



NorthConnex Project

Contracts Summary



This report is a summary document and should not be relied upon for legal advice. This report is not intended for use as a substitute for the actual contracts.

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Introduction

1. Introduction

This report has been prepared by Roads and Maritime Services (**RMS**) in accordance with the public disclosure requirements of the New South Wales Government's August 2012 *NSW Public Private Partnerships Guidelines (PPP Guidelines)*.

It provides a high level summary of the NorthConnex Project and the key features of the Project Deed entered into between RMS and NorthConnex Company Pty Ltd ACN 602 719 513 (**Project Company**) on 31 January 2015 and related documents (together the **Project Documents**) which have been procured under the Unsolicited Proposals – Guide for Submission and Assessment dated February 2014 (**Unsolicited Proposals Guidelines**).

The Project Deed (excluding any commercial-in-confidence material) has been published on the Transport for NSW website in accordance with Government policy and the *Government Information (Public Access) Act 2009 (NSW) (GIPA Act)*.

This report is based on the contract Project Documents as at 2 March 2015, being the date on which the last of the Project Documents (the Deed of Appointment of Environmental Representative) was executed. Amendments of, or additions to, the Project Documents after this date (if any) are not reflected in this report.

Unless otherwise defined in this report, capitalised terms used in this report have the meaning given to those terms in the Project Documents (which are available for download at <http://www.rms.nsw.gov.au/business-industry/partners-suppliers/tenders-contracts/contracts-awarded/class-3-contract-documents.html>).

2. The NorthConnex Project

NorthConnex will be a motorway link of approximately 9 km in length, mostly in tunnel, from the southern end of the M1 (Pacific Highway) at Wahroonga to the M2 Motorway at its existing Pennant Hills Road interchange.

The Project route is shown in Figure 2.1 below:

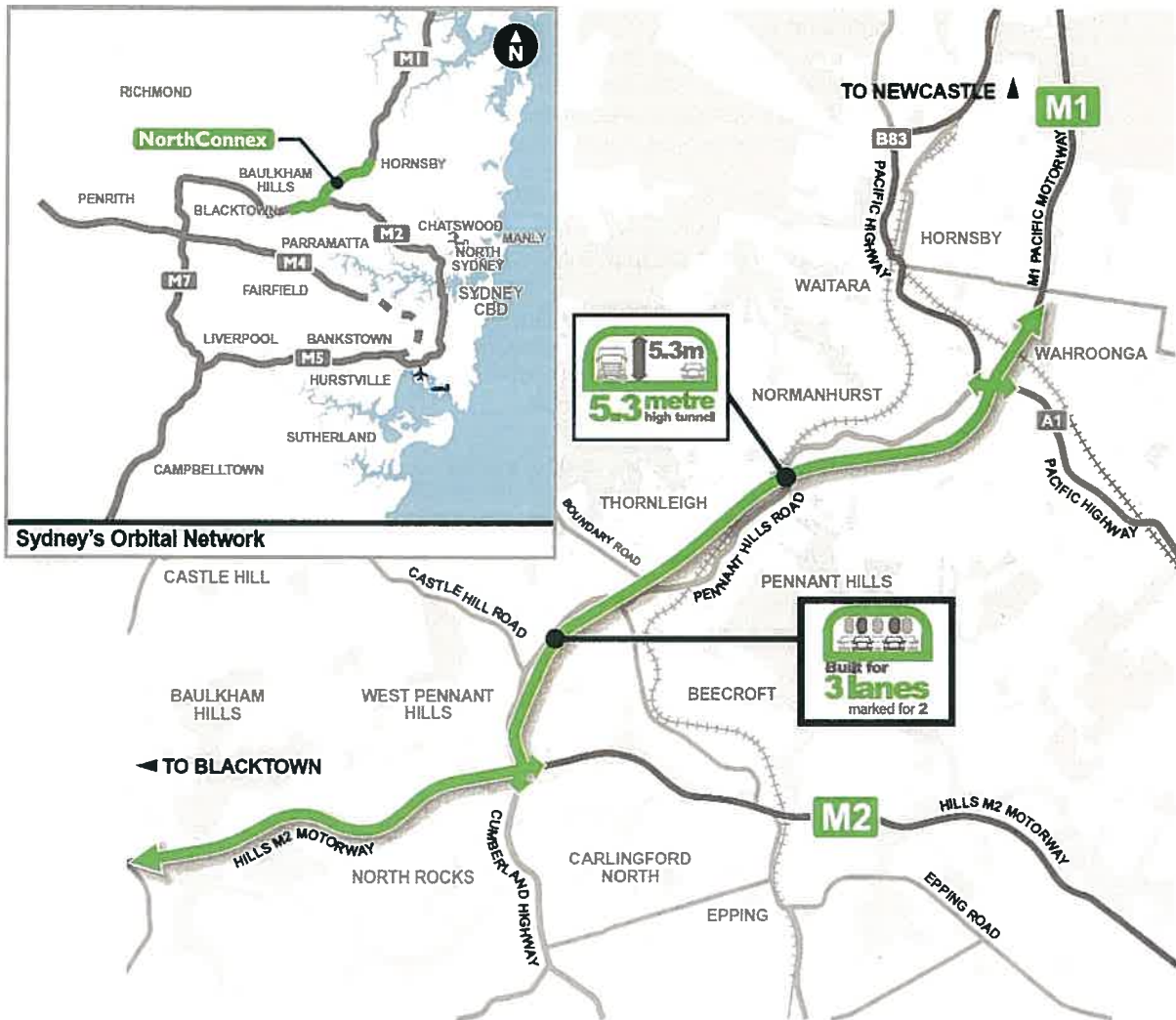


Figure 2.1: NorthConnex – linking Sydney's Orbital road network

Key features of the project include:

- (a) Twin motorway tunnels up to around nine kilometres in length with two lanes in each direction. The tunnels would be constructed with provision for a possible third lane in each direction if required in the future.
- (b) A northern interchange with the M1 Pacific Motorway and Pennant Hills Road, including sections of tunnel for on-ramps and off-ramps, which also facilitate access to and from the Pacific Highway.
- (c) A southern interchange with the Hills M2 Motorway and Pennant Hills Road, including sections of tunnel for on-ramps and off-ramps.
- (d) Integration work with the Hills M2 Motorway including alterations to the eastbound carriageway to accommodate traffic leaving the Hills M2 Motorway to connect to the Motorway travelling northbound, and the provision of a new westbound lane on the Hills M2 Motorway extending through to the Windsor Road off-ramp.
- (e) Tie-in work with the M1 Pacific Motorway extending to the north of Edgeworth David Avenue.
- (f) Tunnel systems and Tunnel ventilation system with air outlets at the north and the south.
- (g) A motorway operations complex located near the southern interchange on the corner of Eaton Road and Pennant Hills Road that includes operation and maintenance facilities.
- (h) Two tunnel support facilities incorporating emergency smoke extraction outlets and substations.
- (i) The project received planning approval on 13 January 2015, subject to a number of conditions of approval.



3. History and Development of the NorthConnex Project

3.1 Development of the NorthConnex Project

In 2002, the Australian Government commissioned an investigation to identify a preferred option for a new link through northern Sydney between the F3 Freeway (now the M1 Pacific Motorway) and the Sydney Orbital Network (being the Hills M2 Motorway and the Westlink M7 Motorway). The findings and recommendations of this investigation are detailed in the *F3 to Sydney Orbital Link Study* (SKM, 2004).

In 2007, a review of the 2004 report was undertaken by the Honourable Mahla Pearlman AO (former Chief Judge of the NSW Land and Environment Court) at the request of the Australian Government.

The 2007 Pearlman Review found that there was no case for altering the conclusions reached in the 2004 report and that a road link based on the purple corridor alignment option as determined by the *F3 to Sydney Orbital Link Study* (SKM 2004) was preferred. This corridor has been used for the NorthConnex Project.

The *NSW Long Term Transport Master Plan (Master Plan)* (Transport for NSW, 2012), which was released in December 2012, presents the NSW Government's direction for transport planning and investment for the next 20 years. It identifies the key challenges that the NSW transport system must address to support the State's economic and social performance, and identifies a planned and coordinated set of actions to address those challenges.

The Master Plan addresses the need to alleviate congestion on Sydney's motorway network using an integrated package of solutions that tackle issues relating to both supply and demand. The completion of the motorway network is identified as a high priority in the Master Plan, including linking the M1 Pacific Motorway and the Hills M2 Motorway (i.e. the NorthConnex Project).

Sydney's motorway network is part of the primary freight network in Sydney and its efficient operation is critical to ongoing productivity. In providing an efficient link between the M1 Pacific Motorway and the Hills M2 Motorway, the project would improve freight access, connectivity and reliability across the greater Sydney area.

3.2 Project objectives

The strategic objectives of the NSW Government and RMS for the NorthConnex Project are:

- (a) to provide a high standard access controlled motorway that integrates with the regional transport network
- (b) to minimise adverse social and environmental impacts in the local area during construction and operation
- (c) to provide opportunities for improved public transport in the area around Pennant Hills Road
- (d) that the NorthConnex Project will assist RMS and others to reduce traffic congestion, particularly along Pennant Hills Road, and to provide quicker travel times for road users
- (e) to ensure the Motorway is safe and reliable for road users
- (f) that the NorthConnex Project will achieve the national objective of connecting Melbourne to Brisbane via a duplicated highway in order to improve the efficient movement of the state and national freight tasks, reducing costs for freight operators and carriers

- (g) that the NorthConnex Project will contribute to reduce the number of heavy vehicles using Pennant Hills Road and as a result contribute to improvements in local air quality, reduce traffic noise and lead to the reduction of heavy vehicle traffic in local streets
- (h) that the NorthConnex Project will demonstrate excellence in design and environmental sustainability
- (i) that the NorthConnex Project will be economically justified and affordable to government and that completion of the NorthConnex Project will be achieved on time and on budget.

3.3 Cost benefit analysis

The project was compared against a “do-nothing” Base Case using a discounted cash-flow technique. The evaluation period for the economic appraisal was 35 years (i.e. 2014 to 2048). All values over the construction and operating period were expressed in December 2013 values (without inflation).

Table 3.1 shows the results of the economic appraisal.

Economic measure	Result
Present value (\$m):	
• capital / recurrent costs	2,300.9
• benefits	4,878.9
Net present value (NPV)	2,578.0
Benefit-cost ratio range (BCR)	2.12

Table 3.1: Results of economic appraisal – project incremental to the Base Case

The project is expected to produce a net economic benefit which exceeds the investment threshold for TfNSW - i.e. a BCR of 2.12 and an NPV of \$2.58bn. The BCR falls to 1.45 when a sensitivity test is conducted at a discount rate of 10%.

The approach to the economic analysis was consistent with the Treasury and TfNSW economic appraisal guidelines.

3.4 The Unsolicited Proposal

The procurement process for the NorthConnex Project was through an unsolicited proposal from Transurban Limited (**Transurban**), Canada Pension Plan Investment Board (**CPPIB**) and QIC Private Capital Pty Ltd, on behalf of its managed clients (**QIC**) (together the **Sponsors**). The unsolicited proposal for the NorthConnex Project was assessed in accordance to the Unsolicited Proposals Guidelines.

Key phases and dates are outlined in Table 3.2 below:

Unsolicited Proposal (Stage 1) submitted by the Sponsors	March 2012	Government subsequently agreed that a stage 2 submission should be provided.
Unsolicited Proposal (Stage 2 - detailed proposal) submitted by the Sponsors	Dec 2012	Government subsequently (May 2013) agreed to proceed to Stage 3 of the unsolicited proposal process (submission of a final binding offer) on the basis that a competitive Design and Construction tender be conducted.
Design and Construction tender process and selection of the preferred D&C tenderer	16 March 2014	Lend Lease Engineering Pty Limited and Bouygues Construction Australia Pty Ltd (together the Contractor) were selected as preferred D&C tenderer following an open competitive tender process to design and build the Motorway.
Unsolicited Proposal (stage 3 - Final Binding Offer) submitted by the Sponsors, conditional on finalising limited outstanding commercial matters and obtaining a Planning Approval	27 November 2014	Government subsequently agreed to accept the Final Binding Offer, subject to acceptable finalisation of limited outstanding issues including receipt of Planning Approval.
Contract/ Financial Close of the NorthConnex Project	31 January 2015	<p>Planning approval was received on 13 January 2015. The parties executed the Project Documents (other than the Deed of Appointment of Environmental Representative) on 31 January 2015.</p> <p>The conditions precedent to those Project Documents were satisfied at this time.</p> <p>The Deed of Appointment of Environmental Representative was executed on 2 March 2015.</p>

Table 3.2: Key Phases of the Unsolicited Proposal Process

3.5 D&C procurement process

As part of the unsolicited proposal, the Sponsors carried out a competitive tender process for the design and construction contract for the NorthConnex Project.

The tender process was developed based on the Sponsors' objective of identifying a contractor who would provide the best offer to undertake the design and construction of the Motorway and that will result in:

- (a) the likely financial transaction being less than the approved budget of \$2.65 billion
- (b) an acceptable likelihood of obtaining planning approval within the required timeframe
- (c) acceptable Whole-of-Life costs during operations
- (d) ease of operation and maintenance
- (e) a high level of user experience during operations.

As part of the agreed procurement strategy these objectives were endorsed by RMS.

The selection of a contractor to design and construct the Motorway involved the following two-stage process:

- (a) Stage 1 - Expression of Interest
- (b) Stage 2 - Request for Tenders and selection of the preferred D&C contractor following negotiations and tender refinements.

Stage 1 of the selection process was completed on 19 August 2013 when the Sponsors invited Thiess John Holland Joint Venture, Globalink Joint Venture (a joint venture between Acciona and Ghella) and Lend Lease Bouygues Joint Venture to submit lump sum tenders to undertake the design and construction of the Motorway on the terms of the tender documents.

As part of Stage 2 of the selection process, all three invited tenderers submitted tenders for the design and construction of the Motorway on 29 November 2013.

Stage 2 of the selection process included the following two phases:

- (a) Phase A – Initial Review and Assessment of Affordability
- (b) Phase B – Detailed Evaluation.

The evaluation was completed at the end of February 2014, allowing the preferred tenderer to be announced on 16 March 2014.

4. Evaluation criteria and weightings

4.1 Unsolicited proposal

The evaluation criteria used to evaluate the unsolicited proposal are set out in the Unsolicited Proposals Guidelines and are summarised in Table 4.1 below.

Uniqueness	<ul style="list-style-type: none">• Demonstration of unique benefits of the proposal and the unique ability of the proponent to deliver the proposal
Value for Money	<ul style="list-style-type: none">• Does the proposal deliver value for money to the NSW Government
Whole of Government Impact	<ul style="list-style-type: none">• What is the opportunity cost for Government
Return on Investment	<ul style="list-style-type: none">• Proposed return on Investment to the proponent proportionate to the proponent's risks, and industry standards
Capability and Capacity	<ul style="list-style-type: none">• Proponent's experience, capability and capacity to carry out the proposal
Affordability	<ul style="list-style-type: none">• Requirement and extent of Government funding
Risk Allocation	<ul style="list-style-type: none">• Risks allocation between the proponent and by the Government

Table 4.1: Evaluation Criteria for Unsolicited Proposals

4.2 D&C tender evaluation process

The criteria used to assess the D&C tenders are described in Table 4.2.

Price Criteria	
1	Comparative Price (Adjusted Capital Cost)
2	Comparative Price (NPV of Whole of Life Costs)
Technical Criteria (non price)	
3	Effective methodology for the delivery of the Contractor's Activities to recognise, manage and resolve issues and to minimise project risks including satisfaction of community expectations and addressing environmental, sustainability and safety requirements.
4	Appropriate design proposals that comply with the requirements of the D&C Deed and minimise unfavourable change to the proposed Scope of Works and Technical Criteria (SWTC) including durability, whole of life performance and functional performance (including environmental and sustainability requirements).
5	Appropriate and effective on site and off site, human and physical resources, systems and organisational structure.
6	Design proposals that provide a high level of road user satisfaction during operations.
7	Level of innovation and interaction during the tender process.
Planning Approval Risk Based on Proposed Scheme (non price)	
8	Likelihood of getting Planning Approval

Table 4.2: D&C tender assessment criteria

The weightings used for the evaluation are summarised in Table 4.3 below.

Assessment Item	Approved Weighting
Price Assessment	30%
Non-Price Assessment	70%

Table 4.3: Evaluation weightings used for D&C tender assessment

5. Results of the public sector comparator (PSC)

In addition to addressing the unsolicited proposal criteria above, including value for money, a Public Sector Comparator was developed in stage 2 for completeness and consistency with the Unsolicited Proposals Guidelines and the NSW PPP Guidelines.

For most Public Private Partnerships (PPP), the PSC is a useful quantitative indicator of value for money because there is a bona fide alternative to a PPP, via traditional Government procurement and funding (the reference project). For economic infrastructure, the PSC is structured as a value of business model, assuming a State Owned Corporation would be the traditional Government sector delivery vehicle, earning a commercial rate of return on revenues derived largely from user charges.

For the NorthConnex Project, the results of the PSC indicated that a dedicated State Owned Corporation (with an assumed BBB credit rating) could only support a capital investment of around \$600m in NPV terms from net Motorway toll revenues, resulting in a funding shortfall of \$1.7 billion in NPV terms. It was assessed that traditional delivery and funding of the NorthConnex Project was not affordable or viable from the State Government's perspective, given the Government's current budget position and commitment to other infrastructure projects, including WestConnex.

The NorthConnex Project PSC results illustrate that the usefulness of the NorthConnex Project PSC was limited to indicating the capital funding shortfall inherent in a traditional Government procured NorthConnex Project, rather than being a genuine quantitative indicator of value for money. This is because the NorthConnex Project is not financially viable based on Motorway toll revenues alone given the estimated project cost of around \$3 billion. Under the terms of the Unsolicited Proposal the M7 concession shareholders proposed to secure these alternative funds from changes to the existing M7 concession, supplemented with State and Commonwealth Government contributions.

6. Public interest evaluation

The Public Interest Evaluation considers each of the eight public interest criteria as set out in the PPP Guidelines. These are:

- (a) effectiveness in meeting government objectives
- (b) achieving better value for money
- (c) community consultation
- (d) consumer rights
- (e) accountability and transparency
- (f) public access
- (g) health and safety
- (h) privacy.

The following summarises the outcome of the NorthConnex Project's Public Interest Evaluation.

Meeting Government objectives

The NorthConnex Project proposal complies with NSW and Commonwealth Government objectives, including the Strategic plan, short and long term transport plans, development plans and employment policies. The proposal is consistent with overarching RMS objectives, budget and delivery strategy.

Achieving value for money

The proposal provides a key strategic link in the Sydney road network through a PPP model that would not be possible for the Government to deliver through a traditional funding model. The proposed level of user charge and the contribution from the taxpayer are considered reasonable considering the benefits that will eventuate from this piece of infrastructure.

Community consultation

The proposal includes a comprehensive community consultation strategy that identifies the key community stakeholders affected or with an interest in the proposal and the ways in which they will be engaged throughout the life of the proposal. The strategy identifies how the community's contribution will be considered and addressed. The Environmental Impact Statement (EIS) is a key tool in the community consultation strategy along with the proposed Submissions Report.

Consumer rights

The construction and operation of the Motorway will comply with the relevant consumer rights and Government policies. Measures to comply with legislation and Government policies will be included in construction management plans and management strategies.

Accountability and transparency

There has been a considerable amount of community engagement throughout the development phase of the NorthConnex Project proposal to date and it is expected that this will continue through the life of the NorthConnex Project. Clear and transparent roles and responsibilities are documented and understood by the people involved in the project and a probity plan has been developed to ensure the State is provided with a value for money outcome. The NorthConnex Project proposal is subject to the provisions of the GIPA Act, and the contract and a contract summary will be disclosed publicly in accordance with Ministerial Memorandum No. 2007-01 *Public Disclosure of Information Arising from NSW Government Tenders and Contracts* (M2007-01) and the GIPA Act which set out specific disclosure requirements arising from NSW Government tenders and contracts.

Public access

The NorthConnex Project proposal will deliver a key strategic road link in the Sydney road network that will be accessible for the entire community, including disadvantaged groups. The proposal will not affect the public's access to essential infrastructure or services and the long term benefits are expected to improve the public's access to these services.

Health and safety

The NorthConnex Project proposal will be designed, constructed and operated in accordance with the relevant health and safety legislation and policies. Health and safety risks will be identified throughout the life of the proposal and managed through development and implementation of targeted plans and procedures during both the construction and operation phase.

Privacy

The privacy of customers will be managed in accordance with relevant State and Commonwealth legislation, the delivery agency's privacy plan and the motorway operators privacy policies. This will apply during the construction phase and the operational phase of the proposal.

7. Project Documents

The principal Project Documents to which RMS is party are as follows:

(a) **Project Deed**

The Project Deed has been entered into between RMS and NorthConnex Company Pty Limited (**Project Company**) and sets out the terms on which the Project Company will finance, design, construct, commission, operate, maintain and toll the Motorway.

The key obligations of RMS under the Project Deed are to:

- (i) grant the Project Company access to the Project Site and Temporary Areas in accordance with the Site Schedule, the RMS Interface Schedule and the RMS Traffic Schedule
- (ii) grant extensions of time to the Sunset Date in the event the Project Company or the State Works Contractor is delayed in achieving Completion by an Excusable Cause of Delay or Transport for NSW directs the Project Company to suspend the performance of the Project Activities under the Development Deed
- (iii) prior to Completion, compensate the Project Company if the Sunset Date is extended due to a Compensation Event or Transport for NSW directs the Project Company to suspend the performance of the Project Activities under the Development Deed
- (iv) after Completion, grant relief to the Project Company if certain events have a Material Adverse Effect (**MAE**)
- (v) use its best endeavours to implement appropriate regulatory measures with respect to Heavy Vehicles travelling on the Motorway or on Pennant Hills Road (having regard to the objectives for the Project outlined in section 3.2 of this report). Provided certain conditions are satisfied, RMS will compensate the Project Company if an agreed percentage of certain Heavy Vehicles continue to use Pennant Hills Road (as opposed to the Motorway)
- (vi) pay the Project Company a termination payment in the event that the Project Deed is terminated (other than for the Project Company's default)
- (vii) if Transport for NSW directs a variation to the Project Company's Activities under the NWRL Deed and certain conditions are satisfied, either direct a Change and pay the Project Company Change Costs or procure that Transport for NSW withdraws the Change
- (viii) satisfy certain of the conditions of the Planning Approval.

(b) **State Works Deed**

The State Works Deed has been entered into between RMS and NorthConnex State Works Contractor Pty Ltd (**State Works Contractor**) to provide for the State to make a contribution of works with a value equivalent to the State's total contribution to the NorthConnex Project. Under the State Works Deed, the State Works Contractor will design and construct the State Works in accordance with the requirements of the Project Deed as if the State Works were Project Works.

The key obligations of RMS under the State Works Deed are to:

- (i) pay the State Works Contractor a state works reimbursement payment on or prior to Financial Close (i.e. 31 January 2015)
- (ii) pay the State Works Contractor state works payments in accordance with the payment regime set out in the State Works Deed
- (iii) pay an early termination amount to the State Works Contractor if the State Works Deed terminates as a result of the Project Deed being terminated under clause 9.10(c), clause 27.11, clause 27.12 or clause 27.13 of the Project Deed (refer to Section 22).

(c) **Project Management Deed**

The Project Management Deed was entered into between RMS, the Project Company, the State Works Contractor and WSO Co Pty Limited to give effect to the management arrangements during the design and construction phase of the Project. It sets out the forecast capital cost of the project and provides for RMS to pay the Project Company a management fee if certain conditions are satisfied.

(d) **D&C Side Deed**

The D&C Side Deed has been entered into between RMS, the Project Company, the State Works Contractor, the Contractor and the Contractor Guarantors.

The D&C Side Deed includes a mechanism for RMS to elect to novate the D&C Deed and the D&C Guarantee from the Project Company and the State Works Contractor to RMS in the event that the Project Deed is terminated and requires the Contractor to obtain RMS's consent to any amendment or assignment of the D&C Deed.

(e) **O&M Side Deed**

The O&M Side Deed has been entered into between RMS, the Project Company, Tollaust Pty Limited (**Operator**) and the Operator Guarantor.

The O&M Side Deed includes a mechanism for RMS to elect to novate the O&M Deed and the O&M Guarantee from the Project Company to RMS in the event that the Project Deed is terminated and requires the Operator to obtain RMS's consent to any amendment or assignment of the O&M Deed.

(f) **RMS Security**

The RMS Security has been entered into between RMS and the Project Company to secure the performance of the Project Company's obligations under the Project Deed and other Project Documents.

(g) **State Works Security**

The State Works Security has been entered into between RMS and the State Works Contractor to secure the performance of the State Works Contractor's obligations under the State Works Deed.

(h) **Independent Certifier Deed**

The Independent Certifier Deed has been entered into between RMS, the Project Company, the State Works Contractor and APP Corporation Pty Ltd (**Independent Certifier**). It provides for RMS, the Project Company and the State Works Contractor to engage the Independent Certifier to perform the functions of the Independent Certifier under the Project Deed and the State Works Deed.

The key obligations of RMS under the Independent Certifier Deed are to:

- (i) appoint the Independent Certifier to perform the Services described in the Independent Certifier Deed
- (ii) nominate two representatives to the Operational Readiness Group no later than the date of the first meeting of the Operational Readiness Group and pay the fees and disbursements of its representatives and a share of the fees of any advisors or consultants attending meetings of the Operational Readiness Group.

(i) **M2/NorthConnex Interface Deed**

The M2/NorthConnex Interface Deed has been entered into between RMS, the Project Company, The Hills Motorway Limited ABN 28 062 329 828 and Hills Motorway Management Limited ABN 89 064 687 645 (together **Hills Motorway**) and regulates the interface between the construction of the NorthConnex Project Works and the operation of the M2 Motorway.

The key rights, obligations and liabilities of RMS under the M2/NorthConnex Interface Deed include:

- (i) to the extent that Hills Motorway is prevented from complying with its obligations by the NorthConnex Project Works, to release Hills Motorway from those obligations
- (ii) to give certain acknowledgements in favour of Hills Motorway in connection with the NorthConnex Project Works
- (iii) to lease certain land to the Project Company which, as at the date of the M2/NorthConnex Interface Deed, forms part of the M2 Motorway.

(j) **PAFA Act Deed Poll of Guarantee**

The PAFA Act Deed Poll of Guarantee has been executed by the Treasurer and will provide for the State to guarantee the payment by RMS of all amounts payable by RMS under the Project Deed, Financiers' Tripartite Deed, State Works Deed, Motorway Site Lease, RMS Security, State Works Security, Project Management Deed and any other document approved in writing by the Treasurer.

(k) **Account Bank Deed (RMS Security)**

The Account Bank Deed (RMS Security) has been entered into between RMS, the Project Company and National Australia Bank (**NAB**) (being the bank with which the Project Company's bank accounts are held). NAB will acknowledge RMS's rights over those bank accounts under the RMS Security.

(l) **Account Bank Deed (State Works Security)**

The Account Bank Deed (State Works Security) has been entered into between RMS, the State Works Contractor and NAB (being the bank with which the State Works Contractor's bank accounts are held). NAB will acknowledge RMS's rights over those bank accounts under the State Works Security.

(m) **TISA Side Deed**

The TISA Side Deed has been entered into between RMS, the Project Company and Transurban Limited (**Transurban**). It regulates RMS's rights in respect of the Technology Implementation and Services Agreement between the Project Company and Transurban (under which Transurban will provide back office tolling services to the Project Company) in the event that RMS exercises certain of its rights under the Project Deed or the Project Deed expires or is terminated and requires Transurban to obtain RMS's consent to any amendment or assignment of the Technology Implementation and Services Agreement.

(n) **TCM Side Deed**

The TCM Side Deed has been entered into between RMS, the Project Company and Roam Tolling Pty Ltd (**TCM Contractor**). It includes a mechanism for RMS to elect to novate the Tolling and Customer Management Agreement from the Project Company to RMS in the event that the Project Deed is terminated and requires the TCM Contractor to obtain RMS's consent to any amendment or assignment of the Tolling and Customer Management Agreement.

(o) **Principal Contractor Deed**

The Principal Contractor Deed has been entered into between RMS, the Project Company and Lend Lease Engineering Pty Limited (**LLE**). Under the Principal Contractor Deed, RMS will appoint LLE as the principal contractor with respect to the Project Works.

On 2 March 2015, RMS, the Project Company, the State Works Contractor, the Contractor and MCW Environmental Consulting Pty Limited ABN 31 155 105 552 (**Environmental Representative**) also entered into the Deed of Appointment of Environmental Representative, which provided for RMS, the Project Company, the State Works Contractor and the Contractor to engage the Environmental Representative to perform certain functions under the Planning Approval.

8. Risk sharing

The risk sharing arrangement is consistent with the PPP Guidelines, which require the State to seek to achieve best value for money by allocating risks to the party best able to manage them. The risk allocation process results in various risks being:

- (a) retained by RMS
- (b) transferred to the private sector or
- (c) shared between the parties

under the Project Documents.

A structured approach to the identification and analysis of potential risk and opportunities on the project was undertaken, consistent with the Australian/New Zealand Standard for Risk Management AS/NZS ISO31000.

A high level outline of the risk allocation under the Project Documents is summarised in Table 8.1.

Type of risk		Description of risk	RMS	Project Company	Comment
1	Land acquisition and access	Responsibility for acquiring the agreed Project Site and making it available to the Project Company	✓		However, the Project Company is responsible for obtaining access to: <ul style="list-style-type: none"> any land forming part of the M2 Motorway or any land in addition to the Project Site, Temporary Areas and Remote Areas.
2	Artefacts	Absolute ownership of Artefacts	✓		The Project Company may claim an extension of time to the Sunset Date if the Project Company is directed or ordered to cease its activities for more than 20 Business Days following discovery of an Artefact.
3		Obligation to take precautions to prevent removal/damage to Artefacts		✓	
4	Native title	Native title claim over the agreed construction site	✓	✓	
5		Native title claim is made with respect to the agreed construction site and work is stopped because of an order by a court, tribunal or RMS	✓		The Project Company may claim an extension of time to the Sunset Date and delay costs for the period of the extension if the Project Company is directed or ordered to cease its activities following a native title claim.
6	Contamination	Contamination on, in, over, under or migrating to or from the Project Site is disturbed or interfered with by the Project Activities or arises from the Project Activities		✓	
		A Contamination Notice is issued with respect to any other contamination	✓		
7	Planning approvals	Responsibility for obtaining planning approval under the <i>Environmental Planning and Assessment Act 1979</i>	✓		

Type of risk		Description of risk	RMS	Project Company	Comment
		(NSW) (EP&A Act)			
		Legal challenge to planning approvals	✓		The Project Company may claim an extension of time to the Sunset Date and delay costs for the period of the extension if the Project Company is directed or ordered to cease its activities following a challenge to the Planning Approval (subject to certain exclusions).
		Modification to the planning approval which requires a change to the Project Works, the O&M Work or the Motorway	✓		
8	Design	Project Works are designed and constructed in accordance with the SWTC.		✓	
9	Quality	Implementation of a quality system for design and construction of the Project Works and responsible for the quality and durability of the design and Project Works.		✓	
		Appointment of an Independent Certifier who will verify design and completion of the Project Works and undertake specified design and construction review, certification and reporting responsibilities.	✓	✓	
10	Fit for purpose	Project Works are fit for purpose		✓	
11	Cost overruns	Project costs exceed expectations		✓	
12	Delay	Project Works do not achieve Completion by the Date for Completion		✓	Subject to the Excusable Cause of Delay and Compensation Event regime, which provides for the Project Company to

Type of risk	Description of risk	RMS	Project Company	Comment
				claim an extension to the Sunset Date and delay costs upon the occurrence of certain events.
13	Environmental impacts	Negative environmental impacts associated with the NorthConnex Project (including ventilation outlets) and compliance with the environmental requirements in the SWTC and planning approval and preparation and compliance with the Environmental Management Plan	✓	The Project Company must comply with the environmental requirements set out in the Project Deed (including the SWTC) and planning approval and must prepare and comply with the Environmental Management Plan
14	Testing and commissioning	Responsibility for testing and commissioning the Project Works	✓	
15	Defects	Responsibility for defect rectification	✓	
16	Traffic risk	Traffic is less than forecast	✓	
17	Heavy Vehicles	Heavy Vehicles do not use the Motorway	✓	Provided certain conditions are satisfied, RMS will compensate the Project Company if an agreed percentage of certain Heavy Vehicles continue to use Pennant Hills Road (as opposed to the Motorway).
18	Connections to the Motorway	Certain connections to the Motorway are closed or materially reduced.	✓	
19	Toll enforcement	The offence of failing to pay tolls is not pursued in a manner which achieves the same outcome as the enforcement of comparable offences on other tollways	✓	
20	Inflation risk	Inflation is more or less than forecast and this impacts on toll escalation	✓	Project Company takes inflation risk on those tolls to be escalated by CPI
21	Rates and taxes	Responsibility for any taxes and rates in respect of the land on which the NorthConnex Project is	✓	

Type of risk	Description of risk	RMS	Project Company	Comment
	located (other than stamp duty)			
	Actual income tax/rates and GST payable differ from the estimated cost		✓	
22	Refinancing	Refinancing results in gains or losses ✓ (Gains only)	✓	
23	Change in law	Change in law (subject to the exceptions below)	✓	
	Change in or new NSW legislation (or the application or interpretation of it) that specifically and only affects: <ul style="list-style-type: none"> the NorthConnex Project by itself or the NorthConnex Project together with other privately owned and operated NSW tollroads. 	✓	✓	The risk of such changes in law prior to Completion is shared between RMS and the Project Company in accordance with the thresholds set out in the Project Deed. Changes in Law after Completion which have a MAE on projected cashflows above a specified threshold may trigger negotiation between the parties under the MAE regime.
	Change in or new Commonwealth environmental law requiring air filtration or contamination control measures for the NorthConnex Project.	✓	✓	The risk of such changes in law prior to Completion is shared between RMS and the Project Company in accordance with the thresholds set out in the Project Deed. Changes in Law after Completion which have a MAE on projected cashflows above a specified threshold may trigger negotiation between the parties under the MAE regime.
24	Force majeure	Risk that force majeure events affect the Project		✓ However, the risk of Uninsurable Force Majeure events is shared between RMS and the Project Company.

Table 8.1: A high level outline of the risk allocation under the Project Documents

9. Participants in the NorthConnex Project

9.1 Public sector parties to the Project Documents

The main public sector parties to the Project Documents are:

Roads and Maritime Services (ABN 76 236 371 088), a New South Wales Government agency constituted by section 46 of the *Transport Administration Act 1988 (NSW)*

Treasurer of the State of New South Wales

9.2 Private sector parties to the Project Documents

The main private sector parties involved in the NorthConnex Project are:

Project Sponsors

Transurban Limited (ultimate owner of a 50% stake in the Project Company and the State Works Contractor) (ACN 121 746 825)

Canada Pension Plan Investment Board (ultimate owner of a 25% stake in the Project Company and the State Works Contractor)

QIC Private Capital Pty Ltd on behalf of its managed clients (ultimate owner of a 25% stake in the Project Company and the State Works Contractor) (ABN 83 076 279 528)

Project Company

NorthConnex Company Pty Ltd (ACN 602 719 513)

State Works Contractor

NorthConnex State Works Contractor Pty Ltd (ABN 19 169 328 385)

D&C Contractor

Lend Lease Engineering Pty Limited (ABN 40 000 201 516)

Bouygues Construction Australia Pty Ltd (ABN 37 144 013 801)

Independent Certifier

APP Corporation Pty Limited (ACN 003 764770)

Operator

Tollaustr Pty Limited (ACN 050 538 693)

Environmental Representative

MCW Environmental Consulting Pty Limited (ABN 31 155 105 552)

10. Contractual structure

A diagrammatic representation of the contract structure appears below and shows the main contracts only.

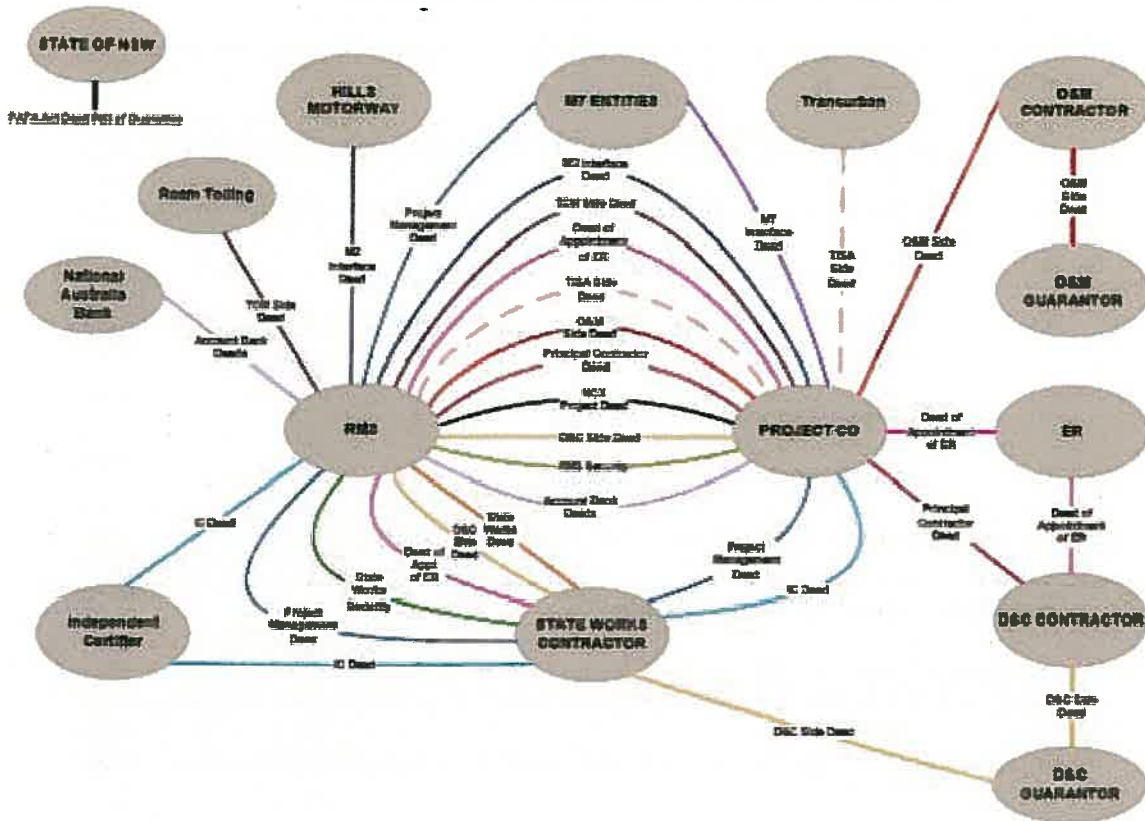


Figure 10: Contract structure

11. Confidentiality and excluded material

RMS will consult with the Project Company and take into account the Project Company's views in determining whether information that is identified as being "Commercially Sensitive Information" under the Project Deed is required to be disclosed.

Information that is "Commercially Sensitive Information" for the purposes of the Project Deed includes:

- (a) the Base Case Financial Model and the information contained within it;
- (b) certain fees, amounts and terms under the Debt Financing Documents;
- (c) certain caps and limitations on liability;
- (d) certain information contained in the subcontracts entered into by the Project Company;
- (e) details of personnel and salaries;
- (f) terms and levels of certain securities; and
- (g) certain amounts set out in the State Works Deed.

12. Auditor General's function

The Auditor General's ability to carry out the audit functions under the *Public Finance and Audit Act 1983 (NSW)* have not been diminished by any of the Project Documents.

Copies of the final Project Documents and supporting documentation have been made available.

Elements of the Project Deed and Project Documents

13. Contract term

The term for the NorthConnex Project is about 33 years from the date of the deed (i.e. from 31 January 2015 to 30 June 2048).

The construction period is estimated to run to approximately the end of 2019.

14. Primary obligations

The Project Company's primary obligations under the NorthConnex Project Deed are to:

- (a) investigate, finance, fund, plan, design, construct and commission the Project Company's Works and the Temporary Works;
- (b) contract for the provision of, acquiring or otherwise procuring or providing all materials, construction plant and utility services required for the performance of its obligations under this deed;
- (c) undertake the O&M Work, including by operating, maintaining and repairing the Motorway;
- (d) unless otherwise expressly permitted by the Project Deed, keep all traffic lanes of the Motorway open to the public for the safe, efficient and continuous passage of vehicles at all times during the Term; and
- (e) yield up possession of the Motorway to RMS at the end of the Term.

In relation to the Project Company's entitlement to levy tolls for the use of the Motorway under the Project Deed, the Project Company is obligated to:

- (a) not levy or impose any charge, toll or fee for or in connection with the use of the Motorway other than in accordance with the Toll Calculation Schedule;
 - (b) only levy tolls by means of the Toll Collection System;
 - (c) not (without the prior written approval of RMS) engage in, or permit the Motorway or the Motorway Site to be used for, any business or revenue generating activity, other than the collection of tolls by the Project Company; and
 - (d) comply with the *Roads Regulation 2008* (NSW).
-

15. Activities of RMS and the Project Company during the construction period

15.1 Project Works

The Project Company is responsible for the design and construction of the Project Works, which comprise:

- (a) Twin motorway tunnels up to around nine kilometres in length with two lanes in each direction. The tunnels would be constructed with provision for a possible third lane in each direction if required in the future.

- (b) A northern interchange with the M1 Pacific Motorway and Pennant Hills Road, including sections of tunnel for on-ramps and off-ramps, which also facilitate access to and from the Pacific Highway.
- (c) A southern interchange with the Hills M2 Motorway and Pennant Hills Road, including sections of tunnel for on-ramps and off-ramps.
- (d) Integration work with the Hills M2 Motorway including alterations to the eastbound carriageway to accommodate traffic leaving the Hills M2 Motorway to connect to the Motorway travelling northbound, and the provision of a new westbound lane on the Hills M2 Motorway extending through to the Windsor Road off-ramp.
- (e) Tie-in work with the M1 Pacific Motorway extending to the north of Edgeworth David Avenue.
- (f) A motorway operations complex located near the southern interchange on the corner of Eaton Road and Pennant Hills Road that includes operation and maintenance facilities.
- (g) Two tunnel support facilities incorporating emergency smoke extraction outlets and substations.

During the construction phase, the Project Company must:

- (a) construct the Project Company's Works and the Temporary Works in accordance with the Project Deed (including the SWTC), the final design documentation and any modifications directed or approved by RMS
- (b) use workmanship of the standard set out in the SWTC and which is fit for purpose
- (c) use materials which are free of defects and other imperfections and of the quality specified in the SWTC.

The Project Company warrants that the Project Works will, upon completion and thereafter at all relevant times during the Term, remain fit for their intended purposes.

15.2 Laws and approvals

In performing its activities, the Project Company must comply with all applicable laws. RMS has obtained the Planning Approval required for the NorthConnex Project.

The Project Company is responsible for:

- (a) obtaining from each relevant Authority all Approvals other than the Planning Approval and the Environment Protection and Biodiversity Conservation Act 1999 (Cth) Approval
- (b) complying with the lawful requirements of each such Authority to permit their proper consideration of the applications for Approvals
- (c) complying with all conditions of all approvals (other than those conditions of the planning approvals which the Project Deed expressly requires RMS to comply with)
- (d) complying with the Law in carrying out the Project Company's Activities.

RMS is responsible for:

- (a) complying with the conditions of the planning approvals which RMS has specifically agreed to comply with under the Project Deed

(b) dealing with a Legal Challenge in relation to the Planning Approval as it sees fit.

Modifications to the Planning Approval under the EP&A Act which are made prior to Completion and do not result from the Project Company's breach, wrongful act or omission or failure to comply with applicable law are treated as if RMS had given a Change Order. In such circumstances, the Project Company must take all reasonable steps to mitigate the cost of any Change and comply with all reasonable directions of RMS concerning the Change.

15.3 Project Site

RMS must give or ensure that the Project Company have access to each area of the Project Site specified in the Site Schedule by the dates set out in the Site Schedule during the delivery phase and RMS must grant the Project Company the Motorway Site Lease and a licence over the Licensed Maintenance Areas during the operations phase.

Any artefacts discovered on or under the surface of the Project Site will (as between RMS and the Project Company) be the property of RMS. The Project Company must immediately notify RMS if any artefacts are discovered, protect them and comply with any RMS instructions.

The Project Company must procure for itself and at its own cost the occupation or use of or relevant rights over any land or buildings in addition to the Project Site which are necessary or which it requires for the execution of the Project Company's Activities. However, if the Project Company has taken all of the steps required by the Project Deed to obtain approval to access certain land identified in the Project Deed but is unable to do so due to an unreasonable objection of the Transport for NSW Traffic Management Centre or RMS, RMS must procure access to that land for the Project Company.

15.4 Handover of Project Site

RMS will grant the Project Company access to the Project Site in accordance with the Site Schedule. If RMS breaches its obligation to grant access to the Project Company, an Excusable Cause of Delay and Compensation Event will arise and the Project Company may be entitled to claim an extension of time to the Sunset Date and delay costs.

15.5 Time

The Project Company is obliged to use its best endeavours to achieve Completion of the Project Works by the earlier of the Date for Completion and the date that is an agreed period after the Motorway Opening Date, and must achieve Completion by the Sunset Date.

Ultimately, the Project Company retains the risk of design and construction of the Project Works not being completed on time or to budget for reasons other than a risk borne by RMS.

If the Project Company becomes aware of a matter which will, or is likely to delay Completion, it must notify RMS and prepare a corrective action plan in respect of the delay. The Project Company must take reasonable steps to avoid or minimise the effects of any delay.

The Project Company must update the delivery program regularly to reflect changes to the program and delays which may have occurred.

15.6 Operational Readiness

The Operational Readiness Group (as established by the Independent Certifier) will have responsibility for determining whether the Project Company has satisfied the Opening Conditions Precedent.

The Project Company must open all traffic lanes of the Motorway to the public for the safe, efficient and continuous passage of vehicles as soon as practicable after the Motorway

Opening Date and may operate the Toll Collection System and levy tolls in relation to the Motorway in accordance with the Project Deed.

15.7 Completion Process

The Independent Certifier, RMS and the Project Company will initially jointly inspect the Project Company's Activities at agreed stages to determine the status of the Project Company Activities in relation to Completion. Following these inspections, the Independent Certifier will provide RMS and the Project Company with a notice containing a list of items to be completed before Completion is achieved or a notice that Completion is so far from being achieved that it is not practicable to issue a list.

RMS's Representative, the Project Company and the Independent Certifier must jointly inspect the Project Company's Activities as soon as possible after the Project Company has notified that it considers it has achieved Completion and within 5 Business Days the Independent Certifier must issue a Notice of Completion if Completion has been achieved. Alternatively, if Completion has not been achieved, the Independent Certifier will issue a notice containing a list of items to be completed before Completion is achieved or a notice that Completion is so far from being achieved that it is not practicable to issue a list.

The Notice of Completion does not constitute approval by RMS or RMS's Representative that Completion has occurred, but is final and binding on the parties for the purposes only of establishing that Completion has occurred. Notwithstanding that Completion may have occurred, the Project Company must as soon as practicable after Completion (and in any event within 6 months after the Date of Completion) correct any Defects which existed at the time of the issue of the Notice of Completion.

16. Maintenance and Operations

Under the Project Deed, the Project Company has the general obligation to carry out maintenance on the Motorway for the Term with agreed conditions of the asset at time of handover at the end of the Term.

The Project Company must operate, maintain and repair the Motorway, including its control centre and all plant and equipment. Minimum standards, tasks and obligations are detailed in the Project Deed and Scope of Works and Technical Criteria.

The Project Company's key O&M obligations include:

- (a) complying with O&M Best Practices and developing, implementing and continuously improving maintenance standards and systems to reflect O&M Best Practices, including performance and intervention standards, appropriate response times and management and control systems
- (b) acting in a timely and expeditious manner
- (c) minimising any disruption to, or compromise of the safety of, the users of the Motorway
- (d) minimising the impact of the performance of the O&M Work on motorists and other users of the Motorway
- (e) performing the O&M Work using good workmanship and materials which are fit for their intended purposes
- (f) if, in the performance of the O&M Work, the Project Company is required to replace any worn, failed or defective parts, use replacement parts which are:
 - (i) of equal quality to those required under the Project Deed

- (ii) fit for their intended purpose.

The Project Company must develop a number of operational plans, including an O&M Plan which describes the quality, amount and frequency of the maintenance activities to be carried out in respect of the Motorway. This plan will be reviewed by both RMS and the Independent Certifier to ensure it complies with the requirements of the Project Deed.

The Project Deed imposes general obligations on the Project Company to carry out the operations of the Motorway, which includes day to day operation of the tunnel and associated control and management of the traffic using the tunnel.

If the Project Company fails to comply with its O&M obligations, RMS may at any time during the Term issue a notice to the Project Company requiring it to rectify any specified non-conformances within 12 months. Where the Project Company fails to remedy such failure within the required period, the Project Company must provide to RMS an unconditional undertaking for an amount determined by RMS (which must be reasonable having regard to the nature of the non-conformances) up to an agreed value (which will also be indexed).

17. Force Majeure Events

If a 'Force Majeure event' occurs, the parties must meet to determine the estimated length of time for which the Force Majeure will continue.

The Project Company's obligations which are affected by the Force Majeure will be suspended to the extent and for so long as such obligations are affected by the Force Majeure. RMS will not be obliged to provide any financial relief to the Project Company during the period of suspension. The Project Company's obligation to keep all traffic lanes of the Motorway open will only be suspended where the occurrence of the Force Majeure event prevents the safe passage of vehicles. The Project Company must remedy and mitigate the effects of a Force Majeure event promptly and in accordance with the Project Deed.

A 'Force Majeure event' means:

- (a) prior to the Motorway Opening Date:
 - (i) earthquake, cyclone, fire, explosion, flood, malicious damage, sabotage, act of a public enemy, terrorism or civil unrest
 - (ii) war, invasion, hostility between nations, civil insurrection, military coup or act of a foreign enemy
 - (iii) ionising radiation or radioactive contamination from nuclear waste or the combustion of nuclear fuel or
 - (iv) confiscation, nationalisation, requisition or property damage under the order of any government or
- (b) on or after the Motorway Opening Date:
 - (i) the events referred to in paragraphs (a)(i) to (iv) above or
 - (ii) the occurrence of any other event other than:
 - A. a breach of a Project Document by the Project Company or any other event arising directly as a consequence of a breach of a Project Document by the Project Company or
 - B. an event the risk of which is not otherwise specifically allocated under a Project Document

which is beyond the reasonable control of the parties and their Related Parties and which is an event which, or an event the effects of which both:

- (c) prevents or delays the Project Company from performing an obligation under the Project Documents
- (d) could not have been Mitigated, prevented, avoided, remedied or overcome by the Project Company or its Related Parties taking those steps which a prudent experienced and competent concessionaire, designer, constructor or operator would have taken.

18. Excusable Causes of Delay

An Excusable Cause of Delay is:

- (a) an "Act of Prevention", being:
 - (i) a breach of the Project Deed by RMS
 - (ii) an act or omission of RMS or its Related Parties, not being an act or omission expressly permitted or allowed by the Project Deed, carried out within the timeframe expressly permitted by the Project Deed, caused or contributed to by the Project Company's breach, negligence or unlawful act or omission of the Project Company, or the exercise of RMS's statutory functions and
 - (iii) a Change initiated by RMS.
- (b) the occurrence of a Legal Challenge which results in the Project Company receiving an order by a court or direction by RMS's Representative to suspend or cease to perform any or all of its obligations under the Project Deed (other than where such direction results from a breach of contract by, or a wrongful act or omission of, the Project Company)
- (c) the occurrence of a Native Title Claim which results in Project Company receiving an order by a court or a direction by RMS's Representative to suspend or cease to perform any or all of its obligations under the Project Deed
- (d) the discovery of an Artefact which results in the Project Company being directed to suspend or cease work for more than 20 Business Days in aggregate or
- (e) a court makes a Final Determination.

If the Project Company is or will be delayed in achieving Completion by an Excusable Cause of Delay, the Project Company may claim an extension of time to the Sunset Date.

19. Compensation Events

The Project Deed requires RMS to compensate the Project Company for the Project Company's Delay Costs if the Sunset Date has been extended following the occurrence of certain events. The events that trigger this right to compensation are called 'Compensation Events' and are each of the following:

- (a) a breach of the Project Deed by RMS or act or omission of RMS which is not expressly permitted by the Project Deed, carried out within the timeframes permitted by the Project Deed, caused by the Project Company or the exercise by RMS of its functions and powers at law

- (b) the occurrence of a Legal Challenge which results in the Project Company receiving an order by a court or direction by RMS's Representative to suspend or cease to perform any or all of its obligations under the Project Deed (other than where such direction results from a breach of contract by, or a wrongful act or omission of, the Project Company)
- (c) the occurrence of a Native Title Claim which results in Project Company receiving an order by a court or a direction by RMS's Representative to suspend or cease to perform any or all of its obligations under the Project Deed or
- (d) a Qualifying Change in Law requires a Change to be made prior to Completion.

The Project Company's Delay Costs are those the extra costs reasonably incurred and payable by the Project Company in relation to a Compensation Event.

The Project Company must take all reasonable steps to mitigate the effects of any 'Compensation Event' and continue to perform its obligations despite the 'Compensation Event' to the extent the Project Company is not prevented from performing those obligations.

20. Changes

20.1 RMS initiated Changes

RMS may direct a Change to the Project Works, Temporary Works, O&M Work or the Project Activities in accordance with the Change Procedure set out in the Project Deed.

Pursuant to the Change Procedure, if RMS directs the Project Company to carry out, or procure that the State Works Contractor carries out, a Change (or a Change is deemed to have been directed by RMS), RMS must pay Change Costs (to the extent the Change increases the costs of the Project Works). RMS is also entitled to a relevant share of Change Savings in the event that a Change results in cost savings.

20.2 Project Company initiated Changes

The Project Company may propose a Change to the Project Works, Temporary Works, O&M Work or the Project Activities in accordance with the Change Procedure set out in the Project Deed. RMS has absolute discretion to approve or reject the proposed Change.

The Project Company bears all risks and costs associated with a Change proposed by the Project Company (unless otherwise agreed by RMS).

20.3 Pre-agreed Changes

RMS may, in its absolute discretion, direct the Project Company to carry out a Pre-Agreed Change.

The Pre-Agreed Changes relate to:

- (a) the safeguarding of the connection to the M2 eastbound Hill Road
- (b) the use of Hornsby Quarry as an alternative spoil disposal site. This Pre-Agreed Change may be exercised at any time prior to 30 September 2015.

21. Events of Default

Each of the following is an "Event of default":

- (a) **failure to progress:** the Project Company fails to commence or expeditiously and diligently progress the Project Activities or displays an intention to permanently abandon the NorthConnex Project
- (b) **Sunset Date:** the Project Company fails to achieve Completion of the Project Works by the Sunset Date
- (c) **unauthorised closure:** the Project Company closes or permits the closure of one or more traffic lanes after the Motorway Opening Date
- (d) **failure to comply with O&M obligations:** the Project Company materially fails to operate, maintain, repair or insure the Motorway in accordance with the Project Deed
- (e) **material default:** any material default of any member of the Project Company Group in respect of its obligations under the Project Deed or any other RMS Project Document (other than a failure to diligently pursue a corrective action plan between Financial Close and the date that is 18 months prior to the Date for Completion)
- (f) **insolvency of Project Company Group member:** insolvency in relation to a Project Company Group member
- (g) **insolvency of contractor or guarantor:** insolvency in relation to the Contractor, Contractor Guarantor, Operator, Operator Guarantor, Tolling and Customer Management Contractor or Technology Operator and such party is not replaced in accordance with the Project Deed
- (h) **material breach:** the Project Company materially breaches a representation or warranty given under the Project Deed or a RMS Project Document.

RMS may give the Project Company written notice on the occurrence of an Event of Default to remedy the Event of Default within a specific remedy period specified by RMS (which may be extended in certain circumstances).

22. Termination rights

22.1 Termination for Events of Default prior to Completion

If, prior to Completion:

- (a) an Event of Default is not remedied within the remedy period or
- (b) the Project Company Group is not diligently pursuing a remedy during the relevant remedy period.

RMS may give the Project Company notice of its intention to terminate the Project Deed and either:

- (c) abandon the Project (**Abandonment Notice**) or
- (d) endeavour to complete the construction of the Motorway (**Pre-Completion Termination Notice**)

in which case the Project Deed will terminate on the date of that notice.

If RMS gives the Project Company an Abandonment Notice, RMS may reinstate the Project Site and Extra Land to the condition that it was in prior to the commencement of the Project Activities and carry out any reinstatement works that are required to be carried out under the M2 Interface Deed or the M7 Interface Deed.

The Project Deed sets out a mechanism for RMS to recover the costs reasonably incurred by RMS in completing construction of the Motorway or reinstating the Project Site (as applicable).

22.2 Termination for Events of Default after Completion

If, after Completion:

- (a) an Event of Default is not remedied within the remedy period
- (b) the Project Company Group is not diligently pursuing a remedy during the relevant remedy period or
- (c) the Motorway is not open to the public to the extent that it is safe to do so during the remedy period (unless permitted otherwise in accordance with the Project Deed)

RMS may give the Project Company 20 Business Days' prior written notice of its intention to terminate the Project Deed. During this 20 Business Day period, the Project Company will have a right to remedy, or procure the remedy of, the Event of Default.

If after the expiration of the 20 Business Day period the Event of Default has not been remedied by the Project Company, RMS may terminate the Project Deed.

22.3 Termination for Native Title Claim, Uninsurable Force Majeure Event and Final Determination

RMS may also terminate the Project Deed if:

- (a) the Project Company is prevented from carrying out the Project Activities for a continuous period of more than 6 months following a direction to suspend works as a result of a Native Title Claim
- (b) a court makes a Final Determination and RMS fails to procure that the effect of that Final Determination is overcome within 18 months or
- (c) an Uninsurable Force Majeure Event exists (or the consequences of that Event exist) for a period of more than 12 months.

22.4 Termination by the Project Company

The Project Company can terminate the Project Deed by giving RMS 30 business days' notice in the event that:

- (a) the NSW Government enacts legislation (including any rules, regulations or by-laws under that legislation) which prohibits or has the effect of prohibiting a member of the Project Company Group from undertaking the Project substantially in accordance with the Project Documents
- (b) an Authority resumes any part of the Motorway Site and as a result any member of the Project Company Group is prevented from undertaking the Project substantially in accordance with the Project Documents
- (c) RMS breaches its access obligations and such breach prevents any member of the Project Company Group from undertaking the Project substantially in accordance

with the Project Documents and is not remedied (or its effects overcome) within 12 months

- (d) RMS breaches its payment obligations under the State Works Deed
- (e) a court makes a Final Determination which is not the result of the Project Company's failure, breach or wrongful act or omission and RMS fails to procure that the effect of such Final Determination is overcome within 18 months
- (f) the Project Company is prevented from carrying out the Project Company's Activities for continuous period of more than 6 months as a result of a direction, order or requirement in respect of a native title claim
- (g) the M7 Project Deed is terminated or
- (h) an Uninsurable Force Majeure Event exists or the consequences of an Uninsurable Force Majeure Event exist for a continuous period of more than 12 months.

RMS may suspend the Project Company's right to terminate by giving the Project Company a notice to this effect within 25 business days of receiving the Project Company's notice. If RMS takes this action:

- (a) the Project Company must continue to perform its obligations under the Project Deed during the suspension period, to the extent it is lawful and practicable to do so
- (b) RMS must pay the Project Company compensation in respect of the period of suspension.

The suspension of the Project Company's right to terminate the Project Deed will continue until (whichever is earlier):

- (a) RMS notifies the Project Company in writing that it is ending the suspension period
- (b) 12 months after the Project Company's termination notice or
- (c) when the relevant event is remedied by RMS or no longer exists.

If a suspension ends for any reason other than the remedying of the relevant event or the relevant event no longer existing, the Project Deed will automatically terminate.

22.5 Consequences of Termination

If the Project Deed is terminated by RMS:

- (a) RMS:
 - (i) will not be liable to pay the Project Company any amount by reason of that termination (including amounts payable to a Subcontractor following termination of a Subcontract where RMS does not exercise its novation rights) if the Project Deed has been terminated for an Event of Default
 - (ii) may require the novation of:
 - A. where the Project Deed is terminated prior to the Date of Completion, the D&C Deed and the Tolling Equipment Works Deed
 - B. where the Project Deed is terminated after the Date of Completion, the O&M Deed, the Tolling and Customer

Management Agreement, the Technology Implementation and Services Agreement and any other Subcontract agreed between RMS and the Project Company (acting reasonably)

- (b) the Project Company must:
- (i) execute, and procure that each member of the Project Company Group executes, all documentation required to effect a transfer to RMS of its interests in the Project
 - (ii) hand over all documents and records related to the Project, including books of account and Contract Documentation
 - (iii) procure the assignment of the Project Company's rights under any insurance policies maintained by the Project Company in accordance with the Project Deed
 - (iv) do all other acts and things to enable RMS or any person engaged by RMS to complete the Project Works and Temporary Works and to operate, maintain and repair the Motorway
 - (v) surrender the Project Site, any Extra Land and any other land upon which the Project Activities are being carried out (including any right, title or interest in them).

If RMS terminates the Project Deed because of a Native Title Claim, a Final Determination (which is not the result of the Project Company's failure, to comply with an obligation or law, its breach or wrongful act or omission) or an Uninsurable Force Majeure Event, RMS must pay an early termination amount to the Project Company.

23. Contractual remedies available to the Crown

RMS will have a number of different contractual remedies available to it should the Project Company default on its obligations related to the Project Deed, or should RMS terminate the Project Deed.

23.1 RMS step-in rights

If:

- (a) the Project Company:
- (i) fails to perform an obligation under this deed, including the rectification of minor Defects which are not required to be rectified prior to Completion
 - (ii) has not within a reasonable time taken steps to remedy the failure after RMS has given written notice requiring the Project Company to do so, or having taken such steps, fails to remedy the failure within a reasonable time, or
- (b) RMS considers that urgent action is reasonably necessary to minimise the risk of harm to:
- (i) the health or safety of persons
 - (ii) the Environment
 - (iii) any property or

- (iv) the safe operation of any road,

RMS may take such action as RMS considers necessary to remedy the Project Company's failure, or take that urgent action and may enter and remain on any land upon which the Project Activities are being carried out.

Any loss suffered or incurred by RMS in taking such action will be a debt due and payable by the Project Company to RMS. However, the Project Company will not be liable for any Loss arising as a consequence of RMS's default or negligent act or omission in taking action.

Nothing in the Project Deed limits or restricts the ability or power of RMS or the NSW Government to continue with its ordinary functions as a roads authority, such as developing and extending the road network.

23.2 Reinstatement or complete the Motorway

If an Event of Default occurs prior to Completion and is not remedied, RMS may terminate the Project Deed and either reinstate the Project Site or complete the Motorway, and recover its costs of doing so in accordance with the mechanism set out in the Project Deed (subject to the limitations on the Project Company's liability set out in the Project Deed).

23.3 Indemnity

The Project Company indemnifies RMS from and against:

- (a) Loss suffered by RMS in respect of injury, disease or death of persons, loss of, loss of use or access to or destruction or damage to property, economic loss arising in connection with the Project Activities, RMS's ownership of the Motorway Site or the use or occupation of the Motorway Site (subject to certain limitations)
- (b) Liability and Loss arising out of or in connection with the Project Company's breach of a Project Document.

23.4 Sue for breach

RMS may claim damages for any breach of contract by the Project Company, other than an Event of Default for which an Abandonment Notice or a Pre-Completion Termination Notice was issued prior to Completion. In the case of such Events of Default, RMS may only recover under the cost recovery mechanism described in section 22.1 above.

23.5 Securities

The Project Company must provide RMS with:

- (a) letters of credit to secure the Project Company's obligation to achieve Completion
- (b) unconditional undertakings to secure the Project Company's obligation to correct all Defects in the Local Area Works
- (c) the unconditional undertaking referred to in section 16 above
- (d) an unconditional undertaking with a value of equal to an agreed percentage of the estimated cost of the works required to achieve Final Handover as security for the performance of those works.

The Project Company must also provide RMS with additional letters of credit in relation to its performance of the NorthConnex Project.

24. Transition out provisions

RMS and the Project Company will carry out joint inspections of the Motorway 3 years and 18 months prior to the Expiry Date and will agree the maintenance and repair works required to achieve Final Handover of the Motorway to RMS, a program for carrying out those works and the estimated cost of those works.

The Project Company must carry out those maintenance and repair works and either progressively deposit an agreed percentage of all revenue collected from the Toll Calculation System into an account in RMS's name until the balance of that account equals an agreed percentage of the estimated cost of the works, or provide RMS with an unconditional undertaking for that amount, as security for the performance of those works.

At Final Handover, the Project Company must yield up to RMS the Motorway and the Motorway Site in a fully functional condition that complies with the SWTC and O&M Manuals. There must be no immediate repair work required to, or Defects in, the Motorway and the Project Company must transfer the then-current O&M Manuals, and all furniture, fittings, plant and equipment required to operate, maintain and repair the Motorway, to RMS. The Project Company must also pay RMS any insurance proceeds from any insurances for reinstatement or replacement of the Project Works or the Motorway to the extent not already reinstated or replaced and assign to RMS any rights available to the Project Company under those insurance, and do all other reasonable acts and things necessary to enable RMS to operate the Motorway at a level equal to that in effect immediately before termination of the Project Deed.

The Project Company must also train RMS's personnel in all aspects of the operation, maintenance and repair of the Motorway and ensure that its personnel are available to consult with RMS on the operation, maintenance and repair of the Motorway for a period of 12 months after expiry of the Term.

If RMS believes that the residual design life of any Asset Element, Asset Type or Asset Sub-Type is less than the "specified residual design life" as set out in the SWTC, RMS may give notice to this effect to the Project Company and the Project Company must carry out all necessary work to ensure that the "residual design life" of the relevant element is equal to that set out in the SWTC. If the Project Company fails to carry out that work, it must pay RMS the cost of that work.

25. Change of ownership or control

The Project Deed places certain restrictions on RMS and the Project Company in the event of an assignment or a change in control.

25.1 Entitlement to assign

The Project Company must not sell, transfer, assign, mortgage, charge or otherwise dispose of, deal with, or encumber its interest in the Motorway or in any of the Project Documents without the prior written consent of RMS. Prior to Completion, RMS may withhold its consent in its absolute discretion. After Completion, RMS must not unreasonably withhold its consent.

RMS may sell, transfer or assign or otherwise dispose of its interest in the Project Documents without the prior written consent of the Project Company provided that either:

- (a) the transferee is supported by a guarantee on similar terms of a PAFA Act Guarantee or
- (b) RMS is selling, transferring, assigning, sub-participating or otherwise disposing of or dealing with all or any part of its rights and benefits under this deed or any Project Document in relation to its entitlement to any rent under the Motorway Site Lease.

25.2 Change of Control prior to Completion

Under the Project Deed the Project Company makes an undertaking that the direct legal and beneficial owners of the Project Company will remain unchanged until Completion. Prior to Completion, the Project Company must not permit any Change of Control of the Project Company, or any person to acquire any shares or economic interests in any Sponsor Entity or the State Works Contractor who:

- (a) is not an Ultimate Shareholder or
- (b) who is an Ultimate Shareholder but which is an entity managed by an Ultimate Shareholder which does not have an economic interest in the shares of a Sponsor Entity or the State Works Contractor

without RMS's consent, which must not be unreasonably withheld. RMS will be deemed to be acting reasonably if it withholds its consent where it is of the reasonable opinion that:

- (c) the Project Company has not provided it with full details of the proposed change and any further information reasonably requested by RMS or
- (d) the new entity does not comply with anti-money laundering laws or anti terrorism laws, does not provide RMS with a letter of support in respect of any unpaid funding obligation or does not demonstrate to RMS that it is a fit and proper person to be an investor in the Project.

25.3 Change of control after Completion

Any Change of Control of the Project Company after Completion will be deemed to be an assignment of the Project Company of its interests in the Project Deed and other Project Documents and will require the prior written consent of RMS (which must not be unreasonably withheld).

26. Dispute resolution

All disputes between RMS and the Project Company arising out of the NorthConnex Project must be resolved in accordance with the Dispute Resolution Procedure set out in the Project Deed.

26.1 Dispute process

The dispute resolution procedure essentially involves three elements: negotiation, expert determination and arbitration. Throughout these processes both parties must continue to perform all of their obligations under the Project Deed.

26.2 Negotiation

If a dispute arises, the persons holding the positions of chief executive officer of each of RMS and the Project Company must meet and undertake good faith negotiations to resolve the dispute.

If the parties or their Representatives are unable to resolve the dispute within 20 business days after the date on which notice of the dispute was given, the dispute must be referred to expert determination.

26.3 Expert Determination

If a dispute is referred to expert determination, the Institute of Arbitrators and Mediators Australia (IAMA) Expert Determination Rules (2010 Edition) as modified by the Project Deed, will apply.

The expert's determination is final and binding and must be complied with unless a notice of dissatisfaction is served within 7 days of the expert's determination, at which point the Dispute is referred to arbitration. Non-compliance with an Expert's Determination can also be referred to arbitration by the other party.

26.4 Arbitration

If a dispute is referred to arbitration, the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules 2011 (as modified by the Project Deed) will apply. This process aims to achieve a just, quick and cost-effective resolution of any dispute.

27. Insurance

27.1 The Project Company's insurance requirements

The Project Company must effect and maintain delivery and operations insurances for amounts and deductibles, and for the duration, as set out in the Project Deed. The Project Company's obligations in relation to insurances include to:

- (a) not do or permit, or omit to do, anything which prejudices any insurance
- (b) rectify anything which, if not rectified, might prejudice any insurance
- (c) reinstate any insurance if it lapses
- (d) not cancel, vary or allow any insurance to lapse without prior written consent from RMS (which must not be unreasonably withheld or delayed)
- (e) as soon as reasonably practicable, notify RMS of any fact, circumstance or change in circumstance which could be reasonably expected to prejudice an insurance
- (f) comply with its duty of disclosure to all relevant insurers
- (g) notify RMS as soon as reasonably practicable when it receives or gives a notice in connection with the cancellation of any Delivery Insurance
- (h) do all things reasonably required by the other party or any other person in whose name a Project Insurance is effected to enable RMS or that other person to claim, collect or recover moneys due under any insurance
- (i) keep RMS fully informed of subsequent developments concerning a claim under any insurance
- (j) comply at all times with the terms of each insurance.

The Project Company must pay all premiums in respect of insurance policies effected under the Project Deed.

27.2 Review

RMS and the Project Company will periodically review the minimum limits, sub-limits and deductibles for all operations phase insurances to reach agreement on the limits, sub-limits and deductibles that will apply during the period following the review.

27.3 Insurance proceeds

Where insurance proceeds in excess of an agreed amount are received in respect of physical loss or damage to the works, those proceeds must be deposited into a special purpose account in the joint names of the Project Company and RMS with a financial institution which

has been approved by RMS. The proceeds of any insurance which are received in respect of physical loss or damage to the works or the Motorway will be applied to repair and reinstatement.

The Project Company and RMS will, to the extent permitted under the relevant insurance proceeds, procure the release, on a progressive basis of the insurance proceeds for reinstatement work carried out by the Contractor.

28. Material Adverse Effect

If:

- (a) at any time, an Uninsurable Force Majeure Event occurs; or
- (b) after the Date of Completion:
 - (i) the Planning Approval is modified or replaced and requires a Change to be made to the Motorway or the O&M Work
 - (ii) certain connections to the Motorway are closed or materially reduced or a new high capacity motorway or freeway which connects the M1 Motorway to the M7 Motorway is opened to traffic (other than a motorway or freeway which is owned or operated by a member of the Project Company Group or its Related Body Corporate)
 - (iii) a Qualifying Change in Law occurs which causes a net increase in the cost of carrying out the O&M Work or
 - (iv) the offence of failing or refusing to pay the toll for the use of the Motorway is not enforced, or recovery procedures are not pursued, in a manner which in substance achieves the same outcome as the enforcement and recovery procedures pursued by the State of NSW or its Authorities for comparable tollway offences on private tollways as at the date of the Project Deed

and the Project Company believes that this has a MAE, the Project Company may be entitled to claim relief under the Project Deed.

If the Project Company is entitled to relief, the parties must enter into negotiations in good faith to agree on a method of redress. The parties must take a flexible approach in conducting their negotiations, including by considering:

- (a) amendments to the Project Documents
- (b) variations to the Term
- (c) variations to the financial or other contributions of the parties
- (d) adjustments to the Toll Calculation Schedule and/or
- (e) any other appropriate actions.

However, RMS will not be required to consider or provide any method of redress that would require RMS to make an up-front payment to the Project Company, and the methods of redress involving payments of money by RMS to the Project Company will be considered as a measure of last resort.

29. Liabilities, indemnities and/or guarantees given by the Crown

29.1 RMS's liability to the Project Company

RMS may be required to pay the Project Company:

- (a) Change Costs for any Changes directed by RMS, including Pre-Agreed Changes and deemed Changes (in respect of which please see section 20)
- (b) delay costs in the event that a Compensation Event occurs for which an extension to the Sunset Date is granted (in respect of which please see section 19)
- (c) compensation if an agreed percentage of certain Heavy Vehicles continue to use Pennant Hills Road (as opposed to the Motorway) and certain other conditions are satisfied
- (d) compensation under the MAE regime (in respect of which please see section 28)
- (e) compensation if a Qualifying Changes in Law arises prior to Completion and has a direct effect on the D&C Work or the O&M Work such that a Change is required and results in an increase in the Project Company's direct costs of carrying out the D&C Work or the O&M Work; or
- (f) stamp duty assessed in connection with the execution of the Project Documents, the implementation of the Project and certain other related transactions.

RMS is also undertaking the purchase of land for the NorthConnex Project and will be required to complete the purchase of that land prior to the dates by which RMS is obliged to make that land available to the Project Company under the Site Schedule.

RMS is also obliged to make certain payments under the State Works Deed and the Project Management Deed (as described in sections 7(b) and (c) above).

29.2 Guarantees given by the Crown

The PAFA Act Deed Poll of Guarantee executed by the NSW Treasurer (on behalf of the State of NSW) in favour of the Project Company, the State Works Contractor and (upon execution of the Financiers Tripartite Deed) the Security Trustee guarantees the payment by RMS of the Guaranteed Money, which comprises all of the liabilities and obligations of RMS to Project Company under or by reason of any Guaranteed Document, which include, amongst others, the Project Deed, Motorway Site Lease and RMS Security. This guarantee is provided in accordance with section 22B of the *Public Authorities (Financial Arrangements) Act 1987* (NSW).

30. Tolls

30.1 Charge Tolls

The Project Company may levy tolls for the use of the Motorway (or part of it) in accordance with the Toll Calculation Schedule attached to the Project Deed.

The Toll Calculation Schedule provides that the Project Company may levy the "Charge Toll" for the northbound journey and the southbound journey on the Motorway (each a **Tollable Section**).

The Base Toll for each Tollable Section is \$6.0361 as at 1 October 2013, and will be escalated quarterly at the greater of CPI and 1% (the **Theoretical Toll**). The Charge Toll for passenger

vehicles is the Theoretical Toll (rounded up to the nearest whole cent), and the Charge Toll for heavy vehicles is three times the Theoretical Toll (rounded up to the nearest whole cent).

The Toll Calculation Schedule also permits the Project Company to levy an Administration Charge for providing a temporary tag or allowing a Casual User of the Motorway to pay the toll as a deferred toll.

30.2 Additional Rent

If the aggregate of the Charge Tolls and the Administration Charges collected from the operation of the Motorway during a Rent Period (Actual Toll Revenue) is greater than an agreed percentage of the aggregate of the Charge Tolls and the Administration Charges forecast to be received in the Base Case Financial Model during that Rent Period (Base Toll Revenue), the Project Company will pay RMS an agreed percentage of the difference between the Actual Toll Revenue and Base Toll Revenue as Additional Rent.

31. Financing

The NorthConnex Project has been funded by way of:

- (a) the contribution made by RMS under the State Works Deed (in respect of which please see paragraph (b) of section 7 of this Report)
- (b) equity investments by the Sponsors.

However, the Project Deed provides for debt finance to be raised after Completion.

32. Significant guarantees and undertakings

32.1 PAFA Act Guarantee

As mentioned in section 29.2, the State guarantees the performance of RMS's financial obligations under the Project Deed and other documents.