTA, the Minister for Roads, AML, the Trustee and their financiers are renegotiating the project's contracts because of the events that have damaged or destroyed the Eastern Distributor, as discussed in section 3.7 below.

Under the Project Deed, insurance proceeds must be applied to the repair and reinstatement works. Any surplus proceeds must be then be used to repay the project's private sector debt financiers, and if any surplus proceeds then remain the RTA, AML and the Trustee are to negotiate in good faith on an equitable distribution of the balance.

Under the RTA Consent Deed, however, if insurance proceeds are received under the contract works, professional indemnity or damaged works reinstatement policies, and the cost of repairing and replacing the Eastern Distributor is more than \$50 million (indexed to the consumer price index), the insurance proceeds will *have* to be applied to the repair and reinstatement works only if:

- Sufficient funds are available to AML to reinstate the Eastern Distributor within a reasonable time,
- AML is able to repay its debt financiers, substantially in accordance with its debt financing arrangements, within

the period required under these arrangements plus three months,

- The debt service cover ratio under the Project Facility Agreement would not be less than a specified figure, and
- It is economically viable to repair or replace the Eastern Distributor, having regard to the circumstances at the time.

If these criteria are not satisfied after renegotiation of the project's contracts by the RTA, the Minister for Roads, AML, the Trustee and their financiers (as described in section 3.7) or after expert determination (as described below) — or, in any event, within six months of the event giving rise to the insurance proceeds — part or all of the insurance proceeds may be applied to repay the project's debt financiers, with the balance, if any, being paid into a trust account for insurance proceeds established under the Project Deed.

This balance may then be withdrawn from the trust account only with the RTA's consent. The RTA has agreed to grant its consent if it is reasonably satisfied that the funds are to be applied to repair or reinstate the Eastern Distributor in accordance with the Project Deed, or if the debt financiers' Agent has certified that the four criteria listed above have been satisfied.

Additional indemnities

AML and the Trustee have released the RTA from all claims and demands resulting from any accident, damage or injury on the Eastern Distributor, its ancillary works, its land and associated licence areas and easements, except where RTA negligence or wilful default or a breach of its contractual obligations causes or contributes to the accident, damage or injury.

AML has also indemnified the RTA against all damage, expense, loss or liability arising from:

- Negligent or wasteful use of Eastern Distributor services by AML
- Failures by AML to control any Eastern Distributor water overflows or leakages that could have been prevented or remedied by exercising reasonable care and due diligence, and
- Any loss, injury or damage to persons or property of any nature on the Eastern Distributor, its ancillary works, its land and associated licence areas and easements, if this is not caused by the wilful default or negligence of the RTA.

Concession fees

In return for its right to levy tolls and use this revenue for its own benefit, AML must pay the RTA “concession fees” in accordance with a schedule to the Project Deed.

As described below, the payment of some of these concession fees will be able to be deferred, through the issuing of promissory notes, until the returns achieved by the project’s equity investors reach specified levels, after which cash payments will need to be made to satisfy AML’s obligations under the promissory notes. Other concession fees will need to be paid in cash on their due dates regardless of the returns achieved by investors.

The concession fees will comprise:

- (a) An annual fee of \$15 million, the first payment being on the date of “financial close” (i.e. 18 August 1997) and the last being on the 24th of the anniversaries of “financial close” that occur after all of the Eastern Distributor has been opened to traffic (i.e. about half-way through the 48-year operating concession period).

Part or all of each of these payments may take the form of a promissory note showing a payment date (subject to the provisions described below) of 31 December 2042.

From the first 30 June after a date that the Project Deed terms the “equity return date”, described below, AML must make annual cash payments of 35% of the Trustee’s and AML’s “surplus cash” — their cash surplus in any year generated from all sources after their payments of operating, maintenance and administrative expenses, their payments of all principal, interest and fees due under their debt financing arrangements and their payments to maintenance, debt and similar reserves, but before any distributions to the project’s equity investors and AM Holdings (see *Figure 3*) — less any of the \$15 million/year that AML has elected to pay in cash, in order to satisfy (or partly to satisfy) any obligations AML has under the promissory notes, even if the payment date shown on these notes (31 December 2042) has not yet occurred. Subsequent cash payments of 35% of the “surplus cash” will then need to be made during each succeeding financial year until all the promissory notes have been paid in full to the RTA.

The “equity return date” after which these cash payments are to be made is the earlier of the dates on or by which:

- The Airport Motorway Trust and AM Holdings receive an amount sufficient to give the equity investors — treated as if they were all notional

corporate taxpayers holding units in the trust and shares in AM Holdings at “financial close” and continuing to hold these units and shares throughout the 48-year operating term — a real after-tax internal rate of return of at least 10% per annum, or

- A “base case” financial model developed by AML, as defined in the Project Deed and as updated to reflect the project’s actual performance, indicates that the equity investors — treated on the same “notional initial investor” basis — have received a real after-tax internal rate of return of at least 10% per annum.
- (b) An additional \$2.2 million, in cash, six months after “financial close” (i.e. 18 February 1998).
- (c) An additional \$8 million, in cash, on the third anniversary of “financial close” (i.e. 18 August 2000).
- (d) Three additional cash payments, of up to \$6.5 million each, on the first, second and third anniversaries of the date on which the Eastern Distributor (other than the William Street ramps) is opened to traffic. Each of these payments is to be equal to the amount (if any) by which actual toll revenue in the preceding year has exceeded the forecast toll revenue for that period (as predicted by the “base case” financial model), up to a limit of \$6.5 million.
- (e) Once all of AML’s promissory notes have been paid in full to the RTA, annual cash payments of 10% of the Trustee’s and AML’s “surplus cash”, as defined in (a) above. The first of these payments will need to be made by the first 14 August after all the promissory notes have been paid in full, and subsequent payments will need to be paid by the anniversary of this date, with the last payment being due 45 days after the end of the 48-year operating term.

Interest on overdue payments

If the RTA, AML or the Trustee fails to pay any amount due under the Project Deed or the Lease by the due date, it must pay interest of 2% per annum plus the National Australia Bank’s reference rate for A\$ loans to prime commercial customers (or, if there is no such reference rate, NAB’s rate for overdrafts of more than A\$100,000 to prime commercial customers).

Adjacent development

AML may construct a service centre or another transport-related development on land adjacent to the Eastern Distributor, accessible to users of the Eastern Distributor from either or both directions, with the RTA’s prior written consent.

Any such RTA consent may be subject to conditions. In deciding whether to give its consent, the RTA may take any relevant factor into account, specifically including:

- The policies of the NSW Government, the RTA and other government authorities in relation to the proposed development
- Any concessions proposed by AML, including the type and range of services to be offered and the accessibility of the development from the Eastern Distributor
- The effects of the development on AML's ability to comply with its contractual commitments to the RTA
- The proposed contractual arrangements, including the extent to which they are arms-length commercial transactions and the consideration involved
- The identity and nature of any proposed lessees, sub-lessees and/or operators of the development, including their financial and commercial standing, reputation and expertise
- The design and aesthetics of the proposed development
- The proposed development's construction, including standards of workmanship and materials
- Proposed reporting and accounting obligations
- AML's compliance with legal requirements in relation to the development.

Cross-city road tunnel

The Project Deed expressly acknowledges the RTA's right to connect a future east–west cross-city road tunnel under the Sydney CBD to the Eastern Distributor.

As already indicated, if such a connection is made, AML may levy tolls on northbound Eastern Distributor tunnel users who enter the cross-city tunnel. The RTA must use its best endeavours to minimise the connection's disruption of free traffic flows on the Eastern Distributor, and must indemnify AML and the Trustee against any damage, expense, loss or liability arising from physical damage to the Eastern Distributor, other than that inherent in making the connection.

If the RTA notifies AML and the Trustee that a connection between a cross-city tunnel and the Eastern Distributor is to be made, *and* the equity investors (treated as “notional initial investors” as described above) are receiving real after-tax returns as predicted in the “base case” financial model, *and* the connection materially increases AML's net revenue, the RTA, AML and the Trustee must negotiate in good faith to ensure an equitable sharing of the connection's costs and benefits.

These negotiations must take account of the capacity of each party to bear and finance the costs, and must not reduce the returns to equity investors (treated as “notional

initial investors”) or the ability of the Trustee to meet its obligations under the project's debt financing arrangements.

The provision described above are subject to section 15P of the Centennial Park and Moore Park Trust Act, which precludes any Eastern Distributor agreements from being likely to prevent the provision of an east–west cross-city tunnel.

The Project Deed expressly acknowledges the RTA's statutory powers to demolish or modify the Cahill Expressway across Circular Quay, regardless of whether it is replaced by a cross-city tunnel.*

The deed stipulates that in determining the effect of any such demolition or modification on the Eastern Distributor project — for example, as part of possible renegotiations of the Project Deed, as discussed in section 3.7 below — consideration must be given to the effect of any cross-city tunnel connection on Eastern Distributor traffic and revenue.

Project debt refinancing

Under the Project Deed AML and the Trustee are entitled, from time to time and with the RTA's prior consent, to refinance all or part of the project debt. This may include the issuing of indexed bonds or other long-term debt instruments.

The Project Deed specifies procedural and information disclosure requirements for any refinancing proposals. AML and the Trustee must pay the RTA's reasonable costs in reviewing any proposal.

Under the Project Deed, the RTA may not unreasonably withhold its consent to any proposed refinancing if:

- The incoming financiers, or their agents, execute a deed substantially in the form of the RTA Consent Deed,
- The incoming financiers receive no greater security than is held by the project's debt financiers under the Project Facility Agreement, and
- The refinancing does not make the RTA's position under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed worse than under the debt assumptions of the Project Deed's “base case” financial model.

Under the RTA Consent Deed, however, the RTA expressly acknowledges that AML and the Trustee will need to refinance the project in order to pay out their debt financiers under the Project Facility Agreement, and has undertaken that the RTA will not withhold or delay its consent to any

* As discussed in section 3.5 above, the RTA has promised, in the Project Deed, to maintain single lane northbound access from the Domain Tunnel onto the Cahill Expressway over Circular Quay and to maintain northbound access from the western end of the Cahill Expressway onto Sydney Harbour Bridge.

such refinancing within the last three years of the term of the Project Facility Agreement if:

- The incoming financiers, or their agents, execute a deed substantially in the form of the RTA Consent Deed,
- The incoming financiers receive no greater security than is held by the debt financiers under the Project Facility Agreement, and
- AML demonstrates, to the RTA's reasonable satisfaction, that the refinancing is on commercial terms, having regard to market conditions at that time.

Under the RTA Consent Deed the RTA has also expressly agreed that AML may obtain additional funding, in accordance with the Project Facility Agreement, for an automatic vehicle identification system for electronic tolling of Eastern Distributor users. The RTA has agreed to the additional debt financiers' securities that would be associated with any such funding, and has also agreed to the priority of these securities.

Reporting obligations

The Project Deed sets out requirements for AML to:

- Provide the RTA with copies of the project's private sector financing agreements and security documents and a private sector completion undertaking
- Maintain accounts and other records relating to the Eastern Distributor and make them available to the RTA for inspection and auditing purposes
- Give the RTA quarterly company-certified cash flow and profit and loss statements, an independently audited annual profit and loss statement and monthly traffic reports
- With the Trustee, notify the RTA when the project debt has been repaid in full and when AML and the Trustee derive an amount sufficient to give the project's equity investors (treated as "notional initial investors") a real after-tax internal rate of return of 10% pa, and
- With the Trustee, give the RTA a copy of the updated "base case" financial model every two years.

Assignment and mortgages

The RTA, AML and the Trustee have agreed that they will not deal separately with their interests under the Project Deed and the Lease, and that any dealings with their interests under the Project Deed and the Lease will occur at the same time, on substantially the same terms and with the same parties.

AML and the Trustee may give securities over their interests in the Project Deed and the Lease in order to secure project debt financing arrangements, provided the person taking these securities enters into a deed of consent with the RTA on substantially the same terms as the RTA Consent Deed.

This exception aside, AML and the Trustee may not assign, novate or otherwise deal with their interests in and obligations under the Project Deed and the Lease, or sub-lease or license the Eastern Distributor, its ancillary works and land and associated licensed areas and easements, until all of the Eastern Distributor, including its William Street ramps, has been opened to traffic. After that date they may do so only with the RTA's prior consent.

Dispute resolution

Disputes concerning any of the following issues may be referred by the RTA, AML and/or the Trustee to a mutually agreed, mutually appointed independent expert for final, binding determination:

- Whether design documentation prepared by AML satisfies the *Scope of Works and Technical Criteria*.
- Whether AML is constructing the Eastern Distributor in a proper and workmanlike manner, using good quality materials, plant and equipment and in accordance with its design documentation.
- Whether the time specified in a "remedy notice" issued by the RTA following a default by AML or the Trustee, as discussed in section 3.8 below, is reasonable.
- Whether an event giving rise to a right to renegotiate the project's contracts, as discussed in section 3.7 below, has occurred (if this dispute is not resolved within 30 days of the parties' entering these negotiations).
- The "renegotiation" action that should be taken (again if this dispute is not resolved within 30 days of the parties' entering these negotiations).
- The calculation of —
 - Equity investors' real after-tax internal rates of return (treating them as "notional initial investors"),
 - "Early termination" payments to be made to AML and the Trustee by the Minister for Roads following a termination of the Project Deed for an RTA default, as discussed in section 3.8 below,
 - Damages payable to AML and the Trustee by the RTA and the Minister for Roads following a termination of the Project Deed for an RTA default, again as discussed in section 3.8 below, or
 - The tolls able to be charged by AML under the toll calculation schedule to the Project Deed, as discussed in section 3.4 above.
- Increases in the level of public liability insurance.

Any other disputes under the Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed may be referred by the RTA, AML and/or the Trustee for mediation by the Australian Commercial Disputes Centre Limited in Sydney.

Under the RTA Consent Deed, the RTA must notify the Agent of the project's debt financiers if the RTA intends to refer a dispute to expert determination.

Under the Project Deed and the RTA Consent Deed, representatives of the project's debt financiers — including the financiers' Security Trustee and Agent and the trustee of another trust under which AML and/or the Trustee may issue indexed bonds — must be given copies of all information provided to the expert, may make submissions to the expert and may attend and participate in meetings held by the expert with all the parties to the dispute. Prior to making a determination, the expert must consult with these representatives to ascertain their views about the proposed resolution of the dispute.

Similarly, under the Project Deed Leighton Contractors, as AML's contractor under the D&C Contract, may be given copies of information given to the expert, may attend and participate in meetings and may make submissions to the expert, provided AML and Leighton Contractors reasonably satisfy the RTA that this is relevant to a Project Deed dispute concerning design and construction issues and that the resolution of this dispute potentially affects Leighton Contractors' interests under the D&C Contract.

If the expert's determination requires any amendments to the Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed, these changes must be promptly prepared and executed.

3.7 Renegotiation of the Project Deed and other contracts

In addition to the Project Deed's provisions for renegotiation of the Project Deed if AML and the RTA agree to amend the *Scope of Works and Technical Criteria*, as discussed in sections 3.3 and 3.4 above, the Project Deed expressly envisages a range of other circumstances under which the project's contracts might need to be renegotiated.

If:

- Any toll is imposed on users of the "Sydney orbital" route between the M5 East's connection with General Holmes Drive and the southern end of the Eastern Distributor, or
- A toll is imposed on northbound users of Sydney Harbour Tunnel or Sydney Harbour Bridge, or any such toll is subsequently changed, or
- The Cahill Expressway across Circular Quay is demolished or modified to less than one traffic lane in each direction, or
- The RTA develops another arterial road between Anzac Parade/Moore Park Road/South Dowling Street and Sydney Harbour Tunnel/Sydney Harbour Bridge, other than the cross-city tunnel discussed above, or the RTA

or the Minister for Roads grants a concession for the development of such an arterial road, or

- A court issues an injunction preventing AML from constructing, operating, maintaining or repairing the Eastern Distributor, or from levying or keeping tolls, in the manner contemplated by the Project Deed and its other contracts with the RTA, and this injunction is not issued as a result of a wrongful act or default by AML, the Trustee or AML's contractors under these contracts (other than in relation to third party claims for economic loss concerning the NSW Government's decision to proceed with the project or the existence or location of the Eastern Distributor and its ancillary works or the traffic diversion and control measures described in section 3.3 above),

and AML and the Trustee notify the RTA that they reasonably consider this event has had a material adverse effect on:

- Their ability to carry out the project in accordance with the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, or
- Their ability to repay their debt financiers, substantially in accordance with their debt financing arrangements, within the period required under these arrangements plus three months, or
- The level or timing of the project's revenues or outgoings, and hence the returns of the project's equity investors over the 48-year operating term,

the RTA or the Minister for Roads must then enter into good faith negotiations with AML, the Trustee and their financiers, so as to enable AML and the Trustee to:

- Repay their debt financiers, substantially in accordance with their debt financing arrangements, within the period required under these arrangements plus three months, and
- Give the equity investors (treated as "notional initial investors") the lower of:
 - ◻ The real after-tax internal rate of return they would have received — having regard to past, present and projected circumstances, and using the "base case" financial model as updated to reflect the project's actual performance — had the event not occurred, and
 - ◻ The real after-tax internal rate of return they were predicted to receive under the original "base case" financial model, plus 3%.

Similarly, if:

- The RTA fails to comply with its traffic management obligations under the Project Deed to procure —
 - The introduction of two-way traffic in Crown Street, primarily for local access,
 - Bus priority lanes on both sides of Oxford Street between College Street and Taylor Square and on Flinders Street between Taylor Square and Fitzroy Street,
 - The maintenance of northbound access from the western end of the Cahill Expressway onto Sydney Harbour Bridge, in accordance with a management plan that is described in a schedule to the Project Deed (among other things, there will be a new dedicated northbound bus lane on the approach to the bridge)
 - The maintenance of single lane northbound access from the Domain Tunnel onto the Cahill Expressway over Circular Quay, and
 - The closure of Bourke Street at Taylor Square, or
- A transit lane is established for northbound traffic on Southern Cross Drive (except during the Olympics period from 1 September to 15 October 2000), or
- The cost of performing the obligations of AML and the Trustee under the Project Deed and the Lease increases beyond the cost reasonably anticipated at the time the Project Deed was signed, because of —
 - A change in NSW or local government legislation (including regulations or by-laws), NSW public authority requirements or legally binding NSW Government, local government or NSW public authority guidelines (as already discussed, any such change by the NSW Government that discriminated against the Eastern Distributor or toll-road operators more generally would oblige the RTA to pay AML's increased costs), or
 - A change in the application of existing NSW public authority requirements, or
 - A change in the courts' interpretation of existing NSW legislation,

and AML and the Trustee notify the RTA that they reasonably consider this event has had a material adverse effect on:

- Their ability to carry out the project in accordance with the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, or
- Their ability to repay their debt financiers, substantially in accordance with their debt financing arrangements, within the period required under these arrangements plus three months, or

- The level or timing of the project's revenues or outgoings, and hence the returns of the project's equity investors over the 48-year operating term,

the RTA or the Minister for Roads must then enter into good faith negotiations with AML, the Trustee and their financiers, so as to enable AML and the Trustee to:

- Repay their debt financiers, substantially in accordance with their debt financing arrangements, within the period required under these arrangements plus three months, and
- Give the equity investors (treated as "notional initial investors") the real after-tax internal rate of return they would have received — having regard to past, present and projected circumstances, and using the "base case" financial model as updated to reflect the project's actual performance — had the event not occurred.

Finally, if:

- An event or circumstance that occurs or is discovered is beyond the control of AML and its contractors, and the risk is not otherwise specifically allocated in the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, and as a result of this event or circumstance — and despite all reasonable measures by AML and its contractors, including acceleration measures — either:
 - The Eastern Distributor (including the William Street ramps) is not open to traffic within 40 months of the date of "financial close", or
 - This deadline is unlikely to be met, and AML reasonably satisfies the RTA that the project's financiers under the Project Facility Agreement are likely to refuse or defer further construction funding as a result, or
- A *force majeure* event, as defined in the Project Deed,* occurs after the entire Eastern Distributor has been opened to traffic, or

* *Force majeure* events are defined as one or more or a series of the following: fire, lightning, explosions, floods, earthquakes, hurricanes, malicious damage, natural disasters, sabotage, riots, the acts of a public enemy, war, revolution, radioactive contamination, toxic or dangerous chemical contamination, strikes and other industrial disputes and actions other than those solely between AML, its contractors and their respective employees, and any other event or circumstance beyond the control of AML and its contractors for which the risk is not otherwise specifically allocated in the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed. To qualify as a *force majeure* event, any such event or series of events must have caused AML to default on its obligations under the Project Deed, the Lease, the RTA Deed of Charge, the RTA Consent Deed or the project's debt financing arrangements, and this default must have been incapable of being prevented, overcome or remedied by AML or its contractors exercising the standard of care and diligence of a prudent and competent owner, operator or maintainer of such a motorway, including the expenditure of all reasonable sums of money.

- The cost of performing the obligations of AML and the Trustee under the Project Deed and the Lease increases beyond the cost reasonably anticipated at the time the Project Deed was signed, because of —

- A change in Commonwealth government legislation (including regulations or by-laws), Commonwealth authority requirements or legally binding Commonwealth Government or Commonwealth authority guidelines, or
- A change in the application of existing Commonwealth authority requirements, or
- A change in the courts' interpretation of existing Commonwealth legislation,

except in relation to income tax,

and AML and the Trustee notify the RTA that they reasonably consider this event has had a material adverse effect on:

- Their ability to carry out the project in accordance with the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, or
- The ability of the Trustee to repay its debt financiers within the period required under its debt financing arrangements plus three months, or
- The level or timing of the project's revenues or outgoings, and hence the returns of the project's equity investors over the 48-year operating term,

and

- The real after-tax internal rate of return the equity investors (treated as "notional initial investors") are now forecast to receive — having regard to past, present and projected circumstances, including the event notified, and using the "base case" financial model as updated to reflect the project's actual performance — is no higher than the real after-tax internal rate of return predicted for them under the original "base case" financial model,

the RTA or the Minister for Roads must then enter into good faith negotiations with AML, the Trustee and their financiers with a view to enabling AML and the Trustee to have a substantially similar (but not materially lessened) ability to:

- Repay their debt financiers within the period required under their debt financing arrangements plus three months, and
- Give the equity investors (treated as "notional initial investors") the lower of —
 - The real after-tax internal rate of return they would have received — having regard to past, present and projected circumstances, and using the "base case" financial model as updated to re-

flect the project's actual performance — had the event not occurred, and

- The real after-tax internal rate of return they were predicted to receive under the original "base case" financial model.

The RTA, AML and the Trustee have agreed that in any of the negotiations described above, they should each have the maximum flexibility to achieve the prescribed results, and that possible actions include:

- Amendments to the Project Deed, the Lease, the RTA Deed of Charge and/or the RTA Consent Deed, including changes to the toll calculation schedule to the Project Deed, the project's operating term, the risk allocations between the parties and the parties' financial contributions to the project.
- The waiver or releasing of existing rights under these contracts, including rights to receive payments.
- Requests to the project's debt financiers for restructuring of the debt financing arrangements.
- Any other action agreed by the parties.

If the parties cannot agree on the action to be taken within 30 days of entering the negotiations, the matter may be referred for binding expert determination, as discussed in section 3.6 above.

Under the RTA Consent Deed, the RTA must notify the project debt financiers' Agent before any negotiations occur, and the Agent or its representative are entitled to attend and participate in the negotiations. Copies of any written communications forming part of the negotiations must be sent to the Agent.

The RTA and the Minister for Roads may not amend the terms of the Project Deed, the Lease, the RTA Deed of Charge, the RTA Consent Deed or the PAFA Act Deed of Guarantee without the Agent's prior consent, which may not be unreasonably withheld or delayed.

3.8 Defaults and termination of the Project Deed

The Project Deed will terminate at the end of the 48-year operating term, unless it is terminated earlier, as discussed below.

Upon termination of the Project Deed and the Lease for any reason, AML must give up possession of the Eastern Distributor, its ancillary works and its plant and equipment to the RTA, in accordance with the *Scope of Works and Technical Criteria*.

In addition, if the Project Deed is terminated early for any reason, AML must pay the RTA, on or before the termination date, a portion of the next "concession fee" that would otherwise have been payable (see section 3.6),

calculated on the basis of the number of days since the last concession fee was paid and the number of days between the termination date and the date on which the next concession fee payment would have been due. No further concession fee payments to the RTA are then required.

The other consequences of any early termination of the Project Deed vary, depending on the reasons for the termination and the party at fault.

The notes below summarise, in turn,

- Arrangements under the Project Deed for AML and the Trustee to remedy any defaults by AML or the Trustee
- Arrangements under the RTA Consent Deed for the project debt financiers' Security Trustee and Agent to remedy any defaults by AML or the Trustee
- The grounds on which the RTA may terminate the Project Deed for a default by AML or the Trustee, and the procedures and timeframes to be followed
- The grounds on which AML and the Trustee may terminate the Project Deed for a default by the RTA or the Minister for Roads, the procedures and timeframes to be followed, and the payments to be made to AML and the Trustee by the RTA and the Minister for Roads following a termination in these circumstances.

Remediation of defaults by AML or the Trustee

If AML or the Trustee defaults under the Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed, or breaches a warranty to the RTA under the Project Deed, the RTA may give AML or the Trustee a notice requiring them to remedy the default, or overcome its effects, within a reasonable time specified in the notice. Under the RTA Consent Deed, a copy of this notice must also be provided to the project debt financiers' Security Trustee and Agent.

If the default is a failure to pay money, the parties have agreed in the Project Deed that this "reasonable time" will be 14 days.

Unless urgent action is necessary, or the default is a failure to pay money, AML and the Trustee must give the RTA a program to remedy the default in accordance with the RTA's notice, and the RTA must consult with them in good faith to develop and settle this program.

If AML and the Trustee fail to remedy the default, or if urgent action is necessary, the RTA may take any remedial action it considers appropriate, and AML and the Trustee must indemnify the RTA against any damage, expense, loss or liability it incurs as a result, unless it arises from the negligence or wilful default of the RTA or its contractors.

If AML and the Trustee consider, in good faith, that the time specified in the RTA's original notice is not reasonable, they must immediately notify the RTA and the RTA must

review the time allowed for the default to be remedied. The RTA is obliged to grant a reasonable extension of time if AML and the Trustee are diligently pursuing the agreed remedial program. If AML and the Trustee still consider that the time allowed, as varied, is not reasonable, they may refer the matter for binding expert determination, as discussed in section 3.6 above.

Under the RTA Consent Deed, while AML and the Trustee are attempting to remedy the default the RTA must give the project debt financiers' Security Trustee and Agent copies of all material correspondence and documents the RTA issues to AML or the Trustee concerning the default.

Remediation of AML/Trustee defaults by the project debt financiers' Security Trustee and Agent

In addition to the rights of AML and the Trustee to remedy their defaults under the Project Deed, the project debt financiers' Security Trustee and Agent have rights to remedy the default, or procure its remedy, under the RTA Consent Deed.

Under that deed, and subject to the debt financiers' securities, the Security Trustee may also:

- Appoint a receiver or agent to exercise any or all of AML's and the Trustee's rights, and perform some or all of their obligations, under the Project Deed, the Lease, the RTA Deed of Charge, the RTA Consent Deed and the PAFA Act Guarantee.
- Engage others reasonably acceptable to the RTA to perform some or all of these obligations, or permit them to be engaged by a receiver or agent appointed by the Security Trustee.
- With the RTA's prior consent, and as discussed in section 4.2 below, sell any or all of AML's and the Trustee's rights and obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed to purchaser(s) approved by the RTA.

While the default remains, the RTA must discuss its remedy, in good faith, whenever this is reasonably requested by the Security Trustee or the Agent.

If requested and able to do so, the RTA must give the Security Trustee, the Agent and their agents, consultants and contractors access to the Eastern Distributor, its ancillary works and land and associated licensed areas and easements, as reasonably necessary, to permit or facilitate their "step in and cure" and disposal rights under the project's debt financing arrangements, the Project Deed, the RTA Consent Deed and other project contracts.

Termination for defaults by AML and the Trustee

The RTA may terminate the Project Deed, by giving AML and the Trustee 30 days' notice, if:

- It is entitled to do so at general law, after a failure by AML and the Trustee to comply with a “remedy notice” issued by the RTA.
- AML commits a substantial breach of the Lease and fails to comply with a “remedy notice” issued by the RTA.
- A new or additional trustee of the Airport Motorway Trust is appointed without the RTA's consent, unless the effect of this is overcome to the RTA's satisfaction within the 30-day notice period.
- The Airport Motorway Trust is terminated, unless the effect of this is overcome to the RTA's satisfaction within the 30-day notice period.

Under the RTA Consent Deed, a copy of the termination notice must also be provided to the project debt financiers' Security Trustee and Agent, and the Project Deed may not be terminated if this is not done.

If the termination notice is based on either of the first two grounds listed above, AML and the Trustee may suspend the RTA's right to terminate the Project Deed for 12 months if all of their debts under the project's debt financing arrangements have not been repaid.

They may do so by giving a written notice to the RTA within 14 days of receiving the RTA's notice of termination. Under the RTA Consent Deed, their debt financiers' Agent may do this on their behalf.

Under the Project Deed, if AML and the Trustee remedy the default within the 12 months, the Project Deed will remain in force. The same will also apply if, within the 12 month period, the default ceases to exist, or the RTA is compensated in a manner reasonably acceptable to it for any damage or cost it has incurred, or the RTA, AML and the trustee agree on amendments to the contracts to remedy the default in a manner reasonably satisfactory to the RTA. If none of these occurs, the Project Deed will automatically terminate 12 months after the date of the RTA's termination notice.

Notwithstanding these provisions, under the RTA Consent Deed the RTA must extend the 12-month suspension period, as requested by AML or the debt financiers' Security Trustee, to a total of up to 24 months, if the Security Trustee or the debt financiers' Agent are using reasonable endeavours to remedy the default.

Further, under the RTA Consent Deed the RTA may not terminate the Project Deed if:

- The Minister for Roads or the RTA are in material breach of any of their obligations under the Project Deed or the Lease, or
- The Lease has not been registered and the Agent notifies the RTA that a proposed purchaser of the rights and obligations of AML and the Trustee under the Project Deed, the Lease, the RTA Deed of Charge, the RTA Consent Deed and the PAFA Act Guarantee — as described above and in section 4.2 below — requires the Lease to be registered before completing this acquisition.

No compensation is payable by the RTA if it lawfully terminates the Project Deed for an AML or Trustee default in accordance with the provisions described above.

Termination for RTA defaults

AML and the Trustee may terminate the Project Deed, by giving the RTA 30 days' notice, if:

- The RTA or the Minister for Roads have breached a series of warranties and undertakings they have made in the Project Deed — concerning the powers of the RTA, AML and its contractors, the validity of the project's contracts, its planning approval and State Environmental Planning Policy 51, the compliance of works under the *Scope of Works and Technical Criteria* with the project's planning approval, and non-interference with the performance by AML and the Trustee of their obligations under the contracts — and because of this breach a court has made a final determination (i.e. not subject to appeal) that AML may not construct, maintain, operate or repair the Eastern Distributor or levy or keep its tolls in accordance with the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.
- More generally, a court has made a final determination preventing AML from constructing, maintaining, operating or repairing the Eastern Distributor, or levying or keeping its tolls, in the manner contemplated by the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, and this court determination did not result from a wrongful act or default by AML or its contractors.
- New NSW legislation (including rules, regulations and by-laws) prohibits or effectively prohibits AML from constructing, maintaining, operating or repairing the Eastern Distributor, or levying or keeping its tolls, in the manner contemplated by the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

- A government authority resumes any part of the Eastern Distributor, its ancillary works or land or its associated licensed areas or easements, and this has a material adverse effect on AML's ability to construct, maintain, operate or repair the Eastern Distributor, or levy or keep its tolls, in accordance with the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.
- The Minister for Roads fails to declare any parts of the Eastern Distributor that have not already been declared as a tollway under section 52 of the Roads Act, and/or fails to direct the RTA to assume responsibility for all of the tollway in accordance with section 63 of the Roads Act, by the time the Eastern Distributor (other than the William Street ramps) is open to traffic.
- The Minister for Roads or the RTA breaches any obligation under the Project Deed or the Lease and AML is prevented from constructing, maintaining, operating or repairing the Eastern Distributor, or levying or keeping its tolls, in the manner contemplated by the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

The RTA may suspend the rights of AML and the Trustee to terminate the Project Deed for 12 months, by giving them a notice to this effect within 14 days of receiving their termination notice.

If the relevant event is remedied by the RTA within the 12 months, or if it ceases to exist, the Project Deed will remain in force. Otherwise, the Project Deed will automatically terminate 12 months after the date of the AML's and Trustee's termination notice.

During the suspension period,

- AML and the Trustee must continue to perform their obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed if this is lawful and it is practicable for them to do so.
- If the termination notice was issued before all of the Eastern Distributor (including the William Street ramps) is open to traffic, the RTA must pay AML and the Trustee the increased project costs actually incurred by them, prior to the opening of all the motorway to traffic, as a result of any delay caused by the event that led them to issue the termination notice, *plus* an amount equal to any income tax payable on these RTA payments by AML and/or the Trustee. These increased costs are to be determined, to the RTA's satisfaction, by reference to the "base case" financial model, and the payments are to be made monthly in arrears.
- If the termination notice was issued after all of the Eastern Distributor (including the William Street ramps) is open to traffic, the RTA must pay AML and

the Trustee the amount they would have received from toll collections, *plus* an amount equal to any income tax payable on these RTA payments by AML and/or the Trustee. Again, these payments are to be made monthly in arrears.

If the Project Deed is terminated by AML and the Trustee on any of the bases summarised above,

- The Minister for Roads must pay AML and the Trustee, jointly and within 30 days, an "early termination amount" equal to the sum of —
 - Their debts to the project's debt financiers on the termination date, excluding any penalty rates of interest, and
 - An amount sufficient to give the Airport Motorway Trust and AM Holdings the ability to give the project's equity investors (treated as "notional initial investors") the real after-tax internal rate of return that the "base case" financial model — as updated to reflect the project's actual performance, and having regard to past, present and projected circumstances — forecasts they will receive to the termination date.

According to the Project Facility Agreement between the private sector parties and their debt financiers, the debt commitments aggregate to \$493 million and the equity investments will reach \$203 million.

The amount to be paid by the Minister is to take account of amounts previously received by the Airport Motorway Trust and AM Holdings.

Any dispute about the calculation of this "early termination amount" may be referred for binding expert determination, as discussed in section 3.6 above.

- The RTA and the Minister for Roads must compensate AML and the Trustee for any damage, expense, loss or liability they incur because of the termination, having regard to any losses during the suspension period (if any), the payment of the "early termination amount" described above and any amounts payable by a resuming government authority, if the Project Deed has been terminated because of a land resumption.

These damages will include, without double counting, an amount sufficient to enable AML to give the project's equity investors (treated as "notional initial investors") the real after-tax internal rate of return that the "base case" financial model — as updated to reflect the project's actual performance, and having regard to past, present and projected circumstances — forecasts they would have received over the full 48-year operating term had the Project Deed not been terminated.

The amount to be paid by the Minister and the RTA is to take account of amounts previously received by

AML, including the “early termination amount”, and is to be discounted (at 10% per annum) to take account of its early receipt and the returns available on investments of a similar nature.

Any dispute about the calculation of these damages may be referred for binding expert determination, as discussed in section 3.6 above.

Had the Project Deed been terminated for an RTA default

before there had been significant work on the project — estimated at two months at the time the Project Deed was signed — the RTA would have had to indemnify AML and the Trustee for their actual damage, expense, loss or liability as a result of the termination, including all accountable project costs and all reasonable overheads and returns, but would not have been liable to pay the component of damages calculated to give the equity investors their forecast returns over the full operating term of 48 years.

4 The RTA Deed of Charge and the RTA Consent Deed

4.1 The RTA Deed of Charge

Under the RTA Deed of Charge of 28 July 1997 between the RTA, AML and the Trustee, as amended by an Amending Deed (RTA Deed of Charge) of 12 August 1997 between the RTA, AML and the Trustee, each of AML and the Trustee has granted the RTA a fixed and floating charge over all its present and future undertakings, assets and rights — in the Trustee’s case, in its capacity as trustee of the Airport Motorway Trust, as discussed in section 2.4 above — as security for the due and punctual performance of all its obligations to the RTA, including, in particular, its obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

AML and the Trustee have warranted that there are no encumbrances over their charged property other than the encumbrances created by the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed and other specified encumbrances arising in the course of their carrying out their obligations under these contracts.

They have also pledged not to deal, sell or part with possession of their charged property, or create any interest or encumbrance over their property other than to their debt financiers or otherwise as permitted by the RTA, and have pledged that their subsidiary companies will do likewise.

As already indicated, the relative priorities of the charges created by the RTA Deed of Charge and other securities to secure the obligations of the Trustee and AML to the project’s debt financiers are governed by the RTA Consent Deed, discussed in section 4.2 below. Once all the project’s debt financiers have been fully repaid, the RTA Deed of Charge will rank ahead of all other securities affecting the property of AML and the Trustee.

Subject to the RTA Consent Deed, the charges created by the RTA Deed of Charge may be immediately enforced by the RTA, without the need for any demand or notice, if:

- The RTA becomes entitled to terminate the Project Deed at general law, after a failure by AML and the Trustee to comply with a “remedy notice” issued by the RTA under the Project Deed,

- AML commits a substantial breach of the Lease and fails to comply with a “remedy notice” issued by the RTA,
- A new or additional trustee of the Airport Motorway Trust is appointed without the RTA’s consent, unless the effect of this is overcome to the RTA’s satisfaction, or
- The Airport Motorway Trust is terminated, unless the effect of this is overcome to the RTA’s satisfaction,

and the event of default is continuing unremedied and has not been waived, and the RTA’s right to terminate the Project Deed because of the default has not been suspended.

In these circumstances, and again subject to the RTA Consent Deed, the RTA may appoint a receiver or a receiver and manager of the charged property, exercising powers set out in the RTA Deed of Charge, and this receiver and any RTA officer may exercise specified powers of attorney.

In addition to the specific powers granted to the RTA under the RTA Deed of Charge, the deed authorises the RTA, in the event of any default by AML or the Trustee in fully and punctually performing any of their express or implied obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, to do all things the RTA believes necessary or desirable to make good the default in accordance with these contracts.

Under the RTA Deed of Charge and the Intercreditor Deed of 28 July 1997 between the RTA, AML, National Australia Bank Limited, Macquarie Bank Limited and four infrastructure bond issuers lending money to AML (Airport Motorway Infrastructure No 1 Limited, Airport Motorway Infrastructure No 2 Limited, Airport Motorway Infrastructure No 3 Limited and Airport Motorway Infrastructure No 4 Limited), all of the RTA’s powers under the RTA Deed of Charge are also subject to the prior rights of these infrastructure bond lenders concerning specified infrastructure bond accounts under the Intercreditor Deed and other infrastructure bond documents.

4.2 The RTA Consent Deed

The RTA Consent Deed of 15 August 1997, between the Minister for Roads, the RTA, AML, the Trustee and National Australia Bank (both as Security Trustee for the project's debt financiers under a Debenture Stock Trust Deed and as Agent for the debt financiers under the Project Facility Agreement),

- Records the RTA's consent to the securities held by the Security Trustee on behalf of the private sector debt financiers,
- Records the consent of the Security Trustee and the Agent to the RTA Deed of Charge,
- Sets out the relative priorities of these securities and the RTA Deed of Charge, and
- Regulates some of the rights of the RTA and Minister for Roads under the Project Deed and other project contracts.

The RTA Consent Deed's provisions in relation to project debt refinancing, the application of certain insurance proceeds, dispute resolution, contract renegotiations and defaults by AML and the Trustee under the Project Deed, including the "step in and cure" rights of the Security Trustee and Agent, have already been discussed in sections 3.6, 3.7 and 3.8 above. Other key provisions of the RTA Consent Deed are summarised below.

Ranking of securities

With the exception of what are termed "RTA priority moneys" — any amounts AML or the Trustee owe to the RTA because the RTA has taken action to remedy a default by AML or the Trustee under Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed, under the provisions of the Project Deed discussed in section 3.8 above, but only in relation to the RTA's reasonable costs in the operation and routine maintenance of the Eastern Distributor — each of the debt financiers' securities has priority over any RTA security over the same property.

Accordingly, any money received by the Security Trustee, the RTA or any receiver, receiver and manager or attorney on enforcement of a debt financiers' security or the RTA Deed of Charge, as the case may be, is to be applied:

- First, to pay any "RTA priority moneys",
- Second, to pay all sums of money secured from time to time by the debt financiers' securities, and
- Third, to pay all other sums of money secured from time to time by the RTA Deed of Charge.

Similarly, if a receiver or controller takes possession of any property under any of the debt financiers' securities, that person may immediately, upon notice to the RTA, assume

control from any receiver or controller of the same property appointed under the RTA Deed of Charge.

Limits on enforcement actions by the RTA

Subject to the RTA's rights to terminate the Project Deed for an AML or Trustee default, as discussed in section 3.8 above, until all the project's debt financiers have been fully repaid the RTA may not, without the prior consent of the Security Trustee,

- Accelerate the payment of any amounts owing to the RTA, including any "concession fee" promissory notes issued by AML under the Project Deed, unless the project's debt financiers have declared that the amounts they are owed are prematurely due and payable under the project's debt financing arrangements.
- Demand payment, or present any promissory note issued by AML under the Project Deed, other than in accordance with the Project Deed.
- Enforce any debt owed to the RTA by AML or the Trustee, by execution or otherwise.
- Crystallise the floating charge in the RTA Deed of Charge.
- Enforce any RTA Deed of Charge security by sale, possession, the appointment of a receiver or otherwise.
- Take any insolvency or similar action against AML or the Trustee.

Enforcement actions by the Security Trustee

Subject to the debt financiers' securities, the Security Trustee may:

- Appoint a receiver or agent to exercise any or all of AML's and the Trustee's rights, and perform some or all of their obligations, under the Project Deed, the Lease, the RTA Deed of Charge, the RTA Consent Deed and the PAFA Act Guarantee.
- Engage others reasonably acceptable to the RTA to perform some or all of these obligations, or permit them to be engaged by a receiver or agent appointed by the Security Trustee.
- Dispose of any or all of AML's and the Trustee's rights and obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

Before any such disposal, AML, the Trustee or the Security Trustee must provide the RTA with details of the proposed purchaser(s) and the terms and conditions of the proposed disposal, and obtain the RTA's consent. The RTA may not withhold its consent if:

- The proposed purchaser is a reputable corporation with sufficient expertise and ability and a sufficiently high

financial and commercial standing to properly carry out AML's and the Trustee's obligations

- The proposed purchaser agrees to be bound by the terms of the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed, and
- AML and the Trustee give the RTA details of the proposed sale.

The RTA Consent Deed sets out requirements for novations of the project contracts to accompany such a sale.

Access to Eastern Distributor land following a finance default

If AML or the Trustee default on their obligations to their debt financiers and the Security Trustee advises the RTA of its desire to exercise its resultant rights under the debt financing arrangements' securities, the RTA must ensure that the Security Trustee, the Agent and their agents, receivers or receivers and managers, or any of their contractors, subcontractors or employee workers,

- Are granted access to the Eastern Distributor land under the licence granted to AML and the Trustee under the Project Deed (see section 3.3 above), and
- Have rights (but not obligations) equivalent to those of AML under the Project Deed, with the Security Trustee effectively stepping into the shoes of AML for the purpose of receiving the benefit of undertakings by the Minister for Roads and the RTA in the Project Deed. (AML's obligations under the Project Deed will continue.)

Amendment of project contracts

The RTA and the Minister for Roads may not amend the terms of the Project Deed, the Lease, the RTA Deed of

Charge, the RTA Consent Deed or the PAFA Act Guarantee without the Agent's prior consent, which may not be unreasonably withheld or delayed.

Similarly, the Security Trustee and the Agent may not amend the terms of the project's debt financing arrangements, so as to affect the project debt, the payback period, the amortisation requirements or the interest, fees and margins, without the RTA's prior consent. The RTA may not unreasonably withhold or delay its consent if the amendment will not worsen the RTA's position under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed.

Restrictions on RTA dealings

The RTA may not transfer or otherwise dispose of its interest in the Eastern Distributor, its ancillary works and land, associated licensed areas and easements, the Project Deed, the Lease, the RTA Deed of Charge or the RTA Consent Deed without the Agent's prior consent. The Agent may not unreasonably withhold or delay its consent if the obligations of the transferee or assignee to AML and the Trustee under these contracts will continue to be guaranteed by the State of NSW under the PAFA Act Guarantee.

Similarly, the RTA may not assign, transfer or dispose of any debt owed to it by AML or the Trustee, or part with possession of any promissory notes issued by AML under the Project Deed, without the prior approval of AML, the Agent and the Security Trustee. In the case of any promissory note, this approval may be withheld unless each party is satisfied that the new holder of the promissory note will be bound by the restrictions in the Project Deed and the RTA Consent Deed on making demands on these notes, and will be bound to ensure that any subsequent holder of the note will be similarly bound.

5 The PAFA Act Deed of Guarantee

Under the Public Authorities (Financial Arrangements) Act Deed of Guarantee of 14 August 1997, between the Treasurer (on behalf of the State of NSW), the RTA, AML, the Trustee and National Australia Bank (as the debt financiers' Agent and Security Trustee), the State of NSW unconditionally and irrevocably guarantees the RTA's performance of all its obligations under the Project Deed, the Lease, the RTA Deed of Charge and the RTA Consent Deed to all the other parties to these contracts.

This guarantee is a continuing obligation, remaining in force until seven months after the term of these contracts, or until seven months after any earlier termination of the contracts.

The State's liability under the guarantee will continue even if the RTA is discharged from any or all of its guaranteed obligations under the contracts for any reason whatsoever.

The State must perform the obligations it has guaranteed within 21 days of a demand being made by any of the other parties to the guaranteed contracts. Such a demand may be made if a demand has previously been made on the RTA and the RTA has failed to perform within 21 days.

In turn, the RTA has indemnified the State, the Treasurer and the NSW Government against any and all of the liabilities they may incur because of the Deed of Guarantee.

6 Economic benefits and costs

A series of economic evaluations of the Eastern Distributor project have been undertaken over the last year, using a variety of assumptions and modelling techniques. All of these studies suggest the Eastern Distributor will bring substantial economic benefits to the community, and that these benefits will be much greater than the project's economic costs.

The assumptions and predictions of these studies are summarised in *Table 1*.

The economic benefits taken into account in the studies include:

- Travel time savings, as estimated from traffic modelling studies (in all of the studies, these travel time savings are by far the largest single economic benefit, and are much greater than *all* the economic costs)
- Reduced accident costs
- Amenity improvements, assessed in terms of increased property values, and
- The residual value of the Eastern Distributor assets at the end of the studies' evaluation period.

The costs taken into account include:

- Construction costs
- Land acquisition and disturbance costs
- Road maintenance costs, and

- Vehicle operating costs.

The economic evaluation study summarised in the November 1996 *Environmental Impact Statement*, by Rust PPK, was based on the Eastern Distributor as it was then envisaged, before the project was substantially modified and expanded in the light of submissions responding to the EIS. The later studies whose predictions are summarised in *Table 1* have examined both this original proposal and the finally modified project, and have also tested the effects of using different models to predict future traffic volumes and the effects of changed assumptions about tolls, the valuation of travel time, construction-phase disruption and time penalties at tolling booths.

The costs and benefits associated with "externalities" such as increases and reductions in air or noise pollution, other than the project's amenity impacts, were not quantified in the studies, because of a lack of recognised methodologies or guidelines for such costings.

However, qualitative assessments of these factors suggest their economic impacts would be swamped by the economic impacts of the major benefits (travel time savings and, in some of the studies, vehicle operating cost savings) and the major costs (construction costs, road maintenance costs, land acquisition costs and, in some of the studies, the costs of disruption during construction).

Table 1. Results of economic evaluations of the Eastern Distributor

Evaluation	Net present value (1996 \$, @7% real)	Benefit:cost ratio
Original <i>Environmental Impact Statement</i> , November 1996 (Rust PPK, Eastern Distributor before modifications, using TRACKS traffic forecasting model for a "low" traffic scenario, with travel time valued at \$15.02/hour)	\$513 million	2.3
RTA <i>Representations Report</i> , April 1997 (Rust PPK, Eastern Distributor with modifications, using TRACKS traffic forecasting model for a "low" traffic scenario, with travel time valued at \$15.02/hour)	\$378 million	1.7
RTA <i>EIS Revised Economic Analysis</i> report, June 1997 (Rust PPK, Eastern Distributor with higher tolls, using Long Technical traffic forecasting model with travel time valued at \$12.50/hour and taking account of construction-phase disruption)	<i>Tunnel only:</i> \$992 million <i>As now being built:</i> \$1,971 million	<i>Tunnel only:</i> 3.8 <i>As now being built:</i> 4.5
June 1997 environmental impact assessment report by Director-General, Department of Urban Affairs and Planning (as for the study above, but with travel time savings "frozen" at 2001 levels)	<i>Tunnel only:</i> \$715 million <i>As now being built:</i> \$1,146 million	<i>Tunnel only:</i> 3.0 <i>As now being built:</i> 3.0

The June 1997 environmental impact assessment report by the Director-General of the Department of Urban Affairs and Planning concluded that the project's benefits will be sufficiently high to "significantly outweigh any tangible adverse impacts that are not amenable to costing". This report also concluded that the then-proposed and now adopted modifications to the project would assist in the reduction of environmental impacts, and stated, "Therefore the additional costs involved could be considered to indirectly reflect environmental and social values."

Other economic studies, examined but not used by the RTA as part of the decision-making process, show even higher economic benefits than those summarised in *Table 1*, with benefit:cost ratios of between 7.0 and 8.5. On the basis of these studies, the State Chamber of Commerce published a report in April 1997, *Driving Ambition — the Economic Case for the Eastern Distributor*, which claimed that the net economic benefits of the Eastern Distributor project are likely to be around \$3 billion and that the overall impact will be positive for the business community of Sydney and the State's economy.

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