

Rolling Stock Public Private Partnership
Summary of contracts



Rolling Stock PPP project contracts as at 7 December 2006



RailCorp

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1 Introduction

This report summarises the main contracts, from a public sector perspective, for the Rolling Stock Public Private Partnership (PPP) project.

It has been prepared by Rail Corporation New South Wales (“RailCorp”) in accordance with the public disclosure provisions of the NSW Government’s November 2001 *Working with Government Guidelines for Privately Financed Projects*, under which the contracts for this project were concluded, and has been submitted to the New South Wales Auditor-General for auditing prior to its tabling in Parliament.

In line with the *Guidelines*, and revised *Working With Government Guidelines* issued in December 2006, after the contracts were concluded, this report:

- Focuses on the project contracts to which RailCorp is a party or which otherwise have a potentially substantive impact on public sector benefits or risks. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector’s exposure.
- Does not disclose the private sector parties’ cost structures, profit margins, intellectual property or other matters which are expressly confidential under the contracts, on the basis that their disclosure might place the private sector parties at a disadvantage with their competitors.

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

It is based on the project’s contracts as at 7 December 2006. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.

1.1 The project

The Rolling Stock PPP project involves:

- Private sector financing, design, manufacturing and commissioning of 626 new double-deck carriages, providing 78 new trains and two spare carriages for CityRail services in metropolitan Sydney, with the first of these trains being introduced into service by April 2010 and all of the carriages being operational by September 2013 (there is also an option for RailCorp to order up to additional 20 trains)
- Private sector financing, design, construction, manufacturing and commissioning of a new maintenance facility for these trains in Auburn and new train simulators for the training of RailCorp drivers and guards
- An obligation on the private sector parties to make at least 72 of the new trains (and more for special events) available for

RailCorp’s CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational period for some or all of the trains

- Private sector maintenance, cleaning, repair and refurbishment of the new trains, maintenance facility and train simulators, to RailCorp-specified standards, throughout their operational periods
- Private sector decommissioning of the trains, and/or handing over of some or all of the trains to RailCorp, at the end of their operational periods, and
- Handing over of the train maintenance facilities to RailCorp at the end of the operational period

in return for specified payments by RailCorp during the delivery phase of the project and performance-based monthly payments by RailCorp throughout the rest of the project.

In contrast to tollroad projects, which partly depend on revenue from tolls paid by users, the private sector participants in the project will not be taking any “demand risk”. In other words, the payments to them will not be based on CityRail’s farebox revenue or patronage.

The Rolling Stock PPP project represents the largest single order for new passenger trains ever undertaken in Australia.

The new carriages will replace all of the remaining 498 non-airconditioned CityRail carriages in Sydney—a milestone expected to be achieved by the end of 2012—and provide additional rolling stock to accommodate forecast growth in CityRail’s patronage.

Each of the new airconditioned, stainless steel trains will seat about 880 passengers and feature passenger information screens, 16 wheelchair spaces, improved resistance to vandalism and crash damage, improved security (including CCTV cameras) and a traction interlocking system that will prevent the train from moving off until all its doors are closed.

The project will generate employment between late 2007 and 2013 for up to 290 people—250 of them electrical and mechanical tradespeople—at Cardiff, west of Newcastle, where the trains’ crew cabs will be manufactured and assembled and final assembly, fit-out, testing and commissioning of the trains will take place.

The cost of building the new trains, the maintenance facility and the simulators is expected to be around \$2 billion, excluding financing costs.



The new trains' design will be a development of the Millennium train design.

The private sector participants in the project include:

- Downer EDI, ABN AMRO, Babcock & Brown and AMP, as equity investors in the project (through "Reliance Rail" entities described later in this report) and, in the case of ABN AMRO, also as the project's principal debt finance underwriter
- Westpac, National Australia Bank, Mizuho and Sumitomo Mitsui Finance, as debt financiers for the project, and
- EDI Rail, Hitachi, the Changchun Railway Vehicles Company and John Holland as the principal designers and builders of the new trains, train maintenance centre and train simulators and, in the case of a subsidiary of EDI Rail, also as the maintainer of these assets.

The NSW Treasury has estimated that the present value of the cost of the new trains, associated facilities and maintenance services to RailCorp over the next 37 years, of around \$3.65 billion, will be approximately 30% lower than it would have been under conventional public sector delivery, assuming the same timeframes for both methods of delivery (*Table 1*).

1.2 Processes for selecting and contracting with the private sector parties

1.2.1 Shortlisting of proponents

On 31 August 2004 RailCorp issued a *Request for Expressions of Interest* in the financing, design, manufacturing and maintenance of a sufficient number new carriages to ensure approximately 125 four-carriage "sets" (with drivers' cabs at both ends) would be available at all times for CityRail services.

This *Request* indicated that RailCorp was reviewing its operational requirements, and that its final requirements might include single-deck carriages and/or eight-carriage rather than four-carriage train "sets", but specified that proponents should demonstrate their abilities to design and manufacture trains suitable for CityRail's current operating configurations.

Responses to the *Request for Expressions of Interest* were received, by the closing date of 13 October 2004, from six consortia.

These *Responses* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury and the NSW Ministry of Transport, assisted by three advisory committees on legal and commercial issues, financial issues and technical issues and external advice from PricewaterhouseCoopers (financial issues), Clayton Utz (legal issues) and Halcrow (technical issues).

The Evaluation Committee's activities were overseen by a Project Steering Group, with members from RailCorp, NSW Treasury, the NSW Cabinet Office and the NSW Ministry of Transport', and by independent probity auditors from Deloitte Touche Tohmatsu.

The proponents were not asked to submit specific designs at this *Expressions of Interest* stage, and the evaluation criteria initially adopted in evaluating the six *Responses* were directed primarily at the proponents' demonstrated experience, capabilities and capacities.

These criteria were grouped into six categories: safety management (20% weighting), project management (10% weighting), design, manufacturing and commissioning (20%), maintenance (20%), financial and commercial (20%) and the proponents' overall approach (10%).

On 14 December 2004 RailCorp issued all six proponents with an *Addendum* to the original *Request for Expressions of Interest*, inviting updated *Responses* in the light of RailCorp decisions that the Rolling Stock PPP project would now involve two separate sets of contracts, one for single-deck carriages (with at least 208 always to be available for CityRail services) and the other for double-deck carriages.

This *Addendum* indicated that:

- About 500 carriages would be required, but the actual numbers of carriages to be contracted for would be decided on the basis of further RailCorp operational analyses and an assessment of the relative value for money of the detailed

Table 1. “Value for money” comparison between public sector and private sector project delivery.

Delivery method	“Public sector comparator” (PSC) (hypothetical, risk-adjusted estimate of the cost of the most efficient likely method of public sector delivery)			Private sector delivery
	“PSC best case” (95% probability that PSC cost would be higher than this)	“PSC most likely case” (mean of PSC cost estimates)	“PSC worst case” (95% probability that PSC cost would be lower than this)	
Estimated present value of the financial cost of the project (over 37 years) to RailCorp	\$4, 914 m	\$5,203 m	\$5,511 m	\$3,648 m
Estimated saving achieved through private sector delivery	26%	30%	34%	

The “most likely” cost estimate for the “public sector comparator” of \$5,203 million includes a “raw” capital cost estimate with a present value (@6.16% pa) of \$2,047 million, a “raw” operational cost of \$1,304 million, a risk adjustment of \$1,225 million, and a competitive neutrality adjustment of \$61 million.

The cost estimate for private sector delivery of \$3,648 million includes a notional upward adjustment reflecting NSW Treasury estimates of the value of risks which were not transferred to the private sector parties, so as to permit a “like for like” comparison with the cost estimates for the “public sector comparator”. Its present value has been estimated using an evaluation discount rate that incorporates a systemic risk premium of 0.9%, in accordance with NSW Treasury policies on the assessment of complying proposals.

Adjustments have been made to both the “public sector comparator” and private sector cost estimates to recognise ancillary RailCorp costs of \$566 million for items that are not included in the project itself but are nonetheless required for the delivery of the project.

proposals to be submitted by the shortlisted respondents later in the project’s procurement process

- RailCorp expected to ask for eight-carriage rather than four-carriage train “sets”, and
- RailCorp would require at least 20% local (Australian and New Zealand) content.

The six proponents were invited to bid for the single-deck carriages component of the project, the double-deck carriages component or both.

In line with RailCorp’s encouragement of both domestic and international participation in the project, the criteria for evaluating the revised *Responses* to the amended *Request for Expressions of Interest* were expanded to encompass the experience, capabilities and capacities not just of the proponents themselves but also of their major suppliers and/or maintainers.

All six of the proponents submitted revised *Responses* by the closing date, 2 February 2005.

On 1 March 2005 RailCorp announced that four of the original six proponents had been shortlisted to submit detailed proposals for the single-deck carriages and that two of them had also been shortlisted for the double-deck carriages as well.

1.2.2 Selection of the successful proponent

On 20 May 2005 RailCorp issued two *Requests for Detailed Proposals* to the shortlisted proponents, one for a sufficient number of new single-deck carriages to ensure 26 single-deck eight-carriage train “sets” would be available at all times for CityRail services and the other for a sufficient number of new double-deck carriages to ensure 33 double-deck eight-carriage train “sets” would be available at all times for CityRail services.

Proponents tendering for the double-deck train contract were also asked to submit a priced option for an “availability” of 26

double-deck trains, to permit direct value-for-money comparisons with the single-deck train proposals.

The members of the shortlisted proponents executed **Deeds of Disclaimer and Confidentiality**, after their shortlisting and again at the time they submitted their *Detailed Proposals*, warranting to RailCorp that in preparing their *Detailed Proposals* they would not be relying on specified “information documents” provided by RailCorp and promising to comply with confidentiality requirements.

All four of the shortlisted proponents for the single-deck carriages component of the project and both of the shortlisted proponents for the double-deck carriages component submitted *Detailed Proposals* by the closing date, 10 October 2005.

The *Detailed Proposals* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury and the NSW Ministry of Transport, assisted by four advisory committees on legal and commercial issues, financial issues, technical issues and secondary evaluation issues and by external advice from PricewaterhouseCoopers (financial issues), Clayton Utz (legal issues), Halcrow (technical issues) and Horsell (insurance issues).

As before, this Evaluation Committee’s activities were overseen by the Project Steering Group and by independent probity auditors from Deloitte Touche Tohmatsu.

The *Detailed Proposals* were initially evaluated in terms of their compliance (on a pass/fail basis) with two “mandatory” evaluation criteria (satisfaction of the 20% local content requirement and a requirement for at least one apprentice to be employed for every nine tradespersons who are locally employed on the project).

Proposals satisfying these two mandatory criteria were then evaluated in terms of a series of “primary” evaluation criteria, broadly categorised into eight groups of technical criteria, two groups of legal and commercial criteria and three groups of



An artist's impressions of the drivers' cab, with a guards' workstation on the right.

financial criteria, one of them the net present cost of the project to RailCorp.

Six of the groupings of technical criteria (safety, contract management, train performance, "through life support", the maintenance facility and the simulators) were applied to relevant individual parts of the *Detailed Proposals*, while the other two (the proponents' understanding of and compliance with the project's specifications and other technical requirements, and their relevant technical experience, capabilities and capacities) were applied to all six of these aspects of the *Detailed Proposals*.

For example, the "Safety" section of each *Detailed Proposal* was assessed in terms of specified and detailed "safety" technical criteria and also in terms of the two generally applied groupings of technical criteria.

The scores awarded were then adjusted to reflect pre-determined relative weightings: safety 15%, contract management 22%, train performance 28%, "through life support" 22%, the maintenance facility 7% and the simulators 6%.

While "safety" was treated as a separate area for the purposes of assessing matters such as rail safety accreditations and proponents' safety management systems, safety was also a factor in all of the other technical areas, so its overall importance in the evaluations was higher than the 15% weighting for the specific "safety" area might appear to suggest.

The first grouping of legal and commercial criteria related to the proposed commercial terms of the project, and especially the extent to which RailCorp's proposed terms had been accepted. Where possible, proposed material alterations to the terms were assigned a value that was subsequently taken into account in calculating the net present cost of the project. If a value could not be assigned, a qualitative assessment was undertaken.

The second grouping of legal and commercial criteria concerned the extent to which each proponent's proposed project structure would deliver a single point of accountability. This was assessed in terms of their proposed contract structures (50% weighting), equity structures (25%) and organisational structures (25%).

The financial criteria other than the net present cost related to the deliverability of the proposed funding arrangements (50%) and financial robustness (50%).

In calculating the final primary evaluation criterion, the net present cost of the project to RailCorp, the Evaluation Committee took account of payments to the private sector, adjustments for the value of the retained risk (as affected by the proposed commercial terms) and adjustments for inadequacies in the pricing and scope of the technical parts of the *Detailed Proposals*.

No weightings were applied to the total scores for the three broad categories of grouped "primary" criteria (technical, legal and commercial and financial).

In the case of *Detailed Proposals* assessed on the basis of the "primary" criteria as being candidates for further shortlisting, an additional evaluation was conducted, applying two groupings of "secondary" criteria, to:

- Determine whether RailCorp should proceed with the proposed single-deck trains component of the project or switch entirely to double-deck trains, and
- If relevant, assess the desirability of any one proponent's being shortlisted for both the single-deck train and double-deck train components of the project.

The first grouping of "secondary" criteria involved comparisons of the net present costs to RailCorp of the various proposals for 26 "available" single-deck eight-carriage train sets with the net present costs of equivalent proposals for 26 "available" double-deck train sets.

The second grouping of "secondary" criteria, the security and contestability of supply, related to the proponents' abilities to satisfy the requirements of both the single-deck contracts and the double-deck contracts and whether a single supplier would support a contestable marketplace for the supply, maintenance, modification and refurbishment of electric passenger trains.

On 4 May 2006 the NSW Premier, Mr Morris Iemma, announced that it had been decided not to proceed with the procurement of single-deck trains. RailCorp would, however, seek final



An artist's impression of the new train maintenance facility in Auburn

proposals from the two shortlisted double-deck train proponents.

On 31 May 2006 RailCorp invited both of these proponents to submit *Final Committed Proposals* for a sufficient number of new double-deck carriages to ensure 72 double-deck eight-carriage train “sets”—including 13 train “sets” added to the project to accommodate future patronage growth—would be available for CityRail services at all times, with four more during special events. RailCorp subsequently amended this “sufficiency” requirement to specify that at least 78 train sets must be manufactured.

The closing date for these *Final Committed Proposals* was 10 August 2006.

On 10 August 2006 the members of the two finally shortlisted proponents executed further **Deeds of Disclaimer and Confidentiality**, warranting to RailCorp that in preparing their *Final Committed Proposals* they would not be relying on specified “information documents” provided by RailCorp and promising to comply with confidentiality requirements.

The *Final Committed Proposals* were evaluated by an Evaluation Committee with members from RailCorp, NSW Treasury, NSW Treasury Corporation and the NSW Ministry of Transport, again assisted by advisory committees and the same professional advisers.

The criteria for these evaluations were very similar to those applied in assessing the *Detailed Proposals*, but differed in some of their details within the groupings described above. The changes mainly reflected the changes made by RailCorp to the scope of the project, a greater focus on any subcontractors taking significant project risks, a greater focus on organisational accountabilities and the fact that funding commitments were now being sought.

For the technical evaluations, the relative weightings accorded to the maintenance facility and simulator groupings of criteria were also slightly adjusted, to 10% and 3% respectively. The “single point of accountability” criteria were separated from the

legal and commercial evaluation and their weightings were amended to 40% for the proponents’ proposed contractual structures, 20% for their proposed equity structures and 40% for a new requirement, their organisational accountability plans.

On 10 November 2006 the NSW Premier, Mr Morris Iemma, announced the selection of Reliance Rail as the successful proponent for the project, subject to final documentation being concluded in a form satisfactory to RailCorp.

1.2.3 Execution of the contracts

Following final negotiations, the execution of all but one of the project contracts to which RailCorp is a party was completed on 3 December 2006, and the execution of the final contract was completed on 5 December 2006.

Most of these contracts took effect immediately, but the principal provisions of three of them—the main Project Contract, a Debt Finance Side Deed and a Call Option Deed—took effect only upon “financial close”, on 7 December 2006 (see section 2.3 of this report).

All of the other project contracts were executed on or before 7 December 2006 and took effect on or before that date.

1.3 The structure of this report

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

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

Section 3 focuses on the parties primary contractual obligations, while section 4 summarises RailCorp’s securities for the private sector parties’ performance of their obligations and section 5 summarises the NSW Government’s guarantee of RailCorp’s own performance under the contracts.

2 Overview of the project's contracts

2.1 The participants in the project

2.1.1 Public sector parties to the contracts

The public sector parties to the Rolling Stock PPP project (Figure 1) are:

- **Rail Corporation New South Wales** (ABN 59 325 778 353) ("**RailCorp**"), a statutory State-owned corporation established by section 4 of the Transport Administration Act (NSW), and
- The **NSW Treasurer**, for and on behalf of the State of New South Wales, who has executed a guarantee by the State of RailCorp's performance of its obligations under the project's contracts (see section 5 of this report).

RailCorp's powers to enter into the project's contracts arise from:

- The Transport Administration Act's stipulations that one of RailCorp's principal objectives is to "deliver safe and reliable passenger railway services in New South Wales in an efficient, effective and financially responsible manner", that its functions include the operation of railway passenger services and that it may conduct any business which it considers will further its objectives
- RailCorp's powers, under the State Owned Corporations Act (NSW), to enter into contracts, acquire and deal with property and do anything else that is necessary or convenient for, or in connection with, the performance of its functions
- Express approvals to enter into this project's contracts, granted on 23 November 2006 by the NSW Premier and the NSW Minister for Finance, as RailCorp's voting shareholders, in accordance with section 20X of the State Owned Corporations Act, and
- An approval granted by the NSW Treasurer, on 20 November 2006, for RailCorp to enter into the project's financing arrangements, in accordance with section 20(1) of the Public Authorities (Financial Arrangements) Act (NSW).

2.1.2 Private sector parties to the contracts

The private sector parties which have contracted with RailCorp and/or the NSW Treasurer are:

- **Reliance Rail Pty Ltd** (ACN 111 280 427, ABN 18 111 280 427) ("**PPP Co**")—a special purpose vehicle which was established for this project and which may not conduct any other business unless RailCorp consents—in its capacity as the trustee of the Reliance Rail Trust (ABN 48 077 619 824), which was established on 7 December 2006 under a Trust

Deed (Operating) – Reliance Rail Trust executed by PPP Co on 24 November 2006.

All of the shares in PPP Co and all of the units in the Reliance Rail Trust are held by **Reliance Rail Holdings Pty Ltd** (ACN 111 280 169, ABN 46 111 280 169) ("**PPP Co Holding Co**"), as the trustee of the Reliance Rail Holding Trust, which was established on 7 December 2006 under a Trust Deed (Holding) – Reliance Rail Holding Trust executed by PPP Co Holding Co on 24 November 2006.

In turn, on the date of financial close, 7 December 2006, the shares in PPP Co Holding Co and the units in the Reliance Rail Holding Trust were held by:

- Downer PPP Investments Pty Ltd (ACN 122 730 152, ABN 16 122 730 152), a wholly owned subsidiary of Downer EDI Ltd (ACN 003 872 848, ABN 97 003 872 848), a public company listed on the Australian Stock Exchange (49% holding)
- IEF Reliance Rail Pty Ltd (ACN 122 695 970), which is wholly owned by AMP Investment Services Pty Ltd (ACN 063 986 989, ABN 71 063 986 989)—a wholly owned subsidiary of AMP Capital Holdings Ltd (ACN 078 651 966, ABN 69 078 651 966) and ultimately of AMP Ltd (ACN 079 354 519, ABN 49 079 354 519), a public company listed on the Australian Stock Exchange—as the trustee of the AMP Investments Infrastructure Equity Fund (ABN 51 728 262 954) (17.2% holding)
- REST Reliance Rail Pty Ltd (ACN 122 695 934), which is also wholly owned by AMP Investment Services Pty Ltd and hence ultimately by AMP Ltd (6.8% holding)
- GIF Reliance Rail Pty Ltd (ACN 122 696 002), which is wholly owned by AMP Investment Services Pty Ltd as the trustee of the AMP Capital Global Infrastructure Fund No 2 (ABN 89 564 003 117) (1.5% holding)
- ABN AMRO Rail Holdings Pty Ltd (ACN 120 875 765), which is wholly owned by ABN AMRO Investments Australia Ltd (ACN 120 541 988, ABN 95 120 541 988) as the trustee of the ABN AMRO Rail Investment Trust (12.75% holding), and
- Babcock & Brown Public Partnerships GP Ltd (incorporated in England and Wales, registration no 05938778), a wholly owned subsidiary of Babcock & Brown International Holdings Pty Ltd, as the general partner of Babcock & Brown Public Partnerships

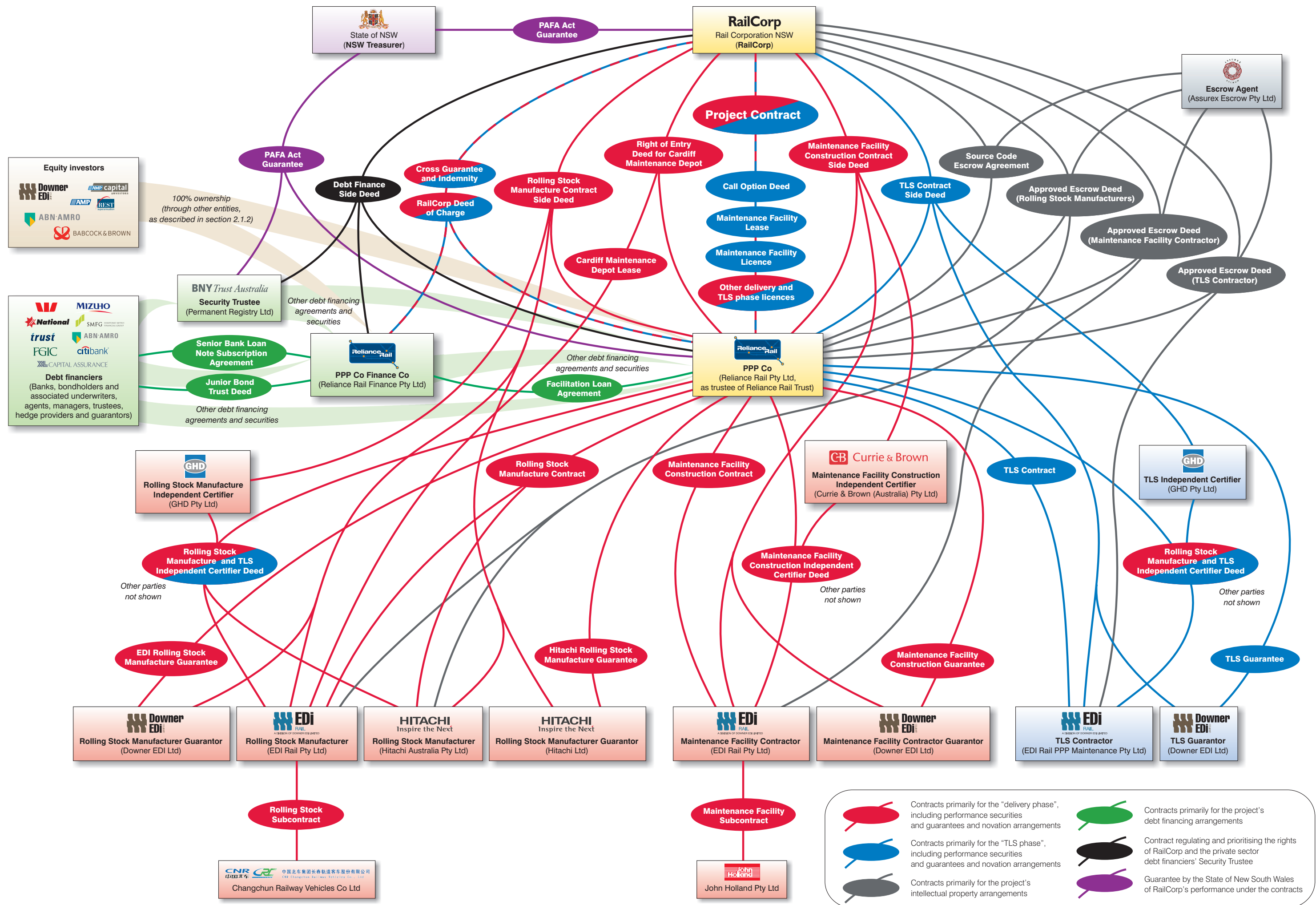


Figure 1. Overview of the structure of the Rolling Stock PPP project's contracts from a public sector perspective, focussing on the contracts which currently have (or in some cases potentially might have) public sector parties or which otherwise directly affect public sector benefits and risks.

Limited Partnership (UK registration no LP11596)
(12.75% holding)

- **Reliance Rail Finance Pty Ltd** (ACN 120 380 805, ABN 23 120 380 805) (“**PPP Co Finance Co**”), a special purpose vehicle, wholly owned by PPP Co, which will:
 - ♦ Borrow funds from the project’s debt financiers, including four major banks (Westpac Banking Corporation, Mizuho Corporate Bank, Ltd, National Australia Bank Ltd and Sumitomo Mitsui Banking Corporation) and bondholders, and
 - ♦ On-lend these funds to PPP Co.

In addition to these arrangements, the project’s equity investors have supplemented their shareholding and unitholding investments by making loan payments to PPP Co (via PPP Co Holding Co) under a series of subordinated debt agreements.

- **Permanent Registry Ltd** (ACN 000 334 636, ABN 88 000 334 636) (“**the Security Trustee**”), as the security trustee for the project’s debt financiers under a NSW Rolling Stock PPP Security Trust Deed executed by PPP Co, PPP Co Finance Co, PPP Co Holding Co and the Security Trustee on 1 December 2006.

Permanent Registry is wholly owned by BNY Trust (Australia) Pty Ltd (ACN 113 947 309, ABN 83 113 947 309), which is jointly owned by Permanent Trustee Company Ltd (ACN 000 000 993, ABN 21 000 000 993), a wholly owned subsidiary of Trust Company Ltd (ACN 004 027 749, ABN 59 004 027 749), a public company listed on the Australian Stock Exchange, and BNY Holdings (Australia) Pty Ltd (ACN 114 463 937, ABN 48 114 463 937), which is owned by BNY International Financing Corporation and ultimately by The Bank of New York, Inc.

- **EDI Rail Pty Ltd** (ACN 000 002 031, ABN 92 000 002 031) and **Hitachi Australia Pty Ltd** (ACN 075 381 332, ABN 34 075 381 332) (“**the Rolling Stock Manufacturers**”), which are jointly and severally obliged to PPP Co to design, manufacture and commission the new train carriages—which are called “cars” in the project’s contracts—and the train simulators, thereby enabling PPP Co to meet its obligations to RailCorp to design, manufacture and commission the trains and simulators.

EDI Rail Pty Ltd is a wholly owned subsidiary of Downer EDI Ltd and Hitachi Australia Pty Ltd is wholly owned by Hitachi Ltd (ACN 002 539 693, ABN 35 002 539 693), a Japanese listed company.

- **Downer EDI Ltd** and **Hitachi Ltd** (“**the Rolling Stock Manufacturer Guarantors**”), which have provided parent company guarantees of the Rolling Stock Manufacturers’ performance of their obligations to PPP Co and have entered into an associated side contract with RailCorp.
- **GHD Pty Ltd** (ACN 008 488 373, ABN 39 008 488 373) (“**the Rolling Stock Manufacture Independent Certifier**”), which will provide independent certification services to PPP Co, the

Rolling Stock Manufacturers and other private sector parties during the design, manufacture and commissioning of the trains and simulators and has entered into an associated side contract with RailCorp.

- **EDI Rail Pty Ltd** (as “**the Maintenance Facility Contractor**”), which is obliged to PPP Co to design and construct the maintenance facility in Auburn, thereby enabling PPP Co to meet its obligations to RailCorp to design and construct this facility.
- **Downer EDI Ltd** (as “**the Maintenance Facility Contractor Guarantor**”), which has provided a parent company guarantee of the Maintenance Facility Contractor’s performance of its obligations to PPP Co and has entered into an associated side contract with RailCorp.
- **Currie & Brown (Australia) Pty Ltd** (ACN 007 406 840, ABN 15 007 406 840) (“**the Maintenance Facility Construction Independent Certifier**”), which will provide independent certification services to PPP Co, the Maintenance Facility Contractor and other private sector parties during the design and construction of the maintenance facility and has entered into an associated side contract with RailCorp.

- **EDI Rail PPP Maintenance Pty Ltd** (ACN 122 730 116, ABN 97 122 730 116) (“**the TLS Contractor**”), which is obliged to PPP Co to provide maintenance services and other “through life support” for the trains, the simulators and the maintenance facility, thereby enabling PPP Co to meet its obligations to RailCorp to provide this “through life support”.

EDI Rail PPP Maintenance Pty Ltd is wholly owned by EDI Rail Pty Ltd and thus ultimately by Downer EDI Ltd.

- **Downer EDI Ltd** (as “**the TLS Guarantor**”), which has provided a parent company guarantee of the TLS Contractor’s performance of its obligations to PPP Co and has entered into an associated side contract with RailCorp.
- **GHD Pty Ltd** (as “**the TLS Independent Certifier**”), which will provide independent certification services to PPP Co, the TLS Contractor and other private sector parties concerning the “through life support” and has entered into an associated side contract with RailCorp.
- **Assurex Escrow Pty Ltd** (ACN 008 611 578, ABN 64 008 611 578) (“**the Escrow Agent**”), which has entered into a series of contracts with RailCorp, PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor concerning access to the source code of computer programs.

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 1*.

The principal contract is **RailCorp Rolling Stock PPP Project Contract No C01645** (“**the Project Contract**”), dated 3 December 2006, between RailCorp and PPP Co.

The Project Contract comprises a brief “Deed of Agreement”, detailed “Conditions of Contract” attached to this Deed of Agreement, 22 “Schedules” and 18 “Exhibits”, but is described in this report simply as “the Project Contract”.

It sets out the terms under which:

- (a) **PPP Co must finance, design, construct and commission the trains, simulators and maintenance facility.**

PPP Co will satisfy these obligations to RailCorp through:

- ◆ Equity investments and subordinated loans by the project’s equity investors, as described in section 2.1.
In line with the *Working with Government Guidelines for Privately Financed Projects* and the express confidentiality provisions of the project’s contracts (see section 3.7.8), the details of the project’s equity investments and underwritings are generally beyond the scope of this report.
- ◆ Loans to PPP Co by PPP Co Finance Co, under a **NSW Rolling Stock PPP Facilitation Loan Agreement (“the Facilitation Loan Agreement”)** between PPP Co and PPP Co Finance Co dated 1 December 2006, supported by:
 - Bank loans to PPP Co Finance Co by Westpac Banking Corporation (ACN 007 457 141, ABN 33 007 457 141), Mizuho Corporate Bank, Ltd (ACN 099 031 106, ABN 83 099 031 106), National Australia Bank Ltd (ACN 004 044 937, ABN 12 004 044 937) and Sumitomo Mitsui Banking Corporation, Sydney Branch (ARBN 114 053 459), under a **NSW Rolling Stock PPP Senior Bank Loan Note Subscription Agreement (“the Senior Bank Loan Note Subscription Agreement”)**, executed by PPP Co, PPP Co Finance Co and these banks on 1 December 2006, and associated debt financing agreements
 - Bonds to be issued under a series of senior and junior bond financing agreements, including a **NSW Rolling Stock PPP Junior Bond Trust Deed (“the Junior Bond Trust Deed”)**, executed by PPP Co, PPP Co Finance Co and Permanent Custodians Ltd (ACN 001 426 384, ABN 55 001 426 384), as the trustee of and manager for the junior bondholders, on 1 December 2006, and
 - Arrangements for RailCorp and PPP Co to share the risks associated with movements in interest rates, as described later in this report (see section 3.6.4).

In line with the *Working with Government Guidelines for Privately Financed Projects* and the express confidentiality provisions of the project’s contracts (see section 3.7.8), the details of the project’s debt financing arrangements, other than provisions for the sharing of interest rate risks, are generally beyond the scope of this report.

- ◆ The performance by the Rolling Stock Manufacturers of their joint and several obligations to PPP Co to design, manufacture and commission the trains and simulators under the **Rolling Stock PPP Rolling Stock Manufacture Contract (“the Rolling Stock Manufacture Contract”)** between PPP Co and the Rolling Stock Manufacturers, dated 6 December 2006.
- ◆ The performance of any other rolling stock manufacturers appointed by PPP Co.
- ◆ The performance by the Maintenance Facility Contractor of its obligations to PPP Co to design and construct the maintenance facility under the **Rolling Stock PPP Rolling Stock Maintenance Facility Design and Construct Contract (“the Maintenance Facility Construction Contract”)** between PPP Co and the Maintenance Facility Contractor, dated 6 December 2006.
- ◆ The performance of any other maintenance facility design and construction contractor appointed by PPP Co.

EDI Rail Pty Ltd’s performance of its obligations to PPP Co as a Rolling Stock Manufacturer under the Rolling Stock Manufacture Contract has been guaranteed to PPP Co by Downer EDI Ltd, as one of the Rolling Stock Manufacturer Guarantors, in a **Rolling Stock PPP Parent Company Guarantee (“the EDI Rolling Stock Manufacture Guarantee”)** between PPP Co and Downer EDI Ltd, dated 2 December 2006.

Similarly, Hitachi Australia Pty Ltd’s performance of its obligations to PPP Co as the other Rolling Stock Manufacturer under the Rolling Stock Manufacture Contract has been guaranteed to PPP Co by Hitachi Ltd, as the other Rolling Stock Manufacturer Guarantor, in a **Rolling Stock PPP Parent Company Guarantee (“the Hitachi Rolling Stock Manufacture Guarantee”)** between PPP Co and Hitachi Ltd.

In carrying out their obligations to PPP Co the Rolling Stock Manufacturers have executed, and will execute, a series of supply contracts and other subcontracts, many of them with Australian and New Zealand firms. One of the most important of PPP Co’s subcontracts is a **RailCorp Rolling Stock PPP Double Deck Trains Deed of Agreement and General Conditions of Contract (“the Rolling Stock Subcontract”)** between EDI Rail Pty Ltd and Changchun Railway Vehicles Co Ltd, a leading rolling stock manufacturer in China, dated 3 December 2006.

In addition, RailCorp has continued and recently updated its lease of its Cardiff maintenance depot to one of the Rolling Stock Manufacturers, EDI Rail Pty Ltd (**“the Cardiff Maintenance Depot Lease”**), thereby permitting these premises to be used for part of the manufacture of the new trains.

The Maintenance Facility Contractor's performance of its obligations to PPP Co under the Maintenance Facility Construction Contract has been guaranteed to PPP Co by the Maintenance Facility Contractor Guarantor in a **Rolling Stock PPP Parent Company Guarantee ("the Maintenance Facility Construction Guarantee")** between PPP Co and the Maintenance Facility Contractor Guarantor, dated 2 December 2006.

The Maintenance Facility Contractor has subcontracted the design and construction of the maintenance facility to John Holland Pty Ltd (ACN 004 282 268, ABN 11 004 282 268) under a **Rolling Stock Maintenance Facility Design and Construct Subcontract ("the Maintenance Facility Subcontract")**, dated 3 December 2006.

(b) During this "delivery phase", until the completion of the last of the trains, RailCorp must:

- ◆ Design and construct specified "enabling works" associated with the Auburn maintenance facility and the housing of the train simulators
- ◆ Grant PPP Co licences to use the maintenance facility's construction site for preliminary site investigations and then for the design and construction of the facility
- ◆ Give PPP Co specified rights of access to the rail network for the testing and commissioning of the new trains, including a dedicated section of track adjacent to and northwest of the new maintenance facility
- ◆ Provide train crews for this testing and commissioning of the trains
- ◆ Provide transitional "stabling" (train parking) locations, away from the maintenance facility, for trains that are being commissioned, and
- ◆ Make a series of payments to PPP Co at specified "milestones" in its planning for and delivery of the trains, simulators and maintenance facility.

(c) PPP Co must:

- ◆ Make at least 72 of the new trains (and more for special events) available for RailCorp's CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational period for some or all of the trains, and
- ◆ Maintain, clean, repair and refurbish the trains, simulators and maintenance facility and provide other specified "through life support" services, to RailCorp-specified standards, throughout their operational periods.

PPP Co will satisfy these obligations to RailCorp through:

- ◆ The performance by the TLS Contractor of its obligations to PPP Co to provide "through life support" services under the **Rolling Stock PPP Through Life Support (TLS) Contract ("the TLS Contract")**

between PPP Co and the TLS Contractor, dated 6 December 2006, and

- ◆ The performance of any other TLS contractors appointed by PPP Co.

The TLS Contractor's performance of its obligations to PPP Co under the TLS Contract has been guaranteed to PPP Co by the TLS Guarantor in a **Rolling Stock PPP Parent Company Guarantee ("the TLS Guarantee")** between PPP Co and the TLS Guarantor, dated 2 December 2006.

Upon the completion of the maintenance facility, RailCorp must, if requested by PPP Co in accordance with a **Call Option Deed** between RailCorp and PPP Co, dated 3 December 2006, grant a **Maintenance Facility Lease** and a **Maintenance Facility Licence** for this facility and its access routes, on terms specified in the Call Option Deed, for approximately 33½ years or until any earlier termination of the project's contracts.

(d) Throughout the "TLS phase", from the completion of the first train "set" until the expiry or earlier termination of the project's contracts, RailCorp must:

- ◆ Grant PPP Co and its associates a licence to use RailCorp's rail network land and train "stabling" depots to maintain and repair the trains and recover any trains that break down
- ◆ Provide train crews at the maintenance facility for the trial running of trains and the preparation of trains stabled on its sidings, and
- ◆ Make performance-based monthly payments to PPP Co, as detailed later in this report (see section 3.6).

(e) PPP Co must decommission the trains, and/or hand over of some or all of the trains to RailCorp, at the end of their operational periods, and hand over the maintenance facilities to RailCorp at the end of its operational period.

In order to set up arrangements ensuring RailCorp will be able to exercise its rights under the Project Contract to obtain the source code of various computer programs used and developed by PPP Co and its contractors, RailCorp has entered into an **Original Source Code Escrow Agreement ("the Source Code Escrow Agreement")** with PPP Co and the Escrow Agent, dated 3 December 2006, an **Approved Escrow Deed (Core Contractors) ("the Approved Escrow Deed (Rolling Stock Manufacturers)")** with PPP Co, the Escrow Agent and the Rolling Stock Manufacturers, dated 3 December 2006, an **Approved Escrow Deed (Core Contractors) ("the Approved Escrow Deed (Maintenance Facility Contractor)")** with PPP Co, the Escrow Agent and the Maintenance Facility Contractor, dated 3 December 2006, and an **Approved Escrow Deed (Core Contractors) ("the Approved Escrow Deed (TLS Contractor)")** with PPP Co, the Escrow Agent and the TLS Contractor, again dated 3 December 2006.

Should PPP Co default on its obligations to the Rolling Stock Manufacturers under the Rolling Stock Manufacture Contract, or should RailCorp terminate the Project Contract during the project's "delivery phase" for any reason (see section 3.8 of this report), RailCorp will be entitled, under a **Rolling Stock Manufacture Contract Side Deed** between RailCorp, PPP Co, the Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors and the Rolling Stock Manufacture Independent Certifier, dated 5 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees and the **Independent Certifier Deed ("the Rolling Stock Manufacture and TLS Independent Certifier Deed")** under which the Rolling Stock Manufacture Independent Certifier was appointed.

Similarly,

- Should PPP Co default on its obligations to the Maintenance Facility Contractor under the Maintenance Facility Construction Contract, or should RailCorp terminate the Project Contract during the project's "delivery phase" for any reason, RailCorp will be entitled, under a **Maintenance Facility Construction Contract Side Deed** between RailCorp, PPP Co, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor and the Maintenance Facility Construction Independent Certifier, dated 3 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee and the **Independent Certifier Deed ("the Maintenance Facility Construction Independent Certifier Deed")** under which the Maintenance Facility Construction Independent Certifier was appointed.
- Should EDI Rail Pty Ltd, one of the Rolling Stock Manufacturers, become insolvent, default on its obligations to RailCorp under the Cardiff Maintenance Depot Lease or default on its obligations to PPP Co under the Rolling Stock Manufacture Contract, PPP Co will be entitled, under a **Right of Entry Deed for Cardiff Maintenance Depot** between RailCorp, PPP Co and EDI Rail Pty Ltd, dated 3 December 2006, to "step in" and effectively assume most of EDI Rail's rights and obligations under the Cardiff Maintenance Depot Lease, and RailCorp will not be entitled to terminate this lease during any such "step in" period.
- Should PPP Co default on its obligations to the TLS Contractor under the TLS Contract, or should RailCorp terminate the Project Contract during the project's "TLS phase" for any reason, RailCorp will be entitled, under a **TLS Contract Side Deed** between RailCorp, PPP Co, the TLS Contractor, the TLS Guarantor and the TLS Independent Certifier, dated 3 December 2006, to "step in" and effectively assume PPP Co's rights and obligations under the TLS Contract, the TLS Guarantee and the Rolling Stock Manufacture and TLS Independent Certifier Deed under which the TLS Independent Certifier was appointed.

Some of RailCorp's rights and obligations under the Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed are subject to restrictions or additional process requirements under the **Debt Finance Side Deed** between RailCorp, PPP Co, PPP Co Finance Co and the debt financiers' Security Trustee, dated 3 December 2006. As an example, this agreement requires RailCorp to notify the Security Trustee before it terminates the Project Contract for a default by PPP Co, giving the Security Trustee an opportunity to cure the default.

Under the **RailCorp Deed of Charge** between RailCorp, PPP Co and PPP Co Finance Co, dated 3 December 2006, all of the obligations of PPP Co and PPP Co Finance Co to RailCorp under the project's contracts are secured by charges over the assets, undertakings and rights of PPP Co, the Reliance Rail Trust and PPP Co Finance Co.

Priorities between RailCorp's charges and securities held by the project's private sector debt financiers are governed by the Debt Finance Side Deed, which also:

- Records RailCorp's consent to the private sector securities and the Security Trustee's consent to RailCorp's charges
- Records the consent of RailCorp and the Security Trustee to each other's "step in" rights under the project's contracts
- Regulates the exercise of these "step in" rights, and
- Records PPP Co's and PPP Co Finance Co's consents to these arrangements.

The Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor, the TLS Contractor and the TLS Contractor Guarantor have also expressly consented to RailCorp's charges, in the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed.

Under a **Cross Guarantee and Indemnity** between RailCorp, PPP Co and PPP Co Finance Co, dated 3 December 2006,

- PPP Co has given RailCorp an irrevocable and unconditional guarantee of PPP Co Finance Co's obligations to RailCorp under or in any way associated with any of the project contracts to which RailCorp is a party
- PPP Co Finance Co has promised to pay RailCorp, on demand, any overdue amounts of money that are to be paid to RailCorp by PPP Co under any of the project contracts to which RailCorp is a party, and
- PPP Co and PPP Co Finance Co have irrevocably, unconditionally, jointly and severally indemnified RailCorp against any loss, expense, damage or liability arising out of any failure, by either of them, to perform their obligations under or in any way associated with any of the project contracts to which RailCorp is a party, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies

specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1).

Similarly, a **Deed of Guarantee** (“**the PAFA Act Guarantee**”) between the NSW Treasurer (on behalf of the State of NSW), RailCorp, PPP Co and the Security Trustee, dated 3 December 2006, provides a guarantee by the State of NSW, in accordance with section 22B of the Public Authorities (Financial Arrangements) Act (NSW), of RailCorp’s performance of its obligations under the Project Contract, a Maintenance Site Safety Interface Agreement which is expected to be executed under rail safety arrangements described in section 3.7.1, Expert Determination Agreements which are to be executed under arrangements described in section 3.7.17, the Call Option Deed, the Maintenance Facility Lease, the Maintenance Facility Licence, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Rolling Stock Manufacture Contract Side Deed, the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity and any other documents approved, in writing, by the NSW Treasurer in the future.

The contracts (listed above) for which RailCorp’s performance has been guaranteed under the PAFA Act Guarantee, plus the PAFA Act Guarantee itself, are collectively referred to in the project contracts as “**the RailCorp project agreements**”, and this terminology is adopted in this report.

2.3 Conditions precedent

Although the Project Contract and the other RailCorp project agreements were executed on 3 and 5 December 2006, and most of the RailCorp project agreements took effect immediately, under the terms of the Project Contract, the Debt Finance Side Deed and the Call Option Deed most of the provisions of these three contracts were not to become legally binding until:

- The RailCorp project agreements (other than the Maintenance Site Safety Interface Agreement, the Expert Determination Agreements, the Maintenance Facility Lease and the Maintenance Facility Licence) and other specified project agreements to which RailCorp is not a party—the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees, the Rolling Stock Subcontract, the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee, the Maintenance Facility Subcontract, the TLS Contract, the TLS Guarantee, the project’s private sector equity documents and the project’s private sector debt financing documents (other than a mortgage on the Maintenance Facility Lease)—had all been executed and their own conditions precedent, other than any requiring the Project Contract to have taken effect, had been satisfied or waived. This condition precedent was satisfied on 6 December 2006.
- The NSW Minister for Transport had recommended, and the NSW Treasurer had granted, an approval for RailCorp’s entering into the project’s joint financing arrangements under section 20(1) of the Public Authorities (Financial Arrangements) Act (NSW). This condition precedent was satisfied on 20 November 2006, when the NSW Treasurer executed a section 20(1) approval in response to a recommendation by the Minister for Transport on 17 November 2006.
- The NSW Treasurer had approved a guarantee of RailCorp’s performance under section 22B of the Public Authorities (Financial Arrangements) Act. This condition precedent was satisfied on 24 November 2006, when the Treasurer agreed to the form of the PAFA Act Guarantee that was ultimately executed on 3 December 2006.
- RailCorp had received two unconditional and irrevocable bank bonds, for a total of \$50 million, as securities for PPP Co’s performance of its “delivery phase” obligations to RailCorp. This condition precedent was satisfied on 6 December 2006.
- PPP Co had effected “delivery phase” insurance policies as specified in the Project Contract and RailCorp had received certified copies of these policies or coverage placement slips. This condition precedent was satisfied on 6 December 2006, with RailCorp waiving some of the Project Deed’s detailed requirements for some of these initial insurance policies.
- PPP Co had given RailCorp a tax opinion, satisfactory to RailCorp, confirming that changes made to the project’s contracts since the Australian Taxation Office issued a ruling on the application of section 51AD and Division 16D of the Income Tax Assessment Act (Cth) to the project had not adversely affected this ruling. This condition precedent was satisfied on 5 December 2006.
- RailCorp had received the private sector participants’ audited “base case” financial model for the project, in a form satisfactory to RailCorp, and an associated letter of confirmation and audit report. This condition precedent was satisfied on 7 December 2006.
- RailCorp had received specified details (constitutions, trusts, powers of attorney and copies of relevant board minutes) concerning all of the parties to the RailCorp project agreements, other than RailCorp itself. This condition precedent was satisfied on 5 December 2006, with the exception of five waivers on particular matters granted by RailCorp and confirmed on 6 and 7 December 2006.
- PPP Co had given RailCorp a legal opinion, satisfactory to RailCorp, concerning the validity and enforceability of Hitachi Ltd’s execution of the Rolling Stock Manufacture Contract Side Deed. This condition precedent was satisfied on 5 December 2006.

RailCorp and PPP Co certified on 7 December 2006 that all of these conditions precedent had been satisfied or waived in accordance with the Project Contract and that "financial close" had occurred on that date.

Accordingly, of the RailCorp project agreements,

- The Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity and the PAFA Act Guarantee have been binding since they were executed on 3 December 2006
- The Rolling Stock Manufacture Contract Side Deed has been binding since it was executed on 5 December 2006, and

- The Project Contract, the Debt Finance Side Deed and the Call Option Deed have been binding since 7 December 2006.

All of the other project contracts executed on or before 7 December 2006, including the Rolling Stock Manufacture Contract, the Rolling Stock Manufacture Guarantees, the Rolling Stock Subcontract, the Rolling Stock Manufacture and TLS Independent Certifier Deed, the Maintenance Facility Construction Contract, the Maintenance Facility Construction Guarantee, the Maintenance Facility Subcontract, the Maintenance Facility Construction Independent Certifier Deed, the TLS Contract, the TLS Guarantee and the private sector parties' equity and debt financing agreements, have been binding since 7 December 2006 at the latest.

3 The Project Contract and associated intellectual property, lease, licence, step-in and novation arrangements

3.1 General obligations of PPP Co and RailCorp and general acceptance of risks by PPP Co

3.1.1 PPP Co's principal obligations

As already indicated in section 2.2, PPP Co's main obligations under the Project Contract are to:

- Finance, design, construct and commission the trains, simulators and maintenance facility:
 - ♦ Using its best endeavours to complete the trains, simulators and maintenance facility by dates specified in the Project Contract, and
 - ♦ In accordance with detailed standards, specifications and other requirements set out in Schedules and Exhibits to the Project Contract.

The trains and simulators to be designed, manufactured and commissioned by PPP Co are described in section 3.2.1 below, and the scope of PPP Co's maintenance facility works is described in section 3.3.1.2.

- Make at least 72 of the new trains (and more for special events) available for RailCorp's CityRail services every day over a period of about 30 years, with up to two possible five-year extensions of the operational periods for some or all of the trains.

The scope of these "availability" obligations is described in section 3.5.1 below.

- Maintain, clean, repair and refurbish the trains, simulators and maintenance facility and provide other specified "through life support" ("TLS") services, in accordance with detailed standards, specifications and other requirements set out in schedules and exhibits to the Project Contract, throughout their operational periods.

The scope of these "TLS" obligations is described in section 3.5.2 below.

- Decommission the trains, and/or hand over of some or all of the trains to RailCorp, at the end of their operational periods, as described in section 3.5.8.
- Hand over the maintenance facilities to RailCorp at the end of its operational period, as described in section 3.5.10.

3.1.2 RailCorp's principal obligations

Again as already indicated in section 2.2, RailCorp's main obligations under the Project Contract are:

- During the project's "delivery phase", until the completion of the last of the trains, to:
 - ♦ Design and construct specified "enabling works" associated with the maintenance facility and the housing of the train simulators
 - ♦ Grant PPP Co licences to use the maintenance facility's construction site for preliminary site investigations and then for the design and construction of the facility
 - ♦ Give PPP Co specified rights of access to the rail network for the testing and commissioning of the new trains, including a dedicated section of track adjacent to and northwest of the new maintenance facility
 - ♦ Provide train crews for this testing and commissioning of the trains
 - ♦ Provide transitional "stabling" (train parking) locations, away from the maintenance facility, for trains that are being commissioned, and
 - ♦ Make a series of payments to PPP Co at specified "milestones" in its planning for and delivery of the trains, simulators and maintenance facility, as described in section 3.4.2 below.
- During the project's "TLS phase", from the completion of the train simulators, maintenance facility or first train "set" (whichever is earliest) until the expiry or earlier termination of the project's contracts, to:
 - ♦ Grant PPP Co the Maintenance Facility Lease and the Maintenance Facility Licence, if called upon to do so by PPP Co
 - ♦ Grant PPP Co and its associates a licence to use RailCorp's rail network land and train "stabling" depots to maintain and repair the trains and recover any trains that break down
 - ♦ Provide train crews at the maintenance facility for the trial running of trains and the preparation of trains stabled on its sidings, and
 - ♦ Make performance-based monthly payments to PPP Co, as described in section 3.6 below.

RailCorp is not obliged to perform any work or provide any facilities to PPP Co beyond the express requirements of the Project Contract.

3.1.3 No restrictions on RailCorp's or other authorities' statutory powers

Except for RailCorp's express contractual obligations under the RailCorp project agreements, the RailCorp project agreements do not in any way fetter RailCorp's exercising of any of its statutory functions or powers.

PPP Co has also acknowledged that, subject to any express provisions of the Project Contract, it bears the risk that other government, semi-government, administrative and judicial authorities or owners of utility services might exercise their statutory functions or powers in ways that might interfere with PPP Co's performance of its obligations under the Project Contract.

3.1.4 General acceptance of risks by PPP Co

Subject to specific assumptions of risk by RailCorp under the Project Contract, as described in this report, PPP Co has accepted all of the risks associated with the project.

This expressly includes the risks that the project's costs might be higher than estimated, that the time required to meet PPP Co's "delivery phase" obligations (and hence the time before PPP Co receives monthly payments from RailCorp) might be greater than expected, that the number of train carriages PPP Co manufactures might prove insufficient for it to satisfy its "availability" obligations, that changes in rail patronage might mean the maintenance requirements for the trains are greater than PPP Co has estimated, and that PPP Co might have made inadequate provisions for the work and materials required to meet its obligations.

PPP Co has also expressly acknowledged that:

- RailCorp has made no representations or warranties concerning the project's contracts or arrangements, or any other matter relevant to PPP's decision to enter into the project's contracts, other than the RailCorp representations and promises set out in the Project Contract itself
- PPP Co has assessed the project's risks itself, doing everything that would be expected of a leading world expert in the most modern design, manufacture and commissioning of trains and simulators and a prudent, competent and experienced designer, builder and maintainer of facilities similar to the maintenance facility, and has not relied on any pre-contractual information of any type provided by RailCorp, and
- More specifically, PPP Co has not relied and will not rely on specified non-contractual "information documents" provided by RailCorp, and RailCorp will not be liable for any of these documents, even if they were or are "misleading or deceptive" or "false and misleading" under the Trade Practices Act (Cth) or equivalent State legislation.

3.1.5 General warranties by PPP Co and PPP Co Finance Co

PPP Co and PPP Co Finance Co have each made a series of general warranties to RailCorp, in the Project Contract and the Cross Guarantee and Indemnity respectively, concerning their legal and financial status, their relationships with other entities, their compliance with the project's contracts (including restrictions limiting their trading purposes to this project) and, in PPP Co's case, the status of the Reliance Rail Trust.

Most of PPP Co's warranties are deemed to be repeated by PPP Co on a daily basis throughout the term of the project, while most of PPP Co Finance Co's are similarly deemed to be repeated, but only on each day during which any of the payments guaranteed by PPP Co Finance Co are still outstanding.

3.1.6 General indemnities by PPP Co and PPP Co Finance Co

PPP Co has promised in the Project Contract that it will indemnify RailCorp against any claim or loss RailCorp suffers as a result of any deaths, injuries, property damage or loss of use of property, or any reasonably foreseeable economic losses directly arising from property damage or a loss of use of property, that is caused by, or contributed to by,

- Any PPP Co breach of any RailCorp project agreement, or
- Any negligent or other wrongful act or omission, concerning PPP Co's obligations under the Project Contract or the use or occupation of the maintenance facility construction site or associated work sites, by PPP Co, PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entities controlled by them, PPP Co's contractors (at any level), the project's equity investors, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above,

but excluding any claims or losses to the extent that:

- They are indirect, consequential or purely economic losses beyond any amounts for these losses that are recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1)
- They arise from a RailCorp breach of any RailCorp project agreement or any fraudulent, negligent or other wrongful act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation
- They are economic losses resulting from any event for which RailCorp's monthly "TLS phase" "availability payments" to PPP Co have been reduced, because of the lateness, cancellation, withholding or withdrawal of trains, under "reliability and disruption adjustment" arrangements described in section 3.6.1.2 of this report
- They are losses of any type arising from a loss of use of the trains or any RailCorp property as a result of an event for

which RailCorp’s monthly “availability payments” to PPP Co have been reduced under these “reliability and disruption adjustment” arrangements

- RailCorp has assumed control of the claim, or an associated insurance claim, and this has directly or indirectly reduced the available insurance proceeds
- Any other RailCorp act or omission has directly or indirectly reduced insurance proceeds, *unless* this action has been taken in good faith (a) to protect RailCorp passengers or employees, the general public, RailCorp infrastructure or other property or (b) in accordance with RailCorp’s statutory functions or powers, or
- Any failure by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation to mitigate the losses or effects of the claim, again unless this failure has arisen from action taken in good faith to (a) protect RailCorp passengers or employees, the general public, RailCorp infrastructure or other property or (b) in accordance with RailCorp’s statutory functions or powers.

However, PPP Co’s total liabilities to RailCorp (on *any* legal or equitable bases, not limited to contractual claims) for any individual event:

- Triggering this indemnity, or
- More generally, causing
 - ◆ Indirect, consequential or pure economic losses
 - ◆ Increased costs of working (or losses of net revenue, business or opportunities) arising from property damage or losses, or
 - ◆ Third party claims or liabilities

that are in any way connected with PPP Co’s obligations under the Project Contract or any project-associated act or omission by PPP Co, PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entities controlled by them, PPP Co’s contractors (at any level), the project’s equity investors, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above

are capped at \$250 million, indexed to the Consumer Price Index (CPI) from the June quarter of 2006, *except* in the cases of:

- “Reliability and disruption adjustments” to RailCorp’s monthly “TLS phase” “availability payments” to PPP Co (see section 3.6.1.2)
- Third-party claims or liabilities for deaths or personal injuries or diseases
- Liabilities for losses—other than indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations—caused by malicious or fraudulent acts by PPP Co, PPP Co Finance Co, PPP Co Holding Co,

their subsidiaries, any other entities controlled by them, PPP Co’s contractors (at any level), the project’s equity investors, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above

- Any liability that is otherwise limited by the Project Contract
- Any liability which PPP Co may not lawfully limit or exclude
- Any total liability exceeding the cap, to the extent that it is recovered by PPP Co under the insurance policies specified in the Project Contract or would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1), and
- Any total liability—not counting any liability for any indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations—exceeding the cap, to the extent that it is recovered by PPP Co from another third party, such as PPP Co Finance Co, PPP Co Holding Co, their subsidiaries, any other entity controlled by them, a PPP Co contractor (at any level), an equity investor, any related corporation of any of the above or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of any of the above.

In addition to these arrangements under the Project Contract, under the Cross Guarantee and Indemnity PPP Co and PPP Co Finance Co have (as already indicated in section 2.2) irrevocably, unconditionally, jointly and severally indemnified RailCorp against any loss, expense, damage or liability arising out of any failure, by either of them, to perform their obligations under or in any way associated with any of the RailCorp project agreements, other than any indirect, consequential or purely economic loss that is not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

3.2 Design, manufacture and commissioning of the trains and simulators

3.2.1 Scope of the works

As indicated in sections 2.2 and 3.1.1, PPP Co must finance, design, construct and commission the trains and simulators:

- Using its best endeavours to complete the trains and simulators by dates specified in the Project Contract, and
- In accordance with detailed standards, specifications and other requirements set out in the Project Contract.

The principal technical requirements for the trains are set out in an Exhibit to the Project Contract, a *RailCorp Train Performance Specification*, and the principal technical requirements for the simulators are set out in another Exhibit to the Project Contract, a *RailCorp Simulator Specification*. However, the technical

specifications to be followed by PPP Co also include a *Train Design Book* and a *Simulator Design Book*, both of which were prepared by PPP Co and are additional Exhibits to the Project Contract.

Each of the new trains—other than a three-carriage prototype—is to have eight carriages (“cars”), joined together to form an eight-car “set” with a drivers’ cab at each end.

3.2.1.1 Option to delete separate guards’ cabs

Under the current specifications, each train “set” is to have a separate guards’ cab in at least one of the two central cars. However, RailCorp has an option to delete this requirement for a guards’ cab at any time before 30 June 2007.

If RailCorp exercises this option, the specifications will be amended accordingly and PPP Co must:

- On 30 June 2007, pay RailCorp a sum equal to \$500,000 divided by the number of whole calendar months between the date on which RailCorp notifies PPP Co of its decision and 30 June 2007, and
- On the date of practical completion of the seventh train “set”, targeted for 15 September 2010 (see section 3.2.5), pay RailCorp a further \$3,267,000.

If RailCorp informs PPP Co before 30 June 2007 that it has decided not to change the existing requirement for a guards’ cab, PPP must, on 30 June 2007, pay RailCorp a sum equal to \$500,000 divided by the number of whole calendar months between the date on which RailCorp notifies PPP Co of its decision and 30 June 2007.

3.2.1.2 Option to order more trains

PPP Co has agreed to manufacture and commission 78 train “sets”, and may build and commission more if it wishes. As already indicated in section 3.1.4, PPP Co has accepted the risk that the number of “sets” it manufactures and commissions might not be sufficient for it to fulfil its obligations to make specified numbers of “sets” available for CityRail services during the “TLS phase” of the project (see section 3.5.1).

RailCorp also has an option to order the manufacturing of up to 20 additional trains.

Under this option, RailCorp may, at any time 18 months or more before the expected date of completion of the 78th “set” (targeted for 5 September 2013), issue a written notice:

- Requiring PPP Co—or, if PPP Co prefers, the Rolling Stock Manufacturers and/or, if relevant, the TLS Contractor—to negotiate in good faith for the manufacture of:
 - ♦ A specified number of up to 20 additional trains and (if required by RailCorp) the provision of associated “through life support” services during the “TLS phase” of the project, and/or
 - ♦ A specified number of additional train simulators and (if required by RailCorp) the provision of associated “TLS” services, and

- Specifying the extent to which RailCorp requires PPP Co or its relevant contractor(s) to finance these works and services.

If RailCorp issues such a notice, PPP Co or the relevant contractor(s) will have three months to respond with a proposal for pricing and other terms which must be referable to the terms of the Project Contract, and the parties must then commence negotiations, in good faith, within 20 business days, with a view to reaching agreement on any of the proposed terms that are not initially acceptable to RailCorp.

If agreement cannot be reached, PPP Co will not be obliged to manufacture additional trains, unless it finds it needs to do this to satisfy its train “availability” obligations (section 3.5.1).

3.2.2 Approvals

In carrying out its obligations to design, manufacture and commission the trains and simulators PPP Co must:

- Obtain, maintain and comply with all the statutory and other approvals, licences and permits required for it to meet its obligations under the Project Contract, including, in particular, the rail safety requirements described in section 3.7.1, under which PPP Co is also obliged to assist RailCorp to obtain a variation to its own rail safety accreditation, and the environmental requirements described in section 3.7.5
- Ensure that its contractors (at any level), PPP Co Finance Co, PPP Co Holding Co and any other associates of PPP Co, and their officers, employees, agents, contractors, consultants, advisers, nominees and licensees, do likewise, and
- Ensure that PPP Co, its associates and the trains and simulators comply with all applicable laws.

3.2.3 Design obligations

PPP Co must design the trains and simulators and prepare detailed design documentation in accordance with the Project Contract and, more specifically,

- The *RailCorp Train Performance Specification*, PPP Co’s *Train Design Book*, the *RailCorp Simulator Specification* and PPP Co’s *Simulator Design Book*
- Detailed *RailCorp Contract Management Requirements*, described in section 3.2.7 below, and
- Any variations directed or approved by RailCorp under the Project Contract’s variation provisions, described in section 3.7.14 below.

PPP Co has warranted that all of its design documents for the trains and simulators, including its *Design Books*, are and will be safe and fit for their intended purposes.

Intellectual property and moral rights in the designs will be governed by the arrangements described in section 3.7.6.

PPP Co must conduct a series of five technical reviews of its designs with RailCorp, as specified in the *Contract Management Requirements* described in section 3.2.7, so as to permit

RailCorp to monitor its progress and provide feedback on its compliance with the requirements of the Project Contract.

In the case of the first three of these reviews—a “system definition” review, a “preliminary” design review and a “critical” design review—PPP Co must submit design documentation to RailCorp, at times set out in a *Delivery Programme* to be developed by PPP Co in accordance with the *Contract Management Requirements* (see sections 3.2.5 and 3.2.7), and RailCorp may (but need not) review this documentation and provide feedback to PPP Co within 20 business days.

If RailCorp indicates any of the design documentation does not comply with the requirements of the Project Contract, it must provide reasons, and PPP Co must submit amended design documentation for RailCorp’s review within 20 business days.

Each of these first three technical reviews will be regarded as completed only when a period of 20 business days has elapsed without RailCorp’s indicating the relevant design documentation does not comply with the requirements of the Project Contract.

The resultant “final” design documentation after the “critical” design review may be amended only under the Project Contract’s variation provisions, described in section 3.7.14, or through the submission of revised documentation to RailCorp, followed by a period of 20 business days during which RailCorp does not respond that the amended design documentation does not comply with the requirements of the Project Contract.

RailCorp and PPP Co have acknowledged that the design development processes summarised above may result in changes to the designs specified in the *Design Books*, and have agreed that these changes may be made if and only if:

- PPP Co satisfies RailCorp that the change is necessary to comply with other requirements with a higher priority than the *Design Book* in question
- PPP Co satisfies RailCorp that the change complies with the other specifications, is consistent with the design intent of the relevant *Design Book* and will not lessen any standard, level of service, scope or requirement of any part of the project’s works, or
- A variation has been directed or approved under the arrangements described in section 3.7.14.

3.2.4 General manufacturing and delivery obligations

PPP Co must manufacture the trains and simulators in accordance with the Project Contract and, more specifically,

- The *RailCorp Train Performance Specification*, PPP Co’s *Train Design Book*, the *RailCorp Simulator Specification* and PPP Co’s *Simulator Design Book*
- The detailed RailCorp *Contract Management Requirements* described in section 3.2.7 below
- PPP Co’s “final” design documentation after a “critical” design review (see section 3.2.3), and

- Any variations directed or approved by RailCorp under the Project Contract’s variation provisions, described in section 3.7.14 below.

PPP Co has warranted that the completed trains and simulators will be, and will remain, safe and fit for their intended purposes, and has undertaken that in manufacturing and commissioning the trains and simulators it will:

- Use workmanship which is fit for its purpose and of a standard prescribed in the specifications listed above or, in its absence, a standard consistent with best industry standards, and
- Use parts, components, goods and materials which are of merchantable quality and fit for their intended purposes and which comply with the specifications listed above or, in their absence, are new and consistent with best industry standards.

RailCorp must provide rooms to house the main train simulator at the Australian Rail Training Facility in Petersham, and must give PPP Co and its contractors reasonable access to these areas for the installation of this simulator.

3.2.5 Timeframes

PPP Co must regularly and diligently progress its design, manufacturing and commissioning of the trains and use its best endeavours to complete each eight-car train “set” by its “date for practical completion”, as set out in a Schedule to the Project Contract, with the first “set” being targeted for practical completion by 20 April 2010 and the 78th by 5 September 2013.

PPP Co must also use its best endeavours to complete the simulators six months before the date on which it expects to achieve practical completion of the first train “set”.

PPP Co must develop and periodically update a *Delivery Programme* in accordance with the *Contract Management Requirements* (see section 3.2.7) or any other reasonable RailCorp requirements, and must give RailCorp copies of each updated *Delivery Programme* and monthly *Delivery Phase Progress Reports*, again as specified in the *Contract Management Requirements*.

If PPP Co becomes aware of any matter which might delay the completion of a train “set” or the simulators, it must notify RailCorp as soon as reasonably practicable, providing details and a *Corrective Action Plan*. Similarly, PPP Co must submit a *Corrective Action Plan* if RailCorp reasonably believes PPP Co will be delayed in completing a “set” or the simulators and notifies PPP Co of this belief.

PPP Co must then implement its *Corrective Action Plan*, unless RailCorp notifies it within 15 business days that it does not believe the *Plan* will allow PPP Co to avoid, mitigate or minimise the consequences of the delay, in which case PPP Co must amend and resubmit the *Corrective Action Plan*. RailCorp will not be liable for any delays or losses incurred by PPP Co as a result of these processes.

PPP Co is free to accelerate the progress of its works, and RailCorp may assist in this, although it need not do so.

However,

- The date of practical completion of the *first* of the train “sets” to be completed may not be earlier than six months after the practical completion of the simulators and three months after the practical completion of the maintenance facility (targeted for 20 January 2010)
- The practical completion of the *seventh* of the train “sets” may not occur until specified requirements for the weight and in-service reliability of the first six “sets” have been satisfied (see section 3.2.11.1), agreement has been reached on the times to be assumed for the resolution of particular types of operational problems as part of these and other reliability tests and as part of the calculation of RailCorp’s “TLS phase” “availability payments” to PPP Co (see section 3.6.1.2), and RailCorp is satisfied with a specified *Safety Assurance Report* which PPP Co must prepare for revenue operation of the trains (see sections 3.2.7 and 3.7.1), and
- More generally, RailCorp is not obliged to certify the practical completion of *any* train “set” before its targeted date for practical completion, within 15 business days of the practical completion of the previous “set” in the case of the first six “sets” or within ten business days in the case of all subsequent “sets”.

Provided PPP Co has regularly and diligently progressed its design, manufacturing and commissioning activities and used its best endeavours to complete each train “set” and the simulators by their specified “dates for practical completion”, RailCorp will not be entitled to claim damages from PPP Co for any delays or disruptions. Any delay in the completion of (say) a train “set” will, however, defer PPP Co’s receipt of the final “milestone” payment for this train, under the arrangements described in section 3.4.2 below, and subsequent “availability payments” for the “set” in question, under the arrangements described in section 3.6.1.

RailCorp may order PPP Co to suspend any of its train or simulator design, manufacturing or commissioning activities if (but only if) PPP Co is not carrying out these activities in accordance with the Project Contract’s requirements, and may then instruct PPP Co to resume all or part of the suspended activities. PPP Co will not be entitled to make any claim against RailCorp in connection with such a suspension.

If PPP Co is delayed in completing a train “set”, or has to incur additional costs in avoiding or minimising such a delay, as a result of:

- A RailCorp breach of its obligations under the Project Contract (such as, for example, late completion of the RailCorp “enabling works” described in section 3.3.1.1 or a failure to give PPP Co agreed rights of access to the rail network to commission the trains, as described in section 3.2.9)

- A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, or
- Industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that has not been caused, directly or indirectly, by any action or inaction by PPP Co, its subcontractors or its other associates which was not required by the Project Contract,

RailCorp must pay PPP Co for all of the reasonable (and reasonably foreseeable) costs and losses it incurs, including any lost revenue, *other than* any costs or losses arising from any failure by PPP Co to take reasonable steps to mitigate its costs and losses.

3.2.6 Subcontracting

As already indicated in section 2.2, PPP Co has subcontracted its train and simulator design, manufacture and commissioning obligations to the Rolling Stock Manufacturers under the Rolling Stock Manufacture Contract.

PPP Co requires RailCorp’s consent before it may enter into any other subcontract concerning its “delivery phase” obligations under the Project Contract if this contract is for more than \$10 million (indexed in line with CPI movements since the June quarter of 2006), lasts for more than three years (including any options for extensions) or is for the design, manufacture, supply or installation of any of a specified series of train components. It must also ensure the Rolling Stock Manufacturers obtain RailCorp’s consent before they enter any such contracts themselves (the Project Contract calls these contracts, which include the Rolling Stock Manufacture Contract and the Rolling Stock Subcontract, “**significant contracts**”). RailCorp may not unreasonably delay or withhold its consent.

PPP Co must ensure any “significant contracts” entered into by itself or the Rolling Stock Manufacturers:

- Are on commercial terms negotiated on an “arms length” basis and approved by RailCorp
- Exclude the application of the proportionate liability provisions in the Civil Liability Act (NSW) (these provisions are also excluded under the Project Contract itself, and PPP Co must ensure the same exclusion is made in *all* of its subcontracts and sub-subcontracts, not just its “significant contracts”)
- Recognise RailCorp’s rights to “step in” to remedy PPP Co breaches of the Project Contract and other PPP Co defaults (see sections 3.8.3.2, 3.8.3.4, 3.8.3.5 and 3.8.3.6)
- Recognise RailCorp’s rights under the Project Contract’s arrangements for the end of the project (section 3.5.10)
- Require the contractor to provide all the information PPP Co needs to comply with the Project Contract and, in particular, the *Contract Management Requirements* discussed in section 3.2.7

- Require the contractor to implement a contract management and quality assurance system which complies with a *Compliance Management Plan* which PPP Co must prepare as part of its obligations under the *Contract Management Requirements*, and
- Allow PPP Co to novate the contract to RailCorp or its nominee if there is an early termination of the Project Contract (sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5).

PPP Co must also:

- Give RailCorp written details about any proposed “significant contractor” and the proposed terms of its appointment, other than pricing information
- Use its best endeavours to ensure all its “significant contractors” are reputable, have sufficient experience and expertise, arrange the availability of the necessary skills, resources and rail safety accreditations and have a suitably high financial and commercial standing
- If necessary, replace any contractors that do not meet these requirements
- If requested, give RailCorp copies of all proposed and executed “significant contracts” (and also, if requested, all other proposed and executed subcontracts)
- Refrain from terminating any “significant contract” unless a replacement contract has been established or RailCorp otherwise gives its consent
- Monitor the performance of each “significant contractor” and notify RailCorp of any defaults or terminations, and
- If requested by RailCorp, ensure each “significant contractor” enters into agreements with RailCorp equivalent to the Rolling Stock Manufacture Contract Side Deed.

Notwithstanding these generally applicable requirements, if PPP Co, the debt financiers’ Security Trustee or any controller, agent, receiver, manager or similar “enforcing party” appointed by the Security Trustee has sought RailCorp’s consent to the replacement of one or both of the Rolling Stock Manufacturers in order to remedy a PPP Co breach of any of the project’s contracts, RailCorp *must* give its consent, provided specified preconditions have been satisfied, under arrangements described in sections 3.8.3.1 and 3.8.3.3 of this report.

3.2.7 Management plans, records, reports, inspections and audits

PPP Co must establish, implement, comply with and, when necessary, update a comprehensive contract management system, documented in a specified series of “**Project Plans**”, for the performance all of its obligations to RailCorp under the Project Contract.

This system must satisfy a series of Australian Standards, including rail safety, occupational health and safety and quality, environmental and risk management standards, detailed *Contract Management Requirements* set out in an Exhibit to the Project Contract, and the requirements of all relevant

government and other authorities, including reasonable requirements imposed by RailCorp from time to time.

The “Project Plans” specified in the *Contract Management Requirements*—including plans of relevance to the maintenance facility and/or “through life support” aspects of the project (see sections 3.3.9 and 3.5.6)—are:

- An over-arching *Contract Management Plan*, incorporating, among other things, a *Local Industry Participation Plan*
- A *Safety Management Plan*
- A *Systems Assurance Plan*
- A *Configuration Management Plan*
- A *Train and Simulator Delivery Plan*
- A *Maintenance Facility Works Delivery Plan*
- A *Transition Plan*
- A *Through Life Support Plan*, and
- Numerous subsidiary plans and “sub-plans” within each of these plans.

PPP Co has warranted that its contract management system and “Project Plans” are and will always be fit for their intended purposes, as specified in the Project Contract and its *Contract Management Requirements*.

The Project Contract’s Exhibits include initial versions of several of PPP Co’s “Project Plans”. PPP Co must prepare the other plans and submit them to RailCorp in accordance with the *Contract Management Requirements*, and must review and update its contract management system and the “Project Plans” as specified in these *Requirements* and also whenever any event or circumstance—expressly including any exercise by RailCorp of its option to delete the guards’ cabs (section 3.2.1.1), any variations (section 3.7.14), any changes in law (section 3.7.13), the commencement of a new phase of design, manufacture or construction (as shown in PPP Co’s *Delivery Programme*, one of the subsidiary components of its *Programme Management Plan* within its *Contract Management Plan*) and anything making it possible the plans might not be fit for their intended purposes—might affect the way PPP Co carries out its obligations under the Project Contract. The updated plans, which may not increase RailCorp’s obligations or liabilities, must then be submitted to RailCorp.

RailCorp may direct PPP Co to update any “Project Plan” that has not been updated as required or that does not comply with the Project Contract, specifying a time within which the updated plan must be submitted to RailCorp.

RailCorp may, but need not, review any submitted original or updated PPP Co “Project Plan”. If RailCorp indicates within 20 business days that a plan does not comply with the requirements of the Project Contract, it must provide reasons, and PPP Co must submit an amended plan for RailCorp’s review within 20 business days.

In addition to their specifications for the “Project Plans”, the *Contract Management Requirements* specify much (but not all)

of the training PPP Co must provide, the individuals it must employ in key positions and a wide range of other procedures and processes PPP Co must follow.

Nominated representatives of PPP Co and RailCorp must participate in a joint Senior Project Group which must hold monthly meetings throughout the delivery phase of the project, until the last of the trains is completed, and then meet every three months. This group must monitor overall progress, assist in resolving any matters referred to it by either party and review PPP Co's *Delivery Phase Progress Reports* (section 3.2.5) and its monthly *Performance Reports* during the "TLS phase" of the project (see sections 3.5.6 and 3.6). It will, however, have no legal responsibilities or powers.

Subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp may enter PPP Co's manufacturing sites and other areas used by PPP Co and the Rolling Stock Manufacturers and other "significant contractors" (section 3.2.6) during business hours, or otherwise on 24 hours' notice unless there is an emergency, to observe, monitor, inspect and review PPP Co's performance of its obligations under the Project Contract, provided this is done in ways which do not unreasonably interfere with PPP Co's performance of its obligations. PPP Co must facilitate and assist these inspections.

PPP Co must allow RailCorp to access PPP Co's contract management system, and the contract management systems of PPP Co's subcontractors, sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp must do this in ways which do not unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

RailCorp may also conduct, or direct PPP Co to conduct, any reasonable tests concerning its train and simulator design, manufacture and commissioning obligations, in addition to the detailed *planned* testing program set out in PPP Co's *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (see section 3.2.10). RailCorp must give PPP Co at least 24 hours' notice of these tests, PPP Co must provide all reasonable assistance, and when the results are obtained they must be released to the other party within five business days. RailCorp must pay any reasonable costs incurred by PPP Co as a result of this testing, unless:

- The results disclose a breach of the Project Contract
- The work tested has been covered up or made inaccessible in breach of a direction by RailCorp that its prior written approval of this would be required, or
- The work tested is work to correct or overcome a defect in PPP Co's works,

in which case PPP Co must bear its own costs and pay RailCorp any reasonable costs incurred by RailCorp in connection with the testing.

3.2.8 EDI Rail's Cardiff Maintenance Depot Lease and PPP Co's right to 'step in'

As already indicated in section 2.2,

- RailCorp has recently continued and updated its lease of its Cardiff maintenance depot to one of the Rolling Stock Manufacturers, EDI Rail Pty Ltd, thereby permitting these premises to be used for part of the manufacture of the new trains
- PPP Co will be entitled, under the Right of Entry Deed for Cardiff Maintenance Depot, to "step in" and effectively assume most of EDI Rail's rights and obligations under this Cardiff Maintenance Depot Lease should EDI Rail become insolvent, default on its obligations to RailCorp under the Cardiff Maintenance Depot Lease or default on its obligations to PPP Co under the Rolling Stock Manufacture Contract, and
- RailCorp will not be entitled to terminate this lease during any such "step in" period.

If it chooses to exercise these "step in" rights, PPP Co must give RailCorp a notice to this effect, specifying a step-in date within the following 20 business days, and PPP Co and RailCorp must then consult on any necessary arrangements within five business days.

During any "step in" period PPP Co must give any other organisations for which EDI Rail is or has been carrying out work at the Cardiff maintenance depot reasonable access to remove any of their property on the premises. It must also make any of the works being carried out for them safe for removal and/or, in specified circumstances, use EDI Rail's plant and equipment to complete any works that do not form part of the Rolling Stock PPP project's works.

PPP Co may "step out" of its assumption of EDI Rail's rights and obligations under the Cardiff Maintenance Depot Lease at any time, by giving RailCorp 20 business days' notice.

3.2.9 Network access for the testing and commissioning of the trains

PPP Co will be entitled to move, test and commission the new trains on:

- A dedicated "commissioning track", reserved for these purposes, adjacent to and northwest of the new Auburn train maintenance facility (see *Figure 2* in section 3.5.3), and
- The rest of RailCorp's metropolitan rail network, at times and locations approved in advance by RailCorp under complex "network access rights" arrangements set out in the Project Contract.

In return for a PPP Co payment of \$1, RailCorp must grant PPP Co a right to take "possession" of the parts of the "commissioning track" that are not within the areas PPP Co will be able to use under the Maintenance Facility Licence described in section 3.5.3. This "possession" will last from the date of practical completion of the maintenance facility (see section 3.3.13), targeted for 20 January 2010, until a date, no

later than 31 December 2015, that will be determined by RailCorp following the practical completion of the last of the trains. PPP Co, its subcontractors and its other associates will not be able to make any claims against RailCorp associated with PPP Co's use of this track.

The Project Contract's arrangements for PPP Co's "network access rights"—again in return for a PPP Co payment of \$1 to RailCorp, and encompassing PPP Co's rights to run the trains and its rights to carry out work on sections of RailCorp's tracks—specify:

- Procedures and timeframes for RailCorp and PPP Co to develop "agreed" network access rights, based on "promised" network access rights, which are listed in an Exhibit to the Project Contract, and more detailed submissions to be made by PPP Co in the future
- RailCorp's right to cancel or change any of these "agreed" network access rights at any time, without any liability to PPP Co if RailCorp provides equivalent network access rights as soon as reasonably practicable
- Procedures for PPP Co to request additional network access rights, beyond the "agreed" rights, RailCorp's undertaking to endeavour to grant the requested additional rights, without being under any obligation to do so, and RailCorp's right to cancel or change the additional rights at any time, without any liability to PPP Co
- Generally applicable PPP Co rail safety and coordination obligations associated with all of its network access rights (see also section 3.7.1)
- More specifically, the rail safety and other procedures PPP Co must follow each time one of the trains that is being moved or tested is operated on the wider RailCorp rail network in accordance with PPP Co's network access rights
- PPP Co's obligations if, during any of these train runs, a defect attributable to PPP Co or its subcontractors or other associates, or any other act or omission by PPP Co or its associates, causes an incident that affects, or might affect, the operation of other trains on the RailCorp network, including PPP Co's obligations to:
 - ♦ Promptly assist RailCorp in removing the train from its network, and
 - ♦ Pay RailCorp \$10,000 (indexed in line with movements in the CPI from the June quarter of 2006) if the incident causes the cancellation of one or more RailCorp trains, as RailCorp's sole remedy in these circumstances
- PPP Co's liability, if it fails to use any authority it has been granted to work on a section of RailCorp's tracks without having requested the cancellation of this authority at least 14 weeks in advance, to reimburse RailCorp for all the reasonable costs RailCorp has incurred in connection with the authority, including the costs of providing alternative transport, *unless* the failure has been caused by a RailCorp act or omission (if RailCorp or another of its contractors carries out work on the same section of track during the

"unused" track possession, this liability will be reduced on a *pro-rata* basis)

- Procedures to be followed if PPP Co cannot use an "agreed" network access right because its works have been delayed by a RailCorp breach of the Project Contract, a *force majeure* event (see section 3.7.18) or any other event for which PPP Co has not specifically accepted the risks, which is beyond PPP Co's control and which could not have been avoided by a prudent company in PPP Co's position (including RailCorp's obligations to provide, or in the last two cases reasonably endeavour to provide, equivalent network access rights), and
- PPP Co's obligations if it might be late in handing a section of the rail network back to RailCorp, including its liability to reimburse RailCorp for all the reasonable costs it incurs as a result, except to the extent that the late handover is caused by an act or omission by RailCorp, other RailCorp contractors or other parties associated with RailCorp.

3.2.10 Testing and commissioning

PPP Co must test and commission the new trains and simulators in accordance with its *Integrated Test Plan*—one of the plans it must develop as a subsidiary component of its *Systems Assurance Plan*—and the *Contract Management Requirements* (see section 3.2.7).

RailCorp's only obligations concerning this testing and commissioning are to provide the necessary train crews and the network access rights discussed in section 3.2.9 above, including stabling (train parking) facilities for up to eight train "sets" at locations other than the Auburn train maintenance facility.

PPP Co must give RailCorp 180 days' notice of the date on which it expects to start the testing and commissioning of each of the train "sets", and must renew these notices 30 days before the expected dates.

It must give RailCorp the results of all of the tests, as specified in the *Contract Management Requirements*. If a train "set" fails a test, PPP Co must report this to RailCorp, carry out the necessary rectification work, notify RailCorp and conduct the test again.

If PPP Co fails to complete the new Auburn maintenance facility by its targeted date for practical completion (20 January 2010), and this means the maintenance facility cannot be used for the testing of the prototype train and the first train "set" in accordance with PPP Co's *Delivery Programme*, RailCorp must reasonably endeavour to provide PPP Co with suitable alternative testing and commissioning facilities, but only for the prototype and the first "set", not for the subsequent train "sets".

3.2.11 Completion and initial in-service reliability testing of the trains

The Project Contract distinguishes between "practical" and "final" completion of the trains.

3.2.11.1 Practical completion

“Practical” completion of each train “set” will be achieved by PPP Co when:

- The “set” has been completed and complies with all relevant requirements of the Project Contract, apart from minor defects which will not prevent it from satisfying specified minimum functional, presentational and performance operating standards
- It has passed all its commissioning tests (section 3.2.10) and the results of all of these tests have been provided to RailCorp
- It complies with a “configuration baseline” for the trains
- PPP Co has trained RailCorp employees who will operate and help to maintain the “set” in the operational and relevant maintenance aspects of the new trains
- PPP Co has provided RailCorp with specified documents, instruments, operational and maintenance manuals, spares, tools and training materials, and specified time periods for RailCorp to review these materials have expired
- PPP Co has given RailCorp copies of all relevant approvals which PPP Co has had to obtain (section 3.2.2), and
- PPP Co has complied with its relevant rail safety obligations, as described in section 3.7.1.

In addition, practical completion of the *first* of the train “sets” to be completed:

- May not occur (as already indicated in section 3.2.5) until at least six months after the practical completion of the simulators and at least three months after the practical completion of the maintenance facility, and
- Must be preceded by PPP Co’s provision of specified design certificates and a satisfactory interim *Safety Assurance Report* to RailCorp and by its updating of the simulators so that they accurately reflect the configuration and characteristics of the trains,

while practical completion of the *seventh* of the “sets” may not occur until:

- Specified requirements for in-service reliability of the first six “sets” have been satisfied, as discussed below
- Agreement has been reached on the times to be assumed for the resolution of particular types of operational problems as part of these and other reliability tests and as part of the calculation of RailCorp’s “TLS phase” “availability payments” to PPP Co (see section 3.6.1.2)
- It has been demonstrated that the weight of each of the first six “sets” is no more than 10% above its predicted weight of 395.5 tonnes, and

- RailCorp is satisfied with the *Safety Assurance Report* which PPP Co must prepare for revenue operation of the trains (see sections 3.2.7 and 3.7.1),

and, more generally, unless RailCorp decides otherwise, “practical” completion of *any* train “set” may not occur before its targeted date for practical completion (section 3.2.5), within 15 business days of the practical completion of the previous “set” in the case of the first six “sets” or within ten business days in the case of all subsequent “sets”.

The Project Contract sets out procedures for PPP Co to notify RailCorp of the expected completion of each “set” and for RailCorp to inspect the set and either certify its practical completion, listing any minor defects, or notify PPP Co that practical completion has not been achieved, accompanied (if practicable) by a list of what still needs to be done.

PPP Co must expeditiously rectify all minor defects identified in RailCorp’s certificates of practical completion.

As indicated above, the compliance of the first six “sets” with specified initial in-service reliability requirements must be established before practical completion of the seventh “set” can be achieved. These requirements set limits on the numbers of incidents involving:

- Late availability of the trains for CityRail services (by three minutes or more), and/or late CityRail services using the trains (again by three minutes or more), because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates
- Failures by PPP Co to meet its “availability” obligations (see section 3.5.1) because of a PPP Co decision to withhold or withdraw a “set” from service
- Cancellations of services by RailCorp because a “set”:
 - ♦ Fails to meet specified minimum operating standards
 - ♦ Has a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more
 - ♦ Is introduced into service ten or more minutes late, or is running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted under arrangements described in section 3.5.1.3, or
 - ♦ Is subject to a direction, by the Independent Transport Safety and Reliability Regulator (ITSRR), the Office of Transport Safety Investigations (OTSI) or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates.

(The Project Contract calls these types of incidents “**PPP Co related incidents**”.)

There may be no more than 12 of these incidents during the first 150,000 km of service operations by the first six “sets” or during their first 750 weekday morning, weekday afternoon and weekend day “availability periods” (see section 3.5.1), and there may be no more than nine of these incidents during any “rolling” period of 750 “availability periods” (in all cases these are collective totals for all six “sets”).

However, if:

- PPP Co satisfies all of the requirements for practical completion of the seventh train “set” except these initial reliability requirements, *and*
- The first six “sets” have travelled less than 150,000 km in total since their practical completion, *and*
- The average weekly distance travelled by the first six “sets” in the 21-week period following the practical completion of the first “set” has been less than 1,925 km, *and*
- The first six “sets” have been used by RailCorp for fewer than 75% of the “availability periods” during this 21-week period for which they were made available (treating “sets” which were withheld or withdrawn by PPP Co or failed to meet the specified minimum operating standards as having been used by RailCorp),

RailCorp must pay PPP Co all of the reasonable costs and losses PPP Co incurs as a result of the delay in achieving practical completion of the seventh “set”—including PPP Co’s lost revenue from RailCorp’s “milestone” payments (section 3.4.2) and “availability payments” (section 3.6.1)—from the date 21 weeks after practical completion of the first “set” until the first date on which any of the factors listed above no longer applies.

PPP Co must take all reasonable steps to mitigate these costs and losses and ensure its subcontractors do likewise, and RailCorp will not be liable for any costs or losses arising out of a failure to mitigate PPP Co’s costs and losses.

The Project Contract expressly permits PPP Co to withdraw one of its first six “sets” and substitute another for the purpose of satisfying the initial reliability requirements.

3.2.11.2 Final completion

“Final” completion of each train “set” will be achieved by PPP Co when:

- The “set” has had no more than two “PPP Co related incidents”, as described above, during any 180 consecutive days on which it has been available for services *or* for any 50,000 consecutive kilometres in service
- All of its minor defects identified by RailCorp have been corrected, *and*
- The “set” has no defects that would prevent its satisfying specified minimum functional, presentational and performance operating standards.

The Project Contract sets out procedures for PPP Co to notify RailCorp of the expected final completion of each “set” and for RailCorp to inspect the set and either certify its final completion or notify PPP Co that final completion has not been achieved, accompanied by a list of what still needs to be done.

3.2.12 Completion of the simulators

The Project Contract sets out procedures for PPP Co to notify RailCorp of the expected practical completion of the simulators, as defined in the Project Contract, and for RailCorp to inspect the simulators and either certify their practical completion, listing any minor defects, or notify PPP Co that practical completion has not been achieved, accompanied (if practicable) by a list of what still needs to be done.

Ownership of the simulators will pass to RailCorp on their date of practical completion.

PPP Co must expeditiously rectify all minor defects identified in RailCorp’s certificate of practical completion.

3.3 Design, construction and commissioning of the maintenance facility

3.3.1 Scope of works

As indicated in sections 2.2 and 3.1,

- PPP Co must finance, design, construct and commission the new Auburn train maintenance facility:
 - ♦ Using its best endeavours to complete the maintenance facility by 20 January 2010, and
 - ♦ In accordance with detailed standards, specifications and other requirements set out in Schedules and Exhibits to the Project Contract, and
- RailCorp must:
 - ♦ Design, construct and commission specified “enabling works” associated with the maintenance facility and the housing of the train simulators, and
 - ♦ Grant PPP Co licences to use the maintenance facility’s construction site for preliminary site investigations and then for the design and construction of the facility.

3.3.1.1 RailCorp’s ‘enabling works’

RailCorp’s “enabling works” comprise a series of defined work “packages” at different stages of PPP Co’s construction of the maintenance facility, as set out in a Schedule to the Project Contract and described more generally in a *RailCorp Enabling Works Specification* exhibited to the Project Contract. They encompass:

- Demolition and other works to allow PPP Co to take possession of the maintenance facility construction site
- The design, construction and commissioning of the “commissioning track” adjacent to and northwest of the new

Auburn train maintenance facility (see section 3.2.9 and Figure 2 in section 3.5.3)

- The design, construction and commissioning of trackwork connecting the maintenance centre's tracks to the RailCorp rail network, overhead wiring power supplies and signalling systems, and
- The design, construction and commissioning of accommodation and supports for the train simulators.

3.3.1.2 PPP Co's works

The scope of PPP Co's maintenance facility works is detailed in a *RailCorp Maintenance Facility Specification* and a PPP Co *Maintenance Facility Design Book* exhibited to the Project Contract.

These works encompass both "site" works (earthworks, utility services, trackwork, power, signalling and yard control systems, roadways, walkways, car parking, fencing, security systems, landscaping, an underfloor wheel profiling plant, a washplant facility, a simulator area and a decanting area) and "building" works (the main maintenance building, maintenance roads, buildings for the underfloor wheel profiling plant and washplant facility, and associated office areas, training rooms, stores areas, amenities areas, train crew room and security and communications systems).

The new maintenance facility must be able to cater for up to 1,000 train carriages.

3.3.2 Planning and other approvals

Planning approval for the maintenance facility, under Part 5 of the Environmental Planning and Assessment Act (NSW), was obtained by RailCorp on 30 November 2006. This approval, exhibited to the Project Contract, superseded earlier approvals granted on 2 September 2005, 1 February 2006 and 31 July 2006.

In carrying out its obligations to design, construct and commission the maintenance facility PPP Co must:

- Comply with the conditions of this latest planning approval
- Obtain, maintain and comply with all other statutory and other approvals, licences and permits required for it to meet its obligations under the Project Contract, including (in particular) the rail safety requirements described in section 3.7.1 and the environmental requirements described in section 3.7.5, and ensure that its contractors (at any level), PPP Co Finance Co, PPP Co Holding Co and any other associates of PPP Co, and their officers, employees, agents, contractors, consultants, advisers, nominees and licensees, do likewise, and
- Ensure that PPP Co, its associates and the maintenance facility comply with all applicable laws.

Similarly, in carrying out its obligations to design, construct and commission the RailCorp "enabling works" RailCorp must comply with the planning approval and all applicable laws and give PPP Co specified photographic records, drawings and

statements to help PPP Co comply with the heritage-related conditions of the planning approval.

One of the conditions of the latest planning approval addresses the possibility that Tadgell's Bluebells (*Wahlenbergia multicaulis*) might be found on the site. If they are, RailCorp and PPP Co must consult with qualified botanists to develop appropriate responses. If practical completion of the maintenance facility or any of the train "sets" is then delayed because PPP Co and/or RailCorp are forced to take conservation measures or obtain relevant approvals under the Threatened Species Conservation Act (NSW) or other legislation, RailCorp must pay PPP Co all of the reasonable costs and losses PPP Co incurs as a result of the delay(s), including PPP Co's lost revenue from RailCorp's "milestone" payments (section 3.4.2) and "availability payments" (section 3.6.1). PPP Co must take all reasonable steps to mitigate these costs and losses, and must ensure its subcontractors do likewise, and RailCorp will not be liable for any costs or losses arising out of a failure to mitigate PPP Co's costs and losses.

If the Project Contract's maintenance facility requirements are varied at PPP Co's request (see section 3.7.14.2) and, as a result, RailCorp decides that further environmental impact assessments are required, the planning approval is modified or a new planning approval is issued, PPP Co will be responsible for all of the associated costs and risks, no matter who carries out any additional assessments.

If there is a legal challenge to the planning approval, PPP Co must continue to perform its obligations under the Project Contract unless a court orders it not to or orders it to change the way it performs these obligations. If a court does issue such an order,

- PPP Co must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RailCorp directions concerning the legal challenge and ensure its subcontractors do likewise, and
- RailCorp must pay PPP Co for any reasonable costs it incurs directly as a result of any delay in its performance of its obligations, and/or directly as a result of having to stop and/or resume its performance of its obligations, but *not* for:
 - ♦ Any delay costs if the court order does not prevent PPP Co from achieving practical completion of the maintenance facility by 20 January 2010
 - ♦ Any costs resulting from a failure by PPP Co to mitigate its costs or comply with RailCorp directions, or
 - ♦ Any costs arising from the initiation or upholding of the legal challenge or the issuing of the court order—
 - Because of a PPP Co breach of its obligations under the Project Contract, or any other wrongful act or omission by PPP Co, its subcontractors or its other associates, or
 - Associated with the environmental impact assessment and/or planning approval consequences of a variation of the Project

Contract's maintenance facility requirements at PPP Co's request (see section 3.7.14.2).

3.3.3 Design obligations

3.3.3.1 RailCorp's design obligations

RailCorp must design its "enabling works" in accordance with broad descriptions of these works in the Project Contract's *RailCorp Enabling Works Specification*, all applicable laws and the maintenance facility's planning approval, so that each completed "package" of these works is fit for its intended purpose.

It must give PPP Co "as built" drawings for each "package", as necessary for PPP Co to be able to meet its own design, construction and commissioning obligations.

3.3.3.2 PPP Co's design obligations

PPP Co must design the maintenance facility and prepare detailed design documentation in accordance with the Project Contract and, more specifically,

- The *RailCorp Maintenance Facility Specification* and PPP Co's *Maintenance Facility Design Book*
- The detailed RailCorp *Contract Management Requirements* described in sections 3.2.7 and 3.3.9, and
- Any variations directed or approved by RailCorp under the Project Contract's variation provisions (section 3.7.14).

PPP Co has warranted that all of its design documentation for the maintenance facility, including its *Maintenance Facility Design Book*, is and will be safe and fit for its intended purposes.

Intellectual property and moral rights in the designs will be governed by the arrangements described in section 3.7.6.

RailCorp has prepared a "reference design" for the maintenance facility, but PPP Co is not obliged to follow this design, provided its own designs, as documented in the *Maintenance Facility Design Book*, contemplate design solutions of a higher standard, providing a greater scope or higher level of service or imposing more demanding requirements.

PPP Co must conduct a series of five technical reviews of its designs with RailCorp, as specified in the *Contract Management Requirements*, so as to permit RailCorp to monitor its progress and provide feedback on its compliance with the requirements of the Project Contract. The Project Contract's arrangements for these reviews, the development and finalisation of the designs and amendments to the *Maintenance Facility Design Book* are directly analogous to those already described in section 3.2.3 for the trains' and simulators' designs.

3.3.4 Construction site access

In return for a payment of \$1, RailCorp has granted PPP Co, its subcontractors and its other associates a non-exclusive licence to use a defined maintenance facility construction site for preliminary site investigations until RailCorp has completed the

first "package" of its "enabling works" or until any earlier termination of the Project Contract.

Once RailCorp has completed this first "package" of its "enabling works", it must, in return for another payment of \$1, grant PPP Co, its subcontractors and its other associates a non-exclusive licence to use this defined construction site, for the purpose of designing and constructing the maintenance facility, until the date of practical completion of this facility or until any earlier termination of the Project Contract.

This licence will be subject to a series of "conditions of access", mostly concerned with PPP Co's construction methods, set out in a Schedule to the Project Contract, and a series of other conditions, including obligations on PPP Co to:

- Ensure RailCorp and its contractors etc have reasonable access to the site in order to carry out RailCorp's remaining "enabling works"
- Refrain from using the site for any purpose other than the project without RailCorp's consent
- Protect and repair a defined section of Manchester Road North, and
- Compensate RailCorp for any costs or losses it incurs if this road is damaged, other than any indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract (see section 3.7.10.1) or that would have been recovered had PPP Co complied with its insurance obligations.

3.3.5 Site conditions, contamination and utilities

PPP Co has accepted the construction site "as is", in its present condition and state of repair and expressly including any latent conditions, contamination, heritage artefacts (see section 3.3.11), native title claims (see section 3.3.10) and/or any other existing or future third party claims or interests.

If contaminated material is disturbed or arises from PPP Co's activities, PPP Co must dispose of the material or otherwise deal with it in accordance with the relevant laws, remediate the site and indemnify RailCorp against any claims or losses it incurs in connection with the contamination or any breach by PPP Co of these obligations, other than any indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

PPP Co must similarly indemnify RailCorp against any claims or losses RailCorp incurs in connection with:

- Any disruption PPP Co causes to electricity, gas, water, sewerage, drainage, telephone, electronic communications or other utility services, or
- Any failure by PPP Co to comply with obligations to:
 - ♦ Protect, relocate, modify and provide all the utility services it needs in order to comply with its obligations

under the RailCorp project agreements (other than traction power electricity for the trains), and

- ◆ Obtain RailCorp's consent before constructing any utility services infrastructure outside the site or identifying the exact locations of utility services within the site,

subject to the same exception.

PPP Co must ensure that RailCorp is able to use any excess capacity in the maintenance facility's utility services and associated utility service infrastructure constructed by PPP Co, once PPP Co's maintenance facility works have reached practical completion (see also section 3.7.7).

3.3.6 General construction obligations

3.3.6.1 RailCorp's 'enabling works'

RailCorp must construct and commission its "enabling works" in accordance with the broad descriptions of these works in the *RailCorp Enabling Works Specification*, all applicable laws and the maintenance facility's planning approval, so that each completed "package" of these works is fit for its intended purpose and free of defects, other than any minor defects, identified by RailCorp, which:

- Do not prevent the "package" from being reasonably able to be safely used for its intended purpose
- Do not prevent a continuation of PPP Co's maintenance facility works or RailCorp's "enabling works"
- Are assessed by RailCorp, on reasonable grounds, as not requiring prompt rectification, but
- Must subsequently be expeditiously rectified by RailCorp as described in section 3.3.13 below.

3.3.6.2 PPP Co's works

PPP Co must construct the maintenance facility in accordance with the Project Contract and, more specifically,

- The *RailCorp Maintenance Facility Specification* and PPP Co's *Maintenance Facility Design Book*
- The detailed *RailCorp Contract Management Requirements* described in sections 3.2.7 and 3.3.9
- PPP Co's "final" design documentation for the maintenance facility, after the "critical" design review (section 3.3.3.2), and
- Any variations directed or approved by RailCorp under the Project Contract's variation provisions, described in section 3.7.14 below.

PPP Co has warranted that the completed maintenance facility will be, and will remain, safe and fit for its intended purposes, and has undertaken that in constructing and commissioning the facility it will:

- Use workmanship which is fit for its purpose and of a standard prescribed in the specifications listed above or, in its absence, of a standard consistent with best industry standards, and

- Use parts, components, goods and materials which are of merchantable quality and fit for their intended purposes and which comply with the specifications listed above or, in their absence, are new and consistent with best industry standards.

3.3.6.3 Coordination

RailCorp and PPP Co have expressly acknowledged a series of interfaces between RailCorp's "enabling works", PPP Co's maintenance facility works and other activities under the Project Contract, and have agreed to cooperate with each other to facilitate each others' works, coordinate their activities, protect their works against accidental damage by the other party, minimise disruption to the other party's works and resolve any interface problems that might arise.

3.3.7 Timeframes

3.3.7.1 RailCorp's 'enabling works'

In the case of some of the "packages" of works constituting RailCorp's "enabling works", RailCorp is not obliged to start the relevant works until PPP Co has given RailCorp a specified period of notice that it requires RailCorp to carry out these works. In these cases,

- If PPP Co notifies RailCorp before the end of this notice period that it has completed specified preconditions for the "package" of works, RailCorp must complete the "package" of works—and issue a certificate that it complies with the Project Contract's requirements, apart from minor defects as described in section 3.3.6.1, under arrangements described in section 3.3.13 below—within a period of time specified for each "package" in a Schedule to the Project Contract, and
- If PPP Co has not completed the preconditions for a works "package" by the end of the relevant notice period, the deadline for RailCorp to complete the "package" of works will be extended by the length of PPP's delay in satisfying the preconditions *plus* any further period RailCorp needs to undertake the works, taking account of the availability of track "possessions" and the need to remobilise contractors.

In the case of works "packages" for which PPP Co notice periods and preconditions are not specified, RailCorp must simply complete the relevant works and issue their certificates of compliance within time periods specified for each of these "packages", without any extensions of time.

RailCorp must notify PPP Co, as soon as reasonably practicable, of any matter which will or might delay any of RailCorp's "enabling works".

3.3.7.2 PPP Co's works

PPP Co must regularly and diligently progress its design, construction and commissioning of the maintenance facility and use its best endeavours to complete the facility by 20 January 2010.

PPP Co must develop and periodically update the maintenance facility aspects of its *Delivery Programme* in accordance with the *Contract Management Requirements* (sections 3.2.7 and 3.3.9)

or any other reasonable RailCorp requirements, and must give RailCorp copies of each updated *Delivery Programme* and monthly *Delivery Phase Progress Reports*, again as specified in the *Contract Management Requirements*.

If PPP Co becomes aware of any matter which might delay the completion of the maintenance facility, it must notify RailCorp as soon as reasonably practicable, providing details and a *Corrective Action Plan*. Similarly, PPP Co must submit a *Corrective Action Plan* if RailCorp reasonably believes PPP Co will be delayed in completing the facility and notifies PPP Co of this belief.

PPP Co must then implement its *Corrective Action Plan*, unless RailCorp notifies it within 15 business days that it does not believe the *Plan* will allow PPP Co to avoid, mitigate or minimise the consequences of the delay, in which case PPP Co must amend and resubmit the *Corrective Action Plan*. RailCorp will not be liable for any delays or losses incurred by PPP Co as a result of these processes.

PPP Co is free to accelerate the progress of its maintenance facility works, and RailCorp may assist in this, although it need not do so.

Provided PPP Co has regularly and diligently progressed its design, construction and commissioning activities and used its best endeavours to complete the facility by 20 January 2010, RailCorp will not be entitled to claim damages from PPP Co for any delays or disruptions. Any delay in the completion of the facility will, however, defer PPP Co's receipt of at least one of its "milestone" payments from RailCorp, under the arrangements described in section 3.4.2 below. In addition, because practical completion of the first train "set" may not be certified until at least three months after the practical completion of the maintenance facility, a delay in completing the facility might defer PPP Co's subsequent "availability payments" from RailCorp, under the arrangements described in section 3.6.1.

RailCorp may order PPP Co to suspend any of its maintenance facility design, construction or commissioning activities if (but only if) it is not carrying out these activities in accordance with the Project Contract's requirements, and may then instruct PPP Co to resume all or part of the suspended activities. PPP Co will not be entitled to make any claim against RailCorp in connection with such a suspension.

If PPP Co is delayed in completing the maintenance facility, or has to incur additional costs in avoiding or minimising such a delay, as a result of:

- A RailCorp breach of its obligations under the Project Contract (such as, for example, late completion of any of RailCorp's "enabling works")
- A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, or
- Industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that has not been caused,

directly or indirectly, by any action or inaction by PPP Co, its contractors or its other associates which was not required by the Project Contract,

RailCorp must pay PPP Co for all of the reasonable, and reasonably foreseeable, costs and losses it incurs, including any lost revenue, other than any costs or losses arising from any failure by PPP Co to take reasonable steps to mitigate its costs and losses.

3.3.8 Subcontracting by PPP Co

As already indicated in section 2.2, PPP Co has subcontracted its maintenance facility design, construction and commissioning obligations to the Maintenance Facility Contractor under the Maintenance Facility Construction Contract.

PPP Co requires RailCorp's consent before it may enter into any other "significant contracts" (see section 3.2.6) concerning the design, construction and commissioning of the maintenance facility, and must ensure the Maintenance Facility Contractor obtains RailCorp's consent before it enters any such contracts. RailCorp may not unreasonably delay or withhold this consent.

The Project Contract imposes restrictions on these maintenance facility "significant contracts", and requirements for the procedures PPP Co must follow, that are directly analogous to those already described in section 3.2.6 for "significant contracts" concerning the design, manufacture and commissioning of the trains and simulators.

3.3.9 PPP Co construction management plans, records, reports, inspections and audits

In designing, constructing and commissioning the maintenance facility PPP Co must comply with the Project Contract's detailed requirements for PPP Co's contract management system, "Project Plans", training, "key personnel" and Senior Project Group participation, as already described in section 3.2.7.

Subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp may enter the maintenance facility construction site at any time to observe, monitor, inspect and review PPP Co's performance of its obligations under the Project Contract, provided this is done in ways which do not unreasonably interfere with PPP Co's performance of its obligations. PPP Co must facilitate and assist these inspections.

PPP Co must allow RailCorp to access PPP Co's contract management system, and the contract management systems of PPP Co's subcontractors, sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp must do this in ways which do not unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

RailCorp may also conduct, or direct PPP Co to conduct, any reasonable tests concerning its maintenance facility design, construction and commissioning obligations, in addition to the detailed *planned* testing program that must be set out in PPP Co's *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (section 3.2.7). If it does so, the

Project Contract's procedural requirements and cost allocations will be the same as those already described in section 3.2.7 for equivalent tests concerning the design, manufacture and commissioning of the trains and simulators.

3.3.10 Native title

If there is a native title claim over any part of the maintenance facility or its construction site, PPP Co must continue to perform its obligations under the Project Contract unless it is ordered not to, or is ordered to change the way it performs these obligations, by RailCorp or by a court, tribunal or any other legal requirement, in which case:

- PPP Co must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RailCorp directions concerning the native title claim and ensure its subcontractors do likewise
- RailCorp must pay PPP Co for any reasonable costs it incurs directly as a result of any delay in its performance of its obligations, and/or directly as a result of having to stop and/or resume its performance of its obligations, but *not* for:
 - ◆ Any delay costs if the order by RailCorp or the court, tribunal or legal requirement does not prevent PPP Co from achieving practical completion of the maintenance facility by 20 January 2010 and does not prevent PPP Co from achieving the practical completion of any of the train "sets" by its specified date for practical completion (section 3.2.5), or
 - ◆ Any costs resulting from a failure by PPP Co to mitigate its costs or comply with RailCorp directions, and
- RailCorp will not otherwise be liable for any losses PPP Co, its subcontractors or its other associates suffer as a result of the native title claim.

RailCorp, and not PPP Co, will be liable to pay any compensation or other amounts that have to be paid to any native title holders.

3.3.11 Archæological and heritage artefacts

Any archæological or heritage artefacts discovered on or under the construction site will (as between RailCorp and PPP Co) be the absolute property of RailCorp.

PPP Co must immediately notify RailCorp if any artefacts are discovered, protect them and comply with any RailCorp instructions, including any directions to suspend its work.

RailCorp must reimburse PPP Co for any extra costs it reasonably incurs in complying with RailCorp's instructions, but will not otherwise be liable to PPP Co, and any failure by PPP Co to perform its obligations under the Project Contract as a result of RailCorp's instructions will not amount to a breach of the contract.

3.3.12 Testing and commissioning of the maintenance facility

PPP Co must test and commission the new maintenance facility in accordance with its *Integrated Test Plan*, one of the plans it must develop as a subsidiary component of its *Systems Assurance Plan*, and the *Contract Management Requirements* (sections 3.2.7 and 3.3.9).

It must give RailCorp the results of all of the tests, as specified in the *Contract Management Requirements*.

3.3.13 Completion

The Project Contract sets out procedures for:

- RailCorp to notify PPP Co of the completion of each "package" of RailCorp's "enabling works", for RailCorp and PPP Co to jointly inspect these works and for RailCorp to certify the compliance of these works with the requirements of the Project Contract, apart from identified and listed minor defects, and
- PPP Co to notify RailCorp of the expected practical completion of the maintenance facility and for RailCorp to inspect the facility and either certify its practical completion, listing any minor defects, or notify PPP Co that practical completion has not been achieved, accompanied (if practicable) by a list of what still needs to be done.

RailCorp must expeditiously rectify all minor defects identified in its certificates of compliance for the "enabling works", and PPP Co must expeditiously rectify all minor defects identified in RailCorp's certificate of practical completion for the maintenance facility.

3.3.14 The 'return' of certain facilities to RailCorp

Some of the facilities designed, constructed and commissioned under the arrangements summarised above are to be "returned" to RailCorp at specified times, and will not subsequently be maintained by PPP Co as part of its "through life support" ("TLS") obligations described in section 3.5.2 below.

The facilities to be "returned" to RailCorp are:

- From the date of practical completion of the maintenance facility, the parts of the construction site that are outside the areas to be leased or licensed to PPP Co, during the "TLS phase" of the project, under the Maintenance Facility Lease and the Maintenance Facility Licence (see section 3.5.3), *plus* specified rail infrastructure (tracks, overhead wiring, signalling, etc) within an "interconnection area" that is to be agreed between RailCorp and PPP Co under arrangements set out in the Call Option Deed (section 3.5.3)
- From the date (no later than 31 December 2015) on which PPP Co's right of "possession" of the "commissioning track" is ended by RailCorp following the practical completion of the last of the trains (see section 3.2.9), or from any earlier date determined by RailCorp, defined "future RailCorp facilities areas" within the areas be licensed to PPP Co under the Maintenance Facility Licence (see section 3.5.3), and

- From the date on which PPP Co's right of "possession" of the "commissioning track" is ended, or from any earlier date determined by RailCorp, defined "maintenance facility access areas" within the areas to be licensed to PPP Co under the Maintenance Facility Licence.

PPP Co must correct all defects in these facilities, other than the "maintenance facility access areas", during a 12-month defects liability period commencing on the date of practical completion of the maintenance facility. If a defect is corrected in any of the facilities, its defects liability period will recommence on the date on which the defect is corrected.

The Project Contract sets out procedures for RailCorp to notify PPP Co of a defect and direct PPP Co to correct the defect within a specified reasonable period of time.

If PPP Co fails to comply with such a notice—following the application of dispute resolution procedures specified in the Project Contract if PPP Co disputes the notice and it is determined that the defect does exist (see section 3.7.17)—RailCorp may, among other remedies, ask a court to order PPP Co to correct the defect, correct the defect itself or engage others to correct the defect. In either of the last two cases, PPP Co must pay RailCorp for any losses it incurs, other than any indirect, consequential or purely economic losses that are not recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

3.4 'Delivery phase' security bonds and RailCorp payments

3.4.1 Security bonds

In addition to the securities granted to RailCorp under the RailCorp Deed of Charge (see section 4.1), PPP Co has, as already indicated in section 2.3, given RailCorp two unconditional bank bonds, for a total of \$50 million, to secure the performance of its "delivery phase" obligations under the Project Contract.

If they are not drawn upon, these bonds must be released by RailCorp on the date of final completion of the 78th train "set" (section 3.2.11.2).

3.4.2 'Milestone' payments

RailCorp must make specified payments to PPP Co at specified "milestones" during the "delivery phase" of the project, as set out in a Schedule to the Project Contract, until "final" completion of the last of the trains.

These "milestone payments", none of which is to be indexed for inflation, are:

- \$10 million once PPP Co has given RailCorp all of the "Project Plans" it has to submit on or before 3 March 2007, and 20 business days have elapsed, since the last of these plans was submitted, without RailCorp's notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.7 and 3.3.9)

- \$3 million once:
 - ♦ PPP Co has given RailCorp all of the "Project Plans" it has to submit for or during the "system definition" review of PPP Co's designs (sections 3.2.3 and 3.3.3.2), and 20 business days have elapsed, since the last of these plans was submitted, without RailCorp's notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.7 and 3.3.9), and
 - ♦ PPP Co has submitted all the other documents required for this "system definition" review, and has done everything else the Project Contract requires for this review, to RailCorp's satisfaction, and
 - ♦ The "system definition" review has been completed, with 20 business days having elapsed, since the last of the relevant design documentation was submitted, without RailCorp's notifying PPP Co of any non-compliances with the requirements of the Project Contract (sections 3.2.3 and 3.3.3.2)
- \$3 million once analogous requirements have been satisfied for the "preliminary" design review (sections 3.2.3 and 3.3.3.2)
- \$10 million once analogous requirements have been satisfied for the "critical" design review (sections 3.2.3 and 3.3.3.2)—including PPP Co's provision of advice to RailCorp about any changes to RailCorp's specifications for "through life support" in the light of changes to or advances in the trains and their intended operations, under arrangements described in section 3.5.2.1 below—and PPP Co has satisfied RailCorp's that:
 - ♦ PPP Co has materially complied with its *Local Industry Participation Plan*, one of the subsidiary components of its *Contract Management Plan* (sections 3.2.7 and 3.3.9), and has ensured that the Rolling Stock Manufacturers and Maintenance Facility Contractor have done likewise (see section 3.7.4), and
 - ♦ The Project Contract's 20% local (Australian and New Zealand) content requirement is reasonably likely to be achieved (see section 3.7.4)
- \$5 million once RailCorp is satisfied "qualification" testing, as specified in the *Contract Management Requirements* and in PPP Co's *Integrated Test Plan*, one of the subsidiary components of its *Systems Assurance Plan* (sections 3.2.7, 3.2.10, 3.3.9 and 3.3.12), has been successfully completed
- \$5 million once PPP Co has completed mock-ups of the trains' passenger saloons and crew cabins
- \$2 million once RailCorp has certified practical completion of the train simulators and any listed minor defects in the simulators have been rectified (section 3.2.12)
- \$6 million once RailCorp has certified practical completion of the maintenance facility and any listed minor defects in the maintenance facility have been rectified (section 3.3.13)

- \$4 million once PPP Co has given RailCorp a specified series of operational and maintenance manuals, in a form that satisfies RailCorp, under arrangements described in section 3.5.2 below, and
- \$2 million each time RailCorp certifies “final” completion of a train “set” (section 3.2.11.2), *provided*:
 - ♦ RailCorp has already certified “practical” completion of the seventh “set” (section 3.2.11.1), with RailCorp’s payments for the initial “sets” being withheld until this occurs, and
 - ♦ The “set” in question weighs no more than 395.5 tonnes, with the payment for any set weighing more than 395.5 tonnes being reduced by \$35,000 multiplied by the percentage by which its actual weight exceeds this amount, to compensate RailCorp for its additional power consumption costs etc.
- ♦ Weekday afternoon periods, between noon and the completion of CityRail’s last timetabled service for the day on any weekday that is not a public holiday (the last service may not finish until after midnight), and
- ♦ Weekend and public holiday periods, between the start of CityRail’s first timetabled service for the day and the completion of CityRail’s last timetabled service for the day on any Saturday, Sunday or public holiday (again, the last service may not finish until after midnight)

These RailCorp payments to PPP Co must be paid into bank accounts specified in the Debt Finance Side Deed.

3.4.3 Payment of an adjustment for the cost of the trains’ earthing systems

The private sector parties’ “base case financial model” for the project, as agreed at “financial close” on 7 December 2006 (see section 2.3), includes a provisional sum for the trains’ electrical earthing systems.

PPP Co must give RailCorp a detailed cost estimate for these systems by 7 March 2007, and RailCorp and PPP Co must then use their best endeavours to agree on these costs before 1 May 2007.

If the agreed cost estimate is higher than the provisional sum, RailCorp must pay the difference to PPP Co on or before 1 July 2007. If it is lower, PPP Co must pay the difference to RailCorp on or before the same date.

If the parties cannot agree, either of them may refer the matter for resolution under the Project Contract’s dispute resolution procedures, described in section 3.7.17.

3.5 Train ‘availability’ and ‘through life support’ obligations

3.5.1 General ‘availability’ obligations

As already indicated in sections 2.2 and 3.1.1, from the date of “practical” completion of each of the train “sets” (section 3.2.11.1) PPP Co must make the “set” available to RailCorp in accordance with Project Contract requirements for specified numbers of the “sets” to be “available” for CityRail services.

In these requirements, “availability” is defined in terms of:

- Three types of “availability periods”:
 - ♦ Weekday morning periods, between the start of CityRail’s first timetabled service for the day and 12 midday on any weekday that is not a public holiday
 - ♦ Weekday afternoon periods, between noon and the completion of CityRail’s last timetabled service for the day on any weekday that is not a public holiday (the last service may not finish until after midnight), and
 - ♦ Weekend and public holiday periods, between the start of CityRail’s first timetabled service for the day and the completion of CityRail’s last timetabled service for the day on any Saturday, Sunday or public holiday (again, the last service may not finish until after midnight)
- Three “phases” within the overall “through life support” (“TLS”) phase of the project:
 - ♦ A “transition-in” phase, while the trains are being progressively manufactured, commissioned and introduced into service, between the date of practical completion of the first train “set” (targeted for 20 April 2010) and the date of practical completion of the 78th (targeted for 5 September 2013)
 - ♦ A “steady state” phase, and
 - ♦ A “transition-out” phase, between:
 - The first PPP Co decommissioning or RailCorp acquisition of a train under arrangements described in section 3.5.8 below (currently targeted for 20 July 2040 or, if it is later, 30 years after the actual date of practical completion of the first train “set”, but potentially five or ten years later than this under the extension options described in section 3.5.7), and
 - The expiry of the Project Contract (currently targeted for 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train “set”, but potentially five or ten years later than this) or any earlier termination of the Project Contract, and
- Conditions which must be satisfied before any train “set” is considered “available” for CityRail services during any “availability period”, including the set’s practical completion, its compliance with specified minimum operating standards, and its delivery to a specified pick-up point near the Auburn maintenance facility, its readiness at a RailCorp “stabling” depot or (if applicable) the fact that it is already providing a CityRail service.

In some circumstances, discussed in section 3.5.1.4 below, trains may be *deemed* to be “available” even if they are not *physically* available as described above.

3.5.1.1 Routine ‘availability’ requirements

The numbers of trains which PPP Co must routinely make available for CityRail services during each “availability period” are specified, for each of the three “phases”, in a Schedule to the Project Contract.

During the “transition-in” phase the number of trains routinely to be made available by PPP Co for each “availability period” will gradually increase from one to 72 as each additional “set” reaches practical completion. It will then remain at 72 until the

“transition-out” phase, during which it will progressively decrease as each “set” is decommissioned or acquired by RailCorp, with only ten still being required just before the expiry of the Project Contract.

PPP Co may only use the carriages and trains it manufactures as part of this project to provide the required “availability”, unless a carriage or train is lost, stolen or destroyed, fails or malfunctions during normal operations or is temporarily replaced during servicing, maintenance or repair.

3.5.1.2 Additional ‘availability’ requirements for special events and ad hoc needs

In addition to these routine “availability” requirements, during the “steady state” phase, but not before or after this phase, four additional train “sets” must be made available for all “availability periods” during Royal Easter Shows, all “availability periods” on 31 December and 1 January each year and up to four other “special events” each financial year, each lasting up to four consecutive “availability periods”, as notified by RailCorp at least one month in advance.

RailCorp may cancel the requirement for four extra trains during any of these additional “special events” by giving PPP Co at least 48 hours’ notice, and may then impose the requirement for a different additional “special event” if it chooses to do so.

These planned additional “availability” requirements for “special events” are supplemented by provisions in the Project Contract for *ad hoc* additional “availability” requirements during any of the three project phases described above, not just the “steady state” phase. Under these arrangements, RailCorp may at any time ask PPP Co how many additional “sets” it is willing to provide for any particular nominated “availability period(s)”, PPP Co must respond within five business days, and RailCorp may then direct PPP Co to provide some or all of this additional number of “sets”.

3.5.1.3 Train deliveries and substitutions

The Project Contract sets out detailed arrangements for PPP’s day-to-day provision of the required numbers of trains, including:

- Requirements for PPP Co to tell RailCorp, in accordance with *Interface Protocols* that will be issued by RailCorp under arrangements described in section 3.5.2.1, which of PPP Co’s trains will *not* be made available for each “availability period”.
- The delivery of trains a specified period of time before the start of each “availability period”, so that RailCorp’s train crews may complete specified train preparation tasks before the “availability period” commences. The period of time to be specified for this preparation of the trains is to be determined by RailCorp prior to the practical completion of the first train “set”.

- PPP Co’s right to substitute a spare “set”, from the same location, for a “set” which, at the start of an “availability period”,
 - ♦ Does not satisfy the specified minimum operating standards
 - ♦ Has a defect, attributable to PPP Co, the TLS Contractor or PPP Co’s other subcontractors or associates, which RailCorp reasonably believes may delay its services by ten minutes or more, or
 - ♦ Is subject to a direction, by the Independent Transport Safety and Reliability Regulator (ITSRR), the Office of Transport Safety Investigations (OTSI) or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

provided PPP Co notifies RailCorp of this substitution.

- In the same circumstances, PPP Co’s right to substitute a spare “set” from a different location, but only if RailCorp agrees.
- PPP Co’s right to provide a substitute for a “set” that has been cancelled by RailCorp, while in service, on the grounds that it:
 - ♦ Has failed to meet specified minimum operating standards
 - ♦ Has a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more
 - ♦ Has been introduced into service ten or more minutes late, or has been running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, or
 - ♦ Is subject to a direction, by ITSRR, OTSI or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

and PPP Co’s right to provide a substitute for a “set” that has incurred a defect, or is otherwise in a condition which would lead to its being taken out of service, provided it gives RailCorp at least three hours’ notice before the commencement of the “availability period” from which the substitution is to take effect. (If less than three hours’ notice is given, the substitution is permitted only if RailCorp agrees.)

3.5.1.4 *Deemed 'availability'*

For the purposes of the Project Contract's "availability" requirements and RailCorp's associated "availability payments" to PPP Co, summarised in section 3.6.1 below, a train "set" that does not satisfy the Project Contract's *physical* "availability" criteria may nonetheless be *deemed* to be "available" if its failure to satisfy these criteria arises because:

- The "set" has been damaged by a collision with another train, a road vehicle or any other object, a derailment, vandalism or graffiti covering an area of more than 10 m², *unless*:
 - ◆ The event causing the damage occurred while the "set" was in PPP Co's possession for maintenance or in the maintenance facility
 - ◆ The event causing the damage resulted from a defect attributable to PPP Co or its subcontractors or other associates, or from any other act or omission by PPP Co or its associates, or
 - ◆ RailCorp has directed PPP Co to repair the damage but PPP Co has not done this within the required time, in which case the "set" will *not* be deemed to be "available" beyond the time required for reinstatement, *or*
- The "set" or the maintenance facility has been damaged as a result of:
 - ◆ A RailCorp breach of the Project Contract
 - ◆ A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates
 - ◆ War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
 - ◆ Nuclear radioactivity,

unless RailCorp has directed PPP Co to repair the damage but PPP Co has not done this within the required time, in which case, again, the "set" will *not* be deemed to be "available" beyond the time required for reinstatement, *or*

- RailCorp has directed a variation under the arrangements described in section 3.7.14.1, *unless* PPP Co has not completed this variation within the required time, in which case the "set" will *not* be deemed to be "available" beyond the required time, *or*
- RailCorp has approved a variation, requested by PPP Co under the arrangements described in section 3.7.14.2, that is required to ensure PPP Co's works, the train "sets", the maintenance facility or the simulators comply with specified types of changes in law (see section 3.7.13), or to restore their functionality following a modification to RailCorp's infrastructure, *unless* PPP Co has not completed this

variation within the required time, in which case the "set" will *not* be deemed to be "available" beyond the required time, *or*

- The "set" has been damaged (other than by graffiti covering an area of 10 m² or less) or destroyed, *and* this:
 - ◆ Occurred while the "set" was in RailCorp's possession, and was not caused by any act or omission by PPP Co or its associates or any event which occurred before the practical completion of the "set", or
 - ◆ Resulted from:
 - A RailCorp breach of the Project Contract
 - A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates
 - War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
 - Nuclear radioactivity,

and PPP Co is obliged to repair or replace the "set", within a reasonable period of time as specified by RailCorp, under arrangements described in section 3.7.10.3 below, *unless* PPP Co has not completed its repairs or replacement within the specified time, in which case the "set" will *not* be deemed to be "available" beyond the specified time, *or*

- RailCorp has breached the Project Contract, or there has been a negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates, *or*
- There is a defect in the "set", the maintenance facility, PPP Co's works or the simulators as a result of work by RailCorp or its contractors other than PPP Co and its associates, *or*
- ITSRR, OTSI or any other investigative authority has ordered RailCorp not to operate the "set" or not to use the maintenance facility, *unless*:
 - ◆ The order has resulted from a defect attributable to PPP Co or its subcontractors or other associates, or from any other act or omission by PPP Co or its associates, *or*
 - ◆ RailCorp has directed PPP Co to carry out rectification work to deal with the issue which led to the order, but PPP Co has not done this within the required time, in which case the "set" will *not* be deemed to be "available" beyond the time required for reinstatement, *or*
- There has been industrial action by RailCorp employees, or the employees of a RailCorp-related corporation, that was not caused, directly or indirectly, by any action or inaction by

PPP Co, its contractors or its other associates which was not required by the Project Contract.

Arrangements for RailCorp to make monthly “availability payments” to PPP Co for making the “sets” available, and for these payments to be reduced if PPP Co fails to meet all its “availability” obligations, as RailCorp’s sole remedy in these circumstances, are described in section 3.6.1 below.

3.5.2 General TLS obligations

3.5.2.1 Existing PPP Co and RailCorp obligations

As already indicated in sections 2.2 and 3.1.1, PPP Co must provide specified “through life support” (“TLS”) services, in accordance with detailed standards, specifications and other requirements set out in the Project Contract, for:

- The trains
- The train simulators
- The maintenance facility (other than the associated facilities “returned” to RailCorp as described in section 3.3.14), and
- PPP Co’s maintenance plant, equipment, parts and spares

throughout the “TLS phase” of the project, from the date of practical completion of the simulators, the maintenance facility or the first train “set” (whichever is earliest) until the expiry or earlier termination of the Project Contract.

For its part, RailCorp must provide at least one train crew at the maintenance facility, at specified times before each “availability period” and during the morning and afternoon peak periods, for the preparation of trains stabled at the maintenance facility and trial runs of trains following major maintenance or intermittent failures, but not for routine movements of trains to and from the facility’s train maintenance building.

The TLS services to be provided by PPP Co are:

- Train maintenance and repair services, including incident response services and wheel profiling services
- Train presentation services, including internal train cleaning and exterior train washing services
- “Operations” services, including the updating of information in the trains’ operating systems and passenger information systems and the downloading of data from the trains’ operating and security systems
- “Technical” services, including assistance with the design of modifications, the updating of design documentation, training materials and PPP Co’s *Technical Maintenance Plan*, *Reliability Programme* and *Maintainability Programme* (subsidiary components of the PPP Co *Systems Assurance Plan* described in section 3.2.7), assistance with safety investigations and audits (see section 3.7.1), the redesign of obsolete, unreliable or otherwise deficient components, updating of the simulators’ systems data and equipment and maintenance and support services for the trains’ telemetry systems

- “Logistics support” services, including the maintenance of PPP Co’s configuration management system in accordance with its *Configuration Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6), the training of RailCorp personnel, the provision of operating and maintenance manuals and support tools and equipment for RailCorp personnel, spares support services and the provision of a maintenance management information system
- Simulator maintenance, repair and support services
- Maintenance facility maintenance, repair and support services, and
- If directed by RailCorp, “reimbursable” repairs to the trains:
 - ♦ Following a collision with another train, a road vehicle or any other object, a derailment, vandalism or graffiti covering an area of more than 10 m², or
 - ♦ In response to an order by ITSRR, OTSI or any other investigative authority.

(If the event causing the damage occurred while the “set” in question was in PPP Co’s possession for maintenance or repairs or in the maintenance facility, or if the damage or ITSRR or OTSI order resulted from a defect attributable to PPP Co or its subcontractors or other associates or from any other act or omission by PPP Co or its associates, the repairs must be carried out as part of PPP Co’s routine train maintenance and repair services, and will not be “reimbursable”.)

PPP Co must provide these services in accordance with the Project Contract—including, more specifically, a *RailCorp Through Life Support Specification* and a *PPP Co Through Life Support Description* exhibited to the Project Contract—so that:

- PPP Co is able to meet the train “availability” requirements discussed in section 3.5.1
- The requirements of the project’s specifications and final design documentation are met throughout the “TLS phase” of the project
- All defects in the trains, simulators, maintenance facility and maintenance plant, equipment, parts and spares are rectified as required by the Project Contract, and
- The trains, simulators, maintenance facility and maintenance plant, equipment, parts and spares remain fit for their intended purposes throughout the “TLS phase” of the project.

PPP Co has accepted full responsibility for the methods and techniques it adopts in providing the services, and has warranted that:

- Its *Through Life Support Description* is and will be fit for its intended purpose
- Its workmanship will be fit for its purpose and of a standard prescribed in the project’s specifications or, in its absence, of a standard consistent with best industry standards

- It will use parts, components, goods and materials which are of merchantable quality and fit for their intended purposes and which comply with the project's specifications or, in their absence, are new and consistent with best industry standards
- Its design documentation for any manufacturing or construction works carried out as part of its "TLS phase" obligations will be, and will remain, safe and fit for its intended purposes, and
- Any manufacturing or construction works carried out as part of its "TLS phase" obligations will be, and will remain, safe and fit for their intended purposes, regardless of any variations directed or approved by RailCorp.

PPP Co may not amend its TLS services, as described in its *Through Life Support Description*, unless:

- It satisfies RailCorp that the change is necessary for it to comply with the *RailCorp Through Life Support Specification*, and that the latter imposes a higher standard, level of service, scope or requirement
- It satisfies RailCorp that the change complies with the *RailCorp Through Life Support Specification*, is consistent with the intent of the *Through Life Support Description* and will not lessen any standard, level of service or scope for any part of the TLS services, or
- The change is ordered or agreed to under the contractual variation arrangements described in section 3.7.14.

Throughout the "TLS phase" of the project both PPP Co and RailCorp must comply with *Interface Protocols* issued from time to time by RailCorp.

Draft *Interface Protocols* are attached to the *RailCorp Through Life Support Specification*. PPP Co must develop these protocols and submit a more detailed draft to RailCorp before the expected or actual date of practical completion of the first train "set" (targeted for 20 April 2010), and the parties must then meet to discuss this revised draft. RailCorp may then, if it chooses, reissue the *Interface Protocols* with amendments as determined by RailCorp, and PPP Co will not be entitled to make any claim against RailCorp in connection with these amendments.

In addition, either party may at any time request an update or other amendment of the *Interface Protocols*. If this occurs, the parties must discuss their requirements within ten business days. If the request is made by RailCorp, and PPP Co notifies RailCorp within ten business days of the meeting that it considers the proposed amendments will increase PPP Co's costs or reduce PPP Co's revenue, the proposal must be treated as a RailCorp-initiated variation and handled under the arrangements described in section 3.7.14.1. Otherwise, RailCorp may again, if it chooses, reissue the *Interface Protocols* with amendments as determined by RailCorp, and PPP Co will again not be entitled to make any claim against RailCorp in connection with the amendments.

3.5.2.2 Option for CityRail's Millennium trains also to be maintained by PPP Co at the maintenance facility

RailCorp may, at any time, notify PPP Co that it requires PPP Co to negotiate with RailCorp, in good faith, for PPP Co—through a subcontract with the TLS Contractor or a related corporation—to provide maintenance and other "through life support" services at the Auburn maintenance facility for CityRail's *Millennium* trains, which were designed and manufactured by EDI Rail and are currently maintained by EDI Rail at a maintenance depot in Eveleigh.

If this occurs, PPP Co must submit a detailed proposal to RailCorp as soon as practicable, and in any event within three months unless RailCorp grants an extension of time. This proposal must address a series of requirements and criteria set out in the Project Contract, including the likely costs, timeframes and effects on PPP Co's performance of its existing obligations.

RailCorp will then have 60 business days, or longer if PPP Co grants an extension of time, to accept or reject PPP Co's proposal or withdraw from the whole idea. If RailCorp accepts PPP Co's proposal,

- PPP Co must proceed to implement the proposal and will be relieved of its obligations under the current Project Contract to the extent specified in PPP Co's proposal, and
- The Project Contract will be amended as otherwise necessary to implement the scheme, including provisions for payments for the services now to be provided for the *Millennium* trains.

3.5.3 Leasing and licensing of the maintenance facility

Under the Call Option Deed, RailCorp has, in return for a fee of \$1 paid by PPP Co on 3 December 2006, granted PPP Co an option to call for RailCorp to grant it:

- The Maintenance Facility Lease, in the form of a draft lease in a Schedule to the Call Option Deed, over a defined "lease area" within the maintenance facility, and
- The Maintenance Facility Licence, in the form of a draft licence in another Schedule to the Call Option Deed, over defined "licensed areas" at the maintenance facility.

PPP Co may exercise this call option within 14 days of the later of 1 January 2008 and the date of practical completion of the maintenance facility (targeted for 20 January 2010).

The Call Option Deed sets out arrangements for the surveying and precise identification of the "lease area" and the "licensed areas", the preparation of registrable plans of consolidation and subdivision etc and the identification and creation of easements. However, RailCorp and PPP Co have already agreed that the "lease area" and "licensed areas" will generally be as shown in plans and drawings in a further Schedule to the Call Option Deed, a simplified form of which is presented in **Figure 2**.

In addition to permitting PPP Co and its subcontractors etc to use the "licensed areas" to carry out PPP Co's obligations

under the Project Contract, the Maintenance Facility Licence will give PPP Co and its subcontractors etc limited rights to use specified parts of the “licensed areas”, such as defined carpark area, for other specified purposes.

PPP Co’s rent under the Maintenance Facility Lease will be \$1 per year, and its licence fee under the Maintenance Facility Licence will also be \$1 per year. In both cases these amounts will be payable only if they are demanded by RailCorp.

The Maintenance Facility Lease and the Maintenance Facility Licence will continue until the expiry of the Project Contract—or, if the term of the project is extended under the arrangements described in section 3.5.7, the date on which the Project Contract was originally to have expired (this date is currently targeted for 30 July 2043 or, if it is later, 30 years after the actual

date of practical completion of the 69th train “set”)—or until any earlier termination of the Project Contract.

However, under the Maintenance Facility Licence, PPP Co’s licences to use defined “access areas” and “future RailCorp facilities areas” within the “licensed areas” will end on the date (no later than 31 December 2015) on which PPP Co’s right of “possession” of the “commissioning track” is ended by RailCorp following the practical completion of the last of the trains (see section 3.2.9), or on any earlier date or dates determined by RailCorp, and these areas will then be “returned” to RailCorp, and no longer subject to any PPP Co “through life support” obligations, under the arrangements already described in section 3.3.14.

Unless RailCorp agrees otherwise, PPP Co may use the leased and licensed areas, and permit them to be used, only for the

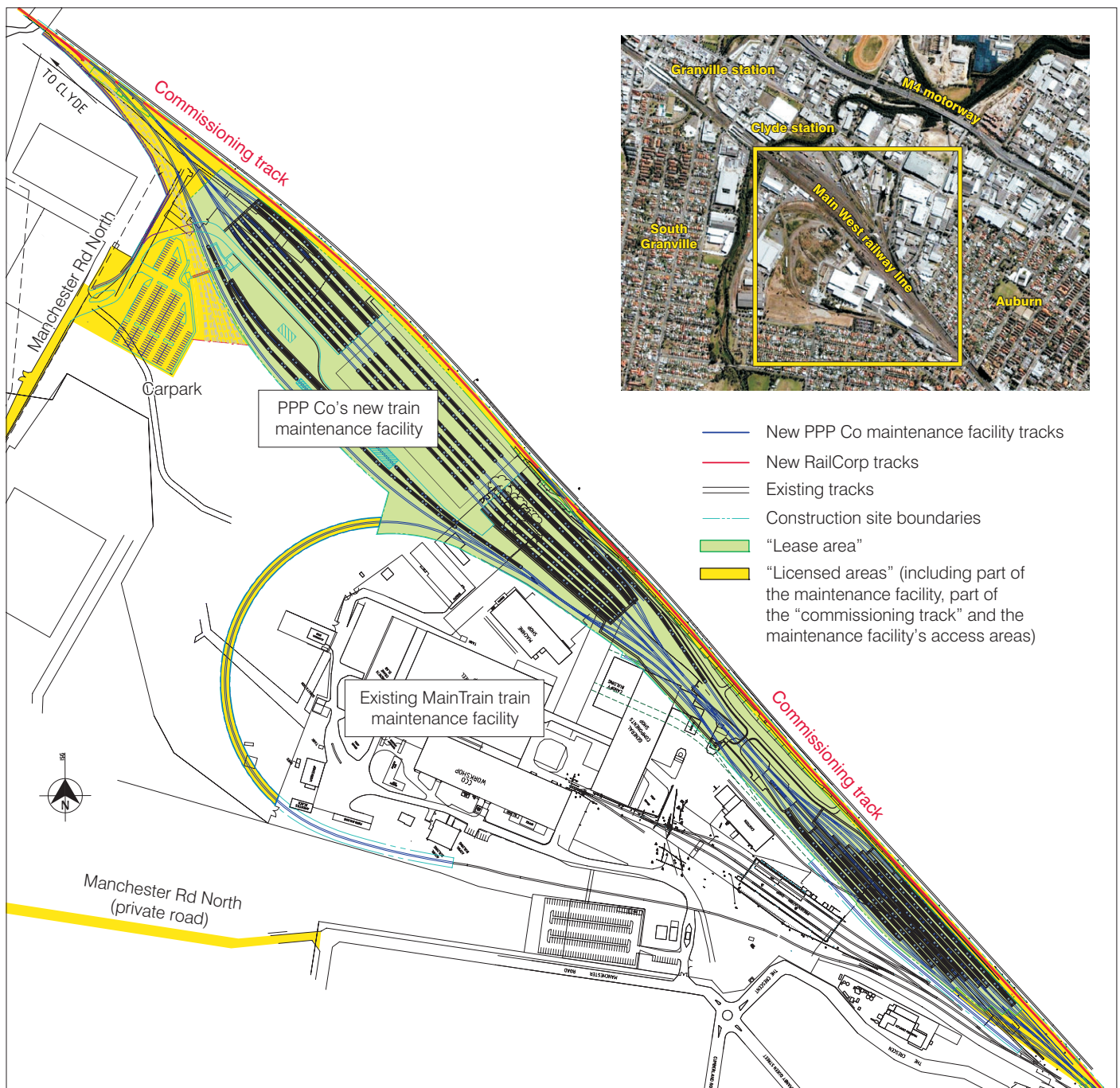


Figure 2. Indicative “lease area” and “licensed areas” at the Auburn maintenance facility.

purposes of the project or the provision of maintenance and other “through life support” services for other RailCorp trains.

3.5.4 Licence to access RailCorp’s ‘rail corridor’ and ‘out depots’

RailCorp must, in return for a payment of \$1, grant PPP Co and its subcontractors and other associates a non-exclusive licence, commencing on the date of practical completion of the first train “set”, to use RailCorp’s rail network land and train stabling depots to:

- Maintain and repair the trains while they are operating on RailCorp’s rail network, and
- Recover any train “sets” which break down while in service.

In exercising these rights, PPP must comply with a specified series of RailCorp manuals, rules, procedures and protocols, including rail safety rules, procedures and protocols (section 3.7.1), the requirements of the Project Contract, including the *RailCorp Through Life Support Specification* and PPP Co’s *Through Life Support Description* (section 3.5.2.1), and any other reasonable RailCorp requirements or directions.

3.5.5 Subcontracting

As already indicated in section 2.2, PPP Co has subcontracted its “through life service” obligations to the TLS Contractor under the TLS Contract.

PPP Co requires RailCorp’s consent before it may enter into any other “significant contracts” (see section 3.2.6) concerning its “through life support” services, and must ensure the TLS Contractor obtains RailCorp’s consent before it enters any such contracts. RailCorp may not unreasonably delay or withhold this consent.

The Project Contract imposes restrictions on these TLS “significant contracts”, and requirements for the procedures PPP Co must follow, that are directly analogous to those described in section 3.2.6 for “significant contracts” concerning the design, manufacture and commissioning of the trains and simulators and the equivalent provisions referred to in section 3.3.8 for “significant contracts” concerning the design, construction and commissioning of the maintenance facility.

3.5.6 Management plans, records, reports and RailCorp inspections and audits

In providing its “through life support” services PPP Co must comply with the Project Contract’s detailed requirements for PPP Co’s contract management system, “Project Plans”, training, “key personnel” and Senior Project Group participation, as already described in section 3.2.7 and referred to in section 3.3.9.

Throughout the project’s “TLS phase” PPP Co must also establish and maintain a performance monitoring system, as specified in a Schedule to the Project Contract, to monitor, analyse and report in detail on:

- The trains’ availability and reliability (these data are to be used in calculating RailCorp’s monthly performance-based

“availability payments” to PPP Co, as described in section 3.6.1 below)

- PPP Co’s provision of “reimbursable” repairs and its wheel profiling, train washing and “operations” services (section 3.5.2.1) (these data are to be used in calculating RailCorp’s monthly “reimbursable TLS payments” to PPP Co, as described in section 3.6.2 below)
- PPP Co’s performance against a series of “key performance indicators” (“KPIs”) (these data are to be used in calculating RailCorp’s monthly performance-based “KPI payments” to PPP Co, as described in section 3.6.3 below)
- The distances travelled by each train “set”
- RailCorp’s “milestone” payments to PPP Co (section 3.4.2)
- The condition and reliability of the maintenance facility and the simulators
- Changes in the configurations of the trains and simulators
- The rail safety certification status of PPP Co and RailCorp personnel
- CPI indexations, to be applied in calculating some elements of the RailCorp payments to PPP Co described in section 3.6
- Interest rate and debt and interest payment data, to be applied in calculating “interest payment adjustments” between RailCorp and PPP Co as described in section 3.6.4 , and
- Data for reports which are required by the Project Contract but which are not able to be produced by PPP Co’s maintenance management information system (section 3.5.2.1).

This performance monitoring system must be able to be electronically accessed by RailCorp, and it must be used by PPP Co to produce monthly *Performance Reports* to RailCorp, as specified in the same Schedule to the Project Contract, as one of the main inputs in calculating the payments described in section 3.6.

PPP Co has promised RailCorp that the data in its performance monitoring system will always be accurate and complete.

RailCorp may monitor and review PPP Co’s performance of its “through life support” services and its performance monitoring system in any way RailCorp thinks fit, subject to particular arrangements for inspections of the maintenance facility described below. Among other things, it may conduct customer satisfaction surveys, undertake audits at any time during the “TLS phase” of the project and the following six months, conduct scheduled and unscheduled reviews and inspections of the trains, the maintenance facility, the simulators and PPP Co’s activities, and obtain feedback from RailCorp’s train crews.

In particular, and subject to any reasonable PPP Co safety and security constraints, RailCorp and any persons authorised by RailCorp may enter the maintenance facility, the trains in this facility and any other areas used by PPP Co, the TLS Contractor and other “significant contractors” (sections 3.2.6, 3.3.8 and

3.5.5) during business hours, or otherwise on 24 hours' notice unless there is an emergency, to observe, monitor, inspect, review and audit PPP Co's performance of its obligations under the Project Contract, provided this is done in ways which do not unreasonably interfere with PPP Co's performance of its obligations (including, in particular, PPP Co activities scheduled in its *Technical Maintenance Plan*, a subsidiary component of its *Systems Assurance Plan*). PPP Co must facilitate and assist these inspections and reasonably endeavour to coordinate its activities so that they do not interfere with RailCorp's inspections, reviews and audits.

PPP Co must also allow RailCorp to access PPP Co's contract management system and performance monitoring system, and the contract management systems of PPP Co's subcontractors, sub-subcontractors, etc, for monitoring and auditing purposes. Again, RailCorp must do this in ways which do not unreasonably interfere with PPP Co's performance of its obligations under the Project Contract.

If a RailCorp audit reveals an inaccuracy or incompleteness in PPP Co's performance monitoring system or its outputs, PPP Co must correct and reissue the affected report(s) or data, remedy the fault(s) in its system and, if the error has affected any of the payments described in section 3.6 below, adjust its next payment claim. If an audit uncovers fraud or any intentionally false or misleading reporting, RailCorp may be entitled to terminate the Project Contract, under the arrangements described in sections 3.8.3.9, 3.8.3.11 and 3.8.4.

3.5.7 Extensions of the term of the project

As indicated in section 3.5.1, the first decommissioning or RailCorp acquisition of any of PPP Co's trains (under arrangements described in section 3.5.8 below) is currently targeted for 20 July 2040 or, if it is later, 30 years after the actual date of practical completion of the first train "set", and the Project Contract is currently targeted to expire on 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train "set".

RailCorp may, however, extend these dates by five or ten years for some or all of the trains.

Under the arrangements for this set out in the Project Contract,

- PPP Co must give RailCorp an estimate of the "through life support" costs of its trains, in lots of five "sets" and in accordance with other requirements set out in the Project Contract, 18 months before the first scheduled decommissioning date
- RailCorp may then, if it chooses, extend the term of the Project Contract by five years, by giving PPP Co a notice to this effect within six months of receiving PPP Co's cost estimates, nominating how many of the train "sets" it wants PPP Co to continue to support
- If RailCorp does so,
 - ◆ PPP Co must continue to meet its "availability" obligations (section 3.5.1) on the basis that the nominated number of "sets" will continue to be

operational, and continue to provide "through life support" services for these trains (section 3.5.2), until, in the case of each "set",

- RailCorp instructs it to decommission the "set", giving it at least 20 business days' notice
 - RailCorp acquires the "set" (see section 3.5.8), or
 - If neither of these occurs, one of the extended scheduled dates for decommissioning of the nominated "sets" (each of these dates will be 35 years and three months after the targeted date for practical completion of one of the nominated "sets", or, if it is later, 35 years after the actual date of practical completion of that "set")
- ◆ PPP Co must continue to use the maintenance facility to provide "through life support" services after the original date for expiry of the Project Contract, but will not need to pay any rent and might not be the only user of the facility
 - ◆ PPP Co and RailCorp must negotiate in good faith to determine the basis on which PPP Co will continue to occupy the maintenance facility, and until an agreement is reached this will be determined by RailCorp
 - ◆ RailCorp must continue to meet its train crew and other obligations concerning the nominated trains, and must make monthly payments to PPP Co equal to 107.5% of the costs directly incurred by PPP Co in complying with its extended obligations, as revealed on an "open book" basis
 - ◆ The monthly payments regime described in section 3.6 below will not apply for the nominated trains, but will continue to apply for the other trains (if any) until they are decommissioned or acquired by RailCorp or until the original expiry date of the Project Contract
 - ◆ RailCorp may extend the term of the Project Contract by a *further* five years, by giving PPP Co a notice to this effect at least 12 months before the first extended scheduled date for decommissioning of a "set", nominating how many of the train "sets" it wants PPP Co to continue to support during this additional period, and
 - ◆ The Project Contract will end on the earliest of:
 - Its extended expiry date
 - The date, if any, on which, as a result of any RailCorp directions to decommission the nominated train(s) or any RailCorp acquisitions of these trains, PPP Co is no longer providing "through life support" for any of the nominated trains, and
 - Any termination of the Project Contract on the grounds discussed in section 3.8.

3.5.8 Decommissioning and/or RailCorp acquisition of the trains

As already indicated, unless RailCorp extends the term of the Project Contract each of the train “sets” must either be:

- Decommissioned by PPP Co on one of 69 currently specified decommissioning dates,* with PPP Co notifying RailCorp of each decommissioning at least 60 days in advance, or
- Acquired by RailCorp on one of the currently scheduled decommissioning dates, at no cost to RailCorp, if RailCorp tells PPP Co that it wishes to do this within 30 days of receiving PPP Co’s notice of the set to be decommissioned.

If RailCorp extends the term of the Project Contract, the revised arrangements and timeframes described in section 3.5.7 will apply.

In either case, if RailCorp exercises its option to acquire a train “set” PPP Co must:

- Ensure the train’s condition on its handover date complies with specified minimum operating conditions and other requirements of the Project Contract, and is consistent with all of its scheduled maintenance having been carried out
- Do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for the train, including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the train and advice from experienced, competent personnel
- Not do anything that materially prejudices or frustrates the handing over of the train, as a going concern, to RailCorp, and
- Do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the train.

3.5.9 Remediation of the maintenance facility over the last five years of the project

RailCorp and PPP Co must conduct a joint inspection of the maintenance facility and PPP Co’s maintenance plant, equipment, parts and materials, if this inspection is required by RailCorp, at least five years before the currently scheduled expiry of the Project Contract (i.e. before 30 July 2038 or, if it is later, before the date 25 years after the actual date of practical completion of the 69th train “set”).

Similar joint inspections must also be carried out, if required by RailCorp, at least three years and one year before the currently scheduled expiry of the Project Contract.

* Each of these currently specified decommissioning dates will be 30 years and three months after the targeted date for practical completion of one of the first 69 “sets” or, if the actual date of practical completion of any of these 69 “sets” is later than its targeted date, 30 years after its actual date of practical completion. The currently specified decommissioning dates for the last ten “sets” to be decommissioned by PPP Co or acquired by RailCorp will all be the same date, 30 years and three months after the targeted date for practical completion of the 69th “set” (i.e. 30 July 2043) or, if the actual date of practical completion of the 69th “set” is later than its targeted date, 30 years after its actual date of practical completion.

Following each of these inspections, RailCorp and PPP Co must reasonably endeavour to agree on:

- The rectification, maintenance and remediation works, if any, that PPP Co will need to carry out during the rest of the project in order to bring the maintenance facility and PPP Co’s maintenance plant, equipment, parts and materials to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, and ensure that at the end of the Project Contract they will comply with a series of “return conditions” specified in a Schedule to the Project Contract
- A program for PPP Co to carry out these works, and
- The estimated total cost of these works, including a contingency and risk allowance of at least 10%.

If they cannot agree within 20 business days of the relevant inspection, either party may refer the matter for determination under the Project Contract’s dispute resolution procedures, summarised in section 3.7.17.

PPP Co must carry out the agreed or determined works.

In addition, if requested by RailCorp, PPP Co must give RailCorp an unconditional bank bond, for an amount equal to the agreed or determined estimated cost of these works, as a security for PPP Co’s performance of the works. If PPP Co fails to provide this bond, RailCorp may deduct the required amount from its payments to PPP Co under the arrangements described in section 3.6, and retain this sum as a security for PPP Co’s performance of the works until PPP Co provides the requested bank bond.

3.5.10 Arrangements at the end of the project

Before the expiry of the Project Contract, or before its earlier termination under the provisions described in section 3.8, PPP Co must:

- Procure the novation to RailCorp or its nominee, from the end of the Project Contract or any other date agreed to by RailCorp, of any agreements, subleases or licences related to PPP Co’s activities, as nominated by RailCorp in its absolute discretion
- Do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for “through life support” of the maintenance facility and simulators to RailCorp or its nominee, including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the maintenance facility and simulators and advice from experienced, competent personnel

- Not do anything that materially prejudices or frustrates the handing over of the maintenance facility, as a going concern, to RailCorp, and
- Do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the maintenance facility.

Upon the expiry of the Project Contract, or its earlier termination under the provisions described in section 3.8, PPP Co must:

- Transfer the maintenance facility and its maintenance plant, equipment, parts and materials to RailCorp or its nominee, in conditions complying with the “return conditions” specified by the Project Contract (the Security Trustee for the project’s debt financiers has expressly agreed to this transfer)
- Ensure advice from experienced, competent personnel, about any aspect of “through life support” of the maintenance facility and the simulators, continues to be available to RailCorp or its nominee for another 12 months
- Pay RailCorp or its nominee any insurance proceeds it holds for the reinstatement of the maintenance facility, to the extent required for its reinstatement, and assign its rights under the relevant insurance policies to RailCorp or its nominee
- Continue not do anything that materially prejudices or frustrates the handing over of the maintenance facility, as a going concern, to RailCorp
- Continue to do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the maintenance facility
- Give RailCorp access to PPP Co’s financial accounts and other financial records as necessary for the continued operation, maintenance and repair of the maintenance facility and, if RailCorp has acquired any of the trains, the continued operation and “through life support” of these trains, and
- Make redundancy payments to any of its employees who are made redundant, in accordance with all relevant agreements and laws and in line with general standards at the time.

In addition to these generally applicable arrangements, other, special arrangements will apply if the Project Contract is terminated early, as described in sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5 below.

3.6 ‘TLS phase’ RailCorp and PPP Co payments

Throughout the “TLS phase” of the project, from the completion of the train simulators, maintenance facility or first train “set” (whichever is earliest) until the expiry or earlier termination of the project’s contracts, RailCorp must pay PPP Co:

- Monthly performance-based “availability payments”, as described in section 3.6.1
- Monthly “reimbursable TLS payments” for any “reimbursable” repairs by PPP Co and PPP Co’s wheel

profiling, train washing and “operations” services (section 3.5.2.1), as described in section 3.6.2

- Monthly performance-based “key performance indicator payments”, as described in section 3.6.3
- Quarterly “interest payment adjustments”, if market interest rates exceed interest rates assumed in the private sector participants’ “base case” financial model for the project, as described in section 3.6.4, and
- Miscellaneous other amounts for specific services provided by PPP Co, such as a fleet management data link and training services, in accordance with specified schedules of rates,

and PPP Co must pay RailCorp:

- Quarterly “interest payment adjustments”, if market interest rates are less than the interest rates assumed in the private sector participants’ “base case” financial model for the project, as described in section 3.6.4
- “Incident response payments” whenever RailCorp has provided resources or equipment, other than a train crew, in response to any incident involving one of PPP Co’s trains that has affected, or might have affected, the operation of trains on RailCorp’s rail network, as described in section 3.6.5, and
- Miscellaneous other amounts for specific services provided by RailCorp, such as assistance provided by RailCorp maintenance personnel, in accordance with a specified schedule of rates.

RailCorp’s payments to PPP Co must be paid into specified bank accounts.

If there is a dispute about any of the payments, either party may refer the matter for determination under the Project Contract’s dispute resolution procedures (section 3.7.17). However, if RailCorp notifies PPP Co that an amount RailCorp must pay PPP Co is less than an amount claimed by PPP Co, PPP Co may invoke these dispute resolution procedures only within 30 days of RailCorp’s notification, and if it does not do so RailCorp will have no liability to PPP Co concerning the dispute.

The Project Contract sets out arrangements and preconditions for the lodgment and payment of payment claims and specifies timeframes for these payments. Overdue payments will incur simple interest at an interest rate 3% pa above the BBSY bank bill rate.

RailCorp will be entitled to set off its payment liabilities against any amounts it is due to receive from PPP Co, other than any “interest payment adjustment” (section 3.6.4) and specified types of payments to be made by PPP Co after any early termination of the Project Contract in specified circumstances (see sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5). PPP Co may not set off its payment liabilities.

3.6.1 Monthly ‘availability payments’ to PPP Co by RailCorp

RailCorp’s “availability payments” to PPP Co will depend on the extent to which PPP Co has fulfilled its train “availability” obligations to RailCorp (section 3.5.1), as documented in PPP Co’s performance monitoring system and monthly *Performance Reports* to RailCorp (section 3.5.6).

3.6.1.1 *Formulae for calculating the ‘availability payments’*

Each month’s “availability payment” will initially be calculated, in accordance with formulae set out in a “Payment Regime” Schedule to the Project Contract and *before* applying a “floor” limit which is also set out in this Schedule and is discussed in section 3.6.1.3 below, by:

- (1) Multiplying a “price per set availability unit”—the initial value of which was specified in the outputs of the private sector participants’ “base case” financial model on the date of “financial close” (7 December 2006), and which will be indexed in line with CPI increases (from the June quarter of 2006) until the practical completion of the 78th train “set”, and then in line with progressively lower proportions of CPI increases in the periods to the end of 2035, the end of 2040 and the end of the project—by the total number of train “set availability units” which PPP Co is required to provide for all of the “availability periods” during the month (sections 3.5.1.1 and 3.5.1.2) (with one train’s availability for one “availability period” constituting one “set availability unit”), *not counting*:
 - ◆ Any trains for which three months have not yet elapsed since the target dates for their practical completion (section 3.2.5), or
 - ◆ The second, third and fourth “availability periods” during any planned additional “special event” requirements imposed by RailCorp under the arrangements described in section 3.5.1.2.
- (2) Multiplying a lower “price per set availability unit (additional special events)” —the initial value of which was again specified in the outputs of the private sector participants’ “base case” financial model on the date of “financial close” (7 December 2006), and which will again be indexed in line with CPI increases (from the June quarter of 2006) until the practical completion of the 78th train “set”, and then in line with progressively lower proportions of CPI increases in the periods to the end of 2035, the end of 2040 and the end of the project—by the total number of train “set availability units” which PPP Co is required to provide during the month for the second, third and fourth “availability periods” in any planned additional “special event” requirements imposed by RailCorp under the arrangements described in section 3.5.1.2.

- (3) Calculating a “set availability allowance” for the month, equal to the product of:
 - ◆ The “price per set availability unit” referred to above
 - ◆ The total distance, in kilometres, travelled by PPP Co’s operational train “sets” during the month, multiplied by 3.25 and then divided by 50,000, and
 - ◆ A “**transition-in adjustment**” factor, starting at 25% during the first six months after the practical completion of the first train “set” and progressively increasing to 100% after 30 months, with provisions for these timeframes to be extended in specified circumstances, including specified *force majeure* circumstances (section 3.7.18) and other circumstances in which 50% or more of PPP Co’s operational trains are not able to be made “available” or are only *deemed* to be “available” (section 3.5.1.4).
- (4) Calculating a “**volume adjustment**” for the month, using a formula which :
 - ◆ Takes account of the average number of “available” train sets during the month’s “availability periods”, and
 - ◆ Incorporates a factor which produces a negative “volume adjustment” if the average distance travelled by PPP Co’s operational train “sets” during the month is less than 12,500 km per train and a positive “volume adjustment” if it is greater.
- (5) Calculating a “re-basing adjustment” for the month, reflecting changes in labour costs and changes in foreign exchange rates, in accordance with detailed provisions in an annexure to the “Payment Regime” Schedule to the Project Contract.
- (6) Adding the results of the calculations referred to in steps (1) to (5).
- (7) Subtracting, from this total, “**reliability and disruption adjustments**” for all of the train “sets” for the month, as described in section 3.6.1.2 below.

In addition to the “availability payments” calculated in this way, PPP Co will be entitled to claim an additional “availability payment” in July each year if, in the previous financial year, RailCorp has *not* required it to provide four additional train “sets” during four additional “special events” under the arrangements described in section 3.5.1.2. These additional payments, if any, will be calculated as if PPP Co had in fact been required to provide the extra “availability”, in June, for just one “availability period” for each “unused” special event.

3.6.1.2 *‘Reliability and disruption adjustments’*

For each train “set”, its “reliability and disruption adjustment” (if any) for any given “availability period” will be the highest of the following potentially applicable adjustments:

- A “late into service” or “late in service” adjustment if the “set” is introduced into service three or more minutes late, or is running three or more minutes late, because of defects

attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted under the arrangements described in section 3.5.1.3, equal to 50% of the “price per set availability unit” multiplied by the progressively increasing “transition-in adjustment” factor described in step (3) of section 3.6.1.1

- A “very late into service” or “very late in service” adjustment if the “set” is introduced into service ten or more minutes late, or is running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, equal to 75% of the “price per set availability unit” multiplied by the “transition-in adjustment” factor described in step (3) of section 3.6.1.1
- A “cancellation” adjustment if the “set” is cancelled by RailCorp while it is in service, or when it is due to enter service, because it:
 - ◆ Fails to meet specified minimum operating standards
 - ◆ Has a defect, attributable to PPP Co or its subcontractors or other associates, which RailCorp reasonably believes may delay the train’s services by ten minutes or more, or
 - ◆ Is introduced into service ten or more minutes late, or is running ten or more minutes late, because of defects attributable to PPP Co or its subcontractors or other associates or any other act or omission by PPP Co or its associates, or because PPP Co was late in making it available for CityRail service, or because a spare “set” has had to be substituted, or
 - ◆ Is subject to a direction, by ITSRR, OTSI or any other investigative authority, that RailCorp must not operate the “set”, because of one or more defects attributable to PPP Co or its subcontractors or other associates or because of any other act or omission by PPP Co or its associates,

equal to ten times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor described in step (3) of section 3.6.1.1, and

- “Withholding or withdrawing” adjustments if PPP Co does not achieve the required total “availability” for the “availability period” in question because PPP Co has withheld or withdrawn the “set” from service, equal to:
 - ◆ Five times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor described in step (3) above, if PPP Co has given RailCorp 24 hours’ or less notice of the withholding or withdrawal, and
 - ◆ 1½ times the “price per set availability unit”, multiplied by the “transition-in adjustment” factor, if PPP Co has

given RailCorp more than 24 hours’ notice of the withholding or withdrawal.

In calculating these various “reliability and disruption adjustments”,

- If a train delay is partly caused by defects attributable to PPP Co or its subcontractors or other associates or by any other act or omission by PPP Co or its associates, and partly caused by other factors, only the part of the delay attributable to the PPP Co-related problem(s) will be counted.
- However, any delay or failure by RailCorp to address or mitigate the effects of any such PPP Co-related problems will not be regarded as a separate cause of the delay, even if RailCorp’s action or inaction extends the delay.
- If a delay is caused solely by a PPP Co-related problem, and this problem is one of 27 types of problems listed in a Schedule to the Project Contract as problems which RailCorp train crew members are expected to address or mitigate by taking particular types of action as specified in this Schedule, the delay time attributable to the PPP Co-related problem will be *deemed* to be the lesser of:
 - ◆ The actual delay caused by the problem, and
 - ◆ A “**deemed action time**” for the problem, as determined by RailCorp and PPP Co prior to the completion of the first train “set” and then reviewed from time to time under arrangements set out in the same Schedule,

unless:

- ◆ A RailCorp crew member takes the specified action, but it does not have the expected effect, or
- ◆ The delay is caused by more than one of the 27 specified types of problems,

in which case the delay time attributable to the PPP Co-related problem(s) will simply be the length of the actual delay.

PPP Co has expressly acknowledged and agreed that the “reliability and disruption adjustments” described above are genuine pre-estimates of the losses, costs and other detriments RailCorp will incur if these events occur.

Apart from the general PPP Co indemnities described in section 3.1.6, and “PPP Co termination event” arrangements (following multiple RailCorp notices of “unacceptable availability” or “unacceptable reliability”) described in sections 3.8.3.7, 3.8.3.11 and 3.8.4, the “reliability and disruption adjustments” are RailCorp’s only remedies for any PPP Co failures to provide the required train “availability”. Even if a “reliability and disruption adjustment” is held to be legally unenforceable, PPP Co will be liable for any RailCorp losses only up to the amount it would have lost under the “reliability and disruption adjustment” had it applied.

3.6.1.3 Liabilities if a calculated ‘availability payment’ is negative

Under a strict application of the formulae for calculating each month’s “availability payment” described in section 3.6.1.1 above, it is possible for the result to be negative (i.e. less than \$0). In these circumstances,

- If the 78th train “set” has achieved practical completion (section 3.2.11.1), or if three or more months have elapsed since its target date for practical completion (currently 5 September 2013), the “availability payment” for the month will be zero.
- If the 78th train “set” has not yet reached practical completion and three months have not yet elapsed since its target date for practical completion, and the “availability payment” for the month would still have been negative had the calculation in step (1) of section 3.6.1.1 counted the “availability” of trains for which three months have not yet elapsed since the target dates for their practical completion, PPP Co must pay RailCorp an amount equal to the absolute value of the difference between the two results.
- If the 78th train “set” has not yet reached practical completion and three months have not yet elapsed since its target date for practical completion, and the “availability payment” for the month would have been zero or positive had the calculation in step (1) of section 3.6.1.1 counted the “availability” of trains for which three months have not yet elapsed since the target dates for their practical completion, PPP Co must pay RailCorp an amount equal to the absolute value of the original result.

3.6.2 Monthly ‘reimbursable TLS payments’ to PPP Co by RailCorp

PPP Co is entitled to be reimbursed by RailCorp each month, on the basis of schedules of rates annexed to the “Payment Regime” Schedule to the Project Contract, for:

- Any “reimbursable” repairs by PPP Co, as described in section 3.5.2.1, to the extent that the costs of these repairs are not covered by the PPP Co insurance policies described in section 3.7.10.1, and
- PPP Co’s wheel profiling, train washing and “operations” services (section 3.5.2.1).

The prices in the schedules of rates will increase in line with CPI movements since the June quarter of 2006.

A deduction will be made from each of these monthly payments to PPP Co to take account of an amount which the private sector participants’ “base case” financial model for the project has already assumed to have been paid.

3.6.3 Monthly ‘key performance indicator payments’ to PPP Co by RailCorp

RailCorp must make monthly “key performance indicator payments” (“KPI payments”) to PPP Co, based on a specified

series of measures of its performance in providing its “through life support” services.

The “key performance indicators” determining the size of these payments are:

- The Lost Time Injury Frequency Rate associated with the provision of PPP Co’s “through life support” services over the previous 12 months (10% weighting)
- The number of occurrences at the maintenance facility which PPP Co has had to report to the Office of Transport Safety Investigations (OTSI) under section 64 of the Rail Safety Act over the previous 12 months (5% weighting)
- The number of defects in 69 types of “passenger amenity KPI items” for the trains, as specified in *Performance Operating Standards* in a Schedule to the *RailCorp Through Life Support Specification* annexed to the Project Contract, which, at the end of the previous month, had not been corrected by PPP Co within “permitted” correction periods specified in these *Standards* (20% weighting)
- The number of defects in 45 other types of “KPI items” for the trains, as specified in *Performance Operating Standards* in a Schedule to the *RailCorp Through Life Support Specification* annexed to the Project Contract, which, at the end of the previous month, had not been corrected by PPP Co within “permitted” correction periods specified in these *Standards* (20% weighting)
- The number of defects in the trains not reported by PPP Co but uncovered in RailCorp audits of the trains, and reported to PPP Co by RailCorp, over the previous three months (20% weighting)
- The number of failures to conform with the currently required configuration for the trains uncovered in RailCorp audits of the trains, and reported to PPP Co by RailCorp, over the previous month (10% weighting), and
- The number of failures to comply with the requirements of RailCorp’s *Staff Cleaning Manual* uncovered in RailCorp audits of trains cleaned by PPP Co, and reported to PPP Co by RailCorp, over the previous month (15% weighting).

The maximum possible “KPI payment” in any month will be \$700,000, indexed in line with CPI increases since the June quarter of 2006, and the minimum possible “KPI payment” will be zero.

3.6.4 Quarterly ‘interest payment adjustment’ payments by RailCorp or PPP Co

From the date of practical completion of the 78th train “set”—or, if it is later, the date on which the private sector participants’ “delivery phase” interest rate hedging arrangements expire—RailCorp must make quarterly payments to PPP Co equal to the amount, if any, by which the interest payable that quarter for bank loans to PPP Co Finance Co under the Senior Bank Loan Note Subscription Agreement, junior bonds issued under the Junior Bond Trust Deed (see section 2.3) and any refinancings of these debts, calculated using specified market

rates (the BBSY bank bill rate in the case of the bank loans and the BBSW rate in the case of the junior bonds), exceeds what these interest payments would be if the relevant interest rates were as projected in the private sector participants' "base case" financial model for the project on 7 December 2006.

PPP Co must make equivalent payments to RailCorp if the market interest rate interest payments are less than the projected interest rate interest payments.

PPP Co must give RailCorp at least 20 business days' notice of its calculations of the amounts to be paid under these arrangements, and RailCorp must notify its agreement, or otherwise, within ten business days. As already indicated, neither party may set off any amounts it is owed against its "interest payment adjustment" payments.

3.6.5 'Incident response payments' to RailCorp by PPP Co

If RailCorp provides resources or equipment, beyond a train crew, in response to any incident involving one of PPP Co's trains that has affected, or might affect, the operation of trains on RailCorp's rail network, PPP Co must pay RailCorp for the costs it incurs, in accordance with a schedule of rates annexed to the "Payment Regime" Schedule to the Project Contract.

3.7 Miscellaneous general provisions of the Project Contract and the other RailCorp project agreements

3.7.1 Rail safety

RailCorp must obtain a variation to its existing accreditation under the Rail Safety Act (NSW) to cover the progressive introduction of the new trains and withdrawal of existing trains and the use of the new maintenance facility to maintain the new trains.

PPP Co must liaise and cooperate with RailCorp, and do everything reasonably necessary to assist RailCorp, in its applications to the Independent Transport Safety and Reliability Regulator (ITSRR) for this variation.

In particular, PPP Co must:

- Prepare draft and final versions of the necessary RailCorp reports, documentation and certificates, as detailed in the Project Contract (including the *Contract Management Requirements* described in section 3.2.7 and referred to in sections 3.3.9 and 3.5.6), the Rail Safety Act, a *National Rail Safety Accreditation Package* issued by ITSRR and RailCorp's *Safety Management System*
- Rectify any non-compliances with these requirements or any other ITSRR requirements identified in RailCorp reviews of the draft documents, and
- Amend the documents submitted by RailCorp to ITSRR, and/or provide further information, if RailCorp requests this in the light of ITSRR responses to its application.

PPP Co must then, throughout the rest of the project, liaise and cooperate with RailCorp, and do everything reasonably necessary to assist RailCorp, in RailCorp's maintenance of its rail safety accreditation and compliance with its other rail safety obligations.

PPP Co must also:

- Obtain, maintain and comply with the conditions of its own accreditation under the Rail Safety Act, and ensure that its contractors (at all levels), PPP Co Finance Co, PPP Co Holding Co and all other associates of PPP Co do likewise if this is required under the Rail Safety Act
- Develop, maintain and submit (to RailCorp and in some cases also to ITSRR) its own *Safety Management System* and *Safety Assurance Reports*, as detailed in the Project Contract (including the *Contract Management Requirements*), the Rail Safety Act and the *National Rail Safety Accreditation Package* issued by ITSRR
- Enter into any rail safety interface agreements required by the Rail Safety Act, RailCorp or ITSRR
- Liaise and cooperate with RailCorp and ITSRR in performing these obligations
- Allow RailCorp to review and comment on its rail safety documentation
- Give RailCorp copies of all rail safety notices, reports and correspondence received by PPP Co or its major contractors in connection with the project or potentially affecting PPP's abilities to meet its obligations under the Project Contract
- Ensure all persons engaged in or connected with PPP Co's fulfilling of its obligations under the Project Contract hold Certificates of Competency if this is required under the Rail Safety Act and otherwise comply with the Rail Safety Act
- Participate in a joint RailCorp/PPP Co Safety Committee
- Ensure that any work carried out for PPP Co within a defined "danger zone" around railway tracks and on station platforms is carried out only in accordance with specified RailCorp "possession" authorities and other systems designed to ensure the safety of workers in these situations
- More generally, ensure that all of its activities within any "rail corridor" along or adjacent to railway tracks complies with a *Safety Protocol* set out in a Schedule to the Project Contract
- Immediately inform RailCorp about any actual or likely event or circumstance which might interfere with or threaten current or future rail safety, and assist RailCorp in its responses (see section 3.7.9), and
- Give ITSRR, the Office of Transport Safety Investigations (OTSI) and any other investigative authorities access to any premises or information they lawfully request, cooperate with their other lawful requests and refrain from hindering or delaying their investigations.

The Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor have all warranted to RailCorp

that they have not had any criminal, civil or other proceedings brought against them anywhere in the world in connection with any rail safety incident, and that no such proceedings are pending or (to their knowledge) threatened.

3.7.2 Occupational health and safety

PPP Co must perform all of its obligations to RailCorp safely and in a manner that protects both people and property.

If RailCorp believes people might be injured or property might be damaged as a result of PPP Co's activities, it may direct PPP Co to change the way it works or direct it to cease working. PPP Co must comply with any such direction at its own cost.

More specifically, PPP Co must:

- Ensure it complies with the Occupational Health and Safety Act (NSW), associated guidelines, all other laws related to occupational health, safety and rehabilitation and detailed, project-specific occupational health and safety requirements set out in a Schedule to the Project Contract
- Ensure its subcontractors and other associates do likewise, and
- Keep RailCorp promptly and fully informed of any serious occupational health and safety incidents or accidents.

3.7.3 Industrial relations

PPP Co is solely responsible for all industrial relations matters associated with its activities, other than industrial relations between RailCorp and RailCorp's own employees.

It must comply with its *Human Resources Plan*, a subsidiary component of its *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6), consult with RailCorp before taking any action which might reasonably be expected to affect RailCorp's own industrial relations, and keep RailCorp informed about any industrial relations problems or issues which are likely to affect PPP Co's activities.

3.7.4 Local content and apprenticeship requirements and local industry participation

As already indicated in sections 3.2.7 and 3.4.2, PPP Co must implement and comply with its *Local Industry Participation Plan*, a subsidiary component of its *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6).

At least 20% of the cost of items listed in a cost schedule forming part of this *Local Industry Participation Plan* must be attributable to items manufactured in Australia or New Zealand.

PPP Co must report to RailCorp on its compliance with its *Local Industry Participation Plan*, keep sufficient records for its compliance with this plan and the project's local content requirement to be audited by RailCorp, allow RailCorp to conduct these audits and ensure the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor do likewise.

In addition to demonstrating that the local content requirement is reasonably likely to be achieved as a precondition for receiving RailCorp's "critical" design review "milestone payment" (section 3.4.2), PPP Co must demonstrate that it *has* been achieved within 20 business days of the practical completion of the 78th train "set".

At any particular time throughout the project, PPP Co, the Rolling Stock Manufacturers and the TLS Contractor must employ one trades apprentice for every nine tradespersons employed in Australia or New Zealand in connection with the project.

3.7.5 Environment protection

In addition to the PPP Co environmental obligations already described in this report—including PPP Co's obligations to comply with the planning approval for the maintenance facility and all other statutory approvals and licences (sections 3.2.2 and 3.3.2), its obligations to remediate any contamination on the maintenance facility's construction site (section 3.3.5) and its obligations to prepare, implement and comply with an *Environmental Management Plan*, a subsidiary component of PPP Co's *Contract Management Plan* (sections 3.2.7, 3.3.9 and 3.5.6)—PPP Co must:

- Prevent any nuisance or unreasonable noise, dust, vibration or disturbance from its activities, unless these impacts are not reasonably able to be avoided or are permitted by the law
- Carry out all its activities in an environmentally responsible manner, and ensure the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor do likewise
- Ensure industrial wastes and hazardous substances are not dumped at the maintenance facility or its surroundings or handled in a way likely to cause an environmental hazard
- Ensure no contaminants are released from the maintenance facility and its surroundings or from the trains
- Immediately notify RailCorp if there is a breach of any environmental requirement
- Indemnify RailCorp against any loss, expense, damage or liability arising out of any breach of these environmental obligations, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1), and
- Allow RailCorp to access the environmental management system it must establish under its *Environmental Management Plan*, and the environmental management systems of the Rolling Stock Manufacturers, Maintenance Facility Contractor and TLS Contractor, for monitoring and auditing purposes.

3.7.6 Intellectual property and moral rights

PPP Co has made a series of promises to RailCorp that its activities, designs, works, facilities, trains, simulators and other “deliverables” will not infringe intellectual property or moral rights, that it may lawfully assign specified intellectual property rights in its reports, design documentation and software to RailCorp and that it may lawfully grant RailCorp licences to use other specified intellectual property rights.

In line with these warranties and associated indemnities, PPP Co has:

- Assigned specified intellectual property rights in its reports, design documentation and software to RailCorp, and undertaken to procure the direct assignment of these rights to RailCorp in cases where the rights are owned by other parties
- Granted RailCorp and its related corporations an irrevocable, perpetual, royalty-free, transferable and non-exclusive licence to use, for the purposes of the project, all of the intellectual property rights in or used in the project’s “deliverables” and specified aspects of work methods that are owned by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their related corporations
- Granted RailCorp and its related corporations an irrevocable, perpetual, royalty-free, transferable and non-exclusive licence to use, for specified non-project purposes associated with the design, manufacture, commissioning, operation, maintenance, repair and alteration of *other* trains and train simulators, much more limited intellectual property rights associated with specific aspects of the trains and their “look and feel” that are owned by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their related corporations
- Undertaken to procure the granting by third parties of equivalent licences for equivalent intellectual property rights owned by them, or, if PPP Co cannot achieve this, procure an alternative licence or develop a reasonably acceptable design workaround at PPP Co’s own cost
- Undertaken to use all reasonable efforts, without any duress or misleading conduct, to procure the waiving of moral rights and the consent of relevant authors to RailCorp’s and PPP Co’s use of their works etc in whatever form RailCorp and PPP Co think fit, and
- Undertaken not to apply any advertising or identification of PPP Co or its associates to any parts of the trains which are visible to the public or RailCorp’s train crews, unless RailCorp consents.

For its part, RailCorp has granted PPP Co perpetual, royalty-free, transferable and non-exclusive licences to use, for the purposes of the project,

- The intellectual property rights PPP Co has assigned to RailCorp, and

- Other intellectual property rights owned by RailCorp, other than its trademarks, which may not be used by PPP Co or its associates without RailCorp’s consent or contrary to a series of conditions that will apply if RailCorp gives its consent.

The Project Contract sets out detailed arrangements for the handling of computer software and other source code consistently with these undertakings, including arrangements for source code to be deposited with and then held “in escrow” by approved escrow agents and accessed by the parties on terms set out in the Project Contract, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor) and any future escrow deeds in an approved form set out in a Schedule to the Project Contract.

3.7.7 Liabilities for taxes, rates, charges and stamp duty

PPP Co must pay all taxes, utility and other charges, levies, fees and workers’ compensation premiums incurred in the performance of the project’s contracts, other than RailCorp workers’ compensation premiums, but RailCorp must reimburse PPP Co for:

- Any NSW stamp duties it has paid for the execution of the project’s contracts
- Any NSW hire of goods duty payable for the hiring of the trains
- Any NSW transfer duty payable for any RailCorp acquisitions of the trains, and
- All municipal rates, water, sewerage and drainage rates (other than water use charges) and land taxes levied on PPP Co for the maintenance facility’s leased and licensed areas.

RailCorp must also supply the electricity for the overhead traction power system for the maintenance facility’s tracks and sidings at no cost to PPP Co.

If RailCorp uses any excess capacity in utility services at the maintenance facility for its own purposes, as it will be entitled to do, it must reimburse PPP Co for the costs of any separate metering systems and pay the applicable usage charges, but will not be liable for any other associated charges or rates.

3.7.8 Confidentiality

All of the project’s major contracts and associated documents, including the Project Contract and all other RailCorp project agreements (section 2.2), may be publicly disclosed by RailCorp, subject only to a series of confidentiality restrictions set out in a Schedule to the Project Contract.

These restrictions prohibit the release, except in specified circumstances, of information revealing:

- The private sector debt financiers’ fees and margins
- The cost structures, profit margins and intellectual property of PPP Co or the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and their

related corporations, contractors, consultants, advisers, agents and other associates

- The private sector participants' "base case" financial model for the project
- The terms of equity investments in the project
- The private sector participants' directors' entitlements and voting rights and their director and shareholder simple and super majority resolution items and powers, or
- The terms of the projects' insurance policies (but not the requirements for these policies, as summarised in section 3.7.10.1).

These confidentiality restrictions do not apply, however, to:

- Any disclosures of information by RailCorp, the State Government or any public authority as required under the Freedom of Information Act (NSW) or as required to satisfy the requirements of the NSW Auditor-General or parliamentary accountability
- More specifically, any disclosures:
 - ♦ Required by a parliamentary house or committee for any legitimate government purpose or process, or
 - ♦ In this *Summary of Contracts*, which has been prepared in accordance with the NSW Government's November 2001 *Working with Government Guidelines for Privately Financed Projects* and also in accordance with the December 2006 version of these *Guidelines*, issued after the project's contracts had been executed (the 2001 *Guidelines* had express provisions forbidding the inclusion of confidential information such as that specified in the Schedule to the Project Contract, while the 2006 *Guidelines* incorporate equivalent provisions in recent amendments to the Freedom of Information Act and, in the case of State-owned corporations such as RailCorp, a memorandum issued by the NSW Premier in 2000)
- Any disclosures required by law or the listing rules of any recognised stock exchange
- Any disclosures which RailCorp or PPP Co, as relevant, reasonably believes must be made to investors in PPP Co, to the project's current or future debt financiers or insurers, to any other party to the project's contracts which needs the information to comply with its contractual obligations or to any rating agency
- Any disclosures to a court, administrative tribunal, arbitrator or independent expert in proceedings (or, in the last case, in an expert determination) to which the person or organisation disclosing the information is a party, or
- Any disclosures of information that is already in the public domain.

PPP Co may not make any public statements about the project, other than any disclosures it is required to make to a recognised stock exchange, without RailCorp's prior consent, and must

ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor and all of its other "significant contractors" (sections 3.2.6, 3.3.8 and 3.5.5) also comply with this requirement.

3.7.9 Alerts and incident management

PPP Co must notify RailCorp immediately if it becomes aware of any event or circumstance, arising from PPP Co's activities, which might interfere with the use of any RailCorp land for railway purposes, the operation of RailCorp's railway infrastructure or the current or future safe operation or capacity or efficiency of RailCorp's rail system.

It must then keep RailCorp informed, providing sufficient information for RailCorp to assess the event or circumstance and its likely effects.

If RailCorp believes the event or circumstance places RailCorp's land, infrastructure or rail system at risk, or threatens the safety of passengers or RailCorp staff or the operation of the rail system, PPP Co must immediately cooperate with RailCorp—if necessary, by ceasing its activities and vacating the affected area(s)—and must, at its own cost, assist RailCorp in taking action to avert any danger and ameliorate the risk, as directed by RailCorp.

RailCorp and PPP Co have agreed they will cooperate openly and constructively—while still reasonably protecting their commercial and legal positions—in their responses to and management and investigation of any incidents involving PPP Co's trains, while they are in service, which have, or might have, resulted in any deaths or serious injuries (see section 3.7.1).

3.7.10 Insurance and loss or damage

3.7.10.1 PPP Co's insurance obligations

PPP Co and the Rolling Stock Manufacturers must take out and maintain the following "delivery phase" insurance policies for the trains and the simulators:

- Until 18 months after the date of practical completion of the 78th train "set", contract works or construction risks insurance for at least \$300 million per occurrence, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to expedite repairs, replacements and reinstatements, with maximum deductibles of \$3 million during commissioning and \$500,000 at other times
- Until the date of practical completion of the 78th train "set", transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the date of practical completion of the 78th train "set", public and products liability insurance for at least \$250 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$250 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and

- Until seven years after the date of practical completion of the 78th train “set”, professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total, with a maximum deductible of \$1 million.

Similarly, PPP Co and the Maintenance Facility Contractor must take out and maintain the following “delivery phase” insurance policies for the maintenance facility works:

- Until the date of practical completion of the maintenance facility, contract works or construction risks insurance for at least \$300 million per occurrence, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to expedite repairs, replacements and reinstatements, with a maximum deductible of \$500,000
- Until the date of practical completion of the maintenance facility, transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the date of practical completion of the maintenance facility, public and products liability insurance for at least \$100 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$100 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and
- Until seven years after the date of practical completion of the maintenance facility, professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total, with a maximum deductible of \$1 million.

From the date of practical completion of the maintenance facility PPP Co and the TLS Contractor must take out and maintain the following “TLS phase” insurance policies:

- Until the expiry or earlier termination of the Project Contract, industrial special risks insurance, covering the maintenance facility and the trains during their maintenance periods, for at least \$650 million, plus additional amounts to cover the costs and expenses of demolition, debris removal, project management and other consultancies and measures to expedite repairs, replacements and reinstatements, with a maximum deductible of \$500,000
- Until the expiry or earlier termination of the Project Contract, transit insurance, including wet marine insurance, for at least the full replacement costs, with a maximum deductible of \$500,000
- Until the expiry or earlier termination of the Project Contract, public and products liability insurance for at least \$250 million per occurrence, with cover for an unlimited number of occurrences (but with a minimum of \$250 million for the aggregate of all product liability claims in any one insurance period) and with a maximum deductible of \$3.5 million, and
- Until seven years after the expiry or earlier termination of the Project Contract, professional indemnity insurance for at least \$100 million per occurrence and \$100 million in total

until seven years after the date of practical completion of the 78th train “set”, and at least \$25 million per occurrence and \$50 million per year in total after this date, with a maximum deductible of \$1 million.

In addition, throughout the project PPP Co and its subcontractors, and all of their contractors, must take out and maintain:

- Employers’ liability, workers’ compensation and compulsory third party motor vehicle insurance, as required by law, and
- Third party property damage motor vehicle insurance for at least \$20 million per occurrence, with cover for an unlimited number of occurrences and with a maximum deductible of \$10,000.

The Project Contract sets out a series of requirements for these insurance policies, other than the employers’ liability, workers’ compensation, compulsory third party motor vehicle and third party property damage motor vehicle policies, including RailCorp approvals of their terms and the notification of RailCorp if a policy is cancelled or allowed to expire. As already indicated in section 2.3, some of the more detailed requirements for some of the “delivery phase” policies were waived by RailCorp on 6 December 2006.

The Project Contract also sets out procedural requirements for PPP Co, including requirements to provide evidence of its policies, notify RailCorp of specified changes in its insurance status and any events which might give rise to an insurance claim (other than under the employers’ liability, workers’ compensation and compulsory third party motor vehicle policies), diligently pursue any insurance claims, allow RailCorp to direct and/or take over its insurance claims in specified circumstances, and establish and use a specified insurance proceeds bank account.

If PPP Co fails to provide satisfactory evidence that a required insurance policy is in effect within ten business days of a RailCorp request for it to do so, RailCorp may take out and maintain the relevant insurance itself and recover its premium and other costs from PPP Co. The Security Trustee for the project’s debt financiers, which must be sent a copy of RailCorp’s request, has expressly acknowledged RailCorp’s right to take this action.

The terms of PPP Co’s initial “delivery phase” insurance policies, as approved by RailCorp, are reproduced in an Exhibit to the Project Contract, but as indicated in section 3.7.8 these details are subject to confidentiality restrictions.

RailCorp may at any time reasonably direct PPP Co to insure against any risk that is not already covered or to increase or change the terms of an existing policy. If it does so, PPP Co must promptly advise RailCorp of the additional premium(s), and if RailCorp decides that PPP Co should proceed with the change RailCorp must reimburse PPP Co for the additional premium(s) and any associated brokerage charges and taxes.

Table 2. Sharing of real increases in the total cost of PPP Co’s “TLS phase” industrial special risks, public and products liability and professional indemnity insurance policies

Actual total cost as a percentage of the sum of the policies’ original cost estimates, as indexed for inflation	PPP Co’s share of the total real cost increase	RailCorp’s share of the total real cost increase
100% to 150%	<ul style="list-style-type: none"> All 	<ul style="list-style-type: none"> None
150% to 200%	<ul style="list-style-type: none"> All of the portion of the cost increase taking the total cost from 100% to 150% of the sum of the original cost estimates (as indexed), <i>plus</i> Half of the rest of the real cost increase 	<ul style="list-style-type: none"> None of the portion of the cost increase taking the total cost from 100% to 150% of the sum of the original cost estimates (as indexed) Half of the rest of the real cost increase
200% to 500%	<ul style="list-style-type: none"> 75% of the portion of the cost increase taking the total cost from 100% to 200% of the sum of the original cost estimates (as indexed), <i>plus</i> 10% of the rest of the real cost increase 	<ul style="list-style-type: none"> 25% of the portion of the cost increase taking the total cost from 100% to 200% of the sum of the original cost estimates (as indexed), <i>plus</i> 90% of the rest of the real cost increase
more than 500%	<ul style="list-style-type: none"> 26.25% of the portion of the cost increase taking the total cost from 100% to 500% of the sum of the original cost estimates (as indexed) None of the rest of the real cost increase 	<ul style="list-style-type: none"> 73.75% of the portion of the cost increase taking the total cost from 100% to 500% of the sum of the original cost estimates (as indexed), <i>plus</i> All of the rest of the real cost increase

3.7.10.2 Annual reviews and the sharing of changes in insurance costs

On each anniversary of the practical completion of the maintenance facility,

- RailCorp must review the minimum sums that must be insured under the “TLS phase” insurance policies, and their specified maximum deductibles, and decide, with advice from a reputable insurance broker, whether these amounts need to be increased or decreased, and
- Both parties must review the premiums and statutory charges paid for the “TLS phase” industrial special risks, public and products liability and professional indemnity policies in the previous year, and compare these actual costs with cost estimates set out in a Schedule to the Project Contract.

If the total cost of these three insurance policies—including any increases or decreases in costs that have arisen as a result of earlier changes in the policies’ minimum sums or maximum deductibles—has been less than 50% of the sum of their original cost estimates, as indexed in line with CPI movements since the June quarter of 2006, the overall cost saving must be shared equally between RailCorp and PPP Co.

If the total cost of the three insurance policies has been between 50% and 100% of the sum of their original cost estimates, as indexed, PPP Co will be entitled to retain the full cost saving.

If the total cost of the three insurance policies has been higher than the sum of their original cost estimates, as indexed, the additional cost must be shared by PPP Co and RailCorp as set out in **Table 2**, subject to RailCorp’s *not* being liable for any cost

increases attributable to PPP Co, its subcontractor or its other associates, including their claims histories.

In addition, if the *individual* cost of any of the three insurance policies is 500% or more of its original cost estimate, as indexed, at any time, not limited to these annual reviews,

- RailCorp and PPP Co will each be liable for 73.75% and 26.25%, respectively, of the portion of the cost increase taking the cost of this policy to 500% of its estimate, and RailCorp will be liable for all of the remaining portion (if any) of the cost increase, although (again) RailCorp will not be liable for any cost increases attributable to PPP Co or its associates, *or*
- RailCorp may declare the risks covered by the policy to be “uninsurable”, and if it does so the arrangements described in section 3.7.10.4 will apply.

3.7.10.3 Liabilities for and responses to loss or damage

PPP Co and RailCorp have agreed to share the risks of damage to or loss or destruction of the trains, the simulators, the maintenance facility and third parties’ property as described below:

- PPP Co bears all the risks of damage to the trains prior to their practical completion, provided the damage is *not* caused by:
 - A RailCorp breach of the Project Contract
 - A negligent, reckless, fraudulent or illegal act or omission by RailCorp, any related corporation or any officer, employee, agent, other contractor, consultant, adviser, nominee or licensee of RailCorp or a related corporation, other than PPP Co and its associates

- ♦ War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority, or
- ♦ Nuclear radioactivity.

(The Project Contract calls these “**excepted risks**”.)

Among other things, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp and bear all the costs of these repairs or replacements, to the extent that any insurance proceeds are insufficient.

- (b) RailCorp bears all the risks of damage to the trains prior to their practical completion—other than graffiti covering an area of 10 m² or less—if this damage is caused by an “excepted risk”.

In these circumstances, PPP Co must again repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, but RailCorp must pay PPP Co the reasonable costs of these repairs or replacements, to the extent any insurance proceeds are insufficient.

- (c) PPP Co bears all the risks of damage to the completed trains during their maintenance periods, provided the damage is *not* caused by an “excepted risk”.

Among other things,

- ♦ If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp and bear all the costs of these repairs or replacements, to the extent any insurance proceeds are insufficient.
- ♦ If the 78th train “set” *has* been completed, and RailCorp and PPP Co agree that it is economically practicable to repair or replace the damaged carriage(s) (or, if they cannot agree, if this is determined under the dispute resolution procedures described in section 3.7.17), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, again bearing all the costs of the repairs or replacements to the extent any insurance proceeds are insufficient.
- ♦ If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),
 - PPP Co will not be obliged to repair or replace the carriages
 - RailCorp and PPP Co must negotiate in good faith in an attempt to agree on ways—such as the rotation of spare carriages or the use of trains with fewer than eight carriages—by which (a) PPP Co will be able to continue to meet the current train “availability” requirements (section 3.5.1), or agreed lesser requirements, and (b) PPP Co will continue

to be entitled to earn the same level of “availability payments” (section 3.6.1), or an appropriately adjusted level of “availability payments” if the “availability” requirements are reduced, and

- If RailCorp and PPP Co cannot reach a contractually binding agreement on these matters within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages but RailCorp will not be obliged to give PPP Co any other financial relief or compensation for any reduction in its “availability payments” as a result of the damage to its carriage(s).

- (d) RailCorp bears all the risks of damage to the completed trains, other than graffiti covering an area of 10 m² or less,

- ♦ During the periods they are in RailCorp’s possession, provided the damage is not caused by an act or omission by PPP Co, its subcontractors or its other associates, or by an event prior to the train’s practical completion, and
- ♦ At any time, if the damage is caused by an “excepted risk”.

Among other things, in these circumstances:

- ♦ If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, and RailCorp must pay it the reasonable costs of these repairs or replacements, to the extent any insurance proceeds are insufficient. (This is a generally applicable obligation, not limited to the specific circumstances of the “reimbursable repairs” described in sections 3.5.2.1 and 3.6.2.)
- ♦ If the 78th train “set” *has* been completed, and RailCorp and PPP Co agree (or it is determined) that it is economically practicable to repair or replace the damaged carriage(s), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, with RailCorp again paying it the reasonable costs of these repairs or replacements to the extent any insurance proceeds are insufficient (again as a generally applicable obligation, not limited to the specific circumstances of the “reimbursable repairs” described in sections 3.5.2.1 and 3.6.2), *unless* RailCorp notifies PPP Co that the carriage(s) need not be repaired or replaced, in which case:
 - The renegotiation arrangements described in (c) above will apply, and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of

carriages, and RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.

- ◆ If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),
 - PPP Co will not be obliged to repair or replace the carriages
 - The renegotiation arrangements described in (c) above will apply, and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must again be adjusted to reflect the decreased number of carriages, and RailCorp must again pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.
- (e) RailCorp and PPP Co will share the risks of damage to the completed trains during the periods they are in RailCorp’s possession, if the damage is caused by an act or omission by PPP Co, its subcontractors or its other associates, or by an event prior to the train’s practical completion.

In these circumstances,

- ◆ If the 78th train “set” has not yet been completed, PPP Co must repair or replace the damaged carriage(s) within a reasonable period specified by RailCorp, with PPP Co bearing the first \$500,000 (indexed in line with CPI movements since the June quarter of 2006) of the costs of these repairs or replacements, to the extent any insurance proceeds are insufficient, and RailCorp paying PPP Co for any reasonable costs of the repairs or replacements, to the extent any insurance proceeds are insufficient, beyond this \$500,000 (as indexed).
- ◆ If the 78th train “set” *has* been completed, and RailCorp and PPP Co agree (or it is determined) that it is economically practicable to repair or replace the damaged carriage(s), PPP Co must again carry out these repairs or replacements within a reasonable period specified by RailCorp, with the costs of these repairs or replacements again being shared as just described, *unless* RailCorp notifies PPP Co that the carriage(s) need not be repaired or replaced, in which case:
 - RailCorp and PPP Co must negotiate in good faith in an attempt to agree on ways by which (a) PPP Co will be able to continue to meet the current train “availability” requirements (section 3.5.1), or agreed lesser requirements, and (b) PPP Co will continue

to be entitled to earn the same level of “availability payments” (section 3.6.1), less \$500,000 (indexed in line with CPI movements since the June quarter of 2006), and

- If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages, RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position, and PPP Co must pay RailCorp \$500,000 (indexed in line with CPI movements since the June quarter of 2006).
- ◆ If the 78th train “set” has been completed but it is agreed or determined that it is *not* economically practicable to repair or replace the damaged carriage(s),
 - PPP Co will not be obliged to repair or replace the carriages
 - The renegotiation arrangements just described will apply, and
 - If RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train “availability” requirements must be adjusted to reflect the decreased number of carriages, RailCorp must again pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position, and PPP Co must again pay RailCorp \$500,000 (indexed in line with CPI movements since the June quarter of 2006).
- (f) PPP Co bears all the risks of damage to the simulators prior to their practical completion, provided the damage is not caused by an “excepted risk”.

Among other things, PPP Co must repair or replace the damaged simulator(s), at its own cost, within a reasonable period specified by RailCorp.
- (g) If the simulator(s) are damaged prior to their practical completion as a result of an “excepted risk”, PPP Co must repair or replace the damaged simulator(s) within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.
- (h) PPP Co bears all the risks of damage to the completed simulators that is caused by an act or omission by PPP Co, its subcontractors or its other associates or by an event prior to the simulators’ practical completion that was not an “excepted risk”.

Among other things, PPP Co must repair or replace the damaged simulator(s), at its own cost, within a reasonable period specified by RailCorp.

(i) If the completed simulators are damaged as a result of other causes, including an “excepted risk”, PPP Co must repair or replace the damaged simulator(s) within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.

(j) PPP Co bears all the risks of damage to the maintenance facility works (excluding the RailCorp “enabling works” described in section 3.3.1.1) prior to the practical completion of the maintenance facility, provided the damage is not caused by an “excepted risk”.

Among other things, PPP Co must repair or replace the damaged works, at its own cost, within a reasonable period specified by RailCorp.

(k) If the maintenance facility works (excluding the RailCorp “enabling works”) are damaged prior to the practical completion of the maintenance facility as a result of an “excepted risk”, PPP Co must repair or replace the damaged works within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.

(l) PPP Co bears all the risks of damage to the completed maintenance facility, provided the damage is not caused by a breach by RailCorp of its “enabling works” obligations (sections 3.3.1.1, 3.3.3.1, 3.3.6.1, 3.3.7.1 and 3.3.13) or any other “excepted risk”.

Among other things, PPP Co must repair or replace the maintenance facility, at its own cost, within a reasonable period specified by RailCorp.

(m) If the completed maintenance facility is damaged as a result of an “excepted risk”, including any breach by RailCorp of its “enabling works” obligations, PPP Co must repair or replace the maintenance facility within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.

(n) PPP Co bears all the risks of damage to its unfixed maintenance plant, equipment, parts and materials, provided the damage is not caused by an “excepted risk”.

Among other things, PPP Co must repair or replace the damaged plant, equipment, parts and/or materials, at its own cost, within a reasonable period specified by RailCorp.

(o) If PPP Co’s unfixed maintenance plant, equipment, parts and/or materials are damaged as a result of an “excepted risk”, PPP Co must repair or replace the damaged plant, equipment, parts and/or materials within a reasonable period specified by RailCorp and RailCorp must pay PPP Co the reasonable costs of these repairs or replacements.

(p) If any property of a third party is damaged, lost or destroyed as a result of a PPP Co breach of the Project

Contract, PPP Co must promptly repair or replace the damaged property at its own cost.

If it fails to do so, RailCorp may carry out these repairs or replacements, after giving PPP Co reasonable notice, and PPP Co will be liable for any costs and losses RailCorp incurs, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (see section 3.7.10.1).

(q) If any property of a third party is damaged, lost or destroyed as a result of PPP Co’s *performance* of its obligations under the Project Contract, PPP Co must, if it has a legal liability to do so and at its own cost, promptly repair or replace the damaged property or reasonably compensate the third party, in the latter case only if the third party agrees.

If PPP Co is legally obliged to take this action but fails to do so, RailCorp may carry out the repairs or replacements or pay reasonable compensation, after giving PPP Co and the Security Trustee reasonable notice, and PPP Co will again be liable for any costs and losses RailCorp incurs, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations.

These specific allocations of risks and liabilities for loss or damage are supplemented by PPP Co’s general commitments to indemnify RailCorp against any claim or loss RailCorp suffers as a result of any deaths, injuries, property damage or loss of use of property, or any reasonably foreseeable economic losses directly arising from property damage or a loss of use of property, that is caused by, or contributed to by,

- Any PPP Co breach of any RailCorp project agreement, or
- Any negligent or other wrongful act or omission, concerning PPP Co’s obligations under the Project Contract or the use or occupation of the maintenance facility construction site or associated work sites, by PPP Co and its associates,

subject to the exceptions and limit on PPP Co’s liability summarised in section 3.1.6.

Whenever PPP Co is obliged to undertake repairs or replacements under the arrangements described above, it must:

- Subject to inspections by its insurers, immediately begin clearing any debris and undertaking initial repair work
- Promptly consult with RailCorp
- Ensure the repairs or replacements comply with the Project Contract’s relevant specifications and will be completed within the reasonable period specified by RailCorp

- Ensure, to the greatest extent possible, that it continues to comply with all its obligations under the RailCorp project agreements
- Minimise any impacts on railway operations
- Keep RailCorp informed of its progress, and
- Apply any insurance proceeds towards the cost of the repairs or replacements. (Any surplus proceeds may be treated by PPP Co as revenue from the project.)

If any of PPP Co's trains is damaged or destroyed but (under the arrangements described in (c), (d) and (e) above) PPP Co is *not* obliged to repair or replace the damaged carriage(s), PPP Co must apply any relevant insurance proceeds to reducing its debts to the project's private sector debt financiers, and *not* to any payments it must make to RailCorp.

3.7.10.4 'Uninsurable' risks

Notwithstanding the "TLS phase" insurance obligations described in section 3.7.10.1, PPP Co will not be required to insure against any risk normally covered by its "TLS phase" industrial special risks insurance or public and products liability insurance policies—or, in limited, specified circumstances, its "TLS phase" professional indemnity insurance policy—if:

- RailCorp and PPP Co agree, or it is determined under the Project Contract's dispute resolution procedures (section 3.7.17), that:
 - ◆ The risk has become "uninsurable", in the sense that is impossible to obtain insurance for the risk from any insurance company with a Standard and Poor's financial security rating of at least A– or a Moody's financial security rating of at least A3, and
 - ◆ This "uninsurability" has not been caused by any act or omission by PPP Co, its subcontractors or its other associates, or
- As already described in section 3.7.10.2, RailCorp declares risk(s) covered by PPP Co's "TLS phase" industrial special risks, public and products liability or professional indemnity insurance to be "uninsurable" on the basis that the premium and associated costs of the relevant insurance policy are 500% or more of their original cost estimate, as indexed in line with CPI movements since the June quarter of 2006.

PPP Co must immediately notify RailCorp if it believes a risk that would otherwise have to be covered by its "TLS phase" industrial special risks policy or its public and products liability policy has become "uninsurable".

If RailCorp and PPP Co agree that a risk is "uninsurable", or it is determined that this is the case, RailCorp and PPP Co must then meet and attempt to agree on whether there should be any changes to PPP Co's rights and obligations, including, in particular, changes to RailCorp's monthly "availability payments" to PPP Co (section 3.6.1).

If they cannot agree on appropriate changes, the "availability payments" must be adjusted so as to deduct an amount equal

to the premium last paid by PPP Co to insure the risk that has now become "uninsurable".

PPP Co must approach the insurance market, on a regular basis, to establish whether the risk continues to be "uninsurable", advising RailCorp of its findings. If a risk ceases to be "uninsurable", PPP Co must take out insurance for it again and the "availability payments" must be readjusted.

If an "uninsurable risk" materialises, RailCorp must, at its option and within a reasonable period of time, *either*:

- (a) Pay PPP Co an amount equal to the insurance proceeds it would have received had the relevant insurance continued to be available.
- (b) If the risk has damaged or destroyed any of PPP Co's trains, require PPP Co to negotiate in good faith in an attempt to agree on ways—such as the rotation of spare carriages or the use of trains with fewer than eight carriages—by which:
 - ◆ PPP Co will be able to continue to meet the current train "availability" requirements (section 3.5.1), or agreed lesser requirements, and
 - ◆ PPP Co will continue to be entitled to earn the same level of "availability payments" (section 3.6.1), or an appropriately adjusted level of "availability payments" if the "availability" requirements are reduced.

If RailCorp chooses this option and RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, the train "availability" requirements must be adjusted to reflect any decrease in the number of carriages, and RailCorp must pay PPP Co an amount which, in combination with any insurance proceeds PPP Co receives, will ensure PPP Co is left in no worse or better financial position.

- (c) If the risk has damaged or destroyed the maintenance facility or other plant or equipment, but it is still practicable to continue the project without the affected part of the maintenance facility or the affected plant or equipment, direct PPP Co not to repair or replace the damaged facility, plant or equipment and require it to negotiate in good faith in an attempt to agree on ways by which:
 - ◆ PPP Co will be able to continue to meet the current train "availability" requirements, and
 - ◆ PPP Co will continue to be entitled to earn the same level of "availability payments".

If RailCorp chooses this option and RailCorp and PPP Co cannot reach a contractually binding agreement within 30 business days, RailCorp must pay PPP Co an amount which will ensure PPP Co is left in no worse or better financial position.

- (d) If the risk has damaged or destroyed all or a substantial portion of the trains or the maintenance facility, terminate the Project Contract.

If RailCorp chooses this option, the arrangements summarised in section 3.8.1 will apply.

3.7.11 Updating of the project's financial model

PPP Co must update the private sector participants' "base case" financial model for the project whenever this is reasonably necessary, and at least once every 12 months.

It must obtain RailCorp's approval of any changes before they are made, apart from:

- The incorporation of relevant and measurable historical data, and
- Any changes notified to PPP Co by a person nominated by RailCorp to check or audit the model.

PPP Co must promptly revise the financial model in accordance with any such notifications, unless it promptly disputes the reasonableness, accuracy or relevance of the specified revisions. If RailCorp and PPP Co cannot agree on any revisions in dispute, PPP Co may refer the matter for determination under the dispute resolution procedures described in section 3.7.17.

However, RailCorp may not agree to or permit any changes to the "base case" financial model, other than minor technical changes which could not reasonably affect the interests of the project's debt financiers, without the Security Trustee's consent, which may not be unreasonably withheld or delayed.

PPP Co must give RailCorp updated and certified copies of the "base case" financial model, including its projections for the rest of the project, by no later than 31 October each year. RailCorp may review this model, but is not obliged to do so.

3.7.12 Financial reporting and audits

The Project Contract sets out requirements for PPP Co (and, through PPP Co, PPP Co Finance Co) to:

- Maintain accounts and other financial records, and have them audited annually
- Make these accounts and records available for RailCorp inspections and audits at all reasonable times throughout the project
- Give RailCorp the same information about the costs of its manufacturing and construction works as it is required to give to the project's debt financiers
- Give RailCorp any information it reasonably requires, from time to time, about the costs of maintaining and repairing the trains
- Give RailCorp certified quarterly cashflow and profit and loss statements
- Give RailCorp specified audited financial statements for each financial year by no later than the following 31 October
- Give RailCorp copies of all notices issued to or received from the Australian Securities and Investments Commission (ASIC) or the Australian Stock Exchange (ASX) by PPP Co, PPP Co Finance Co, PPP Co Holding Co, any of their subsidiaries and any other entities they control

- Give RailCorp copies of all relevant notices and other documents issued to or received from ASIC by the project's equity investors, and
- Promptly give RailCorp any other information about the project which RailCorp reasonably requests from time to time.

3.7.13 Changes in law

The Project Contract's definition of a "change in law" encompasses:

- The amendment, repeal or enactment of NSW or Commonwealth legislation (including subordinate legislation and documents and policies that are legally enforceable under NSW or Commonwealth legislation, such as the maintenance facility's planning approval), and
- A change in the interpretation or application of NSW or Commonwealth legislation as a result of the amendment or repeal of *other* legislation that was in effect on 3 December 2006 or the enactment of other new legislation.

The definition expressly includes all amendments, repeals or enactments of legislation directly in response to the recommendations of the Commission of Inquiry into the Waterfall rail accident, but it otherwise expressly excludes any legislative change whose substance had been publicly notified or was reasonably foreseeable on 3 December 2006.

PPP Co is not generally entitled to make any claim against RailCorp in connection with a "change in law".

However, if the cost of PPP Co's performance of its obligations increases as a result of:

- A "**discriminatory change in law**", applying to this project but not to other NSW rolling stock or rolling stock maintenance projects, or applying to PPP Co but not to others, or applying to the maintenance facility or its site but not to other facilities or land, or applying to privately financed "public private partnership" projects in NSW but not to other projects
- A "**change in railway law**", applying to the rail industry but not to other industries, or
- A "**change in disability law**", affecting the ability of people with disabilities to access and use PPP Co's trains,

RailCorp must compensate PPP Co, using payment mechanisms specified in the Project Contract, so that PPP Co is placed in the financial position it would have been in had the "change in law" not occurred, apart from any costs:

- Resulting from any failure by PPP Co to reasonably attempt to minimise the additional costs
- Incurred during or relating to the period of any delay by PPP Co in notifying RailCorp of any proposal for such a "change in law"
- Resulting from any failure by PPP Co to provide information to RailCorp or consult with it about the likely effects of a proposed "change in law" of these types, or

- Resulting from a new or modified planning approval for the maintenance facility in response to a variation requested by PPP Co (sections 3.3.2 and 3.7.14.2).

In addition, if any “change in law” *other than* a change in tax laws, a “discriminatory change in law”, a “change in railway law” or a “change in disability law” forces PPP Co to incur additional *capital* expenditure in performing its “*TLS phase*” obligations,

- PPP Co must bear all of the additional capital expenditure it incurs, as a result of *all* such “changes in law”, up to \$500,000 (indexed in line with CPI movements since the June quarter of 2006)
- RailCorp and PPP Co will each bear half of the portion (if any) of the additional capital expenditure PPP Co incurs, as a result of all such “changes in law”, between \$500,000 and \$1 million (as similarly indexed), and
- RailCorp must bear all of the portion (if any) of the additional capital expenditure PPP Co incurs, as a result of all such “changes in law”, above \$1 million (as indexed),

apart from any capital expenditure:

- Resulting from any failure by PPP Co to reasonably attempt to minimise the additional expenditure
- Incurred during or relating to the period of any delay by PPP Co in notifying RailCorp of any proposal for such a “change in law”, or
- Resulting from any failure by PPP Co to provide information to RailCorp or consult with it about the likely effects of a proposed “change in law” of this type.

In some circumstances a “change in law” may also necessitate a contractual variation, so that the project’s works, trains, simulators and/or maintenance facility will continue to comply with the law, as discussed in section 3.7.14 below.

3.7.14 Variations

Apart from the Project Contract’s arrangements for the possible deletion of the requirement for a separate guards’ cab on the trains (section 3.2.1.1), the parties’ obligations under the Project Agreement may be varied, under the contract’s variation provisions, only if:

- This is directed by RailCorp, as described in section 3.7.14.1 below, or
- The variation is requested by PPP Co and approved by RailCorp, as described in section 3.7.14.2.

3.7.14.1 RailCorp-initiated variations

RailCorp may at any time issue a proposal for a variation to PPP Co.

If it does so, PPP Co must respond, within 20 business days or any longer period requested by PPP Co and approved by RailCorp, with detailed advice, prepared in accordance with requirements set out in the Project Contract, on the proposed variation’s costs or savings and its impacts on various specified

aspects of the project, including its funding and rail safety aspects.

If all 78 train “sets” have been completed and the value of the works required under the proposed variation is likely to exceed \$500,000 (indexed in line with CPI movements since the June quarter of 2006), RailCorp may require PPP Co to conduct a tender process before finalising its response to RailCorp’s proposal.

Within 40 business days of the finalisation of PPP Co’s response, RailCorp must either:

- Direct PPP Co to proceed with the proposed variation in accordance with its response or, if relevant, a nominated option presented by PPP Co within its response, in which case PPP Co must implement the variation and will be relieved of its other obligations under the Project Contract to the extent specified in its response, and agreed to by RailCorp, as necessary to ensure PPP Co will be no better or worse off as a result of the variation
- Reject PPP Co’s response, in which case RailCorp and PPP Co must consult with each other, in good faith, to attempt to agree on the matters in PPP Co’s response which are in dispute, and
 - ♦ If agreement is reached, PPP Co must implement the agreed variation and will be relieved of its other obligations under the Project Contract to the extent that this has been agreed, or
 - ♦ If agreement is not reached within ten business days, RailCorp may refer the matter for determination under the dispute resolution procedures described in section 3.7.17, while retaining a right to direct PPP Co to implement the variation in the meantime, or
- Withdraw its proposed variation.

RailCorp may also bypass these proposal, response and negotiation processes at any time and simply direct PPP Co to implement a variation on terms set out in RailCorp’s direction. If PPP Co disagrees with any of these terms, it may refer the matter for dispute resolution under the procedures described in section 3.7.17, but in the meantime it must proceed with implementing the variation.

If RailCorp directs PPP Co to implement a variation under any of these processes and the variation increases the project’s net costs, RailCorp must make payments to PPP Co to cover an agreed or determined proportion of this increase in accordance with processes set out in the Project Contract, *unless* the variation is a change to the minimum operating standards for the trains, as specified in the Project Contract, or a change in any RailCorp policy, rule or procedure other than its timetable and its *Interface Protocols* (sections 3.2.7, 3.3.9, 3.5.1.3, 3.5.2.1 and 3.5.6), in which case PPP Co must bear the first \$100,000 of the cost increase from all such changes in each calendar year (indexed in line with CPI movements since the June quarter of 2006) and RailCorp will be liable for the rest.

Conversely, if RailCorp directs PPP Co to implement a variation under any of these processes and the variation decreases the project's net costs, PPP Co must pay RailCorp 50% of the cost saving in accordance with other processes set out in the Project Contract.

3.7.14.2 PPP Co-initiated variations

PPP Co may propose a variation at any time by submitting a detailed proposal, in accordance with requirements set out in the Project Contract, describing, among other things, the proposed variation's costs or savings and its impacts on various specified aspects of the project, including its train "availability" and rail safety aspects.

RailCorp must consider any such PPP Co proposal in good faith.

If the variation requested by PPP Co is required to ensure the project's works, trains, simulators and/or maintenance facility will comply with a "change in law" (section 3.7.13), RailCorp must either:

- Approve the requested variation
- Direct PPP Co to carry out a variation with the same objective under the RailCorp-initiated variation provisions just discussed in section 3.7.14.1, or
- Take any other action RailCorp considers necessary to achieve the same objective, including modifications to RailCorp's rail infrastructure.

Similarly, if the variation requested by PPP Co is required to ensure the project's works, trains, simulators and/or maintenance facility will retain the same functionality they had before a modification to RailCorp's rail infrastructure (RailCorp must try to warn PPP Co about any such modifications which might necessitate such a variation), RailCorp must either:

- Approve the requested variation
- Direct PPP Co to carry out a variation with the same objective under the RailCorp-initiated variation provisions discussed in section 3.7.14.1, or
- Take any other action RailCorp considers necessary to achieve the same objective, including further modifications to RailCorp's rail infrastructure.

In all other cases RailCorp may accept or reject PPP Co's proposed variation in its absolute discretion.

In the case of PPP Co-initiated and RailCorp-approved variations responding to "changes in law", the respective liabilities of RailCorp and PPP Co for any cost increases will be governed by:

- The arrangements described in section 3.7.13, and
- In the case of a "discriminatory change in law", a "change in railway law", a "change in disability law" or any change in law (other than a tax law) which forces PPP Co to incur additional capital expenditure in performing its "TLS phase" obligations, the "deemed availability" arrangements described in section 3.5.1.4.

In the case of PPP Co-initiated and RailCorp-approved variations responding to modifications to RailCorp's rail infrastructure, RailCorp must make payments to PPP Co to cover an agreed or determined proportion of any cost increase in accordance with processes set out in the Project Contract, and the "deemed availability" arrangements described in section 3.5.1.4 will again apply.

In all other cases PPP Co must bear all the risks and costs of proposing and implementing PPP Co-initiated and RailCorp-approved variations, including the costs reasonably incurred by RailCorp in assessing PPP Co's proposals.

If a PPP Co-initiated and RailCorp-approved variation results in cost savings, PPP Co must pay RailCorp 50% of these savings, in accordance with setting-off and payment processes and requirements set out in the Project Contract.

3.7.15 Amendments to and waivers of the project agreements

The Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed and the Call Option Deed all expressly state that they may be amended only by a document signed by representatives of RailCorp, PPP Co and, where relevant, their other parties.

PPP Co may not make or permit any amendment of the project's contracts, except in limited specified circumstances, without RailCorp's prior consent.

In the case of amendments of contracts to which RailCorp is not a party, RailCorp may not unreasonably withhold or delay its consent if PPP Co satisfies it that the amendments will not, among other things, adversely affect PPP Co's ability to perform its obligations under the Project Contract, RailCorp's or PPP Co's rail safety accreditations or RailCorp's ability to enforce its rights under the RailCorp project agreements.

Similarly, RailCorp:

- May not agree to any amendment of the Project Contract or any other RailCorp project agreement, other than a minor technical change which could not reasonably affect the interests of the project's debt financiers, without the Security Trustee's consent, which may not be unreasonably withheld or delayed
- Has expressly acknowledged provisions in the project's debt financing documents restricting PPP Co's rights to amend the project's contracts, including the RailCorp project agreements, and
- Has undertaken not to amend, replace or waive any of the provisions of the Cardiff Maintenance Depot Lease or the Right of Entry Deed for Cardiff Maintenance Depot.

Any failure to exercise or delay in exercising any right or power under the Project Contract, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed or the Call Option Deed will not operate as a

waiver or as a bar to future exercising of the same or any other right or power, and a waiver or consent given under any of the RailCorp project agreements will be binding only if it is given or confirmed in writing.

3.7.16 Restrictions on changes of ownership or control, assignments, encumbrances and refinancing

3.7.16.1 Changes of ownership or control

PPP Co has undertaken that throughout the project it will not carry out any share capital dealings, or allow PPP Co Holding Co to carry out any share capital dealings, other than dealings which are either:

- Expressly permitted by the Project Contract, as specified in a Schedule to the Project Contract, or
- Consented to by RailCorp in advance.

The Project Contract specifies a series of criteria and circumstances determining RailCorp's powers to withhold its consent, both generally and, in the case of Downer EDI, during different phases of the project.

Less limiting criteria will apply, however, if the debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) has sought RailCorp's consent to a change of ownership of PPP Co in order to remedy a PPP Co breach of any of the project's contracts, under arrangements described in section 3.8.3.3.

3.7.16.2 Transfers and encumbrances

RailCorp may transfer its interests in and obligations under the RailCorp project agreements without PPP Co's prior approval, provided:

- The transferee is responsible for Sydney metropolitan passenger rail services and is supported by a NSW Government guarantee on terms no less favourable than the PAFA Act Guarantee (see section 5)
- The transferee agrees to execute a deed in favour of the debt financiers' Security Trustee, in a form reasonably required by the Security Trustee, placing the transferee in the same position as RailCorp under the Debt Finance Side Deed, and
- In the case of RailCorp's interest in the maintenance facility,
 - ◆ If the Maintenance Facility Lease has not yet been granted, the transferee grants an option to lease in the same form as the Call Option Deed, and
 - ◆ Consequential amendments are made to the RailCorp project agreements, as reasonably required by PPP Co, to ensure PPP Co will be no worse off.

Any other transfers of RailCorp's rights and obligations under any of the RailCorp project agreements will require the prior consents of PPP Co, PPP Co Finance Co and the Security Trustee. These consents may not be unreasonably withheld.

In addition, if RailCorp transfers its rights and obligations under the Cardiff Maintenance Depot Lease or the Right of Entry Deed

for Cardiff Maintenance Depot, or creates a security interest over these rights and obligations, it must ensure the transferee executes deeds on the same terms as these documents, or on terms agreed between the transferee and the Security Trustee, and also executes a tripartite deed with PPP Co and the Security Trustee on terms similar to the relevant parts of the Debt Finance Side Deed.

Similarly,

- PPP Co may not transfer its interests in or obligations under any of the project's contracts without RailCorp's prior consent and, in the case of the RailCorp project agreements, the prior consents of PPP Co Finance Co and the Security Trustee as well (again, these consents may not be unreasonably withheld)

Provided specified preconditions are satisfied, RailCorp *must* give its consent to the transfer if it has been sought by the debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) in order to remedy a PPP Co breach of any of the project's contracts, under arrangements described in section 3.8.3.3.

- PPP Co may not create a security interest over, or otherwise deal with, the trains, the maintenance facility or the maintenance facility's site, except as expressly permitted under the RailCorp project agreements, the project's debt financing documents or the Debt Finance Side Deed, or otherwise as approved by RailCorp, and
- The Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor may transfer their rights and obligations under the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract and the TLS Contract, or create a security interest or other encumbrance over these rights and obligations, only with RailCorp's prior consent, which may not be unreasonably withheld or delayed, and only if the transferee or encumbrancee agrees to enter into an equivalent of the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed or the TLS Contract Side Deed (as relevant).

3.7.16.3 Refinancing

PPP Co may not refinance the project in a way likely to produce a refinancing gain or adversely affect any RailCorp rights or obligations under the RailCorp project agreements, and must ensure PPP Co Finance Co does not refinance the project in such a way, unless:

- (a) The proposed refinancing is to replace debt which is due or about to fall due for repayment under the project's existing debt financing documents, or otherwise complies with "refinancing assumptions" specified in a Schedule to the Project Deed, *and*
 - ◆ The terms of the refinancing—other than any terms that are the same as those in the current debt financing documents and any terms providing for the

“refinancing assumptions”—will not materially worsen RailCorp’s position

- ◆ The incoming financiers, or their agent or trustee, will execute a deed substantially in the form of the Debt Finance Side Deed
- ◆ The incoming financiers will have no greater security than the existing debt financiers
- ◆ To the extent that they have future or undrawn commitments to the project, the incoming financiers have a Standard and Poor’s credit rating of at least A– or a Moody’s credit rating of at least A3, and
- ◆ PPP Co has complied with notification and information requirements set out in the Project Contract, or

(b) RailCorp nonetheless consents to the refinancing.

In the latter case RailCorp may not unreasonably withhold or delay its consent if it is reasonably satisfied that:

- The refinancing is to cure a default or potential default under the existing debt financing documents, or to enable the Security Trustee to exercise its rights under the Debt Finance Side Deed, or to permit the current debt financiers to waive a cash lock-up or funding restrictions under the existing debt financing documents when PPP Co has to make payments to RailCorp, the Rolling Stock Manufacturers, the Maintenance Facility Contractor and/or the TLS Contractor, or
- A series of other requirements specified in the Project Contract have been met:
 - ◆ The incoming financiers, or their agent or trustee, will execute a deed substantially in the form of the Debt Finance Side Deed
 - ◆ The incoming financiers will have no greater security than the existing debt financiers
 - ◆ To the extent that they have future or undrawn commitments to the project, the incoming financiers have a Standard and Poor’s credit rating of at least A– or a Moody’s credit rating of at least A3
 - ◆ The refinancing will be on an “arms length” basis
 - ◆ PPP Co has complied with notification and information requirements set out in the Project Contract
 - ◆ The refinancing will not reduce PPP Co’s credit rating (if any) below investment grading
 - ◆ The refinancing will not worsen RailCorp’s position under the RailCorp project agreements, and
 - ◆ If there will be a refinancing gain, this gain has been calculated and the basis for sharing the gain between RailCorp and PPP Co has been agreed or determined under arrangements described below.

More narrowly, if the proposed refinancing is simply a transfer of a current debt financier’s rights and obligations under the

existing debt financing documents to another financier, RailCorp *must* give its consent if:

- The proposed transferee is a bank or financial institution with a Standard and Poor’s credit rating of at least A– or a Moody’s credit rating of at least A3, or
- Its rights and obligations are guaranteed, on terms acceptable to RailCorp, by a financial institution with at least this required credit rating.

If a permitted or otherwise approved refinancing complies with the “refinancing assumptions” specified in the Schedule to the Project Deed, RailCorp will not be entitled to any portion of any associated refinancing gain.

Otherwise, any refinancing gain must be shared between RailCorp and PPP Co, which must reasonably attempt to agree on the amount of this gain and the manner and timing payment of RailCorp’s share. If they cannot agree, either party may refer the matter for determination under the Project Contract’s dispute resolution procedures, as described in section 3.7.17. However, any such referral must be on the basis that RailCorp is to receive 50% of the refinancing gain and is to be paid no later than any of the project’s equity investors.

PPP Co must meet RailCorp’s reasonable costs of reviewing and approving any refinancing proposal, including its legal and financial advisers’ fees.

If a refinancing is permitted or consented to under these arrangements, the incoming financiers (or their agent or trustee), PPP Co and RailCorp must execute a deed substantially in the form of the Debt Finance Side Deed, and PPP Co must give RailCorp certified copies of the new financing agreements and the revised “base case” financial model for the project.

3.7.17 Dispute resolution

All disputes between RailCorp and PPP Co arising out of the Project Contract and the Call Option Deed must be resolved in accordance with detailed procedures set out in the Project Contract, and all disputes under the Maintenance Facility Lease, the Maintenance Facility Licence, the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed must be resolved in accordance with procedures that are precisely analogous to the Project Contract’s procedures.

The Project Contract’s dispute resolution procedures essentially involve three sequential phases: negotiation, expert determination (for many but not all disputes which are not able to be resolved through negotiation) and arbitration.

Throughout these processes both parties must continue to perform all their obligations under the Project Contract.

At the outset, any dispute may be referred for resolution by negotiation between RailCorp’s and PPP Co’s chief executive officers, or their nominees, simply by one party’s giving the other party a notice to this effect, with reasonable particulars about the subject matters of the dispute.

The CEOs or their nominees must then meet—physically, or by a video conference or telephone link-up if they agree—and reasonably endeavour, in good faith, to resolve the dispute within 15 business days of its referral for negotiation. If they succeed in resolving part or all of the dispute, their decision must be executed in a written form that will contractually bind both parties.

If the dispute is not fully resolved within the 15 business days,

- It may be referred for determination by an independent expert if it falls into one or more of 32 categories of disputes listed in the Project Contract as eligible for expert determination, and
- It may be referred directly to arbitration if it does not fall within any of these “expert determination” categories.

A referral to expert determination may be made by either party, again simply by notifying the other party, within 60 business days of the end of the initial 15 business days period for negotiations.

The independent expert appointed to determine the dispute will be selected—on a rotational basis unless both parties agree otherwise—from a panel of three experts whose initial membership must be agreed upon by RailCorp and PPP Co by 31 January 2007 or, if they cannot agree on all the panel’s members, expert(s) nominated by the Australian Centre for International Commercial Arbitration (ACICA).

The terms of the independent experts’ appointments by RailCorp and PPP Co, and the rules and processes they must follow in making their determinations, will be set out in Expert Determination Agreements, which for the initially appointed panel must take the form of a draft agreement set out in a Schedule to the Project Contract and for any later replacement expert must either take this form or be on other reasonable terms agreed to by RailCorp, PPP Co and the replacement expert.

The Rolling Stock Manufacturers, the Maintenance Facility Construction Contractor, the TLS Contractor, the Security Trustee and their advisers and representatives may attend expert determination proceedings as observers, with RailCorp’s prior consent, which may not be unreasonably withheld or delayed.

RailCorp and PPP Co must each bear their own costs in connection with the expert determination proceedings, and must equally share the costs of the expert.

When the expert makes his or her determination there will be a period of five business days during which either party may request amendments, and if such a request is made the expert will have five business days to either amend the determination or advise the parties that no amendment is required.

The determination will then become final and binding *unless* one of the parties, within ten business days of the initial determination or five business days of an amended determination or a notice that no amendment is necessary, notifies the other party that it is dissatisfied and intends to refer

the matter to arbitration, in which case the determination will be binding unless and until it is overturned or varied by the arbitrator.

As already indicated, an unresolved dispute *must* be referred to arbitration after the failure of the “negotiation” phase if it does not fall within any of the “expert determination” categories. In addition, an unresolved dispute that *has* been referred to expert determination must be referred to arbitration if the expert has not made a determination within 60 days of his or her appointment, or within any other period agreed by the parties.

Arbitrations will be conducted by single arbitrators agreed by the parties or, if they cannot agree within 20 business days, an arbitrator nominated by the ACICA. They will generally be governed by the ACICA’s contemporary Arbitration Rules, and the arbitrator will have the power to grant any legal, equitable or statutory remedy. The Security Trustee may attend the arbitration hearings with RailCorp’s prior consent, which may not be unreasonably withheld or delayed.

If the dispute has already been subject to expert determination proceedings, the arbitrator must hand down his or her final award within three months of his or her appointment, unless the parties agree the dispute is complex, in which case the deadline will be extended to six months. There are no equivalent deadlines for disputes which have not previously been referred to expert determination.

3.7.18 Force majeure

“**Force majeure events**” are defined in the Project Contract as any:

- Lightning, earthquake, cyclone, natural disaster, mudslide, fire or explosion
- Flood with an expected return frequency of once every 50 or more years
- “Terrorist act”, as defined in the Terrorism Insurance Act (Cth) as at 3 December 2006
- War, invasion, hostilities, rebellion, insurrection, military or usurped power, martial law or confiscation order by a government or public authority
- Nuclear radioactivity
- Failure of supply of any of the maintenance facility’s utility services other than electricity
- Industrial action within Australia which affects the project and which has been caused by the party to the Project Contract that is *not* the affected party, or
- Statewide or industry-wide industrial action within Australia which is *not* caused by the affected party or its contractors or other associates

which:

- Is beyond the reasonable control of the affected party and its associates, and

- Is preventing or delaying the affected party from performing any of its non-financial obligations under the Project Contract,

provided:

- This situation has not resulted from a breach of any of the project's contracts by the affected party, and
- If PPP Co is the affected party, this situation could not have been prevented, avoided or remedied by taking the steps which a prudent, experienced and competent designer, builder and maintainer of rolling stock and rolling stock maintenance facilities would have taken.

If RailCorp or PPP Co alleges a "*force majeure* event" has occurred, it must immediately notify the other party and, in RailCorp's case, the Security Trustee. If PPP Co is the affected party, it must then, as soon as reasonably practicable, provide details about the event, its affected obligations, the actions it has taken or proposes to take to remedy or mitigate the situation, the time it is unlikely to be able to carry out its affected obligations, the estimated costs of remediation and the insurance proceeds upon which it expects to be able to rely.

RailCorp and PPP Co must then meet within five business days to determine the extent of insurance coverage and how long the "*force majeure* event" is likely to continue.

The affected party must use its best endeavours to overcome or mitigate the effects of the "*force majeure* event".

If PPP Co is the affected party, the debt financiers' Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) may "step in" and assume some or all of PPP Co's rights and obligations under the project's contracts in order to remedy the "*force majeure* event". If the Security Trustee or an "enforcing party" does "step in" in this way, RailCorp must, if requested, give them access to the maintenance facility and surrounding areas and any information RailCorp has about the "*force majeure* event", including details on any steps RailCorp thinks should be taken to remedy this event.

While the "*force majeure* event" continues the affected party's affected obligation will be suspended, but only to the extent and for so long as the "*force majeure* event" continues to prevent or delay their performance. RailCorp may make alternative arrangements for the performance of the suspended obligations.

Subject to:

- The "deemed availability" arrangements described in section 3.5.1.4
- The possible application of the "delay damages" provisions described at the end of section 3.2.5 and the end of section 3.3.7.2
- A possible extension of the 21-week period for the first six train "sets" to have travelled specified distances and met specified usage criteria in order to obviate the need for any

RailCorp payments of the type described at the end of section 3.2.11.1, and

- The possible application of "suspension of termination" provisions described below,

RailCorp will not be liable to:

- Make any "availability payments" (section 3.6.1) to PPP Co for any train "sets" which are not "available" as a result of the "*force majeure* event", or
- Provide any other financial relief to PPP Co during the period of suspension of its affected obligations,

and PPP Co will not be liable to compensate RailCorp for any costs or losses RailCorp incurs during the period of suspension.

If the affected party becomes able to recommence the performance of its affected obligations, it must immediately notify the other party and resume the suspended activities, subject to a reasonable remobilisation period.

If a "*force majeure* event" prevents PPP Co from performing material non-financial obligations for a continuous period of 180 days or more, either party may give the other party 20 business days' notice that it intends to terminate the Project Contract for *force majeure*.

However, if the notice of termination is issued by PPP Co, RailCorp may suspend PPP Co's right to terminate the Project Contract by giving PPP Co a notice to this effect within the following 20 business days.

If RailCorp issues such a suspension notice,

- During the suspension period RailCorp must pay PPP Co:
 - ♦ "Availability payments" (section 3.6.1) and "key performance indicator payments" (section 3.6.3) based on PPP Co's average performance over the six months immediately before the "*force majeure* event", less
 - ♦ The costs which PPP Co is no longer incurring because of the suspension of its obligations, after deducting any reasonable demobilisation costs
- If PPP Co becomes able to recommence its performance of the relevant obligations, it must do so and its notice of termination will cease to have any effect, and
- Otherwise, the Project Contract will not terminate unless and until RailCorp notifies PPP Co that it is ending its suspension of PPP Co's right to terminate for *force majeure* or the Project Contract is terminated on another basis, as described in sections 3.8.2, 3.8.3.11, 3.8.4 and 3.8.5.

If the Project Contract is terminated for *force majeure*, the arrangements described in section 3.8.1 will apply.

3.8 Defaults and termination of the Project Contract

The following sections of this *Summary of Contracts* describe the main provisions of the Project Contract, the Debt Finance Side Deed, the Rolling Stock Manufacture Contract Side Deed,

the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed for:

- Termination of the project's contracts for the occurrence of an "uninsurable" risk (section 3.7.10.4) or for *force majeure* (section 3.7.18)
- "Voluntary" termination of the project's contracts by RailCorp
- The handling of various types of breaches of the project's contracts, and
- Termination of the project's contracts for various types of serious defaults.

The Project Contract may not be terminated on any basis other than under the arrangements summarised below.

3.8.1 Termination for an 'uninsurable' risk or *force majeure*

If RailCorp terminates the Project Contract following the occurrence of an "uninsurable risk", under the arrangements described in section 3.7.10.4, or if RailCorp or PPP Co terminates the Project Contract following a "*force majeure* event" under the arrangements described in section 3.7.18,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train "sets", specifying the particular carriages it wishes to buy, in which case:
 - ♦ PPP Co must give RailCorp or its nominee possession of the nominated carriages as soon as practicable.
 - ♦ Regardless of any extensions of the project under the arrangements described in section 3.5.7, if the Project Contract has been terminated before its original expiry date (currently targeted for 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train "set"), RailCorp must pay PPP Co a sale price for these carriages equal to a "**termination payment**" that is specified in a "Termination Payments" Schedule to the Project Contract for terminations for "uninsurable risks" or *force majeure*, taking account of (among other things) the condition of the carriages.

This payment must be made within 30 days of the parties' agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17, and ownership of the carriages will pass to RailCorp or its nominee, free of any encumbrances, on the date the payment is made.

- ♦ If the Project Contract has been terminated after its original expiry date, the sale price will be nil, and ownership of the carriages will pass to RailCorp or its

nominee, free of any encumbrances, immediately upon RailCorp's notifying PPP Co of the acquisition.

- ♦ PPP Co must do everything reasonably requested by RailCorp to ensure a smooth transition of responsibility for the acquired train(s), including attendance at meetings and the provision of access for familiarisation purposes, information about the status and condition of the train(s) and advice from experienced, competent personnel.
- ♦ PPP Co must not do anything that materially prejudices or frustrates the handing over of the acquired train(s) as a going concern.
- ♦ PPP Co must do everything else that is reasonably required for RailCorp or its nominee to be able to operate, maintain and repair the acquired train(s).

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a "termination payment" that is similarly specified in the "Termination Payments" Schedule to the Project Contract for terminations for "uninsurable risks" or *force majeure*.

Again, this payment must be made within 30 days of the parties' agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to make any "termination payment" to PPP Co.
- If the Project Contract has been terminated during the project's "delivery phase", prior to the practical completion of the 78th train "set", RailCorp may require PPP Co to do any or all of the following:
 - ♦ Procure the novation (transfer) of the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract, the TLS Contract and/or any of PPP Co's other "significant contracts" (sections 3.2.6, 3.3.8 and 3.5.5) to RailCorp or its nominee, with RailCorp or its nominee effectively stepping into the shoes of PPP Co under these subcontracts.

Procedures for any such novations of the Rolling Stock Manufacture Contract, the Maintenance Facility Construction Contract and the TLS Contract—together with consequential novations of their associated Independent Certifier Deeds and (in the case of the Rolling Stock Manufacture Contract) an associated Independent Verifier Deed and consequential novations of the Rolling Stock Manufacture Guarantees, the Maintenance Facility Construction Guarantee and the TLS Guarantee (section 2.2)—are set out in the Rolling Stock Manufacture Contract Side Deed, the Maintenance Facility Construction Contract Side Deed and the TLS Contract Side Deed.

- ◆ Give RailCorp or its nominee possession of PPP Co's plant, equipment, materials, temporary works and tools that have been used for PPP Co's works, as reasonably required to facilitate the completion of these works, and ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor do likewise for their own plant etc.

If this action is taken, RailCorp must reasonably endeavour to ensure that the plant etc are properly used and maintained and that any plant, equipment, materials, temporary works and tools which are not consumed or incorporated into the works and are not required for future operation or maintenance of the trains, the simulators or the maintenance facility are handed back when all the works have been completed.

- ◆ Give RailCorp or its nominee copies of its accounts and all other records and documents related to the project, and ensure the Rolling Stock Manufacturers, the Maintenance Facility Contractor and the TLS Contractor do likewise.
- ◆ Do everything else reasonably required for RailCorp or its nominee to undertake the project, including the granting of intellectual property licences.
- PPP Co must comply with all of its "normal" obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its "termination payment".

If the Project Contract has been terminated before its original expiry date, the sale price for any trains acquired by RailCorp, or RailCorp's "termination payment" if it chooses not to acquire any of the trains, will be equal to:

- The debts (if any) of PPP Co and PPP Co Finance Co under the project's debt financing documents on the date RailCorp's payment is made, not counting any PPP Co debt to PPP Co Finance Co under the Facilitation Loan Agreement, *plus* any amounts PPP Co and PPP Co Finance Co must pay to the project's debt financiers as a result of the early termination of the debt financing arrangements, *less* the sum (without double counting) of:
 - ◆ Any credit balances in PPP Co's bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled
 - ◆ Any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements, and

- ◆ Any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract, *plus*

- 50% of the lesser of the net present value of all equity distributions over the rest of the project, as projected in the original "base case" financial model for the project on 7 December 2006, and the net present value of projected equity distributions in the most recently revised version of the "base case" financial model (see section 3.7.11), calculated in both cases using a discount rate equal to the after-tax return for notional equity investors predicted in the original "base case" financial model, *plus*
- Any redundancy payments to PPP Co employees which PPP Co has reasonably incurred, or will reasonably incur, as a direct result of the termination of the Project Contract, *plus*
- For each of PPP Co's subcontracts, the lesser of the amount PPP Co must reasonably and properly pay under the subcontract as a direct result of the termination of the Project Contract and the sum of a series of specified subcontract breakage costs, including specified demobilisation and redundancy payment costs, *less*
- Any insurance proceeds which are owing to PPP Co and which PPP Co is entitled to retain, and any insurance proceeds which would have been paid or payable to PPP Co had it complied with its insurance obligations (section 3.7.10.1), *less*
- Any amounts RailCorp was entitled to set off or deduct under the Project Contract when it was terminated, expressly including (but without double counting) the costs of bringing any train carriages RailCorp has elected to acquire to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*
- Any amounts third parties are obliged to pay to PPP Co, as at the date of the payment of the sale price or "termination payment", except in cases where PPP Co is obliged to assign its rights to these payments to RailCorp, *less*
- Any gains PPP Co has made or will make as a result of the termination of the Project Contract and any of the other project contracts, to the extent they are not already included in these calculations,

with adjustments, if necessary, to avoid any double counting.

The payment of the sale price or the "termination payment" will be a full and final settlement of PPP Co's rights against RailCorp for the termination of the Project Contract and the other project contracts. Once the Project Contract has been terminated, the only claims PPP Co may make against RailCorp are for the payment of the sale price or "termination payment" itself and for any liabilities which arose before the termination and which are not taken into account in calculating the sale price or "termination payment".

3.8.2 'Voluntary' termination by RailCorp

RailCorp may terminate the Project Contract at any time—for its sole convenience, without giving reasons, even if there have been no defaults by PPP Co, no occurrences of “uninsurable risks” and no “*force majeure* events”, and even if there have been no potentially contract-ending RailCorp directions to decommission trains or RailCorp acquisitions of trains following any extension of the term of the project under the arrangements described in section 3.5.7—simply by giving PPP Co and the Security Trustee a written notice to this effect, nominating the date on which the Project Contract will terminate.

If RailCorp terminates the Project Contract in this way,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the arrangements for this situation described in section 3.8.1 will apply, apart from a difference in the calculation of the sale price if the Project Contract has been terminated before its original expiry date. (This sale price must be equal to a “termination payment” specified in different, “voluntary termination” provisions of the “Termination Payments” Schedule to the Project Contract, as described below.)
- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” that is similarly specified in the “Termination Payments” Schedule to the Project Contract for “voluntary terminations”.

This payment must be made within 30 days of the parties' agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project's “delivery phase”, prior to the practical completion of the 78th train “set”, the arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.

- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

If the Project Contract has been “voluntarily” terminated by RailCorp before its original expiry date, the sale price for any trains acquired by RailCorp, or RailCorp's “termination payment” if it chooses not to acquire any of the trains, will be equal to:

- The debts (if any) of PPP Co and PPP Co Finance Co under the project's debt financing documents on the date RailCorp's payment is made, not counting any PPP Co debt to PPP Co Finance Co under the Facilitation Loan Agreement, *plus* any amounts PPP Co and PPP Co Finance Co must pay to the project's debt financiers as a result of the early termination of the debt financing arrangements, *less* the sum (without double counting) of:
 - ♦ Any credit balances in PPP Co's bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled
 - ♦ Any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements, and
 - ♦ Any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract, *plus*
- An amount which, in combination with distributions paid to the project's equity investors on or before the termination of the Project Contract (and taking account of the timing of these distributions), will give these equity investors a real after-tax rate of return equal to the return predicted in the project's original (7 December 2006) “base case” financial model, *plus*
- Any redundancy payments to PPP Co employees which PPP Co has reasonably incurred, or will reasonably incur, as a direct result of the termination of the Project Contract, *plus*
- For each of PPP Co's subcontracts, the lesser of the amount PPP Co must reasonably and properly pay under the subcontract as a direct result of the termination of the Project Contract and the sum of a series of specified subcontract breakage costs, including specified demobilisation and redundancy payment costs, *less*
- Any insurance proceeds which are owing to PPP Co and which PPP Co is entitled to retain, and any insurance proceeds which would have been paid or payable to PPP Co had it complied with its insurance obligations (section 3.7.10.1), *less*
- Any amounts RailCorp was entitled to set off or deduct under the Project Contract when it was terminated, expressly including (but without double counting) the costs of bringing any train carriages RailCorp has elected to acquire to the

condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*

- Any amounts third parties are obliged to pay to PPP Co, as at the date of the payment of the sale price or “termination payment”, except in cases where PPP Co is obliged to assign its rights to these payments to RailCorp, *less*
- Any gains PPP Co has made or will make as a result of the termination of the Project Contract and any of the other project contracts, to the extent they are not already included in these calculations,

with adjustments, if necessary, to avoid any double counting.

The payment of the sale price or the “termination payment” will be a full and final settlement of PPP Co’s rights against RailCorp for the termination of the Project Contract and the other project contracts. Once the Project Contract has been terminated, the only claims PPP Co may make against RailCorp are for the payment of the sale price or “termination payment” itself and for any liabilities which arose before the termination and which are not taken into account in calculating the sale price or “termination payment”.

3.8.3 Actions to remedy PPP Co breaches, ‘events of default’ and ‘termination events’

3.8.3.1 Appointment by PPP Co of replacement subcontractor(s)

PPP Co may remedy a breach of its obligations under the project’s contracts by replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor only if it obtains RailCorp’s consent.

RailCorp may not unreasonably withhold or delay its consent. Regardless of whether the “normal” requirements for any replacement subcontracts described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5 are satisfied, RailCorp *must* consent to the appointment of a new subcontract or the novation (transfer) of the existing subcontract to PPP Co’s new subcontractor if:

- RailCorp has been given details of the proposed replacement subcontractor and the terms and conditions of the proposed appointment or novation
- RailCorp reasonably believes the proposed replacement subcontractor is reputable, has sufficient experience and expertise, can arrange the availability of the necessary skills, resources and rail safety accreditations and has a sufficiently high financial and commercial standing
- The terms and conditions of the proposed appointment or novation are acceptable to RailCorp, acting reasonably
- The proposed replacement subcontractor has agreed to be bound by the relevant project contracts or other terms agreed with RailCorp, and
- RailCorp is not liable for any reasonable costs, including legal costs, associated with its enquiries, the procurement of

the replacement subcontractor or the preparation, negotiation and execution of associated documents.

3.8.3.2 RailCorp’s general power to ‘step in’ following any unremedied PPP Co breach of any RailCorp project agreement

If PPP Co breaches any of its obligations under the Project Contract or any of the other RailCorp project agreements (section 2.2), RailCorp may issue a notice to PPP Co and the Security Trustee requiring PPP Co to remedy the breach.

RailCorp may then “step in”—taking any action necessary to remedy the breach, other than the initiation or implementation of a variation (section 3.7.14)—if PPP Co fails to remedy the breach within a reasonable time.

If RailCorp does “step in”,

- Any PPP Co obligations under the Project Contract which cannot be performed because of the “stepping in” will be suspended
- PPP Co must assist RailCorp in every possible way, including the provision of access, to ensure RailCorp may “step in” effectively and expeditiously
- RailCorp will not have any obligation to PPP Co to remedy PPP Co’s breach or to overcome any risks (or mitigate the effects of any risks) arising from its “stepping in”
- PPP Co must compensate RailCorp for any costs or losses it incurs as a result of the “stepping in”, other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (section 3.7.10.1)
- RailCorp’s only liability to PPP Co as a result of the “stepping in” will be to pay PPP Co, if the “stepping in” prevents it from fulfilling its train “availability” obligations (section 3.5.1), an amount equal to:
 - ♦ The “availability payment(s)” (section 3.6.1) and “key performance indicator payment(s)” (section 3.6.3) PPP Co would have received during the “stepping in” period, for the aspects of PPP Co’s “availability” and TLS services associated with PPP Co’s inability to meet its “availability” obligations, had RailCorp not “stepped in”, based on PPP Co’s average performance over the six months immediately before the “stepping in” and assuming that the average distance travelled by PPP Co’s train “sets” is only 8,333 km per month (making the “volume adjustment” amount in each “availability payment” a negative amount), *plus*
 - ♦ Any “interest payment adjustment” payments during the “stepping in” period (section 3.6.4), treated as a negative amount if the relevant payment(s) are to be made by PPP Co to RailCorp rather than *vice versa*, *less*

- ◆ Any reasonable costs incurred by RailCorp in remedying PPP Co's breach and otherwise procuring the performance of PPP Co's suspended obligations.
- The "stepping in" will end once RailCorp has remedied PPP Co's breach, or earlier if RailCorp chooses to "step out" without remedying the breach, after giving PPP Co and the Security Trustee reasonable notice.

3.8.3.3 The Security Trustee's general powers to 'step in' and take other actions to remedy any PPP Co breach of any project contract

In addition to RailCorp's general "step in" rights, described above, the Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) may "step in" and assume some or all of PPP Co's rights and obligations under the project's contracts, including the RailCorp project agreements, in order to remedy any unremedied PPP Co breach of the contracts, regardless of whether RailCorp has issued any notice to PPP Co requiring it to remedy the breach.

If the Security Trustee or an "enforcing party" does "step in" in this way, RailCorp must, if requested, give them access to the maintenance facility and surrounding areas and any information RailCorp has about PPP Co's breach, including details on any steps RailCorp thinks should be taken to remedy the breach.

If this "stepping in" remedies the breach, RailCorp must treat the remedy as if it were achieved by PPP Co itself.

During any such "stepping in", the Security Trustee or an "enforcing party" may not unreasonably interfere with the performance by the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor of their obligations to PPP Co, unless this is necessary to remedy PPP Co's breach or unless RailCorp has granted its consent, which it may not unreasonably withhold or delay.

In addition, the Security Trustee or an "enforcing party" may remedy any PPP Co breach:

- By replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, provided it obtains RailCorp's consent, which may not be unreasonably withheld or delayed and which *must* be granted in the circumstances listed in section 3.8.3.1, or
- By selling or otherwise disposing of PPP Co's interests in and obligations under the project's contracts, or by selling or otherwise dealing with the capital and equity in PPP Co as permitted under the project's debt financing agreements, again provided it obtains RailCorp's consent, which may not be unreasonably withheld or delayed.

Regardless of whether the "normal" requirements for such transfers of the contracts or changes in ownership described in sections 3.7.16.1 and 3.7.16.2 are satisfied, RailCorp *must* give its consent if:

- ◆ RailCorp has been given details of the proposed purchaser and the terms and conditions of the proposed disposal

- ◆ In the case of a transfer of PPP Co's interests in the project, RailCorp reasonably believes the proposed purchaser is reputable, has sufficient experience and expertise, can arrange the availability of the necessary skills, resources and rail safety accreditations and has a sufficiently high financial and commercial standing
- ◆ The terms and conditions of the proposed disposal are acceptable to RailCorp, acting reasonably
- ◆ In the case of a transfer of PPP Co's interests in the project, the proposed purchaser has agreed to be bound by the relevant project contracts or other terms agreed with RailCorp, and
- ◆ RailCorp is not liable for any reasonable costs, including legal costs, associated with its enquiries, the procurement of the purchaser or the preparation, negotiation and execution of associated documents.

If PPP Co's interests in the project are transferred under these arrangements, the RailCorp Deed of Charge (see section 4) must be released and the purchaser must enter into equivalents of the RailCorp Deed of Charge and the Debt Finance Side Deed.

3.8.3.4 RailCorp's 'step in' rights under the Rolling Stock Manufacture Contract Side Deed

Under the Rolling Stock Manufacture Contract Side Deed, if PPP Co breaches the Rolling Stock Manufacture Contract RailCorp may "step in" and take steps to remedy the default if, but only if,

- PPP Co and the project's debt financiers have not taken steps to remedy PPP Co's default within a reasonable time, or have failed to remedy the default within a reasonable time
- RailCorp has given PPP Co and the Rolling Stock Manufacturers five business days' notice of its intention to "step in", and
- The Security Trustee has not exercised its own "step in" rights under the arrangements described in section 3.8.3.3.

If RailCorp does "step in",

- Any PPP Co obligations under the Rolling Stock Manufacture Contract which cannot be performed because of the "stepping in" will be suspended
- PPP Co must compensate RailCorp for any reasonable costs or losses it incurs as a result of the "stepping in", other than any indirect, consequential or purely economic loss beyond any amount for this loss that is recovered under the insurance policies specified in the Project Contract or that would have been recovered had PPP Co complied with its insurance obligations (section 3.7.10.1), and
- The "stepping in" will end once RailCorp has remedied PPP Co's breach, or earlier if RailCorp chooses to "step out" without remedying the breach, after giving PPP Co reasonable notice.

The Rolling Stock Manufacturers may not terminate the Rolling Stock Manufacture Contract in response to a PPP Co breach, or

suspend the performance of their obligations under that contract, unless:

- They have notified RailCorp of PPP Co's default, providing specified details, *and*
- They have also given RailCorp a "cure notice" that the period within which the debt financiers are entitled to remedy the default has expired without a remedy's having been effected, or that the debt financiers have no such rights to remedy the default, *and*

(a) If PPP Co's default can be remedied within 20 business days of the "cure notice" to RailCorp, or any longer period permitted under the Rolling Stock Manufacture Contract or agreed to by the Rolling Stock Manufacturers, the default has not been remedied by the end of this period, *or*

(b) Either:

- ♦ RailCorp has notified them that it does not intend to "step in", *or*
- ♦ If the default can reasonably be remedied but not within 20 business days of their "cure notice" to RailCorp or within any longer permitted or agreed period, RailCorp has not "stepped in" within 20 business days of the "cure notice", *or*
- ♦ If the default cannot reasonably be remedied, and the Rolling Stock Manufacturers have claimed compensation for the default, compensation has not been paid, either by PPP Co or by RailCorp after "stepping in", within 20 business days of the "cure notice" or within any longer permitted or agreed period, *or*
- ♦ If the default cannot reasonably be remedied, and the Rolling Stock Manufacturers have not claimed compensation for the default, RailCorp has not "stepped in" within 20 business days of the "cure notice" or any longer permitted or agreed period.

3.8.3.5 RailCorp's 'step in' rights under the Maintenance Facility Construction Contract Side Deed

Under the Maintenance Facility Construction Contract Side Deed, if PPP Co breaches the Maintenance Facility Construction Contract,

- RailCorp may "step in" and take steps to remedy the default under arrangements that are precisely analogous to those described in section 3.8.3.4 for "stepping in" under the Rolling Stock Manufacture Contract Side Deed, and
- The Maintenance Facility Contractor's rights to terminate the Maintenance Facility Construction Contract in response to PPP Co's breach are restricted in ways precisely analogous to those described in section 3.8.3.4 for PPP Co breaches of the Rolling Stock Manufacture Contract.

3.8.3.6 RailCorp's 'step in' rights under the TLS Contract Side Deed

Similarly, under the TLS Contract Side Deed, if PPP Co breaches the TLS Contract,

- RailCorp may "step in" and take steps to remedy the default under arrangements that are precisely analogous to those described in section 3.8.3.4 for "stepping in" under the Rolling Stock Manufacture Contract Side Deed and referred to in section 3.8.3.5 for "stepping in" under the Maintenance Facility Construction Contract Side Deed, and
- The TLS Contractor's rights to terminate the TLS Contract in response to PPP Co's breach are restricted in ways precisely analogous to those described in section 3.8.3.4 for PPP Co breaches of the Rolling Stock Manufacture Contract and referred to in section 3.8.3.5 for PPP Co breaches of the Maintenance Facility Construction Contract.

3.8.3.7 Notices about 'unacceptable' train availability or reliability

RailCorp may issue an "unacceptable availability notice" to PPP Co and the Security Trustee, at any time more than 30 months after the practical completion of the first train "set" (or a later date if specified events have occurred), if PPP Co provides:

- Fewer than 80% of the number of trains the Project Contract requires it to make "available" in any one "availability period" (section 3.5.1.1)
- Fewer than 90% of the number of trains it is required to make "available" in any 12 consecutive "availability periods", or
- Fewer than 95% of the number of trains it is required to make "available" in any 20 "availability periods" in any calendar year,

not counting the four additional trains PPP Co is required to make "available" during each Royal Easter Show and New Year's Eve/New Year's Day "availability period" (section 3.5.1.2).

If six or more of these notices are issued in any rolling two-year period, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying this situation described in section 3.8.3.11.

RailCorp may issue an "unacceptable reliability notice" to PPP Co and the Security Trustee if:

- During any calendar month after the practical completion of the seventh train "set", the total number of "PPP Co related incidents"—as described in section 3.2.11.1, but ignoring any failures by PPP Co to meet its "availability" obligations caused by a PPP Co decision to withhold or withdraw a train from service—involving train "sets" for which more than six months have elapsed since their "final" completion (section 3.2.11.2) or more than 24 months (or more in specified circumstances) have elapsed since their "practical" completion (section 3.2.11.1) exceeds one for every 10,000 "set kilometres", *and*

- The total distance travelled by these trains during the month is more than 75,000 km, or would have been had it not been for specified cancellations and withholdings or withdrawals from service.

If four or more of these notices are issued in any rolling two-year period, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.11.

3.8.3.8 Notices about persistent or frequent PPP Co breaches of any RailCorp project agreement

RailCorp may issue an initial “**persistent breach notice**” to PPP Co and the Security Trustee if PPP Co breaches the same PPP Co obligation under the Project Contract or any other RailCorp project agreement more than twice in any two-year period (not counting breaches of PPP Co’s “availability” obligations (section 3.5.1) or “PPP Co related incidents” (section 3.2.11.1)).

If the breach in question then continues for more than 30 days or any longer period reasonably determined by RailCorp, or if it recurs within 12 months and 30 days of the date on which the initial “persistent breach notice” was issued, RailCorp may issue a “**final persistent breach notice**”.

If the breach in question then continues for a further period of more than 30 days or any longer period reasonably determined by RailCorp, or if it recurs three or more times in the six months following the issuing of the “final persistent breach notice”, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.11.

Similarly, RailCorp may issue an initial “**frequent breaches notice**” to PPP Co and the Security Trustee if PPP Co commits frequent breaches of the Project Contract—regardless of whether these breaches are of the same type or class, but again not counting breaches of PPP Co’s “availability” obligations (section 3.5.1) or “PPP Co related incidents” (section 3.2.11.1)—and these breaches, in aggregate,

- Substantially frustrate the project’s objectives
- Significantly impair RailCorp’s ability to fulfil its objectives under the Transport Administration Act (section 2.1)
- Otherwise have a material adverse effect on RailCorp, RailCorp’s passengers or the use of RailCorp’s rail network by other rail operators, or
- Indicate PPP Co does not intend to be bound by the Project Contract.

If breaches having these effects continue to frequently occur during the following 12 months and 30 days, RailCorp may issue a “**final frequent breaches notice**” to PPP Co and the Security Trustee, and if breaches having these effects then continue to frequently occur at any time in the succeeding six months RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to

arrangements for remedying the situation described in section 3.8.3.11.

3.8.3.9 Procedures for PPP Co to remedy a ‘PPP Co event of default’

“**PPP Co events of default**”, which include but are not limited to PPP Co breaches of the Project Contract, are defined in the Project Contract as:

- Any complete or substantial abandonment of the project by PPP Co
- Any failure by PPP Co to start performing its “delivery phase” Project Contract obligations concerning the trains, the simulators and the maintenance facility within 20 business days of “financial close” (i.e. by 25 January 2007)
- Any failure by PPP Co to regularly and diligently progress these “delivery phase” obligations, *unless*:
 - ♦ This failure arises from the insolvency of either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor, either of the Rolling Stock Manufacturer Guarantors or the Maintenance Facility Contractor Guarantor
 - ♦ PPP Co is diligently pursuing a replacement which satisfies the requirements described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5 or which is otherwise acceptable to RailCorp, and
 - ♦ Fewer than 30 business days have elapsed since the insolvency, or PPP Co has been diligently pursuing a replacement at all times if between 30 and 120 business days have elapsed
- Any fraudulent or false, misleading or deceptive conduct by PPP Co, either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor in the performance of any of PPP Co’s obligations under the Project Contract
- Any insolvency (of specified types) of either of the Rolling Stock Manufacturers, the Maintenance Facility Contractor, the TLS Contractor, either of the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor Guarantor or the TLS Guarantor, if the insolvent organisation has an actual or contingent obligation to PPP Co at the time of the insolvency and either:
 - ♦ A replacement by an organisation which satisfies the requirements described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5, or which is otherwise acceptable to RailCorp, has not been made within 30 business days (or within 120 business days if PPP Co has been diligently pursuing a replacement at all times), or
 - ♦ In the case of an insolvency of the TLS Contractor, PPP Co has failed to appoint a receiver within 30 business days, or an appointed receiver has failed to perform (or procure the performance of) the TLS Contractor’s material obligations under the project’s contracts

- Any invalidity or unenforceability of the parent company guarantees provided to PPP Co under the Rolling Stock Manufacture Guarantees, the Maintenance Facility Construction Guarantee or the TLS Guarantee is or becomes invalid or unenforceable, if this is not rectified within 30 business days
 - Any cancellation or suspension of funding for the project as a result of a default under the project's debt financing and equity agreements
 - Any failure by any of the project's debt financiers and equity investors to provide all of the funding contemplated in the project's "base case" financial model, as revised from time to time (section 3.7.11)
 - Any breach by PPP Co of its subcontracting obligations to RailCorp, as described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5
 - Any failure by PPP Co to provide a "delivery phase" security bond (sections 2.3 and 3.4.1) or, if required by RailCorp, a security bond for any maintenance facility remediation works during the last five years of the project (section 3.5.9)
 - Any failure by PPP Co, the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor to hold the rail safety accreditations required for their work on this project, and any failures to comply with the terms of their rail safety accreditations while undertaking this work (section 3.7.1)
 - Any act or omission by PPP Co, its subcontractors or any of its other associates, while performing PPP Co's obligations under the Project Contract, which leads the Independent Transport Safety and Reliability Regulator (ITSRR) to notify RailCorp that it proposes to suspend or cancel RailCorp's rail safety accreditation
 - Any ITSRR suspension of PPP Co's rail safety accreditation under section 29 of the Rail Safety Act, or any ITSRR suspension of the project-related rail safety accreditations of the Rolling Stock Manufacturers, the Maintenance Facility Contractor or the TLS Contractor
 - Any failure by PPP Co to take out and maintain insurance policies as required by the Project Contract (section 3.7.10.1), except in the case of any "uninsurable risk" (section 3.7.10.4)
 - Any failure by PPP Co to make repairs or replacements, as required by the Project Contract, following damage to its works, the trains, the simulators or the maintenance facility (section 3.7.10.3)
 - Any failure by PPP Co to make a payment by its due date under any of the RailCorp project agreements, if this failure is not remedied within 20 business days of a written demand from RailCorp
 - Any breach of PPP Co's reporting obligations under the Project Contract, including any breach of the routine reporting obligations described or referred to in sections 3.2.7, 3.3.9, 3.5.6 and 3.7.12 and any material inaccuracy in any PPP Co report
 - Any breach by PPP Co of the Project Contract's restrictions on changes in ownership (section 3.7.16.1)
 - Any breaches by PPP Co of the Project Contract's restrictions on transfers of its contractual rights and obligations and the creation of security interests etc (section 3.7.16.2)
 - Any breach by PPP Co of the Project Contract's restrictions on refinancing (section 3.7.16.3)
 - Any false or misleading representation or warranty by PPP Co in the Project Contract or any other RailCorp project agreement, and any other PPP Co breach of the Project Contract or any other RailCorp project agreement, if this misrepresentation, warranty or breach:
 - ♦ Substantially frustrates the project's objectives
 - ♦ Significantly impairs RailCorp's ability to fulfil its objectives under the Transport Administration Act (section 2.1), or
 - ♦ Otherwise has a material adverse effect on RailCorp, RailCorp's passengers or the use of RailCorp's rail network by other rail operators.
- If any of these "PPP Co events of default" occurs, RailCorp may issue a formal notice to PPP Co and the Security Trustee, specifying the nature of the event.
- If the "PPP Co event of default" can be remedied, PPP Co must either remedy the event within ten business days of RailCorp's notice or prepare and submit a draft *Cure Plan* to RailCorp by the same deadline, describing what PPP Co will do to remedy the event and proposing a "cure period".
- RailCorp will then have ten business days to accept or reject the draft *Cure Plan*. If it rejects it, PPP Co must consult with RailCorp in good faith and submit an amended draft *Cure Plan* which meets RailCorp's reasonable requirements.
- Once RailCorp accepts a PPP Co *Cure Plan*, PPP Co must implement the *Cure Plan* or diligently pursue the remediation of the "PPP Co event of default" in other ways, and must remedy the event within the "cure period" specified in this *Plan*.
- RailCorp may not issue an "unacceptable reliability notice" (section 3.8.3.7) or a "frequent breaches notice" (section 3.8.3.8) arising from circumstances that are being diligently remedied by PPP Co in accordance with an approved *Cure Plan*.
- Provided PPP Co is diligently pursuing a remedy, the "cure period" specified in a *Cure Plan* may be extended by RailCorp if necessary. RailCorp may not unreasonably refuse PPP Co's first application for such an extension, but may refuse to consider any subsequent applications in its absolute discretion.
- If RailCorp notifies PPP Co and the Security Trustee of a "PPP Co event of default" but the event cannot be remedied, PPP Co must submit a draft *Prevention Plan* to RailCorp within ten business days, describing what PPP Co will do to prevent any

recurrence of the event. If RailCorp rejects the draft, PPP Co must submit an amended draft *Prevention Plan* which meets RailCorp's reasonable requirements. Once a PPP Co *Prevention Plan* has been approved by RailCorp, it must be implemented by PPP Co.

RailCorp may not issue a "frequent breaches notice" (section 3.8.3.8) if any of the breaches involved is a "PPP Co event of default" and is now subject to an approved *Prevention Plan* which is being diligently implemented by PPP Co.

If PPP Co fails to comply with any of its obligations following a RailCorp notification of a "PPP Co event of default", as summarised above, RailCorp may:

- Require PPP Co to replace the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, as relevant, at PPP Co's cost (any replacement subcontractor must satisfy the requirements for "significant contractors" described in section 3.2.6 and referred to in sections 3.3.8 and 3.5.5, or must otherwise be acceptable to RailCorp)
- If the "PPP Co event of default" is a breach of a RailCorp project agreement, "step in" to remedy the default itself, as described in section 3.8.3.2
- If relevant, exercise its rights under any bank securities it holds under the arrangements described in sections 3.4.1 and 3.5.9, and/or its rights under the RailCorp Deed of Charge (section 4), or
- Issue a formal notice to PPP Co, specifying PPP Co's failure to comply and requiring it to rectify this failure within a specified period of time.

If PPP Co does not comply with such a notice, or (even if RailCorp has not issued such a notice) if PPP Co has failed to remedy a "PPP Co event of default" that can be remedied within its "cure period" or failed to prevent the recurrence of a "PPP Co event of default" addressed by a PPP Co *Prevention Plan*, RailCorp may terminate the Project Contract under the arrangements described in section 3.8.4, subject to arrangements for remedying the situation described in section 3.8.3.11.

3.8.3.10 RailCorp's rights to sue PPP Co for breaches of any RailCorp project agreement or rely on its securities

If PPP Co breaches any of the RailCorp project agreements in any way, RailCorp may, in addition to or as an alternative to the responses described in sections 3.8.3.2, 3.8.3.7, 3.8.3.8 and 3.8.3.9, sue PPP Co or exercise any other contractual or other legal or equitable rights it holds against PPP Co, including (if relevant and available) its rights under any bank securities (sections 3.4.1 and 3.5.9) and/or its rights under the RailCorp Deed of Charge (section 4).

However, as already indicated, it may not terminate the Project Contract on any basis other than under the arrangements summarised in sections 3.8.1, 3.8.2, 3.8.3.11 and 3.8.4.

3.8.3.11 RailCorp's termination rights and the Security Trustee's 'step in' and transfer rights following a 'PPP Co termination event'

"PPP Co termination events" are defined in the Project Contract as:

- The issuing of six or more "unacceptable unavailability notices" to PPP Co in any rolling two-year period (section 3.8.3.7)
- The issuing of four or more "unacceptable reliability notices" to PPP Co in any rolling two-year period (section 3.8.3.7)
- The continuation of a persistent PPP Co breach of the Project Contract for more than 30 days (or any longer period reasonably determined by RailCorp) after the issuing of a "final persistent breach notice" for the breach, or the recurrence of a persistent breach three or more times in the six months following the issuing of a "final persistent breach notice" to PPP Co for the breach (section 3.8.3.8)
- The continued frequent occurrence of breaches which, in aggregate,
 - ◆ Substantially frustrate the project's objectives
 - ◆ Significantly impair RailCorp's ability to fulfil its objectives under the Transport Administration Act
 - ◆ Otherwise have a material adverse effect on RailCorp, RailCorp's passengers or the use of RailCorp's rail network by other rail operators, or
 - ◆ Indicate PPP Co does not intend to be bound by the Project Contract

at any time in the six months following the issuing of a "final frequent breaches notice" to PPP Co (section 3.8.3.8)

- Any failure by PPP Co to remedy a "PPP Co event of default" that can be remedied within its "cure period" as specified in PPP Co's *Cure Plan* (section 3.8.3.9)
- Any failure by PPP Co to prevent the recurrence of a "PPP Co event of default" addressed by a PPP Co *Prevention Plan* (section 3.8.3.9)
- Any failure by PPP Co to respond to a "PPP Co event of default" by taking the required actions described in section 3.8.3.9, followed by a failure to rectify this failure within the time period specified in a formal RailCorp notice requiring it to do so, as described at the end of section 3.8.3.9
- Any insolvency (of specified types) of PPP Co
- Any act or omission by PPP Co, its subcontractors or any of its other associates, while performing PPP Co's obligations under the Project Contract, which leads the Independent Transport Safety and Reliability Regulator (ITSRR) to suspend or cancel RailCorp's rail safety accreditation
- Any ITSRR suspension or cancellation of PPP Co's rail safety accreditation, or the project-related rail safety accreditations of the Rolling Stock Manufacturers, the Maintenance Facility

Contractor or the TLS Contractor, other than a suspension of 28 days or less under section 29 of the Rail Safety Act, and

- Any fatal collision or derailment of any of PPP Co's trains, while it is in service, if the death(s) are found to be principally attributable to negligence by PPP Co or its subcontractors (the Project Contract calls this a "**major safety breach**").

If a "PPP Co termination event" occurs, both RailCorp and the Security Trustee will continue to be able to exercise their rights (if any) to remedy the causes under the arrangements described in sections 3.8.3.2 to 3.8.3.6 and 3.8.3.9.

In addition,

- Under the Project Contract RailCorp may terminate the Project Contract for a subsisting "PPP Co termination event" simply by giving PPP Co and the Security Trustee up to 90 days' notice (see section 3.8.4), but
- Under the Debt Finance Side Deed, RailCorp may not do so unless:
 - ♦ The "PPP Co termination event" involved is a "major safety breach", or, in all other cases,
 - ♦ RailCorp gives the Security Trustee at least 14 days' notice of its intention to terminate the Project Contract *and* the Security Trustee does *not*, within the following 14 days, notify RailCorp that it intends to "step in" to remedy the "PPP Co termination event".

If the Security Trustee does notify RailCorp that it intends to "step in", and the Security Trustee (or any controller, agent, receiver, manager or similar "enforcing party" appointed by the Security Trustee) does "step in", the Security Trustee or its "enforcing party" must promptly submit a *Step-In Report* to RailCorp, outlining:

- PPP Co's outstanding obligations to RailCorp during the "step in" period
- A program to remedy the "PPP Co termination event" and any "PPP Co events of default", or prevent their recurrence if they cannot be remedied
- Details on the proposed performance of PPP Co's obligations under the Project Contract during the "step in" period
- Any events or circumstances it knows of which might become a "PPP Co event of default" (section 3.8.3.9) or a "PPP Co termination event"
- Actions to be taken during the "step in" period
- Details on insurance arrangements during the "step in" period, and
- Any other information RailCorp reasonably requires.

RailCorp and the Security Trustee must consult in good faith to develop and agree on this *Step-In Report*, RailCorp may use auditors and technical advisers to verify the information in the *Report*, and PPP Co must reimburse both of them for the costs they incur in producing and verifying the *Report*.

The *Step-In Report* must be updated at least once a month during the "step in" period".

The initial "step in" period will be any reasonable period agreed between RailCorp and the Security Trustee, but no less than the "cure period" for any "PPP Co event of default" involved in the "PPP Co termination event".

The "step in" period may then be extended, by a reasonable period of up to 180 days, if this is requested by the Security Trustee and:

- The Security Trustee or its "enforcing party" is diligently remedying the "PPP Co termination event", *and*
- An updated *Step-In Report* is submitted, detailing the actions to be taken during the proposed extension of the "step in" period, *and*
 - (a) RailCorp is reasonably satisfied the Security Trustee or its "enforcing party" will complete the remedy within the extended period, *or*
 - (b) A "*force majeure* event" (section 3.7.18) has occurred during the initial "step in" period, preventing the completion of the remedy and necessitating the extension, *or*
 - (c) RailCorp has itself "stepped in" during the initial "step in" period, under the arrangements described in section 3.8.3.2, and this has prevented the completion of the remedy.

Only one extension may be granted.

If the Security Trustee or its "enforcing party" decides to remedy the "PPP Co termination event" by replacing the Rolling Stock Manufacturer(s), the Maintenance Facility Contractor and/or the TLS Contractor, or by selling or otherwise disposing of PPP Co's interests in and obligations under the project's contracts, or by selling or otherwise dealing with the capital and equity in PPP Co as permitted under the project's debt financing agreements, the relevant arrangements described in section 3.8.3.3 will apply.

During the Security Trustee's "step in" period RailCorp may terminate the Project Contract only if:

- The Security Trustee or its "enforcing party" notifies RailCorp that it does not intend to remedy the "PPP Co termination event"
- Prior to the preparation of the initial *Step-In Report*, the Security Trustee or its "enforcing party" has not started or diligently continued to perform PPP Co's obligations under the Project Contract, or has not started or diligently continued to remedy the "PPP Co termination event"
- After the preparation of the initial *Step-In Report* or any update of this *Report*, the Security Trustee or its "enforcing party" is not diligently remedying the "PPP Co termination event" in accordance with the *Step-In Report* or is not otherwise implementing the *Step-In Report*, or
- A new "PPP Co termination event" occurs and has a material adverse effect on RailCorp or its ability to provide passenger

rail services, provided this new “PPP Co termination event” has *not* arisen, wholly or partly, as a result of circumstances identified in the *Step-In Report* or circumstances which occurred before the preparation of the current *Step-In Report* but were not apparent to the Security Trustee at the time.

If a new “PPP Co termination event” which does not entitle RailCorp to terminate the Project Contract occurs during the Security Trustee’s “step in” period, PPP Co must update the *Step-In Report*.

The Security Trustee or its “enforcing party” may terminate the “step in” at any time, by giving RailCorp ten business days’ notice.

If the “PPP Co termination event” has not been remedied when the Security Trustee’s “step in” ends, RailCorp will again be entitled to terminate the Project Contract in accordance with its rights under the Project Contract, and the arrangements described in section 3.8.4 will apply.

3.8.3.12 PPP Co finance defaults

If PPP Co breaches its obligations under the project’s debt financing agreements, the Security Trustee must:

- Notify RailCorp of the default at the same time as it notifies PPP Co, providing reasonable details on the default and, if it has decided to exercise its powers under the debt financing documents, its proposed date and methods of doing so
- Subject to specified exceptions, give RailCorp at least ten days’ notice of any actions to enforce the debt financiers’ securities or recover any money secured by these securities, or at least 24 hours’ notice in the case of an urgent appointment of an “enforcing party” (see also section 4.2), and
- While the finance default continues, give RailCorp copies of all material correspondence and documents, unless they are privileged, and advise RailCorp when specified types of events occur.

3.8.4 Termination by RailCorp for a ‘PPP Co termination event’

3.8.4.1 General termination arrangements

If RailCorp terminates the Project Contract for a subsisting “PPP Co termination event” under the arrangements described in section 3.8.3.11,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.
- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the

arrangements for this situation described in section 3.8.1 will apply, apart from differences in the calculation of the sale price if the Project Contract has been terminated before its original expiry date. (Depending on the type of “PPP Co termination event” involved, this sale price must be equal to different “termination payments” specified in different sections of the “Termination Payments” Schedule to the Project Contract, as described below.)

- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” that is similarly specified in the “Termination Payments” Schedule to the Project Contract.

This payment must be made within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.

- If the Project Contract has been terminated after its original expiry date (currently targeted for 30 July 2043 or, if it is later, 30 years after the actual date of practical completion of the 69th train “set”), RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of the 78th train “set”, the subcontract novation and other arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

3.8.4.2 Overview of train sale prices or ‘termination payments’ for ‘PPP Co termination event’ terminations before the original expiry date

If the Project Contract has been terminated by RailCorp before its original expiry date for a failure to remedy a complete or substantial abandonment of the project by PPP Co (section 3.8.3.9), RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.

If the Project Contract has been terminated by RailCorp before its original expiry date for a “major safety breach” (section 3.8.3.11), the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be calculated on the same basis as for terminations for “uninsurable risks” or “*force majeure* events”, already described in section 3.8.1.

If the Project Contract has been terminated by RailCorp before its original expiry date for any “PPP Co termination event” *other*

than a failure to remedy a complete or substantial abandonment of the project by PPP Co or a “major safety breach” (section 3.8.3.11), the sale price for any trains acquired by RailCorp, or RailCorp’s “termination payment” if it chooses not to acquire any of the trains, will be:

- Calculated on the same basis as for terminations for “uninsurable risks” or “*force majeure* events” (section 3.8.1) if the “PPP Co termination event” occurred during a suspension, by RailCorp, of PPP Co’s right to terminate the Project Contract following a “*force majeure* event”, under the arrangements described in section 3.7.18, and
- Calculated on the same basis as for “voluntary” terminations by RailCorp (section 3.8.2) if the “PPP Co termination event” occurred during a suspension, by RailCorp, of PPP Co’s right to terminate the Project Contract for a “RailCorp termination event”, under arrangements described in section 3.8.5 below

but will otherwise be calculated as described in section 3.8.4.3, if there is a “liquid” market and the project is retendered, or as described in section 3.8.4.4 if there is no retendering of the project or if retendering proves to be unsuccessful.

3.8.4.3 Train sale prices or ‘termination payments’ if new tenders are called

RailCorp must call new tenders for the performance of the same obligations as PPP Co has had under the Project Contract if:

- There is a “liquid” market—with at least two suitable, independent, new-to-the-project and willing bidders for “public private partnership” or similar contracts for works and services similar to those in the Project Contract—that is sufficient for the price likely to be achieved through a tender to be a reliable indicator of “fair value”, and
- There is a reasonable prospect of a successful tender process, attracting at least two compliant tenders, with the highest bid being at least as high as a “debt termination amount” described below.

The “Termination Payments” Schedule to the Project Contract sets out procedures for any tendering process and specifies the assumptions to be made about future insurance proceeds.

Until these procedures are completed and RailCorp pays PPP Co its train sale price or “termination payment”, RailCorp must pay PPP Co monthly (or part-monthly) “**post-termination TLS payments**”, equal in each month or part of a month to:

- The “availability payment” and “key performance indicator payment” which would have been payable had the Project Contract not been terminated, based on PPP Co’s average performance in the six months immediately before the termination and assuming that the average distance travelled by PPP Co’s train “sets” is only 8,333 km per month (making the “volume adjustment” amount in each “availability payment” a negative amount), *plus*
- Any “interest payment adjustment” payments, treated as a negative amount if the relevant payment(s) are to be made by PPP Co to RailCorp rather than *vice versa*, *less*

- Any reasonable costs incurred by RailCorp during the month or part of a month in remedying PPP Co defaults, ensuring the required numbers of trains are made “available” and otherwise procuring the performance of PPP Co’s obligations, and *less*
- The absolute value of any negative “post-termination TLS payment” carried forward from the previous month.

The tender process will be considered “successful” if there are at least two compliant tenders by tenderers regarded by RailCorp as suitable substitutes for PPP Co *and* the highest bid is at least as high as a “**debt termination amount**” which, in these circumstances, is to be calculated, on the date RailCorp pays PPP Co its train sale price or “termination payment” under arrangements described below, as:

- The lesser of (1) all principal and interest amounts outstanding under the project’s debt financing agreements when the Project Contract was terminated and (2) what the project’s latest revised “base case” financial model forecast these amounts to be, *plus*
- Any amounts PPP Co and PPP Co Finance Co must pay to the project’s debt financiers as a result of the early termination of the debt financing arrangements, *less*
- The sum (without double counting) of (1) any credit balances in PPP Co’s bank accounts, other than its insurance proceeds account and another specified account, to which the debt financiers are entitled; (2) any amounts the debt financiers must pay to PPP Co as a result of the early termination of the debt financing arrangements; and (3) any other amounts the debt financiers or their Security Trustee have received by enforcing their rights since the termination of the Project Contract.

If the tender process is “successful”, RailCorp may either enter into new contracts with the successful tenderer or elect not to enter into new contracts, in which case it must notify PPP Co of this decision.

In either case it must pay PPP Co a train sale price or “termination payment”—on the date of execution of the new contracts, or within 20 business days of notifying PPP Co that it will not be entering into new contracts, as relevant—equal to the higher of:

- (a) The “debt termination amount”, calculated on the payment date, and
- (b) The highest tender price offered in any compliant tender by any tenderer regarded by RailCorp as a suitable substitute for PPP Co, even if they are not the successful tenderer, *plus*
 - To the extent they have not been taken into account in the compliant tender with the highest tender price, and also to the extent that they have been received or

retained by RailCorp in accordance with the Project Contract,

- ♦ Any insurance proceeds which are owing to PPP Co and which PPP Co would otherwise be entitled to retain under the Project Contract, *plus*
 - ♦ Any negative “post-termination TLS payment” that has not yet been set off against the following month’s “post-termination TLS payment”, *plus*
 - ♦ Any amounts third parties owe PPP Co on the date of the payment of execution of the new contracts, *less*
- The costs reasonably incurred by RailCorp in carrying out the tender process, *less*
 - The reasonable “out of pocket” expenses (including legal and consultancy costs) incurred by RailCorp in terminating the Project Contract, *less*
 - Any part of RailCorp’s “post-termination TLS payments” to PPP Co which has been used by PPP Co to reduce principal under the project’s debt financing agreements, *less*
 - If RailCorp has elected to acquire any of the trains, any costs of bringing the trains to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, and *less*
 - Any other “RailCorp priority moneys”, as defined in the Debt Finance Side Deed and discussed in section 4.2 below.

If PPP Co disputes the success of the tender process or part or all of the calculations described above under the project’s dispute resolution procedures (section 3.7.17), RailCorp will retain the right to enter into new contracts. If it is agreed or determined that the tender process has indeed been successful, RailCorp must pay PPP Co its train sale price or “termination payment” (or the disputed portion), as described above, within 20 business days of the resolution of the dispute.

If it is agreed or determined that the tender process is *not* successful, RailCorp must pay PPP Co a train sale price or “termination payment” calculated in accordance with the arrangements in section 3.8.4.4 below.

3.8.4.4 Train sale prices or ‘termination payments’ if the project is not retendered or if retendering is not successful

If RailCorp is not required to retender the project, or if a tender process proves to be unsuccessful, RailCorp must pay PPP Co a train sale price or “termination payment” equal to:

- A “debt termination amount” calculated in accordance with the description of this amount in section 3.8.4.3, *less*
- If RailCorp has elected to acquire any of the trains, any costs of bringing the trains to the condition they would have been in had PPP Co complied with its obligations under the Project Contract, *less*

- Any other “RailCorp priority moneys”, as defined in the Debt Finance Side Deed and discussed in section 4.2 below, and *less*
- Any reasonable “out of pocket” expenses (including legal and consultancy costs) incurred by RailCorp in terminating the Project Contract.

This payment must be made within 30 days of any agreement by RailCorp and PPP Co about the amount or any determination of the amount under the project’s dispute resolution procedures (section 3.7.17).

3.8.5 Termination by PPP Co for a ‘RailCorp termination event’

“RailCorp termination events” are defined in the Project Contract as:

- Any failure by RailCorp to comply with its payment obligations under the Project Contract that is not remedied by RailCorp within 20 business days of a written demand from PPP Co (RailCorp will not be liable for any claims by PPP Co that are not made strictly in accordance with notice processes and timeframes set out in the Project Contract)
- Any final court decision, not subject to appeal, which makes it impossible for PPP Co to construct the maintenance facility for a continuous period of two months, *provided* this court decision has not resulted from a breach or other wrongful act or omission by PPP Co, its subcontractors or its other associates
- Any change in NSW law which makes it impossible for PPP Co to construct the maintenance facility or maintain its trains at the maintenance facility for a continuous period of two months, again provided this change in the law has not resulted from a breach or other wrongful act or omission by PPP Co, its subcontractors or its other associates
- Any resumption of any part of the maintenance facility site by a NSW Government authority which makes it impossible for PPP Co to construct the maintenance facility on the rest of the site or maintain its trains at the maintenance facility for a continuous period of two months
- Any failure by RailCorp to give PPP Co access to the maintenance facility site, as required under the Project Contract, if this makes it impossible for PPP Co to construct the maintenance facility for a continuous period of two months, and
- Any other RailCorp breach of its obligations under any RailCorp project agreement which prevents PPP Co from performing all or a substantial portion of its obligations under the Project Contract for a continuous period of two months after PPP Co has notified RailCorp of its breach.

If a “RailCorp termination event” occurs, PPP Co may give RailCorp 30 business days’ notice that it intends to terminate the Project Contract.

RailCorp may suspend PPP Co’s right to terminate the Project Contract for the “RailCorp termination event”—*unless* it is a

“failure to pay” “RailCorp termination event”—by giving PPP Co and the Security Trustee a notice to this effect within 30 business days of receiving PPP Co’s termination notice.

If RailCorp takes this action,

- PPP Co must continue to perform its obligations under the Project Contract during the suspension, to the extent it is lawful and practicable to do so
- RailCorp must, throughout the suspension, make monthly payments to PPP Co that will place PPP Co in the same net after-tax position it would have been in if the “RailCorp termination event” had not occurred
- RailCorp may not issue an “unacceptable availability notice” or an “unacceptable reliability notice” to PPP Co (section 3.8.3.7) if the circumstances that would otherwise permit it to do so have resulted from the “RailCorp termination event”
- The suspension of PPP Co’s right to terminate the Project Contract will continue, unless it is lifted by RailCorp, until:
 - ◆ The “RailCorp termination event” has been remedied or its effects have been overcome, in which case the Project Contract will continue in force, or
 - ◆ If this has not happened in the meantime, 24 months after PPP Co’s termination notice.

If a suspension ends for any reason other than the remedying of the “RailCorp termination event” or its effects, or if RailCorp never imposes a suspension and the initial 30 business days’ notice period has expired, PPP Co may immediately terminate the Project Contract by giving RailCorp a notice to this effect.

If the Project Contract is terminated by PPP Co for a subsisting “RailCorp termination event”,

- The rights and obligations of RailCorp and PPP Co under the Project Contract, the Call Option Deed, the Maintenance Facility Lease and the Maintenance Facility Licence will cease, apart from any accrued rights and obligations and a number of Project Contract rights and obligations which are specified as surviving the end of the Project Contract.

- RailCorp may complete the uncompleted part of the project, either itself or through third parties, if it chooses to do so.
- RailCorp may notify PPP Co, within 30 days, that it wishes to acquire one or more of the train “sets”, specifying the particular carriages it wishes to buy, in which case the arrangements for this situation described in section 3.8.1 will apply, apart from a difference in the calculation of the sale price if the Project Contract has been terminated before its original expiry date (see below).
- If RailCorp chooses not to acquire any of the trains, and the Project Contract has been terminated before its original expiry date, RailCorp must pay PPP Co a “termination payment” within 30 days of the parties’ agreeing on the amount to be paid or within 30 days of a determination of this amount under the dispute resolution procedures described in section 3.7.17.
- If the Project Contract has been terminated before its original expiry date, the train sale price or “termination payment” must be calculated on the same basis as for “voluntary” terminations by RailCorp (section 3.8.2).
- If the Project Contract has been terminated after its original expiry date, RailCorp will not be liable to pay any sale price for any trains it acquires or make any “termination payment” to PPP Co.
- If the Project Contract has been terminated during the project’s “delivery phase”, prior to the practical completion of the 78th train “set”, the arrangements already described for this situation in section 3.8.1 will apply.
- PPP Co must comply with all of its “normal” obligations following the ending of the Project Contract for any reason, as listed in section 3.5.10.
- Provided PPP Co complies with all of its obligations listed above, as relevant, RailCorp must release the RailCorp Deed of Charge (see section 4) as soon as practicable after it has paid for any trains it has acquired or made its “termination payment”.

4 The RailCorp Deed of Charge and interactions between RailCorp’s securities and the debt financiers’ securities

4.1 The RailCorp Deed of Charge

Under the RailCorp Deed of Charge PPP Co and PPP Co Finance Co have granted RailCorp fixed and floating charges over all of the present and future real and personal property assets, undertakings and rights of PPP Co, PPP Co Finance Co and the Reliance Rail Trust (the trust of which PPP Co is the trustee)—excluding a specified hedge collateral account established as part of the project’s debt financing arrangements—as security for the performance of PPP Co and PPP Co Finance Co of all of their obligations under the Project Contract and the other RailCorp project agreements (section 2.2), including their payment obligations.

The Security Trustee, the Rolling Stock Manufacturers, the Rolling Stock Manufacturer Guarantors, the Maintenance Facility Contractor, the Maintenance Facility Contractor Guarantor, the TLS Contractor and the TLS Contractor Guarantor have expressly acknowledged and consented to the creation of these charges.

PPP Co and PPP Co Finance Co have warranted that there are and will be no encumbrances over the charged property other than those created under the project’s debt financing agreements and the other project contracts, arising in the ordinary course of business (including security interests for obligations that are not yet due) or expressly approved by RailCorp, in advance.

They have also promised RailCorp that they will not dispose of, permit the creation of an interest in or part with possession of any of the charged property in any way other than with RailCorp’s consent or in the ordinary course of business, or permit anything that might render the charged property liable to surrender or forfeiture or that otherwise prejudices the property in any way.

The relative priorities of RailCorp’s charges and the debt financiers’ securities are specified in both the RailCorp Deed of Charge and the Debt Finance Side Deed, and are discussed in section 4.2 below. In general terms, though, RailCorp’s charges rank behind the debt financiers’ securities but ahead of all other securities affecting the charged property.

To ensure RailCorp’s charges will have priority over any subsequently registered charges, unless RailCorp agrees otherwise, the maximum prospective liability secured by

RailCorp’s charges has been set, for the purpose of determining priorities between the charges under section 282(3) of the Corporations Act (Cth), at \$10 billion. The RailCorp Deed of Charge makes it clear that this does *not* limit the amount of money secured by RailCorp’s charges.

Subject to the priorities between securities and enforcement rights specified in the Debt Finance Side Deed, RailCorp may immediately enforce its charges if:

- There is a “PPP Co termination event” (section 3.8.3.11)
- PPP Co fails to comply with its obligations following any early termination of the Project Contract (sections 3.8.1, 3.8.2, 3.8.4.1 and 3.8.5), or
- There are changes to specified aspects of arrangements associated with the Reliance Rail Trust, except as permitted under the Project Contract or otherwise approved by RailCorp.

In these circumstances, and again subject to the Debt Finance Side Deed, RailCorp may appoint receiver(s) or receiver(s)/manager(s) of the charged property, exercising powers set out in the RailCorp Deed of Charge, and RailCorp and its authorised representatives may exercise specified powers of attorney granted in the RailCorp Deed of Charge.

4.2 Consents to and priorities between RailCorp’s charges and the debt financiers’ securities

The Debt Finance Side Deed, which will remain in force until the Security Trustee is satisfied that all debts under the project’s debt financing documents have been fully and finally repaid, formally records:

- RailCorp’s consent to the debt financiers’ securities under the project’s private sector debt financing agreements, and
- As already indicated in section 4.1, the Security Trustee’s consent to the charges created by the RailCorp Deed of Charge.

With the exception of “**RailCorp priority moneys**”, described below, each of the debt financiers’ securities has priority over RailCorp’s charges.

In line with these priorities, any money received in enforcing the debt financiers' securities or RailCorp's charges must be applied, subject to specified arrangements for handling contingent liabilities,

- First, to meet the reasonable costs incurred by the Security Trustee (or its "enforcing party") and/or RailCorp (or its receiver/manager) in enforcing their securities
- Second, to remunerate the Security Trustee or its "enforcing party" and any RailCorp receiver or receiver/manager
- Third, to pay any "RailCorp priority moneys"
- Fourth, to pay the sums secured by the debt financiers' securities, and
- Fifth, to pay any other sums of money secured by RailCorp's charges,

with any surplus funds being paid into a nominated PPP Co bank account.

"RailCorp priority moneys" are defined in the Debt Finance Side Deed as any amounts PPP Co owes to RailCorp, or RailCorp is entitled to deduct from a RailCorp payment to PPP Co, for:

- RailCorp repairs of damage to third parties' property (sections 3.7.10.3(p) and (q))
- Costs incurred by RailCorp in taking out and maintaining insurance that should have been taken out and maintained by PPP Co (section 3.7.10.1)
- Costs or losses incurred by RailCorp in "stepping in" to remedy a PPP Co breach of any RailCorp project agreement (section 3.8.3.2), but only if:
 - ♦ RailCorp notified PPP Co of its intention to incur these types of costs at least 21 days before the first costs were incurred
 - ♦ The Security Trustee gave RailCorp a draft *Car Remedy Plan* before this 21-day notice period expired, describing actions the Security Trustee or an "enforcing party" proposed to take under their own "step in" (section 3.8.3.3) to remedy PPP Co's breach, and
 - ♦ RailCorp approved this draft *Car Remedy Plan*, or an amended version of it resubmitted to RailCorp under

arrangements directly analogous to those described in section 3.8.3.9 for the development of PPP Co *Cure Plans* and *Prevention Plans*, but

- ♦ The Security Trustee or its "enforcing party" failed to procure the completion of the works set out in the approved *Car Remedy Plan* within the "cure period" specified in this *Plan*, as extended (if at all) under extension arrangements directly analogous to those described in section 3.8.3.9 for the extension of "cure periods" specified in PPP Co *Cure Plans*, and
- The costs of bringing any train carriages acquired by RailCorp after termination of the Project Contract up to the condition they would have been in had PPP Co complied with its obligations under the Project Contract (sections 3.8.1, 3.8.2, 3.8.4 and 3.8.5), but again only if:
 - ♦ RailCorp gave PPP Co at least 21 days' notice of its intention to deduct these types of costs from its "termination payment"
 - ♦ The Security Trustee gave RailCorp a draft *Car Remedy Plan* before this 21-day notice period expired, describing actions the Security Trustee or an "enforcing party" proposed to take to remedy the trains' condition, and
 - ♦ RailCorp approved this draft *Car Remedy Plan*, or an amended version of it, but
 - ♦ The Security Trustee or its "enforcing party" failed to procure the completion of the works set out in the approved *Car Remedy Plan*.

RailCorp may not take any action to enforce the RailCorp charges, or take any action concerning the solvency or insolvency of PPP Co, without the Security Trustee's consent, and any action by the Security Trustee or an "enforcing party" appointed by the Security Trustee will have priority over any approved RailCorp enforcement action.

Similarly, and notwithstanding the terms of the RailCorp Deed of Charge, RailCorp's charge must operate only as a floating charge unless the Security Trustee consents, and even with this consent it may operate as a fixed charge only to the extent that the charged assets are also subject to a fixed charge under the debt financing securities.

5 The NSW Government's guarantee of RailCorp's performance

The **Deed of Guarantee** (“the **PAFA Act Guarantee**”) between the NSW Treasurer (on behalf of the State of NSW), RailCorp, PPP Co and the Security Trustee, dated 3 December 2006, provides a guarantee by the State of NSW to PPP Co and the Security Trustee, in accordance with section 22B of the Public Authorities (Financial Arrangements) Act (NSW), of RailCorp's performance of its obligations under the Project Contract, the Maintenance Site Safety Interface Agreement, the Expert Determination Agreements, the Call Option Deed, the Maintenance Facility Lease, the Maintenance Facility Licence, the Source Code Escrow Agreement, the Approved Escrow Deed (Rolling Stock Manufacturers), the Approved Escrow Deed (Maintenance Facility Contractor), the Approved Escrow Deed (TLS Contractor), the Rolling Stock Manufacture Contract Side Deed, the Right of Entry Deed for Cardiff Maintenance Depot, the Maintenance Facility Construction Contract Side Deed, the TLS Contract Side Deed, the Debt Finance Side Deed, the RailCorp Deed of Charge, the Cross Guarantee and Indemnity

and any other documents approved, in writing, by the NSW Treasurer in the future.

This guarantee is irrevocable and a continuing obligation. It will remain in force until seven months after the date on which RailCorp has fully discharged all of its obligations under the last of these contracts to remain in force, regardless of any settlements, intervening payments or anything else which might otherwise affect the State's liability as a guarantor at law or in equity.

The State must satisfy its obligations under its guarantee within 21 days of any demand made on it by PPP Co or the Security Trustee. Such a demand may be made only if any period of time allowed in the contracts for RailCorp to remedy its relevant defaults has already expired.

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

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