

the Company and the Trustee must maintain the Land prior to the M2 Motorway Commencement Date in a condition which complies with all relevant Authority requirements.

### 3.7 M2 Upgrade

Clauses 3 does not apply to the design and construction of the M2 Upgrade.

## 4. COMPANY LEASE, TRUST LEASE, TRUST CONCURRENT LEASE AND SUBLEASE

### 4.1 Grant of Company Lease, Trust Lease and Trust Concurrent Lease

(a) Subject to clause 4.3, clause 4.4 and clause 4.6, on the M2 Motorway Commencement Date:

- (i) the RTA must grant the Company Lease to the Company;
- (ii) the Company must accept the Company Lease;
- (iii) the RTA must grant the Trust Lease to the Trustee; and
- (iv) the Trustee must accept the Trust Lease.

(b) Subject to clause 4.5 and clause 4.6, on the day after the M2 Motorway Commencement Date:

- (i) the RTA must grant the Trust Concurrent Lease to the Trustee; and
- (ii) the Trustee must accept the Trust Concurrent Lease.

### 4.2 Completion of leases

The RTA must prepare:

- (a) the Company Lease, which must be in the form of the Annexed Company Lease (but which will be completed by the RTA, including completion of Schedule A to it);
- (b) the Trust Lease, which must be substantially in the form of the Annexed Trust Lease (but which will be completed by the RTA, including completion of Schedule A and Schedule B to it); and
- (c) the Trust Concurrent Lease, which must be in the form of the Annexed Trust Concurrent Lease (but which will be completed by the RTA, including completion of Schedule A and Schedule B to it).

### 4.3 Execution of Company Lease

(a) Subject to clause 4.6:

- (i) the RTA must give the Company Lease to the Company as soon as practicable after the M2 Motorway Commencement Date;

- (ii) the Company must execute the Company Lease within 15 days of receiving it; and
  - (iii) the RTA must produce the certificates of title for the Company Land to the Land Titles Office when the Company requests it, to allow the Company to register the Company Lease.
- (b) Until the Company executes the Company Lease and gives it to the RTA, the RTA and the Company are bound as if the Company Lease had been executed on the M2 Motorway Commencement Date.
  - (c) The RTA must execute the Company Lease within five days of receiving it from the Company, and must return the executed Company Lease to the Security Trustee. The Company must have the Company Lease stamped and registered (at the Company's cost.)
  - (d) The Company must give the RTA a certified copy of the registered Company Lease within 14 days of it being registered.

#### 4.4 Execution of Trust Lease

- (a) Subject to clause 4.6:
  - (i) the RTA must give the Trust Lease to the Trustee as soon as practicable after the M2 Motorway Commencement Date; and
  - (ii) the Trustee must execute the Trust Lease within 15 days of receiving it; and
  - (iii) the RTA must produce the certificates of title for the Trust Land to the Land Titles Office when the Trustee requests it, to allow the Trustee to register the Trust Lease.
- (b) Until the Trustee executes the Trust Lease and gives it to the RTA, the RTA and the Trustee are bound as if the Trust Lease had been executed on the M2 Motorway Commencement Date.
- (c) The RTA must execute the Trust Lease within five days of receiving it from the Trustee, and must return the executed Trust Lease to the Security Trustee. The Trustee must have the Trust Lease stamped and registered (at the Trustee's cost).
- (d) The Trustee must give the RTA a certified copy of the registered Trust Lease within 14 days of it being registered.

#### 4.5 Execution of Trust Concurrent Lease

- (a) Subject to clause 4.6:
  - (i) the RTA must give the Trust Concurrent Lease to the Trustee as soon as practicable after the date referred to in clause 4.1(b);
  - (ii) the Trustee must execute the Trust Concurrent Lease within 15 days of receiving it; and

- (iii) the RTA must produce the certificates of title for the Company Land to the Land Titles Office when the Trustee requests it, to allow the Trustee to register the Trust Concurrent Lease.
- (b) Until the Trustee executes the Trust Concurrent Lease and gives it to the RTA, the RTA and the Trustee are bound as if the Trust Concurrent Lease had been executed on the day after the M2 Motorway Commencement Date.
- (c) The RTA must execute the Trust Concurrent Lease within five days of receiving it from the Trustee, and must return the executed Trust Concurrent Lease to the Trustee. The Trustee must have the Trust Concurrent Lease stamped and registered (at the Trustee's cost).
- (d) The Trustee must give the RTA a certified copy of the registered Trust Concurrent Lease within 14 days of it being registered.

#### 4.6 Surveys, leases in registrable form and plans of consolidation

- (a) The RTA, the Company and the Trustee acknowledge that the Annexed Company Lease, Annexed Trust Lease, Annexed Trust Concurrent Lease and Annexed Sublease cannot be registered under the Real Property Act 1900 (NSW) in their present form.
- (b) The Company and the Trustee must notify the RTA of the final boundaries of the Land for the purposes of the Company Lease, the Trust Lease and the Trust Concurrent Lease as soon as practicable.
- (c) Subject to clause 4.6(f), the RTA must, within 18 months of the Company and the Trustee giving notice under clause 4.6(b):
  - (i) survey the M2 Motorway to identify the Land and strata to be the subject of the Company Lease, the Trust Lease and the Trust Concurrent Lease in accordance with established RTA practice;
  - (ii) prepare and cause to be registered plans of consolidation or subdivision in relation to the Land to reduce, to the extent practically possible, the number of titles comprising the Land;
  - (iii) consult with the Company and the Trustee in relation to the preparation of the survey and plans of consolidation or subdivision;
  - (iv) answer all requisitions raised by the Land Titles Office and liaise with the Land Titles Office with a view to the plans of consolidation or subdivision being registered as expeditiously as possible; and
  - (v) give the Company and the Trustee a copy of each registered plan of consolidation or subdivision as soon as practicable after that plan is registered under the Real Property Act 1900 (NSW).
- (d) The RTA is not required to give:
  - (i) the Company Lease to the Company in accordance with clause 4.3;

- (ii) the Trust Lease to the Trustee in accordance with clause 4.4; or
  - (iii) the Trust Concurrent Lease to the Trustee in accordance with clause 4.5,
- until the plans of consolidation or subdivision referred to in clause 4.6(c) have been registered under the Real Property Act 1900 (NSW).
- (e) Subject to clause 4.6(f), the RTA must ensure that the Company Lease, the Trust Lease and the Trust Concurrent Lease are in registrable form within 18 months of the Company's and the Trustee's notice referred to in clause 4.6(b).
  - (f) The Company and the Trustee agree that if the RTA is diligently performing its obligations under clause 4.6(c), they will grant any extension of the 18 month period referred to in clause 4.6(c) and clause 4.6(e) which the RTA reasonably requires.
  - (g) The RTA, the Company and the Trustee agree to do all things reasonably required to enable the Company Lease, the Trust Lease and the Trust Concurrent Lease to be completed and registered as expeditiously as possible.

#### 4.7 Sublease

- (a) The Trustee and the Company are in default under this deed if they do not, within 30 days of execution of the Trust Lease, enter into the Sublease:
  - (i) substantially in the form of the Annexed Sublease; and
  - (ii) otherwise reasonably acceptable to the RTA.
- (b) The RTA must produce the certificates of title for the Trust Land to the Land Titles Office when the Trustee and the Company request it, to allow the Trustee and the Company to register the Sublease.
- (c) The Trustee must give the RTA a certified copy of the registered Sublease.

#### 4A M2 UPGRADE COMPANY LEASE, M2 UPGRADE TRUST LEASE, M2 UPGRADE TRUST CONCURRENT LEASE AND M2 UPGRADE SUB-LEASE

##### 4A.1 Grant of M2 Upgrade Company Lease, M2 Upgrade Trust Lease and M2 Upgrade Trust Concurrent Lease

- (a) Subject to clauses 4A.3, 4A.4 and 4A.5, on the M2 Upgrade Date of Construction Completion of each M2 Upgrade Stage:
  - (i) the RTA must grant the relevant M2 Upgrade Company Lease to the Company;
  - (ii) the Company must accept the relevant M2 Upgrade Company Lease;
  - (iii) the RTA must grant the relevant M2 Upgrade Trust Lease to the Trustee; and
  - (iv) the Trustee must accept the relevant M2 Upgrade Trust Lease,

which is necessary for the Company and Trustee to have in order for them to perform their obligations and exercise their rights under this deed in relation to the relevant M2 Upgrade Stage.

- (b) Subject to clause 4A.5 and clause 4A.6, on the day after the M2 Upgrade Date of Construction Completion of a M2 Upgrade Stage:
  - (i) the RTA must grant the relevant M2 Upgrade Trust Concurrent Lease to the Trustee; and
  - (ii) the Trustee must accept the relevant M2 Upgrade Trust Concurrent Lease.

#### **4A.2 Completion of M2 Upgrade Leases**

- (a) The RTA must prepare the Stage 1 M2 Upgrade Company Lease.
- (b) The RTA must prepare the:
  - (i) Stage 2 M2 Upgrade Trust Lease; and
  - (ii) Stage 2 M2 Upgrade Trust Concurrent Lease.
- (c) The RTA must prepare the:
  - (i) Stage 3 M2 Upgrade Company Lease;
  - (ii) Stage 3 M2 Upgrade Trust Lease; and
  - (iii) Stage 3 M2 Upgrade Trust Concurrent Lease.

#### **4A.3 Execution of M2 Upgrade Company Lease**

- (a) Subject to clauses 4A.6 and 4A.8:
  - (i) RTA must give each M2 Upgrade Company Lease to the Company as soon as practicable after the relevant M2 Upgrade Date of Construction Completion;
  - (ii) the Company must execute each M2 Upgrade Company Lease within 15 Business Days of receiving it; and
  - (iii) RTA must produce the certificates of title for the relevant part of the M2 Upgrade Company Land to the LPMA when the Company requests it, to allow the Company to register the relevant M2 Upgrade Company Lease.
- (b) Until the parties execute each relevant M2 Upgrade Company Lease, RTA and the Company are bound as if each M2 Upgrade Company Lease had been executed on the M2 Upgrade Date of Construction Completion for that M2 Upgrade Stage.
- (c) RTA must execute each M2 Upgrade Company Lease within five days of receiving it from the Company, and must return each executed M2 Upgrade Company Lease to the Security Trustee as soon as possible thereafter. The Company must have the relevant M2 Upgrade Company Lease stamped and registered (at the Company's cost).

- (d) The Company must give RTA a certified copy of each registered M2 Upgrade Company Lease within 14 days of registration.

#### 4A.4 Execution of M2 Upgrade Trust Lease

- (a) Subject to clause 4A.6 and 4A.8:
  - (i) RTA must give each M2 Upgrade Trust Lease to the Trustee as soon as practicable after the relevant M2 Upgrade Date of Construction Completion;
  - (ii) the Trustee must execute each M2 Upgrade Trust Lease within 15 Business Days of receiving it; and
  - (iii) RTA must produce the certificates of title for the relevant M2 Upgrade Trust Land to the LPMA when the Trustee requests it, to allow the Trustee to register the relevant M2 Upgrade Trust Lease.
- (b) Until the parties execute each relevant M2 Upgrade Trust Lease, RTA and the Trustee are bound as if each M2 Upgrade Trust Lease had been executed on the M2 Upgrade Date of Construction Completion for the relevant M2 Upgrade Stage.
- (c) RTA must execute each M2 Upgrade Trust Lease within five days of receiving it from the Trustee, and must return each executed M2 Upgrade Trust Lease to the Security Trustee as soon as possible thereafter. The Trustee must have the relevant M2 Upgrade Trust Lease stamped and registered (at the Trustee's cost).
- (d) The Trustee must give RTA a certified copy of each registered M2 Upgrade Trust Lease within 14 days of registration.

#### 4A.5 Execution of M2 Upgrade Trust Concurrent Lease

- (a) Subject to clause 4A.6 and 4A.8
  - (i) the RTA must give each M2 Upgrade Trust Concurrent Lease to the Trustee as soon as practicable after the relevant M2 Upgrade Date of Construction Completion;
  - (ii) the Trustee must execute each M2 Upgrade Trust Concurrent Lease within 15 days of receiving it; and
  - (iii) the RTA must produce the certificates of title for the relevant part of the M2 Upgrade Company Land to the LPMA when the Trustee requests it, to allow the Trustee to register the M2 Upgrade Trust Concurrent Lease.
- (b) Until the parties execute each M2 Upgrade Trust Concurrent Lease, RTA and the Trustee are bound as if each M2 Upgrade Trust Concurrent Lease had been executed on the day after the M2 Upgrade Date of Construction Completion of the relevant M2 Upgrade Stage.
- (c) The RTA must execute each M2 Upgrade Trust Concurrent Lease within five days of receiving it from the Trustee, and must return each executed M2 Upgrade Trust Concurrent Lease to the Trustee as soon as possible thereafter. The Trustee must have

each M2 Upgrade Trust Concurrent Lease stamped and registered (at the Trustee's cost).

- (d) The Trustee must give the RTA a certified copy of each registered M2 Upgrade Trust Concurrent Lease within 14 days of registration.

#### 4A.6 Surveys, leases in registrable form and plans of consolidation

- (a) RTA, the Company and the Trustee acknowledge that the Annexed M2 Upgrade Company Lease, Annexed M2 Upgrade Trust Lease, Annexed M2 Upgrade Trust Concurrent Lease and Annexed M2 Upgrade Sublease cannot be registered under the Real Property Act 1900 (NSW) in their present form.
- (b) By a date that is no later than the M2 Upgrade Date of Final Completion, the Company and the Trustee must notify the RTA of the final boundaries of the:
  - (i) Stage 1 M2 Upgrade Company Land;
  - (ii) Stage 2 M2 Upgrade Trust Land; and
  - (iii) Stage 3 M2 Upgrade Trust Land and Stage 3 M2 Upgrade Company Land.
- (c) Subject to clause 4A.6(f), the RTA must, within 18 months of the Company and the Trustee giving notice under clause 4A.6(b):
  - (i) survey the relevant part of the M2 Upgrade Land and associated strata to be the subject of the relevant M2 Upgrade Company Lease, M2 Upgrade Trust Lease and M2 Upgrade Trust Concurrent Lease in accordance with established RTA practice;
  - (ii) prepare and cause to be registered plans of consolidation or subdivision in relation to the relevant part of the M2 Upgrade Trust Land and the M2 Upgrade Company Land to reduce, to the extent practically possible, the number of titles comprising the M2 Upgrade Trust Land and the M2 Upgrade Company Land;
  - (iii) consult with the Company and the Trustee in relation to the preparation of the survey and plans of consolidation or subdivision;
  - (iv) answer all requisitions raised by the LPMA and liaise with the LPMA with a view to the plans of consolidation or subdivision being registered as expeditiously as possible; and
  - (v) give the Company and the Trustee a copy of each registered plan of consolidation or subdivision as soon as practicable after that plan is registered under the Real Property Act 1900 (NSW).
- (d) In respect of each M2 Upgrade Stage until the plans of consolidation or subdivision referred to in clause 4A.6(c) relevant to that M2 Upgrade Stage have been registered under the *Real Property Act 1900* (NSW), RTA is not required to give:
  - (i) the relevant M2 Upgrade Company Lease to the Company in accordance with clause 4A.3; or

- (ii) the relevant M2 Upgrade Trust Lease to the Trustee in accordance with clause 4A.4;
- (iii) the relevant M2 Upgrade Trust Concurrent Lease to the Trustee in accordance with clause 4A.5,

until the plans of consolidation or subdivision referred to in clause 4A.6(c) have been registered under the Real Property Act 1900 (NSW).

- (e) In respect of each M2 Upgrade Stage, subject to clause 4A.6(f), RTA must ensure that the relevant M2 Upgrade Company Lease, M2 Upgrade Trust Lease and M2 Upgrade Trust Concurrent Lease are in registrable form within 18 months of the Company's and the Trustee's notice referred to in clause 4A.6(b).
- (f) The Company and the Trustee agree that if RTA is diligently performing its obligations under clause 4A.6(c), they will grant any extension of the 18 month period referred to in clause 4A.6(c) and clause 4A.6(e) which RTA reasonably requires in order to perform its obligations under clause 4A.6(c).
- (g) RTA, the Company and the Trustee agree to do all things reasonably required to enable the M2 Upgrade Company Lease, M2 Upgrade Trust Lease and M2 Upgrade Trust Concurrent Lease to be completed and registered as expeditiously as possible.

#### 4A.7 M2 Upgrade Sublease

- (a) The Trustee and the Company are in default under this deed if they do not, within 30 days of execution of a M2 Upgrade Trust Lease, enter into a M2 Upgrade Sub-lease in respect of the land the subject of the relevant M2 Upgrade Trust Lease:
  - (i) substantially in the form of the Annexed M2 Upgrade Sub-lease; and
  - (ii) otherwise reasonably acceptable to RTA.
- (b) RTA must produce the relevant certificates of title for the relevant M2 Upgrade Trust Land to the LPMA when the Trustee and the Company request it, to allow the Trustee and the Company to register the relevant M2 Upgrade Sub-lease.
- (c) The Trustee must give the RTA a certified copy of each registered M2 Upgrade Sublease.

#### 4A.8 Consolidation

The parties agree that rather than granting separate M2 Upgrade Company Leases, M2 Upgrade Trust Leases, M2 Upgrade Concurrent Leases and M2 Upgrade Sub-leases in respect of each M2 Upgrade Stage, the Company, the Trustee and RTA may agree to consolidate:

- (a) each M2 Upgrade Company Lease into a single lease of the M2 Upgrade Company Land;
- (b) each M2 Upgrade Trust Lease into a single lease of the M2 Upgrade Trust Land;
- (c) each M2 Upgrade Trust Concurrent Lease into a single concurrent lease of the M2 Upgrade Company Land;



- (d) each M2 Upgrade Sublease into a single sublease of the M2 Motorway Trust Land;
- (e) each M2 Upgrade Company Lease and the Company Lease into a single lease of the Company Land and the M2 Upgrade Company Land;
- (f) each M2 Upgrade Trust Lease and the Trust Lease into a single lease of the Trust Land and the M2 Upgrade Trust Land;
- (g) each M2 Upgrade Trust Concurrent Lease and the Trust Concurrent Lease into a single concurrent lease of the Company Land and the M2 Upgrade Company Land; and
- (h) each M2 Upgrade Sublease and the Sublease into a single sublease for the M2 Upgrade Trust Land and the Trust Land.

## **5. ENVIRONMENTAL AND PLANNING REQUIREMENTS**

### **5.1 Environmental requirements**

- (a) The RTA must perform those obligations which the Environmental Impact Determination requires which are contained in schedule 1 to the Scope of Works and Technical Criteria.
- (b) Subject to clause 5.1(a) and clause 5.2(a), the Company and the Trustee must comply with the Environmental Impact Determination in all respects including:
  - (i) the performance of all obligations which the Environmental Impact Determination requires, whether those obligations appear as the responsibility of the RTA, the Contractor or any other party;
  - (ii) complying with clause 13.6(c) of Part 8 of the Environmental Impact Assessment Report referred to in the Environmental Impact Determination; and
  - (iii) complying with any recommendations made to the RTA as a result of the community liaison process required by the Environmental Impact Determination, with which the RTA requires the Company and the Trustee to comply,

and must indemnify the RTA for any damage, expense, loss or liability it suffers or incurs in respect of any breach of clause 5.1(b).

- (c) The Company and the Trustee must comply with the RTA's Interim Traffic Noise Policy referred to in clause 13.6(c) of Part 8 of the Environmental Impact Assessment Report referred to in the Environmental Impact Determination.
- (d) Subject to clause 5.1(e), if the RTA's Interim Traffic Noise Policy referred to in clause 5.1(c) or any Authority requirement requires the Company and the Trustee to construct noise mitigation structures other than as contemplated by clauses 13.6(c)(1) and 13.6(c)(2) of Part 8 of the Environmental Impact Determination (including the use of absorptive barriers where indicated in the background working papers to the Environmental Impact Statement North West Transport Link Pennant Hills Road to Old Windsor Road referred to in clause 1.1(b) of the Scope of Works and Technical

Criteria), the RTA must indemnify the Company and the Trustee (as applicable) for any increased cost which they incur as a result.

- (e) The RTA is not required to indemnify the Company and the Trustee under clause 5.1(d) to the extent that the construction of noise mitigation structures otherwise than as contemplated by clauses 13.6(c)(1) and 13.6(c)(2) of Part 8 of the Environmental Assessment Report referred to in the Environmental Impact Determination is due to design choices made by the Company and the Trustee as part of the design development process, including any changes to road grade or alignment from those shown in the Environmental Impact Determination.
- (f) Subject to clause 5.1(a) and clause 5.1(b), the RTA, the Company and the Trustee:
  - (i) acknowledge the importance to the Project of effective, proactive and timely community consultation; and
  - (ii) must comply with the community liaison requirements contained in the Environmental Impact Determination.

## 5.2 Environmental Impact Determination and RTA rezoning

- (a) If there is a legal challenge to:
  - (i) the Environmental Impact Determination;
  - (ii) any work carried out by the Company or the Trustee which is in accordance with the Scope of Works and Technical Criteria on the basis that that work is not in compliance with the Environmental Impact Determination; or
  - (iii) the rezoning of the areas referred to in clauses 4.5, 4.7 and 4.8 of Part 8 of the Environmental Impact Assessment Report referred to in the Environmental Impact Determination,the Company and the Trustee must continue to perform their obligations under the Project Documents unless they are:
  - (iv) ordered otherwise by a court; or
  - (v) directed otherwise by the RTA.
- (b) Subject to clause 5.2(c), the RTA must indemnify the Company and the Trustee for all damage, expense, loss or liability which they suffer or incur as a result of being ordered or directed as contemplated by clause 5.2(a).
- (c) Clause 5.2(b) does not apply to the extent that a legal challenge to the Environmental Impact Determination, the Company's or the Trustee's work is upheld due to a breach of the Project Documents by the Company or the Trustee.
- (d) The parties acknowledge that clause 2.1 does not apply to an event referred to in clause 5.2(a).

### 5.3 M2 Upgrade

Clauses 5.1 and 5.2 do not apply to the design and construction of the M2 Upgrade in accordance with the M2 Upgrade Project Deed, including M2 Upgrade Stages that have achieved M2 Upgrade Construction Completion.

### 5.4 Consents and Approvals

- (a) On and from M2 Upgrade Construction Completion of a M2 Upgrade Stage, the Company must in respect of that M2 Upgrade Stage comply with, carry out and fulfil, all conditions and requirements of the Project Approval relevant to the operation, maintenance and repair of the M2 Motorway (including those which RTA is expressed under the terms of the Project Approval to be required to comply with, carry out and fulfil) to the extent those conditions or requirements relate to that M2 Upgrade Stage.
- (b) The parties acknowledge that if, after a M2 Upgrade Stage has achieved M2 Upgrade Construction Completion:
- (i) the Project Approval is modified under the EPA Act;
  - (ii) the Minister for Planning issues a new approval in respect of the M2 Upgrade in substitution for or replacement of the Project Approval;
  - (iii) any such new approval is modified under the EPA Act; or
  - (iv) Hills Motorway is ordered by a court to cease to perform its obligations under this deed in relation to the M2 Upgrade (or to change the way it does so) as a result of a legal challenge brought about by way of legal proceedings in relation to the environmental assessment or determination in respect of the M2 Upgrade under the EPA Act (including a legal challenge to the Project Approval),

(other than as a result of a breach of the Project Approval by Hills Motorway or an application for modification or a new approval by Hills Motorway), then clauses 4.2(b) and 4.3(b) of Annexure A to the M2 Upgrade Project Deed and, to the extent applicable, clause 2.1(c)(iii) of this Deed, may apply,

- (c) If clause 4.2(b) of Annexure A applies in accordance with this clause 5.4, then for the purposes of clause 17 of Annexure A, "Material Adverse Effect" shall have the same meaning as in this Deed and for the purposes of any negotiations under clause 17.2 of Annexure A, the words after "negotiate in good faith to enable" in line 3 will be replaced with:
- "(i) the Trustee to have a substantially similar (but not materially lessened) ability to repay the Project Debt within the Payback Period substantially in accordance with the Debt Documentation; and
  - (ii) the Company and the Trustee to have a substantially similar (but not materially lessened) ability in aggregate to give the Investors (treated as if those Investors were all Notional Initial Investors) the lower of:

- (A) the Equity Return they would have received if the event or circumstances had not occurred; or
- (B) the "Base Case Equity Return",  
with capitalised terms in this insertion having the same meaning as in this deed and as if clause 1.3(g) applied."
- (d) Clause 5.4(a) does not apply to those conditions and requirements of the Project Approval which are specified in Schedule 5 to Annexure A of the M2 Upgrade Project Deed.

## **6. PROJECT DESIGN**

### **6.1 Project Design**

- (a) The Company must design the Company Road (and the related Ancillary Works):
  - (i) with the appropriate level of professional care; and
  - (ii) in accordance with the Scope of Works and Technical Criteria.
- (b) The Trustee must design the Trust Road (and the related Ancillary Works):
  - (i) with the appropriate level of professional care; and
  - (ii) in accordance with the Scope of Works and Technical Criteria.
- (c) The Company and the Trustee must promptly give the RTA Representative all technical data in respect of the design and construction of the Project including design reports, calculations, and Design Documentation progressively as they are prepared to enable the RTA Representative to monitor the progress of the design and construction of the Project.

### **6.2 Changes to the Scope of Works and Technical Criteria**

- (a) The RTA, the Company and the Trustee may change the Scope of Works and Technical Criteria by written agreement. That change may increase or decrease the scope of the previous Scope of Works and Technical Criteria.
- (b) The RTA, the Company and the Trustee acknowledge that:
  - (i) development of detailed design for the Project may present opportunities for enhancing economic, technical or social aspects of the Project;
  - (ii) the Company and the Trustee may request the RTA to agree to a change to the Scope of Works and Technical Criteria as a result of those opportunities; and
  - (iii) agreement to any change to the Scope of Works and Technical Criteria referred to in clause 6.2(b)(ii) must take into account any reasonable and necessary requirements for a public participation process and the necessity to comply with all relevant Law in respect of that change.

- (c) If the change referred to in clause 6.2(a) increases the scope of the previous Scope of Works and Technical Criteria, the RTA, the Company and the Trustee acknowledge that the cost of that change must be met by:
  - (i) an extension of the Term;
  - (ii) a payment by the RTA to either the Company or the Trustee, or both;
  - (iii) an adjustment of the rights and obligations of the RTA, the Company and the Trustee under this deed; or
  - (iv) any combination of those methods.
- (d) If the change referred to in clause 6.2(a) decreases the scope of the previous Scope of Works and Technical Criteria, the RTA, the Company and the Trustee acknowledge that they will negotiate in good faith with a view to equitably sharing any cost savings in a way which benefits the Project and the parties.
- (e) If the RTA requires the Company and the Trustee to comply with a recommendation referred to in clause 5.1(b)(iii), and that requirement is additional to the requirements of the Scope of Works and Technical Criteria, the RTA must indemnify the Company and the Trustee for their costs of complying with that recommendation.

#### **6.2A Busway conversion**

If the RTA, the Minister, the Company and the Trustee agree to convert the busway to a light rail or other transport mode as contemplated by clause 1.2(c)(iii) of the Scope of Works and Technical Criteria, they acknowledge that that agreement must include consideration of the following:

- (a) access arrangements including traffic adjustments;
- (b) Services arrangements including electricity;
- (c) alignment changes;
- (d) station locations; and
- (e) tolling arrangements and other financial issues.

#### **6.3 Proprietary Documentation**

- (a) The Company and the Trustee warrant to the RTA that they own or are entitled to use the Proprietary Documentation.
- (b) The Company and the Trustee give the RTA an irrevocable, non-exclusive licence to use any Proprietary Documentation it requires:
  - (i) for the purposes of the Project including to arrange completion of the Project if this deed is terminated; and
  - (ii) to participate in conferences in respect of the design and construction of projects similar to the Project.

- (c) The Company and the Trustee may patent any concept, product or process they:
  - (i) develop;
  - (ii) discover; or
  - (iii) first reduce to practice,in respect of the Project
- (d) The Company and the Trustee must indemnify the RTA against all damage, expense, loss or liability it suffers or incurs in respect of the use of:
  - (i) the Proprietary Documentation; or
  - (ii) any concept, product or process referred to in clause 6.3(c),for the purposes of the Project.
- (e) The RTA must indemnify the Company and the Trustee against all damage, expense, loss or liability they suffer or incur in respect of the RTA's use of the Proprietary Documentation otherwise than in accordance with clause 6.3(b).

#### 6.4 M2 Upgrade

This clause 6 does not apply to the design and construction of the M2 Upgrade.

### 7. CONSTRUCTION

#### 7.1 Construction

- (a) The Company must construct the Company Road (and related Ancillary Works):
  - (i) with good workmanship and materials; and
  - (ii) in accordance with:
    - (A) the Scope of Works and Technical Criteria; and
    - (B) the Design Documentation.
- (b) The Trustee must construct the Trust Road (and related Ancillary Works):
  - (i) with good workmanship and materials; and
  - (ii) in accordance with:
    - (A) the Scope of Works and Technical Criteria; and
    - (B) the Design Documentation.
- (c) If an Authority claims payment from the Company or the Trustee for any work the Authority has done on the Premises:

- (i) at the request of the RTA or another person other than the Company or the Trustee; and
  - (ii) before 26 August 1994,
- the RTA must:
- (iii) promptly pay that Authority; and
  - (iv) indemnify the Company and the Trustee against any claims that Authority makes in respect of that work.
- (d) The Company, no later than six months after the M2 Motorway Commencement Date, must give the RTA Representative a complete set of as constructed drawings in relation to the Company Road.
  - (e) The Trustee, no later than six months after the M2 Motorway Commencement Date, must give the RTA Representative a complete set of as constructed drawings in relation to the Trust Road.

## 7.2 Project Program

- (a) Within three months after 26 August 1994, the Company and the Trustee must give the RTA Representative a Project Program showing in reasonable detail the activities, their sequences and duration planned to achieve the M2 Motorway Commencement Date by 1 December 1997.
- (b) If the Company or the Trustee amends the Project Program they must give the amendments to the RTA Representative showing in reasonable detail the amendments to the activities, sequences and durations.

## 7.3 Construction reports

Until the M2 Motorway Commencement Date, the Company and the Trustee must give the RTA Representative, at least every month:

- (a) a report on the progress of the Project, with a comparison to the progress projected in the Project Program;
- (b) the quality assurance reports required by the quality assurance system adopted by the Company and the Trustee in accordance with the Scope of Works and Technical Criteria; and
- (c) a report on the progress of any work undertaken by an Authority for the purposes of relocation of Services in connection with the Project.

## 7.4 Surveys and certificates

- (a) Within 180 days of the M2 Motorway Commencement Date, the Company and the Trustee must give the RTA:
  - (i) a detailed survey from a registered surveyor of the work carried out by the Company and the Trustee on the Premises (not including temporary works); and

- (ii) a certificate from a suitably qualified engineer agreed between the parties that the Project has been completed in accordance with relevant Law.
- (b) The survey referred to in clause 7.4(a)(i) must:
  - (i) show the location of the M2 Motorway and the Ancillary Works; and
  - (ii) certify and show that the completed work is located in accordance with the Design Documentation.
- (c) If the survey referred to in clause 7.4(a)(i) shows that any work in respect of the Company Road is not located in accordance with the Scope of Works and Technical Criteria and:
  - (i) that work is not in accordance with relevant Authority requirements; or
  - (ii) the RTA reasonably considers that relocation of the work is necessary for safety reasons; or
  - (iii) the parties, after good faith discussions, agree that relocation of the work is otherwise appropriate or desirable,

the Company must make any alteration the RTA reasonably requires to locate the work in respect of the Company Road in accordance with the Scope of Works and Technical Criteria, or in another agreed location.

- (d) If the survey referred to in clause 7.4(a)(i) shows that any work in respect of the Trust Road is not located in accordance with the Scope of Works and Technical Criteria and:
  - (i) that work is not in accordance with relevant Authority requirements; or
  - (ii) the RTA reasonably considers that relocation of the work is necessary for safety reasons; or
  - (iii) the parties, after good faith discussions, agree that relocation of the work is otherwise appropriate or desirable,

the Trustee must make any alteration the RTA reasonably requires to locate the work in respect of the Trust Road in accordance with the Scope of Works and Technical Criteria, or in another agreed location.

#### **7.5 RTA's right to enter and inspect**

The RTA may enter and inspect the Premises at any time, but must not cause unnecessary inconvenience to the Company, the Trustee or M2 Motorway users.

#### **7.6 M2 Motorway commencement**

The Company and the Trustee must use their best endeavours to ensure that the M2 Motorway Commencement Date is on or before 1 December 1997.



## 7.7 Contracts

The Company and the Trustee must notify the RTA Representative of, and if the RTA Representative requires it, give the RTA Representative:

- (a) access to any proposed or executed contract in respect of the Project with a contract sum of more than \$50,000 (including all plans, specifications and drawings relating to that contract); and
- (b) a copy of any proposed or executed contract in respect of the Project with a contract sum of more than \$10,000,000 (including all plans, specifications and drawings related to that contract).

## 7.8 Traffic diversion and control

- (a) If the Company or the Trustee reasonably considers that it must interfere with traffic flow on existing roadways in order to perform Project work, it must:
  - (i) give the RTA details of the arrangements it proposes;
  - (ii) obtain the RTA's approval in respect of those arrangements; and
  - (iii) give the public sufficient notice of those arrangements.
- (b) Subject to clause 7.8(a), the Company and the Trustee (or their contractors) must, as agent of the RTA, make all arrangements to modify the traffic flow and to divert and control traffic while the work referred to in clause 7.8(a) is being performed.
- (c) The RTA must use its reasonable endeavours to assist the Company or the Trustee in respect of the arrangements referred to in clause 7.8(b), including liaising with relevant Authorities.

## 7.9 Explosives

The Company and the Trustee must not use explosives or blasting material in the construction of the M2 Motorway unless:

- (a) they obtain the prior written consent of all relevant Authorities and the RTA; and
- (b) they ensure that the use of explosives or blasting material is carried out in accordance with any Authority consents.

## 7.10 Staged opening

- (a) The Company may open a stage of the M2 Motorway to the public for the continuous passage of vehicles before the M2 Motorway Commencement Date if:
  - (i) Completion of that stage has occurred;
  - (ii) the Company gives the RTA sufficient notice of its intention to open that stage to allow the RTA to notify the public; and

- (iii) it obtains the RTA's prior written consent, including approval of:
  - (A) any tolls to be charged in respect of that stage; and
  - (B) insurances which the Company and the Trustee must effect before opening that stage.
- (b) In deciding whether to give its consent under clause 7.10(a)(iii), the RTA may take any relevant factors into account, including traffic management, community relations and public safety issues.
- (c) For the avoidance of doubt, this clause 7.10 does not apply to the M2 Upgrade.

#### **7.11 Ownership of Plant**

The RTA and the Minister acknowledge that, as between the parties to this deed, the Company and the Trustee own the Plant until the end of the Term.

#### **7.12 Pennant Hills Road interchange**

- (a) The Company and the Trustee acknowledge that:
  - (i) the RTA will design and construct certain works on Pennant Hills Road at its interchange with the M2 Motorway, as contemplated by the Scope of Works and Technical Criteria; and
  - (ii) they must complete design work in respect of the M2 Motorway at the Pennant Hills Road interchange before the RTA can design and construct the work referred to in clause 7.12(a)(i).
- (b) The Company, the Trustee and the RTA must co-operate to ensure that their work is integrated to the greatest extent possible (including, for example, consideration of balancing earthworks requirements) and:
  - (i) the Company and the Trustee must give the RTA sufficient access to the Land, the M2 Motorway and the Ancillary Works to allow the RTA to carry out the work referred to in clause 7.12(a)(i); and
  - (ii) the RTA, the Company and the Trustee must co-ordinate their respective work to facilitate timely completion of the M2 Motorway and the work which the RTA is required to carry out as referred to in clause 7.12(a)(i).

#### **7.13 Quality**

The Company and the Trustee must prepare and implement a quality system for the Project in accordance with the requirements of the Scope of Works and Technical Criteria.

#### **7.14 RTA indemnity**

The RTA must indemnify the Company and the Trustee against any damage, expense, loss or liability they suffer or incur in respect of:

- (a) the occurrence or discovery of:

- (i) land contamination;
- (ii) Aboriginal or European heritage; or
- (iii) endangered fauna,

on the Land, the Licensed Areas or the land referred to in clause 3.2(c) or clause 3.3(e); or

- (b) a failure of a Determining Authority to assess a Project activity under Part 5 of the EPA Act,

which causes the M2 Motorway Commencement Date to occur after 30 December 1997, despite the Company, the Trustee and their contractors taking all reasonable measures (including acceleration measures) to achieve the M2 Motorway Commencement Date by 30 December 1997.

#### 7.15 M2 Upgrade

This clause 0 (other than clauses 7.5 and 7.11), does not apply to the design and construction of the M2 Upgrade.

### 8. OPERATION

#### 8.1 General

During the Term, the Company must operate the M2 Motorway in accordance with the Scope of Works and Technical Criteria and the manual referred to in clause 8.2.

#### 8.2 Operation, maintenance and repair manual

Before the M2 Motorway Commencement Date, the Company must prepare and give to the RTA an operation, maintenance and repair manual:

- (a) in accordance with the Scope of Works and Technical Criteria;
- (b) otherwise reasonably acceptable to the RTA;
- (c) the parties acknowledge and agree that the operation, maintenance and repair manual referred to in clause 8.2(a) will, from the date of M2 Upgrade Final Completion, be deemed to include the Maintenance Manual (as defined in and approved for the purposes of the M2 Upgrade Project Deed).

#### 8.3 The Company to keep M2 Motorway open

During the Term, the Company must keep the M2 Motorway open to the public for the continuous passage of vehicles unless:

- (a) the RTA agrees otherwise in writing;
- (b) it is necessary to close the M2 Motorway because of:
  - (i) the requirements of any relevant Authority;

- (ii) a Force Majeure Event; or
- (iii) a material threat to the health or safety of M2 Motorway users; or
- (c) it is necessary to close all or any part of the M2 Motorway as a result of or in connection with:
  - (i) the design and construction of the M2 Upgrade in accordance with the M2 Upgrade Documents;
  - (ii) the remedy of an M2 Upgrade Event of Default (or overcoming its effects) in accordance with the M2 Upgrade Project Deed;
  - (iii) to comply with a direction by RTA or other obligation under the M2 Upgrade Project Deed, or to enable RTA to take any action in connection with the exercise by RTA of its step-in rights; or
  - (iv) the reinstatement of the M2 Motorway in accordance with the M2 Upgrade Project Deed.

#### **8.4 Toll calculation and collection**

- (a) Subject to clause 8.4(b) and clause 8.4(c), the Company may levy a toll on M2 Motorway users from the M2 Motorway Commencement Date.
- (b) Except in the case of an emergency, the Company must collect tolls only:
  - (i) at the toll plazas erected at the places specified in the Scope of Works and Technical Criteria; or
  - (ii) at any other place which the RTA and the Company agree upon in writing.
- (c) The Company must levy the toll in accordance with the Toll Calculation Schedule.

#### **8.5 Use of defective facilities**

The Company must not allow members of the public access to the Premises if the Company is aware that there is any material threat to their health or safety.

#### **8.6 Use of Signs**

- (a) The Company must erect or display Signs on the Premises in accordance with the Scope of Works and Technical Criteria and may erect or display other Signs on the Premises with the RTA's prior written approval.
- (b) In deciding whether to approve a Sign, the RTA may consider:
  - (i) the safety and aesthetic features of the Sign; and
  - (ii) any RTA, New South Wales Government or Authority policies with respect to Signs, including the RTA Draft Policy and Guidelines "Advertising in the Road Reserve" dated July 1992.

- (c) Before the Company vacates the Premises under the Company Lease, the Sublease, each M2 Upgrade Company Lease, each M2 Upgrade Sublease or this deed it must:
  - (i) remove all Signs erected or displayed on the Premises; and
  - (ii) make good any damage caused by those Signs,as reasonably required by the RTA.
- (d) Subject to the other provisions of clause 8.6 and the M2 Upgrade Project Deed, the Company may display Signs at or near the toll plaza which deal with the design, construction and operation of the M2 Motorway or the M2 Upgrade.
- (e) The RTA must erect or display Signs at locations other than on the Premises which are agreed between the parties.

#### 8.7 Service centre

- (a) The Company may construct service centres (serving eastbound or westbound users of the M2 Motorway or both) on the Land, or land adjacent to the Land, with the RTA's prior written consent which may be subject to conditions.
- (b) In deciding whether to give its consent to a service centre, the RTA may take any relevant factor into account including:
  - (i) RTA, Authority and New South Wales Government policies in respect of service centres; and
  - (ii) any concession which the Company proposes to grant in respect of the service centre, including:
    - (A) the type and range of services which the service centre will offer; and
    - (B) the accessibility of the service centre to eastbound or westbound users (or both) of the M2 Motorway;
  - (iii) the effect of the service centre on the Company's ability to comply with the Project Documents and M2 Upgrade Documents;
  - (iv) the contractual arrangements the Company proposes, including the extent to which they are an arm's-length commercial transaction;
  - (v) the consideration in respect of the transaction;
  - (vi) the identity and nature of any proposed:
    - (A) sub-lessee of the Land;
    - (B) lessee of the adjacent land; or
    - (C) operator of the service centre,including their financial and commercial standing, reputation and expertise;

- (vii) the design and aesthetics of the service centre;
- (viii) the proposed construction of the service centre including the standard of workmanship and materials;
- (ix) any reporting and accounting obligations the Company proposes in respect of the service centre; and
- (x) the Company's compliance with Law in respect of the service centre.

#### **8.8 Notification of disorderly conduct and unlawful acts**

The Company must promptly notify all relevant Authorities (including police, fire, ambulance and any other emergency services) of any:

- (a) riotous, disorderly, offensive or improper conduct; or
- (b) unlawful act,

on the Premises of which it is aware, and which is of a nature which would usually be reported to those Authorities.

#### **8.9 Plant manuals**

At the end of the Term, the Company must give the RTA all manuals in respect of the Plant.

### **9. MAINTENANCE AND REPAIR**

#### **9.1 Maintenance, repair and surrender of M2 Motorway**

- (a) During the Term, the Company must maintain and repair the M2 Motorway and the Ancillary Works in accordance with the Scope of Works and Technical Criteria and the manual referred to in clause 8.2.
- (b) At the end of the Term, the Company and the Trustee must surrender the M2 Motorway and the Ancillary Works to the RTA in a condition which is consistent with the Company's obligation to maintain and repair them in accordance with this deed.

#### **9.2 Reports**

- (a) Every six months during the Term, the Company must give the RTA a report of all maintenance and repairs carried out on the M2 Motorway and the Ancillary Works during the previous six month period, with details of the procedures and materials used.
- (b) If a report referred to in clause 9.2(a) is submitted to RTA during the 6 month period immediately following the M2 Upgrade Date of Final Completion, the report must include details of all maintenance and repairs carried out on that part of the M2 Motorway that comprises the M2 Upgrade between the M2 Upgrade Date of Final Completion and the date of the report.

**9.3 Inspection**

The Company must inspect the M2 Motorway and the Ancillary Works at least once a month to determine their state of repair.

**9.4 Notice of damage and accidents**

During the Term, the Company must promptly give the RTA a detailed written report of:

- (a) any material damage to or defect or disrepair in the Premises of which it is aware;
- (b) the action the Company proposes to take to correct that material damage, defect or disrepair, and the estimated time that correction will require; and
- (c) any accidents involving material damage or injury which occur on the Premises of which it is aware.

**9.5 Directions by the RTA**

- (a) Subject to this deed, during the Term the RTA may reasonably direct the Company to correct any material damage to or defect or disrepair in the Premises.
- (b) The Company must:
  - (i) comply with that direction within a reasonable time; and
  - (ii) give the RTA a written report of the steps the Company takes to comply with that direction.
- (c) At any time after the Satisfaction Date and up to and including the M2 Upgrade Date of Final Completion, the RTA may not exercise its power pursuant to clause 9.5(a) in respect of any M2 Upgrade Stage which at the relevant time has not achieved M2 Upgrade Construction Completion if the exercise of that power is in a manner inconsistent with the Hills Motorway Parties' rights or obligations pursuant to the M2 Upgrade Documents.

**9.6 RTA may perform obligations**

- (a) If the RTA considers that there is a threat to the safety of M2 Motorway users or other members of the public it may take any action it considers appropriate, after giving the Company:
  - (i) written notice; and
  - (ii) a reasonable period of time in which to deal with the threat (having regard to the nature of the threat).
- (b) The Company must indemnify the RTA against any damage, expense, loss, or liability it reasonably suffers or incurs in respect of the exercise of its rights under clause 9.6, unless that damage, expense, loss or liability arises from the negligence or wilful default of the RTA or its contractors.
- (c) The Company and the Trustee acknowledge that the RTA may enter and remain on the Land while it is exercising its rights under clause 9.6.

**9.7 Rates**

Subject to clause 2.16, clause 17.5 and clause 17.6, the Company must pay all Rates in respect of the Premises.

**9.8 Maintenance and repair budget**

The Company must give the RTA a statement of:

(a) anticipated periodic maintenance; and

(b) capital works expenditures,

to be incurred in the succeeding 12 month period,

(c) at the beginning of each financial year (at the Company's cost); and

(d) at any other time the RTA reasonably requests one (at the RTA's cost).

**9.9 Maintenance and Repairs Accrual Account**

(a) The Company must, by the M2 Motorway Commencement Date:

(i) establish the Maintenance and Repairs Accrual Account with either Westpac Banking Corporation, Commonwealth Bank of Australia Limited, National Australia Bank Limited, or another financial institution approved by the RTA;

(ii) give details of that account to the RTA; and

(iii) notify Westpac Banking Corporation, Commonwealth Bank of Australia Limited or National Australia Bank Limited (or the other financial institution approved under clause 9.9(a)(i)), as the case may be, of the charge over the Maintenance and Repairs Accrual Account in accordance with the Deed of Charge.

(b) The balance of the Maintenance and Repairs Accrual Account must at all times be sufficient to fund periodic maintenance and capital works expenditure including:

(i) significant maintenance expenditure (including pavement resurfacing or rejuvenation);

(ii) upgrading of the capacity of the toll plaza;

(iii) other capital equipment replacement costs; and

(iv) maintenance expenditure,

budgeted to be incurred in the next 12 month period, so that the M2 Motorway and Ancillary Works maintenance does not fall below the standard specified in the Scope of Works and Technical Criteria.



## 9.10 M2 Upgrade

The parties agree that references to periodic maintenance and capital work expenditures in clauses 9.8 and 9.9 do not include the design and construction of the M2 Upgrade or related capital works expenditure.

## 10. RISK OF LOSS OR DAMAGE AND INSURANCE

### 10.1 Responsibility for care of the Premises

- (a) From 26 August 1994 until the end of the Term, the Company and the Trustee are responsible for the care of the Premises.
- (b) Subject to clause 2.1 and clause 10.1(c), the Company and the Trustee must (at their cost) promptly make good loss or damage to the Premises while they are responsible for their care.
- (c) Clause 10.1(b) does not apply to loss or damage which is a direct consequence (without fault or omission on the part of the Company, the Trustee or their contractors) of any negligent act or omission of the RTA.
- (d) The parties agree that:
  - (i) clauses 10.1(b) and 10.7 do not apply to loss, damage or destruction of a M2 Upgrade Stage prior to that M2 Upgrade Stage achieving M2 Upgrade Construction Completion; and
  - (ii) subject to clause 10.1(e), if prior to the M2 Upgrade Date of Final Completion there is loss, damage or destruction which affects both the M2 Motorway and a M2 Upgrade Stage prior to that M2 Upgrade Stage achieving M2 Upgrade Construction Completion, it is acknowledged that while the M2 Upgrade Project Deed remains in force, the making good of loss or damage or the repair or reinstatement of both the M2 Motorway and the M2 Upgrade Stage is linked and will need to be coordinated.
- (e) The parties acknowledge that, subject to the Deed of Consent, if there is loss, damage or destruction of a M2 Upgrade Stage that has not achieved M2 Upgrade Construction Completion, all insurance proceeds received in respect of that loss, damage or destruction under the insurances effected under the M2 Upgrade Project Deed will be applied in accordance with the M2 Upgrade Project Deed.

### 10.2 Insurance policies

- (a) Before commencing construction of the M2 Motorway, the Company and the Trustee must effect:
  - (i) insurance:
    - (A) of the M2 Motorway, the Ancillary Works and all things (including plant) brought on to the Premises by the Company, the Trustee or their contractors for the purpose of the Project (unless otherwise insured);

- (B) against loss, damage or destruction and other insurable risks to the reasonable satisfaction of the RTA including loss, damage or destruction by earthquake, fire, lightning, storm and tempest; and
- (C) for at least \$442,000,000;
- (ii) public liability insurance:
  - (A) covering claims in respect of:
    - (I) damage to any real or personal property; and
    - (II) the injury to, or death of, any person,  
in respect of the Project and use of the Premises; and
  - (B) for at least \$50,000,000; and
  - (C) including a cross-liability clause:
    - (I) in which the insurer agrees to waive all rights of subrogation or action that it may have or acquire against the insured parties; and
    - (II) for the purpose of which the insurer accepts the term insured as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject to the overall sum insured not being increased as a result);
- (iii) insurance against any common law or statutory liability for workers' compensation;
- (iv) professional indemnity insurance:
  - (A) for any breach of a duty owed in a professional capacity by the Company, the Trustee, their contractors and sub-contractors;
  - (B) in the joint names of the Company, its contractors and their consultants; and
  - (C) for at least \$25,000,000;
- (v) motor vehicle insurance including coverage against third party property damage:
  - (A) for all plant and vehicles used in respect of the Project or the use of the Premises; and
  - (B) for at least \$5,000,000; and
- (vi) any other insurances which the RTA reasonably requires and which are commonly effected by land owners, lessees or contractors in the position of the Trustee and the Company provided those insurances can be obtained on payment of a reasonable premium.

- (vii) This clause 10.2 does not apply to the design and construction of the M2 Upgrade.
- (b) By the M2 Motorway Commencement Date, the Company and the Trustee must effect:
  - (i) insurance:
    - (A) of the M2 Motorway and the Ancillary Works;
    - (B) against loss, damage or destruction and other insurable risks to the reasonable satisfaction of the RTA including loss, damage or destruction by earthquake, fire, lightning, storm and tempest; and
    - (C) for the reinstatement cost of the M2 Motorway and the Ancillary Works;
  - (ii) public liability insurance:
    - (A) covering claims in respect of:
      - (I) damage to any real or personal property; and
      - (II) the injury to, or death of, any person,in respect of the Project or use of the Premises;
    - (B) for at least \$100,000,000; and
    - (C) including a cross-liability clause:
      - (I) in which the insurer agrees to waive all rights of subrogation or action that it may have or acquire against the insured parties; and
      - (II) for the purpose of which the insurer accepts the term insured as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject to the overall sum insured not being increased as a result);
  - (iii) insurance against any common law or statutory liability for workers' compensation;
  - (iv) motor vehicle insurance including coverage against third party property damage:
    - (A) for all plant and vehicles used in respect of the Project or the use of the Premises; and
    - (B) for at least \$5,000,000; and
  - (v) any other insurances which the RTA reasonably requires and which are commonly effected by land owners, lessees or contractors in the position of

the Trustee and the Company, provided those insurances can be obtained on payment of a reasonable premium.

### 10.3 Insurance generally

- (a) All insurances which the Company or the Trustee effect under this deed:
- (i) must be effected with insurers approved by the RTA;
  - (ii) must be on terms approved by the RTA;
  - (iii) must not contain any exclusion, endorsement or alteration unless it is first approved in writing by the RTA;
  - (iv) except for the insurances specified in clause 10.2(a)(iii), clause 10.2(a)(iv), clause 10.2(a)(v), clause 10.2(b)(iii) and clause 10.2(b)(iv) must be in the joint names of the RTA, the Company and the Trustee and must identify their respective rights and interests;
  - (v) must contain a term which requires the insurer to notify the RTA in writing whenever the insurer gives the Company or the Trustee a notice of cancellation or any other notice in respect of the policy;
  - (vi) must, before the Project Debt Repayment Date, specify the Security Trustee as the loss payee; and
  - (vii) must, after the Project Debt Repayment Date, specify the Company, the Trustee and the RTA as joint loss payees.
- (b) The Company and the Trustee must:
- (i) give the RTA Representative acceptable proof of currency and coverage of the insurances referred to in clause 10.2(a) before commencing construction of the M2 Motorway;
  - (ii) give the RTA Representative certified copies of all:
    - (A) policies;
    - (B) renewal certificates; and
    - (C) endorsement slips,as soon as they receive them; and
  - (iii) use reasonable endeavours (including paying any reasonable premium) to have each policy endorsed to the effect that the insurer waives its right to avoid the policy or any liability under the policy by reason of non-disclosure or inaccurate disclosure in the proposal relating to that policy.

### 10.4 Periods of insurance

The Company and the Trustee must maintain:

- (a) the insurances referred to in clause 10.2(a)(i), clause 10.2(a)(ii), clause 10.2(a)(iii) and clause 10.2(a)(v) until the M2 Motorway Commencement Date;
- (b) the insurance referred to in clause 10.2(a)(iv) until the third anniversary of the M2 Motorway Commencement Date; and
- (c) the insurances referred to in clause 10.2(b) from the M2 Motorway Commencement Date until the end of the Term.

#### 10.5 Premiums

The Company and the Trustee must punctually pay all premiums in respect of all insurance policies referred to in clause 10.

#### 10.6 M2 Motorway Trust Account

- (a) The M2 Motorway Trust Account must be:
  - (i) established with Commonwealth Bank of Australia Limited, National Australia Bank Limited or another financial institution agreed between the Company, the Trustee and the RTA;
  - (ii) an interest bearing account;
  - (iii) before the Project Debt Repayment Date, in the name of the Security Trustee; and
  - (iv) after the Project Debt Repayment Debt, in the joint names of the Company, the Trustee and the RTA.
- (b) The Company and the Trustee acknowledge that the Security Trustee may only make payments out of the M2 Motorway Trust Account with the RTA's approval in accordance with the Deed of Consent.
- (c) Subject to clause 10.6(d), the Company, the Trustee and the RTA must deposit any amount they receive, under any insurance policy referred to in clause 10.2 into the M2 Motorway Trust Account.
- (d) Any amounts less than \$250,000 (two hundred fifty thousand dollars) (in 1 July 1994 dollars indexed annually by any increase in the CPI) received in respect of damage to the M2 Motorway under an insurance policy referred to in clause 10.2:
  - (i) are not required to be deposited into the M2 Motorway Trust Account; and
  - (ii) must be applied to the repair or reinstatement of the M2 Motorway.

#### 10.7 Reinstatement

- (a) If the M2 Motorway is damaged or destroyed, the Company and the Trustee must:
  - (i) take immediate steps to clear any debris and begin initial repair work;
  - (ii) promptly consult with the RTA to agree on steps to be taken to ensure:

- (A) the prompt repair or replacement of the M2 Motorway:
  - (I) to ensure that it complies with the Scope of Works and Technical Criteria; and
  - (II) with minimal disruption to the M2 Motorway as the principal arterial road servicing the Northwest Regions of Sydney; and
- (B) that, to the greatest extent possible, the Company and the Trustee continue to comply with their obligations under the Project Documents; and
- (iii) manage all repair and replacement activities to ensure that they minimise the impact on the free flow of traffic on the M2 Motorway.
- (b) The Company and the Trustee acknowledge that they must comply with clause 10.7(a) even if the parties have entered into good faith negotiation in respect of the damage or destruction of the M2 Motorway in accordance with clause 2.1.

#### **10.8 Application of insurance proceeds**

Subject to the Deed of Consent, if the M2 Motorway is damaged or destroyed:

- (a) all insurance proceeds in respect of that damage or destruction must be applied to repair or reinstate the M2 Motorway; and
- (b) if the insurance proceeds received under the insurances referred to in clause 10.2 in respect of that damage or destruction exceed the cost of repairing or replacing the M2 Motorway, the resultant credit balance of the M2 Motorway Trust Account must first be applied to repay the Project Debt, and if a credit balance remains after the Project Debt is repaid, the RTA, the Company and the Trustee must negotiate in good faith to agree an equitable distribution of that credit balance.

#### **10.9 Reinstatement of M2 Upgrade**

The parties acknowledge that the Company's and the Trustee's obligations under clauses 10.1(b) and 10.7 do not apply to an M2 Upgrade Stage which has achieved M2 Upgrade Construction Completion to the extent the Company or the Trustee are carrying out Company's Work on or in connection with that M2 Upgrade Stage after the relevant M2 Upgrade Date of Construction Completion.

### **11. INDEMNITIES**

#### **11.1 Release and responsibility for the Land**

- (a) The Company and the Trustee release the RTA from all claims and demands which result from any accident, damage or injury occurring on the Premises, except where the accident, damage or injury is caused or contributed to by the RTA's negligence or wilful default, or breach by the RTA of any of its obligations under the Project Documents.

- (b) The Company and the Trustee have the same responsibilities in respect of persons, property and all other aspects of the Project which they would have if they held the freehold in possession of the Land.

## 11.2 Indemnity by Company

The Company and the Trustee must indemnify the RTA against all damage, expense, loss or liability it suffers or incurs in respect of:

- (a) the Company's or the Trustee's negligent or wasteful use of Services on the Premises;
- (b) failure to control any overflow or leakage of water (including rain water) on or from the Premises which could have been prevented, overcome or remedied by the exercise by the Company, the Trustee or their contractors of a standard of care and due diligence consistent with that of a prudent and competent owner, operator or maintainer of a motorway such as the M2 Motorway, including the expenditure of all reasonable sums of money;
- (c) any loss, injury or damage to persons or property of any nature on the Premises, which is not caused by the wilful default or negligence of the RTA; and
- (d) any breach by the RTA of the Company Lease which is a result of a breach by the Trustee of the Trust Concurrent Lease,

except to the extent that the Company or the Trustee are required to indemnify RTA under the M2 Upgrade Project Deed in respect of such damage, expense, loss or liability.

## 11.3 Survival of indemnities

The indemnities in this deed survive termination of this deed.

## 12. ASSIGNMENT OR MORTGAGE

### 12.1 General intention

- (a) The RTA, the Company and the Trustee acknowledge that in the documentation structure adopted for the Project:
  - (i) the majority of the Company's and the Trustee's substantive obligations requiring:
    - (A) the Company to finance, design and construct the Company Road and operate, maintain and repair the M2 Motorway; and
    - (B) the Trustee to finance, design and construct the Trust Road,are included in this deed, including obligations which would normally appear in the lease documentation; and
  - (ii) the Company Lease, Trust Lease, Trust Concurrent Lease, each M2 Upgrade Company Lease, each M2 Upgrade Trust Lease, and each M2 Upgrade Trust Concurrent Lease are essentially documents of title.

- (b) As a result of this documentation structure, the RTA, the Company and the Trustee acknowledge that they:
  - (i) will not deal with their interests under this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the Sublease, each M2 Upgrade Company Lease, each M2 Upgrade Trust Lease, each M2 Upgrade Trust Concurrent Lease and the M2 Upgrade Sublease separately; and
  - (ii) must ensure that any dealings with their interests in this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the Sublease, each M2 Upgrade Company Lease, each M2 Upgrade Trust Lease, each M2 Upgrade Trust Concurrent Lease and the M2 Upgrade Sublease occur:
    - (A) at the same time;
    - (B) on substantially the same terms; and
    - (C) with the same parties.
- (c) The Company and the Trustee acknowledge that the RTA will consider their compliance with clause 12.1(a) and clause 12.1(b) in deciding whether to give its consent under clause 12.2 or clause 12.3.

## 12.2 Assignment by the Company or the Trustee

- (a) Subject to clause 12.3, neither the Company nor the Trustee may:
  - (i) assign, novate or otherwise deal with its interest in, or obligations under, this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the Sublease, each M2 Upgrade Company Lease, each M2 Upgrade Trust Lease, each M2 Upgrade Trust Concurrent Lease or the M2 Upgrade Sublease; or
  - (ii) sub-lease or licence the Premises,before the M2 Motorway Commencement Date and may only do so after the M2 Motorway Commencement Date with the RTA's prior written consent.
- (b) The Company and the Trustee must give the RTA a certified copy of any agreement under which it assigns or deals with its interest in, or its obligations under, this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the Sublease, each M2 Upgrade Company Lease, the M2 Upgrade Trust Lease, each M2 Upgrade Trust Concurrent Lease or the M2 Upgrade Sublease.

## 12.3 Mortgages

- (a) Subject to clause 12.3(b) the Company and the Trustee may give Security Interests over their interests in this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the Sublease, each M2 Upgrade Company Lease, each M2 Upgrade Trust Lease, each M2 Upgrade Trust Concurrent Lease and the M2 Upgrade Sublease to secure their obligations to any person in respect of the Project Debt.



- (b) Before the Company and the Trustee give Security Interests under clause 12.3(a), they, the person taking the Security Interests and the RTA must enter into a deed of consent on substantially the same terms as the Deed of Consent as at 26 August 1994.

#### 12.4 Proposed listing of Trust

Clause 12 does not restrict:

- (a) the proposed listing of units in the Trust on the Australian Stock Exchange; or
- (b) the transfer of units in the Trust in accordance with Law.

#### 12.5 Proposed listing of Company

Clause 12 does not restrict:

- (a) the proposed listing of shares in the Company on the Australian Stock Exchange; or
- (b) the transfer of shares in the Company in accordance with Law.

### 13. SECURITY FOR PERFORMANCE

#### 13.1 Security from the Company

The Company must give the RTA, as security for the performance of its obligations under this deed, the Company Lease and each M2 Upgrade Company Lease, a charge over all its assets in the form of the Deed of Charge which:

- (a) before the Project Debt Repayment Date, has priority as a second ranking security; and
- (b) after the Project Debt Repayment Date, has priority as a first ranking security.

#### 13.2 Security from Trustee

The Trustee must give the RTA, as security for the performance of its obligations under this deed, the Trust Lease, the Trust Concurrent Lease, each M2 Upgrade Trust Lease and each M2 Upgrade Trust Concurrent Lease a charge over all of the Trust assets in the form of the Deed of Charge which:

- (a) before the Project Debt Repayment Date, has priority as a second ranking security; and
- (b) after the Project Debt Repayment Date, has priority as a first ranking security.

### 14. REMEDY NOTICE AND TERMINATION

#### 14.1 Remedy notice

- (a) If the Company or the Trustee:
  - (i) is in default under the Project Documents; or
  - (ii) breaches a warranty which it gives to the RTA under this deed,

the RTA may give the Company and the Trustee a notice requiring them to rectify that default or remedy that breach of warranty (or overcome their effects) within a reasonable time specified in the notice.

- (b) The parties agree that if the relevant default is a failure to pay money, a reasonable time in which to rectify that default is 14 days.
- (c) If the RTA gives the Company and the Trustee a notice referred to in clause 14.1(a):
  - (i) subject to clause 14.4(e), the Company and the Trustee must comply with the notice; and
  - (ii) unless urgent action is necessary or the relevant default under the Project Documents is a failure to pay money:
    - (A) the Company and the Trustee must give the RTA a program to rectify the relevant default or remedy the breach of warranty in accordance with the terms of the RTA's notice; and
    - (B) the RTA must consult with the Company and the Trustee in good faith to develop and settle that program.
- (d) If the Company and the Trustee fail to rectify a default or remedy a breach of warranty (or overcome their effects) in accordance with the terms of a notice referred to in clause 14.1(a) or if urgent action is necessary:
  - (i) the RTA may take any action it considers appropriate to:
    - (A) rectify that default;
    - (B) remedy that breach of warranty; or
    - (C) take that urgent action,and may enter and remain on the Land to do so; and
  - (ii) the Company and the Trustee must indemnify the RTA against any damage, expense, loss or liability it reasonably suffers or incurs in respect of that action, unless that damage, expense, loss or liability arises from the negligence or wilful default of the RTA or its contractors.
- (e) If, at any time (even if the Company and the Trustee have previously given the RTA a notice under clause 14.1(e)(i)), the Company and the Trustee consider, in good faith, that the time specified in a notice referred to in clause 14.1(a) is not reasonable:
  - (i) they must immediately give the RTA written notice of that fact, including details of their reasons; and
  - (ii) subject to clause 14.1(f), the RTA must, as soon as practicable after receiving a notice under clause 14.1(e)(i), review the time specified in the notice under clause 14.1(a) and notify the Company and the Trustee whether the RTA will vary the original time specified, and if so, what the revised time is.
- (f) If the Company and the Trustee:

- (i) give the RTA a notice referred to in clause 14.1(e); and
- (ii) are diligently pursuing the program referred to in clause 14.1(c)(ii),

the RTA must reasonably extend the time specified in the RTA's notice under clause 14.1(a).

- (g) If the Company and the Trustee consider, in good faith, that the time specified in a notice referred to in clause 14.1(e)(ii) is not reasonable, they may refer the matter to expert determination in accordance with clause 15.2.

#### 14.2 Events of Default

Subject to clause 14.3, the RTA may terminate this deed by giving the Company and the Trustee 30 days' written notice if:

- (a) it is entitled to do so at general law, after it has given the Trustee and the Company a notice under clause 14.1 and the Trustee and the Company have not complied with that notice; or
- (b) the Company or the Trustee commits a substantial breach of the Company Lease, the Trust Lease, the Trust Concurrent Lease, any M2 Upgrade Company Lease, any M2 Upgrade Trust Lease or any M2 Upgrade Trust Concurrent Lease and fails to comply with a notice issued by the RTA under clause 14.1 in respect of that breach; or
- (c) a new or additional trustee of the Trust is appointed without the RTA's consent as required by clause 1.8(b) unless the effect of that appointment is overcome to the RTA's satisfaction within the 30 day notice period; or
- (d) the Trust is terminated in accordance with the Trust Deed or otherwise unless the effect of that termination is overcome to the RTA's satisfaction within the 30 day notice period.

#### 14.3 Suspension period

- (a) If, before the Project Debt Repayment Date, the RTA gives the Company and the Trustee a notice terminating this deed (other than under clause 14.2(c) or clause 14.2(d)) the Company and the Trustee may suspend the RTA's right to terminate, by giving written notice to the RTA within 14 days of receipt of the RTA's notice.
- (b) Subject to the Deed of Consent, the Company's and the Trustee's suspension of the RTA's right to terminate expires:
  - (i) 12 months after the date of the RTA's notice under clause 14.2;
  - (ii) when the relevant event of default is remedied by the Company or the Trustee or no longer exists;
  - (iii) when the RTA has been compensated in a manner reasonably acceptable to it for any damage or cost it suffered or incurred in respect of the event of default; or

- (iv) when the RTA, the Company and the Trustee have agreed amendments to the Project Documents which remedy an event of default in a manner reasonably satisfactory to the RTA,

whichever is earlier.

- (c) If the Company's and the Trustee's suspension of the RTA's right to terminate expires:
  - (i) under clause 14.3(b)(i), this deed automatically terminates under clause 14.2 on that date; or
  - (ii) under clause 14.3(b)(ii), clause 14.3(b)(iii) or clause 14.3(b)(iv), this deed continues in force.

#### 14.4 Termination by the Company and the Trustee

Subject to clause 14.5, the Company and the Trustee may terminate this deed by giving the RTA 30 days' written notice if:

- (a) because of a breach of a warranty given by the RTA or the Minister in clause 2.10(a), a court makes a Final Determination that the Company or the Trustee may not:
  - (i) construct, maintain, operate or repair the M2 Motorway; or
  - (ii) levy on or keep tolls from M2 Motorway users,in accordance with the Project Documents (except to the extent that the Final Determination solely prevents the Company from undertaking the Company's Work substantially in accordance with the M2 Upgrade Project Deed);
- (b) a court makes a Final Determination which prevents the Company or the Trustee from:
  - (i) constructing, maintaining, operating or repairing the M2 Motorway; or
  - (ii) levying on or keeping tolls from M2 Motorway users,in the manner contemplated by the Project Documents, except
  - (iii) where the Final Determination is issued as a result of a wrongful act or default by the Trustee, the Company or their contractors; or
  - (iv) to the extent the Final Determination solely prohibits or has the effect of prohibiting the Company from undertaking the Company's Work substantially in accordance with the M2 Upgrade Project Deed;
- (c) the New South Wales Government enacts legislation which prohibits or has the effect of prohibiting the Company or the Trustee from:
  - (i) constructing, maintaining, operating or repairing the M2 Motorway; or
  - (ii) levying on or keeping tolls from M2 Motorway users

in accordance with the Project Documents (except to the extent such legislation solely prohibits or has the effect of prohibiting the Company from undertaking the Company's Work substantially in accordance with the M2 Upgrade Project Deed);

- (d) an Authority resumes any part of the Premises and the Company's or the Trustee's ability to:
  - (i) construct, maintain, operate or repair the M2 Motorway; or
  - (ii) levy on and keep tolls from M2 Motorway users,

in accordance with the Project Documents is materially adversely affected (except to the extent such resumption solely relates to land on which the Company's Work is to be carried out and as a result the Company is prevented from undertaking the Company's Work substantially in accordance with the M2 Upgrade Project Deed, but not the operation, repair or tolling of any part of the M2 Motorway on that land); or

- (e) the Minister or the RTA breaches any obligation under this deed the Company Lease, the Trust Lease or the Trust Concurrent Lease, an M2 Upgrade Company Lease, an M2 Upgrade Trust Lease or an M2 Upgrade Trust Concurrent Lease (other than a breach of the Company Lease which is a result of a breach by the Trustee of the Trust Concurrent Lease) and the Company or the Trustee are prevented from:
  - (i) constructing, maintaining, operating or repairing the M2 Motorway (except to the extent that the breach solely prevents the Company from undertaking the Company's Work substantially in accordance with the M2 Upgrade Project Deed); or
  - (ii) levying on or keeping tolls from M2 Motorway users,

in accordance with the Project Documents, provided that a reference in this clause to the construction of the M2 Motorway excludes a reference to the design and construction of the M2 Upgrade or the carrying out of the Company's Work.

#### 14.5 Suspension of termination notice

- (a) If the Company and the Trustee issue a notice under clause 14.4, the RTA may suspend the Company's and the Trustee's right to terminate, by giving them written notice within 14 days of receipt of the Company's and the Trustee's notice.
- (b) The RTA's suspension of the Company's and the Trustee's right to terminate expires:
  - (i) 12 months after the date of the Company's and the Trustee's notice under clause 14.4; or
  - (ii) when the relevant event is remedied by the RTA or no longer exists,whichever is earlier.
- (c) If the RTA's suspension of the Company's and the Trustee's right to terminate expires:
  - (i) under clause 14.5(b)(i), this deed automatically terminates under clause 14.4 on that date; or

- (ii) under clause 14.5(b)(ii), this deed continues in force.
- (d) The Company and the Trustee must continue to perform their obligations under the Project Documents while their right to terminate is suspended if:
  - (i) they are lawfully able to do so; and
  - (ii) it is practicable to do so.
- (e) If the RTA suspends the Company's and the Trustee's right to terminate, it must pay the Company and the Trustee monthly in arrears:
  - (i) if the date of the Company's and Trustee's notice under clause 14.4 is before the M2 Motorway Commencement Date the amount which the Company and the Trustee satisfy the RTA is the increased cost of the Project (by reference to the Base Case Model) actually incurred by them prior to the M2 Motorway Commencement Date as a result of any delay caused by the event on the basis of which their notice was issued; or
  - (ii) if the date of the Company's and the Trustee's notice under clause 14.4 is on or after the M2 Motorway Commencement Date, the amount which the Company satisfies the RTA it would have received from toll collection during the period its termination notice was suspended under clause 14.5(a) (including any delay to or loss of toll revenue from the M2 Upgrade to the extent that the Company can demonstrate that the delay or loss was caused by the event on the basis of which the notice was issued, provided that there is no double counting to the extent that the Company or Trustee are entitled to obtain a separate remedy for that delay or loss of revenue under the M2 Upgrade Project Deed).
- (f) If the amount paid to the Company and the Trustee under clause 14.5(e)(i) is subject to any income tax, in the hands of the Company or the Trustee (or, in the case of the Trustee, forms part of its net income for tax purposes), that amount must be increased so that the amount received by the Company or the Trustee (after tax) is the same amount that it would have received if no income tax had been payable.

#### 14.6 Early Termination Amount and damages

- (a) If the Company and the Trustee terminate this deed under clause 14.4, the Minister must pay the Company and the Trustee the Early Termination Amount within 30 days of that termination.
- (b) The RTA and the Minister acknowledge that if the Company and the Trustee terminate this deed under clause 14.4:
  - (i) the RTA and the Minister must compensate the Company and the Trustee for any damage, expense, loss or liability the Company and the Trustee suffer or incur as a consequence of that termination, having regard to:
    - (A) any loss the Company and the Trustee incur during the period in which their notice under clause 14.4 is suspended in accordance with clause 14.5; and
    - (B) the RTA's payment of the Early Termination Amount; and

- (C) if this deed is terminated due to an event referred to in clause 14.4(d), any amount payable by the resuming Authority to the Company or the Trustee as a consequence of that resumption; and
- (ii) the Company and the Trustee may claim under clause 14.6(b)(i) the amount which would enable the Company and the Trustee in aggregate to give the Investors (treated as if those Investors were all Notional Initial Investors) the Equity Return on their investment over the Term, having regard to amounts each of the Company and the Trustee have previously received (including the Early Termination Amount) and discounted (at a rate to be agreed) to take account of early receipt and returns available on investments of a similar nature.
- (c) Where there is a payment of the Early Termination Amount by RTA under this deed, there shall be no double counting in the calculation of that amount to the extent that the Company or Trustee are entitled to obtain an Early Termination Amount (as defined in the M2 Upgrade Project Deed) under the M2 Upgrade Project Deed.

#### **14.6A Default and termination under the M2 Upgrade Project Deed**

- (a) The parties acknowledge and agree that, if an M2 Upgrade Event of Default or an M2 Upgrade Termination Event occurs before M2 Upgrade Final Completion:
  - (i) that M2 Upgrade Event of Default or M2 Upgrade Termination Event will be resolved solely in accordance with the M2 Upgrade Project Deed; and
  - (ii) the parties will have no recourse to clauses 14.1 to 14.6 of this deed in respect of the M2 Upgrade Event of Default or the M2 Upgrade Termination Event, including as a result of any act or omission of the parties while the M2 Upgrade Event of Default or the M2 Upgrade Termination Event (as applicable) is subsisting.
- (b) For the avoidance of doubt, a failure by the Company or the Trustee to remedy any M2 Upgrade Event of Default or M2 Upgrade Termination Event in accordance with the M2 Upgrade Project Deed will not provide RTA with recourse to clauses 14.1 to 14.6 of this deed.

#### **14.7 Transfer of M2 Motorway, Ancillary Works and Plant**

When the Term ends, the Company and the Trustee must transfer the M2 Motorway, the Ancillary Works and the Plant to the RTA in accordance with the Scope of Works and Technical Criteria.

### **15. DISPUTE RESOLUTION**

#### **15.1 Disputes for expert determination**

- (a) If, other than in relation to the design and construction of the M2 Upgrade, a dispute between the parties relates to whether:
  - (i) the Design Documentation satisfies the Scope of Works and Technical Criteria;

- (ii) the Company and the Trustee are constructing the M2 Motorway:
  - (A) in a proper and workmanlike manner;
  - (B) using good quality materials, plant and equipment; or
  - (C) in accordance with the Design Documentation; or
- (iii) the time specified in a remedy notice given by the RTA under clause 14.1 is reasonable,

either the RTA or the Company and the Trustee may refer the matter to expert determination in accordance with clause 15.2.

- (b) If the parties do not reach agreement concerning:
  - (i) whether an event referred to in clause 2.1(d)(i), clause 2.1(d)(iv), clause 2.1(d)(vi) or clause 2.1(d)(viii) has occurred; or
  - (ii) what action should be taken in respect of an event referred to in clause 2.1(d)(i), clause 2.1(d)(iv), clause 2.1(d)(vi) or clause 2.1(d)(viii),

within 30 days of entering into negotiations under clause 2.1(e), either the RTA or the Company and the Trustee may refer the matter to expert determination in accordance with clause 15.2.

- (c) If the parties do not reach agreement concerning:
  - (i) whether an event referred to in clause 2.1(d)(ii), clause 2.1(d)(iii), clause 2.1(d)(v) or clause 2.1(d)(vii) has occurred; or
  - (ii) what action should be taken, in respect of an event referred to in clause 2.1(d)(ii), clause 2.1(d)(iii), clause 2.1(d)(v) or clause 2.1(d)(vii),

within 30 days of entering into negotiations under clause 2.1(f), either the RTA or the Company and the Trustee may refer the matter to expert determination in accordance with clause 15.2.

- (d) If a dispute between the parties relates to:
  - (i) the calculation of:
    - (A) the Equity Return;
    - (B) the Early Termination Amount; or
    - (C) the amount payable to the Company and the Trustee under clause 14.6,either the RTA or the Company and the Trustee may refer the matter to expert determination in accordance with clause 15.2; or
  - (ii) the calculation of tolls under the Toll Calculation Schedule, either the RTA or the Company may refer the matter to expert determination in accordance with clause 15.2.



## 15.2 Choice of expert

- (a) A dispute referred to an expert in accordance with clause 15.1 must be determined by an independent expert:
- (i) agreed between and appointed by the parties; or
  - (ii) in the absence of agreement within 30 days, appointed by:
    - (A) in the case of a dispute under clause 15.1(a), the President of the Institution of Engineers or his nominee; or
    - (B) in the case of a dispute under clause 15.1(b), clause 15.1(c) or clause 15.1(d) the President or other senior officer of the Australian Bankers Association or his nominee,
- and administered in accordance with clause 15.3 and 15.4.
- (b) It is the intention of the parties that:
- (i) the expert appointed to determine a dispute referred to in clause 15.1(a) must have a technical understanding of the issues in contest; and
  - (ii) the expert appointed to determine a dispute referred to in clause 15.1(b), clause 15.1(c) or clause 15.1(d) must have a general understanding of the industry area or other private sector infrastructure projects.
- (c) The expert must not have a significantly greater understanding of one party's business or operations which might allow the other side to construe this greater understanding as a bias.
- (d) Prior to agreeing to determine a matter, the expert must inform the parties of any interest or bias in the case or any circumstance which is likely to lead to a presumption of bias. If the expert informs the parties of any such interest, bias or circumstance that person must not be appointed as an expert without written consent of both parties.
- (e) The RTA, the Company and the Trustee must enter into an agreement with the expert appointed under clause 15.2 on terms customarily used by the expert, setting out the terms of the expert's determination and the fees payable to the expert.

## 15.3 Directions to expert

- (a) In reaching a determination in respect of a dispute referred to in clause 15.1(b), the independent expert must give effect to the policy and intent of the parties entering into the Project Documents as set out in clause 2.1 (including the required result referred to in clause 2.1(g)(i) and clause 2.1(g)(ii)) by employing the options referred to in clause 2.1(i).
- (b) In reaching a determination in respect of a dispute referred to in clause 15.1(c), the independent expert must give effect to the policy and intent of the parties in entering into the Project Documents as set out in clause 2.1 (including the result referred to in

clause 2.1(h)(i) and clause 2.1(h)(ii) by employing the options referred to in clause 2.1(i).

- (c) In reaching a determination in respect of a dispute referred to in clause 15.1(d)(i) or clause 15.1(d)(ii), the independent expert must have regard to clause 2.3(b).

#### 15.4 Rules of expert determination

- (a) The expert must:

- (i) act as an expert and not as an arbitrator;
- (ii) proceed in any manner as he thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
- (iii) take into consideration all documents, information and other material which the parties give him which the expert in his absolute discretion considers relevant to the determination of the dispute;
- (iv) not be expected or required to obtain or refer to any other documents, information or material but may do so if he so wishes;
- (v) issue a draft certificate stating his intended determination giving each party 7 days to make further submissions;
- (vi) issue a final certificate stating his determination in the form that he considers appropriate; and
- (vii) act with expedition with a view to issuing a certificate referred to in clause 15.4(a)(vi) as soon as practicable.

- (b) The RTA and the Company and the Trustee must comply with all directions given by the expert in relation to the resolution of the dispute and must within a time period specified by the expert, give the expert:

- (i) a short statement of facts;
- (ii) a description of the dispute; and
- (iii) any other documents, records or information the expert requests.

- (c) The expert may commission his own advisors or consultants (including lawyers, accountants, bankers, engineers, surveyors, traffic consultants or other technical consultants) to provide information to assist him in his decision. The RTA, the Company and the Trustee must indemnify the expert for the cost of those advisors or consultants.
- (d) The expert will hold a meeting with all the parties present to discuss the dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.
- (e) The expert may discuss the dispute with each party separately to try to achieve a settlement of the dispute.

- (f) The RTA, the Company and the Trustee agree that the meeting referred to in clause 15.4(d) is not a hearing and is not an arbitration.
- (g) The RTA, the Company, the Trustee and the expert agree:
  - (i) subject to clause 15.4(g)(ii), to keep all confidential documents, information and other material disclosed to them during or in relation to the expert determination;
  - (ii) not to disclose any confidential documents, information and other material except:
    - (A) to a party or adviser present at a meeting referred to in clause 15.4(d) or otherwise involved in the expert determination; or
    - (B) if required by Law to do so; and
  - (iii) not to use confidential documents, information or other material disclosed to them during or in relation to the expert determination for a purpose other than the expert determination.
- (h) The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:
  - (i) views expressed or proposals or suggestions made by a party or the expert during the expert determination relating to a possible settlement of the dispute;
  - (ii) admissions or concessions made by a party during the expert determination in relation to the dispute; and
  - (iii) information, documents or other material concerning the dispute which are disclosed by a party during the expert determination unless such information, documents or facts shall have been otherwise discoverable in judicial or arbitral proceedings.
- (i) The RTA, the Company and the Trustee agree that the determination of the expert stated in the certificate referred to in clause 15.4(a)(vi) will be final and binding upon each of them.
- (j) The expert will not be liable in respect of the expert determination, except in the case of fraud by the expert.
- (k) The RTA, the Company and the Trustee agree to release and indemnify the expert from and against all claims, except in the case of fraud by the expert, which may be made against him by any person in respect of the expert's appointment to determine the dispute.
- (l) If the independent expert does not award costs, the RTA must pay one-half of the expert's costs in making the determination.

### 15.5 Role of financiers

- (a) The parties acknowledge the interests and concerns of the providers of the Project Debt in the outcome of any disputes under the Project Documents.
- (b) The RTA acknowledges that representatives of the providers of Project Debt (including the Security Trustee and the Agent under the Amended and Restated TPFDD):
  - (i) will be given copies of all information given to the expert under clause 15.4; and
  - (ii) may attend and participate at the meeting referred to in clause 15.4(d).
- (c) Any representative of the providers of Project Debt may make submissions to the expert for consideration by the expert under clause 15.4(a)(iii).
- (d) The expert must consult with the representatives of the providers of Project Debt to ascertain whether (in their view) a proposed resolution of the dispute would give effect to the policy and intent of the parties entering into the Project Documents as set out in clause 2.1 including the results referred to in clause 2.1(g) and clause 2.1(h).

### 15.6 Amendments

The parties agree that if the expert's determination requires any amendments to the Project Documents they must promptly prepare and execute all necessary documents.

### 15.7 Defaulting party

- (a) The expert or any party to this deed may request the Independent Officer to decide whether any party is a defaulting party.
- (b) A party to this deed is a defaulting party if they:
  - (i) are not acting bona fide to achieve a settlement of a dispute referred to in clause 15.1;
  - (ii) have failed to comply with the directions of the expert given under clause 15.4(b); or
  - (iii) have not cooperated in the dispute resolution procedures under clause 15.
- (c) If the Independent Officer determines that a party is a defaulting party, the expert may make a determination without further participation or discussions with that defaulting party.

### 15.8 Mediation of other disputes

The RTA or the Company and the Trustee may refer any dispute arising out of or in respect of the Project Documents (other than a dispute referred to in clause 15.1) to the Australian Commercial Disputes Centre Limited for mediation. That mediation must be conducted at Sydney and held in accordance with the mediation rules of the Centre.

## 16. REPORTING AND ACCOUNTING OBLIGATIONS

### 16.1 Accounts open for inspection

- (a) The Company and the Trustee must keep:
- (i) the books of account; and
  - (ii) all other records,
- relating to the operation, maintenance and repair of the M2 Motorway at:
- (iii) the administrative building located on the Premises;
  - (iv) the Company's principal place of business in New South Wales; or
  - (v) in the case of the Trustee, at the Company's registered office.
- (b) The Company and the Trustee must ensure that the books of account and records referred to in clause 16.1(a) are available to the RTA at all reasonable times for examination, audit, inspection, transcription and copying.
- (c) If this deed is terminated, the Company and the Trustee must give the RTA any books of account and records referred to in clause 16.1(a) which are necessary for the orderly continuance of the operation, repair and maintenance of the M2 Motorway. The RTA must allow the Company access to those books of account and records for a period of seven years.

### 16.2 Cash flow and profit and loss statement

The Company must give the RTA a cash flow and profit and loss statement:

- (a) certified by the Company's secretary; and
- (b) showing the result of the operation of the M2 Motorway for the immediately preceding Quarter and for the financial year to date,

at the end of each Quarter.

### 16.3 Traffic figures

- (a) The Company must give the RTA the average daily traffic figures for a particular month before the 10th Business Day of the next month.
- (b) The Company must give the RTA any other traffic figures which it reasonably requires.

#### 16.4 Profit and loss statement

The Company and the Trustee must give the RTA a profit and loss statement:

- (a) audited by an independent accountant reasonably acceptable to the RTA; and
- (b) showing the records concerning the operation of the M2 Motorway during the relevant financial year (including the calculations of the actual return paid to the Investors, the Equity Return and the projected Equity Return Date),

as soon as practicable but not later than 120 days after the end of each financial year.

#### 16.5 Project Debt and Equity Return

- (a) The Company and the Trustee must immediately notify the RTA:
  - (i) when the Trustee repays the Project Debt in full; and
  - (ii) when the Company and the Trustee in aggregate derive an amount sufficient to give the Investors (treated as if those Investors were all Notional Initial Investors) a real after tax internal rate of return from the Project which is:
    - (A) equal to the Base Case Equity Return; and
    - (B) equal to twelve and one-quarter percent per annum.
- (b) Six months before the fortieth anniversary of the M2 Motorway Commencement Date, the Company and the Trustee must notify the RTA of:
  - (i) the Equity Return to that date; and
  - (ii) whether the Company and the Trustee in aggregate expect to derive an amount sufficient to give the Investors (treated as if those Investors were all Notional Initial Investors) a real after tax internal rate of return from the Project equal to or in excess of sixteen and one half percent per annum on or before the thirty-sixth anniversary of the M2 Motorway Commencement Date.
- (c) Six months before the forty-third anniversary of the M2 Motorway Commencement Date, the Company and the Trustee must notify the RTA of:
  - (i) the Equity Return to that date; and
  - (ii) whether the Company and the Trustee in aggregate expect to derive an amount sufficient to give the Investors (treated as if those Investors were all Notional Initial Investors) a real after tax internal rate of return from the Project equal to or in excess of sixteen percent per annum on or before the thirty-ninth anniversary of the M2 Motorway Commencement Date.
- (d) Six months before the forty-sixth anniversary of the M2 Motorway Commencement Date, the Company and the Trustee must notify the RTA of:
  - (i) the Equity Return to that date; and

- (ii) whether the Company and the Trustee in aggregate expect to derive an amount sufficient to give the Investors (treated as if those Investors were all Notional Initial Investors) a real after tax internal rate of return from the Project equal to or in excess of sixteen percent per annum on or before the forty-second anniversary of the M2 Motorway Commencement Date.

## 17. GENERAL

### 17.1 Payments

- (a) Before the Project Debt Repayment Date, the RTA and the Minister must deposit:
  - (i) any amount they are required to pay the Company or the Trustee in accordance with clause 2.1, clause 14.5 or clause 14.6 into the M2 Motorway Trust Account; and
  - (ii) any other payments which they are required to make under the Project Documents to the Company or the Trustee into the Revenue Account.
- (b) After the Project Debt Repayment Date, the RTA and the Minister must pay any money which under the Project Documents they are required to pay to the Company or as the Company directs.

### 17.2 Notices

- (a) Any notice in respect of this deed must be:
  - (i) in writing; and
  - (ii) delivered to the address, or sent to the facsimile number shown below:

(A) to the **RTA**:

Roads and Traffic Authority of New South Wales  
Level 1, Pod C, Octagon Building  
99 Philip Street  
Parramatta NSW 2150  
Attention: General Manager, Motorway Management  
Facsimile: (02) 8837 0098

(B) to the **Company**:

The Hills Motorway Limited  
Level 5  
55 Pitt Street  
Sydney NSW 2000  
Attention: General Manager NSW Assets  
Facsimile: (02) 9254 4990

(C) to the **Trustee**:

Hills Motorway Management Limited  
Level 5  
55 Pitt Street

Sydney NSW 2000  
Attention: General Manager NSW Assets  
Facsimile: (02) 9254 4990

- (b) A notice is given on the day that:
  - (i) it is delivered to the addressee; or
  - (ii) it is received by the addressee's facsimile.

### 17.3 Stamp duty and sales tax

The Company and the Trustee must pay all:

- (a) stamp duties and other fees in respect of the execution of this deed; and
- (b) sales tax, excise duty or similar impost levied in respect of the construction of the M2 Motorway, including in respect of the equipment, materials and supplies used in the construction of the M2 Motorway.

### 17.4 Interest

- (a) If the RTA, the Company or the Trustee does not pay an amount under this deed, the Company Lease, the Trust Lease, the Trust Concurrent Lease, the M2 Upgrade Company Lease or the M2 Upgrade Trust Lease by the date that it is due, it must pay interest on that amount:
  - (i) at the rate provided in clause 17.4(b); and
  - (ii) from the date the payment was due until the date the payment is made.
- (b) The RTA, the Company and the Trustee must pay interest under clause 17.4(a) at the rate of two per cent (2%) per annum, plus:
  - (i) the Westpac Banking Corporation's reference rate for Australian Dollar denominated loans, available to prime commercial customers; or
  - (ii) if there is no reference rate referred to in clause 17.4(b)(i), the Westpac Banking Corporation's rate for Australian Dollar overdraft accommodation in excess of \$100,000, available to prime commercial customers.

### 17.5 Reimbursement of local government rates and Water Board rates

If the Company and the Trustee's total liability to pay local government rates and rates (or any equivalent charges) imposed by the Water Board Sydney-Blue Mountains-Illawarra in respect of the Premises and the M2 Upgrade Project Site increases above \$224,069 per year (in 1 July 1994 dollars indexed annually by any increase in the CPI), the RTA must reimburse the Company and the Trustee or both (as applicable) on demand the amount by which their total liability exceeds that amount.



**17.6 Reimbursement of land tax**

The RTA must indemnify the Company and the Trustee (as applicable) in respect of any land tax they are required to pay under the Land Tax Act 1956 (NSW) and the Land Tax Management Act 1956 (NSW) (or any legislation replacing those Acts).