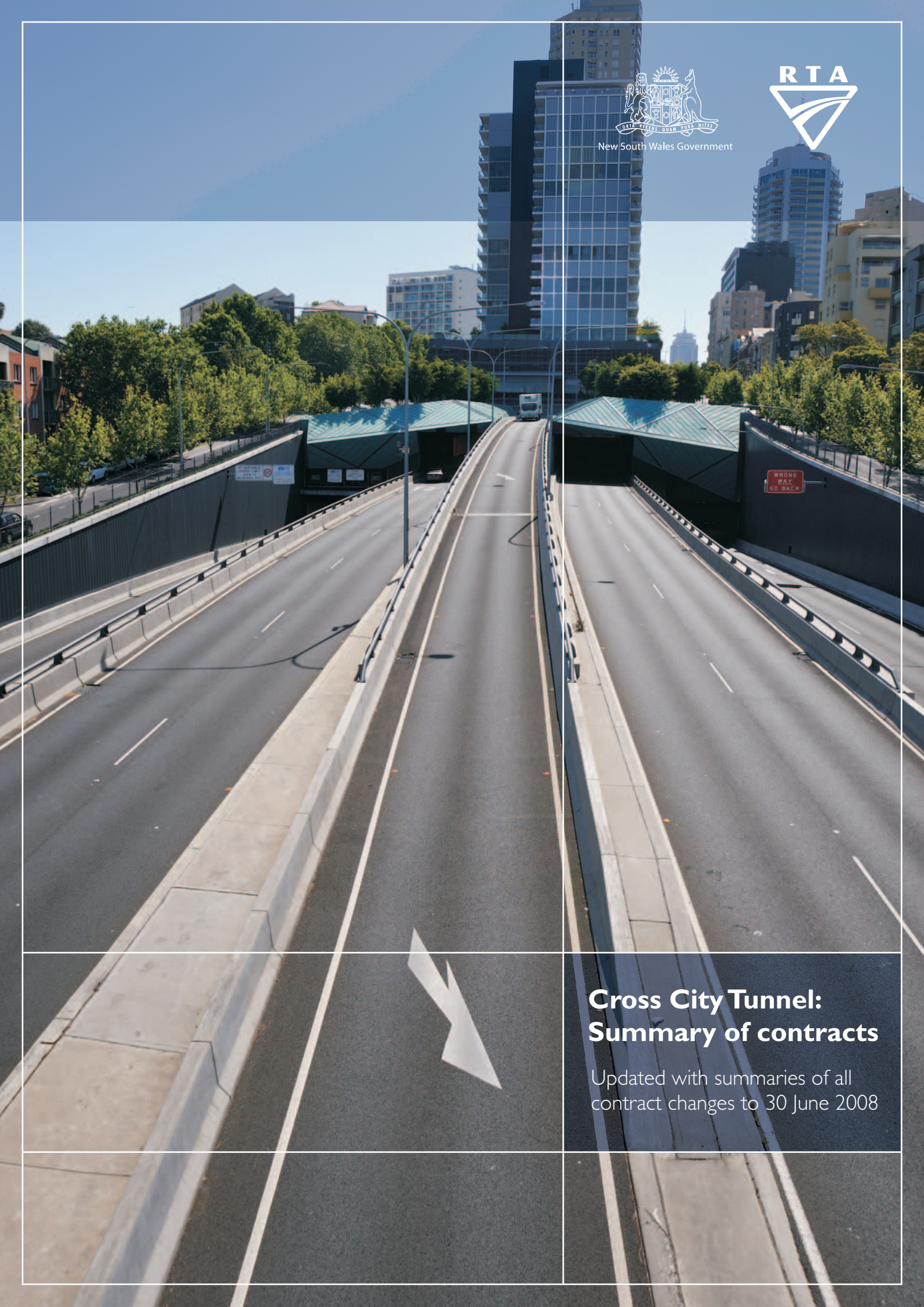




New South Wales Government



## **Cross City Tunnel: Summary of contracts**

Updated with summaries of all contract changes to 30 June 2008



RTA/Pub. 09.113

ISBN 978-1-921598-36-4



Cross City Tunnel  
**Summary of contracts**  
 Updated to 30 June 2008

<b>I</b>	<b>Introduction</b>	<b>I</b>
1.1	The project . . . . .	1
1.2	The project's planning approvals . . . . .	3
1.3	The selection of the private sector participants . . . . .	4
1.3.1	The inviting of initial private sector proposals and shortlisting of proponents . . . . .	4
1.3.2	The inviting of detailed proposals and selection of a preferred proponent. . . . .	4
1.3.3	Contract negotiations between the RTA and the preferred proponent . . . . .	5
1.4	Subsequent amendments of and additions to the project's contracts . . . . .	5
1.4.1	2004–05 amendments . . . . .	5
1.4.2	2007 CCT sale consent and amendments . . . . .	6
1.4.3	2007 alternative professional indemnity insurance arrangements. . . . .	6
1.5	The structure of this report . . . . .	6
<b>2</b>	<b>Overview of the project's contracts</b>	<b>7</b>
2.1	The participants in the project . . . . .	7
2.1.1	Public sector parties to the contracts. . . . .	7
2.1.2	Private sector parties to the contracts . . . . .	7
2.2	Contractual structure . . . . .	11
2.3	Conditions precedent . . . . .	14
2.3.1	The 2002 contracts . . . . .	14
2.3.2	The 2004 amendment contract . . . . .	15
2.3.3	The 2007 sale consent, amendment contracts and professional indemnity insurance arrangements contract . . . . .	15
2.4	Limits on the Trustee's liabilities . . . . .	16
2.5	Upfront payment to the RTA in December 2002. . . . .	16
<b>3</b>	<b>The Project Deed, the Rail and EA Agreements and verification, lease, insurance and novation arrangements</b>	<b>17</b>
3.1	General obligations on and acceptance of risks by the Trustee and the Company . . . . .	17
3.2	Design and construction . . . . .	18
3.2.1	Scope of the Trustee's and Company's works . . . . .	18
3.2.2	Changes to the scope of the Trustee's and Company's works . . . . .	18
3.2.3	Challenges to the project's planning approval . . . . .	20
3.2.4	Design obligations and intellectual property. . . . .	20
3.2.5	Construction access . . . . .	21
3.2.6	Latent conditions and contamination . . . . .	21
3.2.7	Environmental requirements and complaints . . . . .	21

3.2.8	Native title claims . . . . .	22
3.2.9	Third party claims . . . . .	22
3.2.10	Traffic management during construction . . . . .	22
3.2.11	Project construction programs, plans, reports, reviews, inspections and rail safety suspensions . . . . .	23
3.2.12	Quality assurance and verification . . . . .	24
3.2.13	Completion . . . . .	24
3.2.14	Correction of defects . . . . .	25
3.2.15	Design and construction security bonds. . . . .	25
3.3	Operation and maintenance . . . . .	25
3.3.1	Scope of the Trustee's operation, maintenance and repair obligations . . . . .	25
3.3.2	Changes to the Trustee's operation, maintenance and repair obligations . . . . .	27
3.3.3	Compliance with planning approval conditions and directions issued under these conditions . . . . .	27
3.3.4	Operation, maintenance and repair security bonds . . . . .	29
3.3.5	Preparations for and granting of the Land Lease and the Company Lease . . . . .	30
3.3.6	Tolls and administrative charges . . . . .	30
3.3.7	Rent payments to the RTA . . . . .	31
3.3.8	Traffic management and road network changes. . . . .	32
3.3.9	Consultations on future railway projects . . . . .	33
3.3.10	Expiration of the operating term and final handover to the RTA . . . . .	33
3.4	Miscellaneous general provisions . . . . .	34
3.4.1	Rates, levies and taxes . . . . .	34
3.4.2	Loss or damage and insurance . . . . .	34
3.4.3	Accounting and financial reporting . . . . .	36
3.4.4	Restrictions on assignments, encumbrances and refinancing. . . . .	36
3.4.5	Restrictions on amendment of the contracts . . . . .	37
3.4.6	Confidentiality and publicity . . . . .	37
3.4.7	Changes in law. . . . .	38
3.4.8	Dispute resolution under the Project Deed. . . . .	38
3.4.9	Dispute resolution under the Rail Agreement. . . . .	39
3.4.10	Dispute resolution under the EA Agreement . . . . .	39
3.4.11	<i>Force majeure</i> under the Project Deed . . . . .	40
3.4.12	<i>Force majeure</i> under the EA Agreement. . . . .	40
3.5	Renegotiation provisions . . . . .	41
3.6	Defaults under and termination of the Project Deed . . . . .	43
3.6.1	General RTA power to 'step in' following any unremedied Trustee or Company Project Deed default . . . . .	43
3.6.2	RTA notification and Trustee and Company remediation of Trustee or Company 'events of default'. . . . .	43
3.6.3	Security Trustee remediation of Trustee or Company 'events of default' and other potential triggers for termination . . . . .	44
3.6.4	Termination of the Project Deed by the RTA following an 'event of default' . . . . .	45
3.6.5	Termination of the Project Deed by the RTA following an 'uninsurable event' . . . . .	46
3.6.6	Termination of the Project Deed by the Trustee and the Company . . . . .	47
3.7	Defaults under and termination of the Rail Agreement. . . . .	48
3.8	Defaults under and termination of the EA Agreement . . . . .	49
3.9	Finance defaults . . . . .	50
<b>4</b>	<b>The RTA Deed of Charge and interactions between RTA and private sector securities</b>	<b>51</b>
4.1	The RTA Deed of Charge. . . . .	51
4.2	Consents to and priorities between the RTA and debt financiers' securities . . . . .	51
<b>5</b>	<b>NSW Government guarantee of the RTA's performance</b>	<b>53</b>

# I Introduction

---

This report summarises the main contracts, from a public sector perspective, for the Cross City Tunnel in central Sydney.

The original (June 2003) version of this document was prepared by the Roads and Traffic Authority of New South Wales (RTA) in accordance with the public disclosure requirements of sections 3.7 and 7.1 of the NSW Government's November 2001 *Working with Government Guidelines for Privately Financed Projects*, and its compliance with these requirements was assessed by the Auditor-General prior to its tabling in Parliament.

This updated report has been prepared by the RTA in accordance with the public disclosure requirements of section 5.2 of the Government's December 2006 *Working with Government Guidelines for Privately Financed Projects*, and its compliance with these revised requirements has again been assessed by the Auditor-General prior to its tabling in Parliament.\*

The immediate trigger for the preparation of this updated summary of the Cross City Tunnel project's contracts has been a change in the ownership of the private sector parties and associated changes to a number of the project contracts. However, in accordance with the December 2006 *Working with Government Guidelines*—and also in an effort to assist readers in understanding the project's contractual structure as a whole—this summary is not confined to these latest changes to the project, but rather is a comprehensive update of the June 2003 summary as a whole, including changes implemented under the previous (November 2001) *Guidelines*.

In line with both versions of the *Working with Government Guidelines for Privately Financed Projects*, this updated report:

- Focuses on those contracts to which the Minister for Roads, the Treasurer, the RTA, other NSW Government authorities and/or State-owned corporations were and/or are parties, or which otherwise had or have a potentially substantive impact on public sector risks or benefits. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector's exposure.
- Does not disclose the private sector parties' cost structures, profit margins, financing arrangements, financial models, intellectual property or any other matters which would place them at a substantial commercial disadvantage with their competitors, now or in the future.

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

It is based on the project's contracts as at 30 June 2008. Subsequent amendments of or additions to these contracts, if any, are not reflected in this report.

## 1.1 The project

---

The Cross City Tunnel project has involved and involves:

- The financing, design, construction, operation and maintenance of two east–west tollroad tunnels under the Sydney Central Business District and Darlinghurst/Woolloomooloo, between Darling Harbour and Rushcutters Bay, and associated tunnelled links to Sir John Young Crescent, the Cahill Expressway and the Eastern Distributor (*Figures 1 and 2*), and
- The financing, design and construction of associated improvements to surface roads, including new bus and bicycle lanes, intersection improvements, 'traffic calming' measures, wider footpaths and other improvements to pedestrian facilities, to take advantage of the opportunities afforded by reduced traffic congestion.

The project has been funded, designed and built by the private sector, at an estimated development, design, construction, fitout and commissioning cost of more than \$700 million.

The tunnels opened for traffic on 28 August 2005 and the project's other works, mostly involving changes to surface roads in the area, were completed on 5 May 2006.

The tunnel components of the project must be operated, maintained and repaired by the private sector participants until 18 December 2035 or any earlier termination of the project's main contracts, and will then be handed over to the public sector. The project's surface road and property works and some of its services works will also be maintained and repaired by the private sector participants during this period.

The primary objectives of the Cross City Tunnel project were to reduce 'through' traffic in central Sydney, thereby easing traffic congestion and improving environmental amenity in the CBD and on streets approaching the CBD, and to improve east–west traffic flows.

Its benefits were expected to include:

- Improved travel times and service reliability for buses in the city, through reduced congestion and extended 'bus priority' measures

---

\* While complying with the December 2006 *Working With Government Guidelines for Privately Financed Projects*, this document does not report: (a) the financial, economic and risk evaluations presented in the original June 2003 *Summary of Contracts*, as these are now very dated and thus potentially misleading, or (b) the findings of a formal public interest evaluation, as the Cross City Tunnel project was developed, constructed and opened prior to this requirement.





- Eastbound on Cross City Tunnel
- Westbound on Cross City Tunnel
- From eastbound on Cross City Tunnel to southbound on Eastern Distributor
- From northbound on Eastern Distributor to westbound on Cross City Tunnel
- From westbound on Eastern Distributor to southbound on Cross City Tunnel
- From westbound on Cowper Wharf Roadway to northbound in the Domain tunnel, to harbour crossings
- From Bourke Street, Woolloomooloo to southbound on Eastern Distributor
- From westbound on Cross City Tunnel to northbound to harbour crossings and CBD

Figure 1. Cross City Tunnel horizontal alignments.

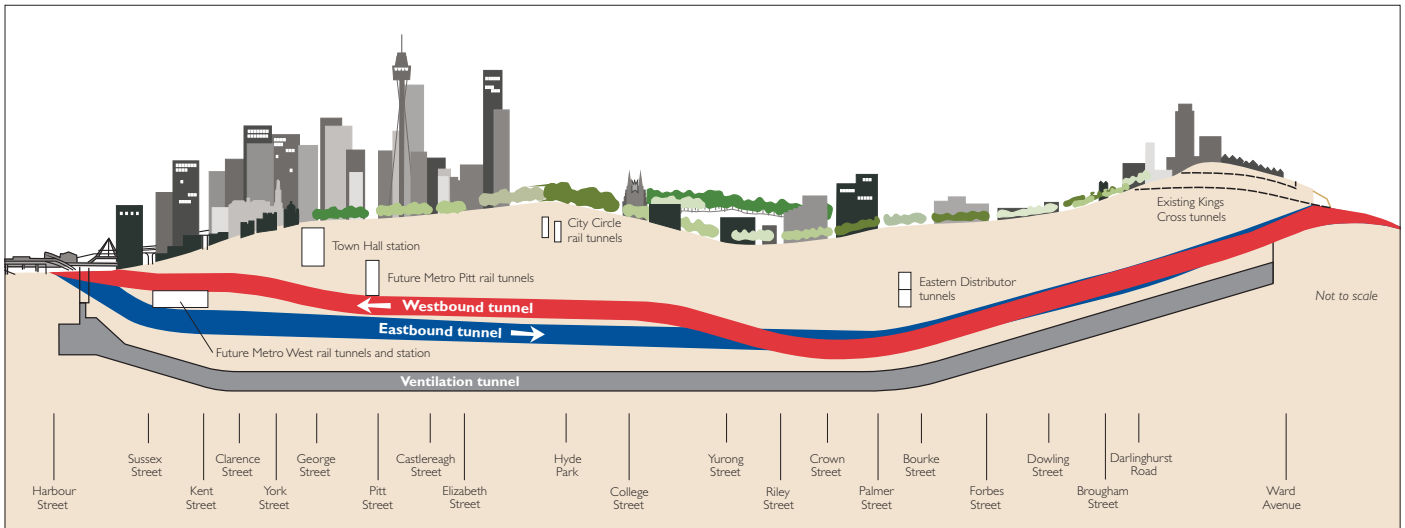


Figure 2. Indicative vertical alignments of the main tunnels.

- Better access to and movements within the city for pedestrians, cyclists, taxis and delivery vehicles
- Safer and more pleasant street environments for pedestrians, residents, workers and businesses, with wider footpaths, the removal of intrusive 'through' traffic and improved urban designs
- Better air quality in the city, and
- Improved travel times for east–west 'through' traffic, with savings of up to 20 minutes during peak periods.

The 2.1 km long eastbound tunnel, following the dark blue alignment shown in Figures 1 and 2, passes under Bathurst Street in the CBD and then under William Street through Darlinghurst/Woolloomooloo. It may be accessed at Darling Harbour by eastbound traffic on the Western Distributor and northbound traffic on Harbour Street, and has exits in Woolloomooloo, joining southbound traffic on the Eastern Distributor, and in Rushcutters Bay, joining eastbound traffic on Bayswater Road.

The 2.1 km long westbound tunnel, following the red alignment in Figures 1 and 2, is alongside the eastbound tunnel under William Street through Darlinghurst/Woolloomooloo but then continues on a different route, under Park and Druiett Streets, through the CBD. It may be accessed by westbound traffic on Craigend Street in Rushcutters Bay and by northbound traffic on the Eastern Distributor in Darlinghurst, and has exits in Woolloomooloo, for traffic travelling north along Sir John Young Crescent to the Cahill Expressway and then either Macquarie Street or the harbour crossings, and at Darling Harbour, for traffic travelling west on the Western Distributor, north or south on Harbour Street or east (back into the city) on Bathurst Street.

Each of these two main tunnels has two lanes, while the other entry and exit tunnels have single lanes. Exhaust air from the tunnels is released from a 60 metre high ventilation stack in Darling Harbour, between two of the Western Distributor's viaducts. Provisions have been made for the possible future retrofitting of filters and/or other air pollution control systems to reduce concentrations of pollutants in the exhaust air released through the Darling Harbour stack, should the technologies involved improve sufficiently for this to be effective.

Both tunnels are electronically tolled. The maximum permissible toll charges for traffic travelling the length of the tunnels are \$2.65 for cars and \$5.30 for heavy vehicles (March quarter 1999 prices, including GST), but westbound vehicles fitted with electronic tolling transponders and exiting onto Sir John Young Crescent are subject to lower maximum permissible tolls of \$1.25 for cars and \$2.50 for heavy vehicles (March quarter 1999 prices, including GST).

These maximum permissible tolls increase each quarter in line with increases in the Consumer Price Index or, if they are higher, quarterly rates of increase equivalent to 4% per annum until mid-2012 and then 3% per annum until mid-2018. From mid-2018, the maximum permissible tolls will increase in line with increases in the CPI.

There are no tolls for buses providing public transport services, but additional charges apply for vehicles without electronic tolling transponders. In addition, the Minister for Planning or the Department of Planning may require higher tolls to be charged for traffic exiting from the westbound tunnel onto Harbour and Bathurst Streets, to help reduce congestion in the western CBD, with the extra revenue in this case being dedicated to public transport, pedestrian, cyclist, air quality and other amenity improvements.

## 1.2 The project's planning approvals

An initial planning approval for the project was issued by the then Minister for Urban Affairs and Planning, Dr Andrew Refshauge, under section 115B(2) of the Environmental Planning and Assessment Act, on 3 October 2001. This approval was subject to 240 conditions.

Three weeks after this planning approval was granted, detailed proposals for implementation of the project were submitted to the RTA, on 24 October 2001, by three shortlisted private sector consortia, in accordance with processes described in section 1.3.2 below.

In addition to providing 'conforming' proposals, these consortia suggested a range of possible design modifications. After analysing these suggestions, the RTA identified one of the modified alternatives, suggested by the ultimately successful consortium, as offering better value than the design concept for which planning approval had been granted.

On 12 December 2002, after extensive public consultations on these and other changes, the Minister for Planning, Dr Andrew Refshauge, modified the original planning approval of 3 October 2001 in accordance with section 115BA(6) of the Environmental Planning and Assessment Act. This modified planning approval was subject to 265 conditions.

Since then,

- Further modifications to the planning approval were made, under section 115BA(6) of the Environmental Planning and Assessment Act, by the Minister for Infrastructure and Planning, Mr Craig Knowles, on 26 February 2004 (concerning a relocation of the tunnels' control centre) and 24 September 2004 (correcting a description in a condition concerning ambient air quality standards)
- On 1 August 2005, with the repeal of Division 4 of Part 5 of the Environmental Planning and Assessment Act, the modified planning approval was deemed to have been granted under Part 3A of that Act, and
- On 7 July 2006, the Minister for Planning, Mr Frank Sartor, modified the planning approval again, this time under section 75W of the Environmental Planning and Assessment Act, so as to permit specified changes to the project's surface roadworks, in response to criticisms of the traffic impacts of the surface roadworks previously required by and implemented in accordance with the project's planning approval.

The roadworks permitted by the 7 July 2006 modification of the project's planning approval were carried out by the RTA, at the RTA's expense, and were completed in September 2006. These works were quite separate from, and not part of, the design and construction works carried out under the privately financed Cross City Tunnel project contracts summarised in this report.

## 1.3 The selection of the private sector participants

### 1.3.1 The inviting of initial private sector proposals and shortlisting of proponents

On 15 September 2000 the RTA invited *Registrations of Interest* from private sector parties for the financing, design, construction, operation and maintenance of the Cross City Tunnel project.

*Registrations of Interest* were received from eight consortia by the closing date of 23 October 2000.

These *Registrations of Interest* were assessed against pre-determined criteria, weighted as follows:

- Compliance with mandatory criteria and provision of organisational details: prerequisites for further assessment.
- Organisation (applicant's roles and structure, tollroad management roles and relationships, design and construction roles and relationships, operation and maintenance roles and relationships and project finance roles and relationships): 5%.
- Tollroad management (management experience and key personnel, ability, commitment and management systems): 9%.

- Design and construction (management experience and key personnel, available capacity, design management, design capabilities, construction management and construction capabilities): 27%.
- Operation and maintenance (operations management, maintenance management and continuous improvement commitment and strategy): 8%.
- Project features (approvals, traffic management, utilities, environmental impacts, geotechnical conditions, spoil disposal, community liaison, key stakeholders, satisfaction of project issues, issues management and risk management): 17%.
- Project finance (experience, delivery record and strategy for equity, debt funding, structure and risk allocations): 12%.
- Financial capacity: 22%.

In February 2001 the RTA advised the eight registrants that it had selected three of them to submit proposals for the project:

- The CrossCity Motorway consortium, sponsored by Bilfinger Berger AG, Baulderstone Hornibrook Pty Limited and Deutsche Bank AG
- The E-TUBE consortium, sponsored by Leighton Contractors Pty Limited and Macquarie Bank, and
- Sydney City Tunnel Company, sponsored by Transfield Holdings Pty Limited and Multiplex Constructions Pty Limited.

### 1.3.2 The inviting of detailed proposals and selection of a preferred proponent

On 8 June 2001 the RTA issued a formal *Request for Proposals* to the three shortlisted consortia, each of which had warranted, in Deeds of Disclaimer executed on 22 March 2001, that it would rely on its own investigations in preparing its proposal.

All three consortia submitted proposals on the closing date, 24 October 2001.

The RTA's assessment of these proposals involved:

- A 'comparative value' assessment against a 'public sector comparator'—a hypothetical, risk-adjusted estimate of the net present cost of delivering the project, to the same level and standard of service, using the most efficient likely form of delivery able to be financed by the public sector—in accordance with the requirements of the November 2001 NSW Government *Working with Government Guidelines for Privately Financed Projects*, and
- A 'non-price assessment', against other pre-determined criteria, weighted as follows:
  - Project structure, participants and organisation: 25%.
  - Design and construction (architectural and landscape design, geometric, drainage, structural, pavement, geotechnical, tunnel, environmental, services, toll collection system and operational management and control system concept designs, design specifications, construction phase traffic arrangements, design and construction program, quality plan requirements, project strategies, quality management, independent verifier and signage): 30%.



- Initial traffic management and safety plan: 10%.
- Initial project plans for quality assurance, project management, environmental management, design, construction, operation and maintenance, community involvement, incident responses, occupational health, safety and rehabilitation management and project training: 25%
- Operation and maintenance (indicative replacement and refurbishment schedule, routine maintenance schedule, specified design lives of asset items and sub-items, maintenance standards and quality manager): 10%.

These assessments, and the combining of each proposal's 'comparative value' and its weighted score under the 'non-price assessment' into an overall 'adjusted comparative value', were carried out in accordance with guidelines and methodologies established and documented by the RTA, with a probity auditor's concurrence, before the proposals were received.

In combining the two types of assessments, the 'non-price assessment' results of all three proponents were expressed as fractions of the best of the three non-price assessment results, the difference between 1.0 and this fraction was then multiplied by a 'nominal value of the non-price assessment in \$ terms' of \$20 million—a figure set by the RTA before the proposals had been received—and the result for each proponent was subtracted from its proposal's 'comparative value' to produce an 'adjusted comparative value'. This meant that for the proponent with the best 'non-price assessment' result, the 'adjusted comparative value' was the same as its 'comparative value', while for the other two proponents it was reduced.

On 7 February 2002 the probity auditor formally advised the RTA that no concerns about the conduct or probity of the evaluation process had been expressed by any of the proponents or any members of the evaluation team, and that his own observations, the observations of the other two members of the probity audit team and the evidence of supporting records had all led him to conclude that the evaluation process had been planned and conducted 'with the highest level of probity applied to all aspects'.

The RTA's assessments concluded that:

- The proposals submitted by the CrossCity Motorway consortium would represent better value for money than the 'public sector comparator' and the proposals submitted by the other two proponents
- The CrossCity Motorway consortium should therefore be selected as the preferred proponent, and
- The RTA should enter into detailed negotiations with this consortium both for its preferred proposal, with tunnels extending to portals east of the existing Kings Cross Tunnel, and for a 'conforming' proposal consistent with the planning approval of 3 October 2001, in case planning approval were not obtained for the preferred proposal.

On 27 February 2002 the Minister for Roads, Mr Carl Scully, announced the selection of the CrossCity Motorway consortium as the preferred proponent and the commencement of contract negotiations with this consortium.

### **1.3.3 Contract negotiations between the RTA and the preferred proponent**

As already indicated, the RTA's negotiations with the CrossCity Motorway consortium were conducted in parallel with a series of changes to the proposed project, leading to the conditions attached to the modified planning approval of 12 December 2002.

Other issues needing to be addressed by the RTA and/or the CrossCity Motorway consortium before the contracts could be finalised included:

- The finalisation of Darling Harbour interfaces and obtaining the approval of the Sydney Harbour Foreshore Authority for the widening of one of the Western Distributor's viaducts
- The finalisation of construction site boundaries and the identification of the boundaries of land strata to be leased for the project
- The finalisation of Cahill Expressway connection details, in conjunction with the operator of the Eastern Distributor, Airport Motorway Limited, and the Royal Botanic Gardens and Domain Trust
- The finalisation of Eastern Distributor interfaces, again in conjunction with Airport Motorways Limited
- The resolution of traffic flow movements east of the Kings Cross Tunnel, a series of project technical requirements, the cost impacts of adjustments to air quality requirements and the final scope of the project
- The finalisation of associated agreements with Rail Infrastructure Corporation, the State Rail Authority and Energy Australia, and
- The obtaining of taxation rulings.

The negotiations were satisfactorily concluded, shortly after the amended project received planning approval on 12 December 2002, with the execution of the principal contracts for the project on 18 December 2002.

As described in section 2.3.1, all of the 2002 contracts to which the RTA, the NSW Rail Infrastructure Corporation and/or the State Rail Authority are or were parties and which were subject to conditions precedent became binding on 19 December 2002. The other 2002 contracts involving public sector parties have been binding since their dates of execution.

## **1.4 Subsequent amendments of and additions to the project's contracts**

### **1.4.1 2004–05 amendments**

On 23 December 2004 the RTA and the principal CrossCity Motorway consortium parties to the project's contracts executed an amendment contract under which the CrossCity Motorway parties undertook to fund up to \$35 million of changes to the project's works directed by the RTA, in return for specified increases in the maximum permissible tolls on tunnel users.

As described in section 2.3.2, these amendments took effect on 17 January 2005.

#### 1.4.2 2007 CCT sale consent and amendments

On 27 December 2006 receivers and managers were appointed to the CrossCity Motorway parties to the project's main contracts. Following a competitive tender process, ownership of the principal private sector parties to the project contracts was subsequently transferred from the CrossCity Motorway consortium to a new consortium formed by ABN AMRO and Leighton Contractors, under sale contracts which were executed on 19 June 2007 and completed on 27 September 2007.

On the same date, 27 September 2007, the RTA:

- Formally consented to this sale, plus an associated refinancing of the project and an associated change in the project's operation and maintenance contractor; by executing a consent deed, and
- Executed a series of other agreements, with parties from the old and new consortia, to make consequential minor amendments to five of the project contracts to which the RTA was and is a party.

These agreements all took effect immediately, on 27 September 2007.

#### 1.4.3 2007 alternative professional indemnity insurance arrangements

On 23 September 2007, shortly before the CCT sale was completed, the RTA became aware that the original private sector participants from the CrossCity Motorway consortium had not renewed their professional indemnity insurance on 30 June 2006, as required under the project's main contract (see section 3.4.2 of this report).

In response, alternative arrangements, providing an equivalent level of protection and remedying the default, were established under a new contract executed with parties from both the old and new consortia on 27 September 2007.

### 1.5 The structure of this report

**Section 2** of this report summarises the structuring of the Cross City Tunnel project and explains the inter-relationships of the various agreements between the public and private sector parties.

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

## 2 Overview of the project's contracts

### 2.1 The participants in the project

#### 2.1.1 Public sector parties to the contracts

The principal public sector parties to the Cross City Tunnel contracts are (or were):

- The **Minister for Roads**, on behalf of the State of New South Wales
- The **Treasurer**, also on behalf of the State of New South Wales, who replaced the Minister for Roads in this role on 27 September 2007
- The **Roads and Traffic Authority of NSW** (ABN 64 480 155 255) ('**RTA**')
- **Rail Corporation New South Wales** (ABN 59 325 778 353) ('**RailCorp**'), which on 1 January 2004 took over the contractual rights and obligations originally assumed, prior to its formation on that date, by the **NSW Rail Infrastructure Corporation** (ABN 21 298 300 693) ('**RIC**') and the **State Rail Authority of NSW** (ABN 73 997 983 198) ('**SRA**')
- **EnergyAustralia** (ABN 67 505 337 385), and
- The **Sydney Harbour Foreshore Authority** (ABN 51 437 725 177).

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

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

The NSW Treasurer has approved the RTA's entering the project's contracts, under section 20 of the Public Authorities (Financial Arrangements) Act 1987, on 16 December 2002 (for the originally executed contracts), 21 December 2004 (for the amendment contract executed on 23 December 2004) and 17 September 2007 (for the amendment contracts executed on 27 September 2007).

#### 2.1.2 Private sector parties to the contracts

The private sector parties to the contracts to which the Minister for Roads, the RTA, RailCorp, the SRA, RIC and/or EnergyAustralia are or were also parties (**Figure 3**) are:

- **CrossCity Motorway Nominees No. 2 Pty Limited** (ABN 53 098 445 811) ('the **Trustee**'), of 131 Cathedral Street, Woolloomooloo, NSW 2011, in its capacity as trustee of the CrossCity Motorway Property Trust (ABN 21 228 045 613).

Since 27 September 2007 all the shares in the Trustee and all the units in the CrossCity Motorway Property Trust have been held by CCM Holdings Trust Pty Limited (ABN 24 127 362 216), also of 131 Cathedral Street, Woolloomooloo, in its capacity as trustee of a CCT Motorway Property Holdings Trust (ABN 81 451 642 516), and, in turn,

- All the shares in CCM Holdings Trust Pty Limited and all the units in the CCT Motorway Property Holdings Trust have been held by CCT Motorway Group Holdings Pty Limited (ABN 83 127 355 239), also of 131 Cathedral Street, Woolloomooloo, in its capacity as trustee of a CCT Motorway Property Trust (ABN 12 245 335 352), and
- All the shares in CCT Motorway Group Holdings Pty Limited and all the units in the CCT Motorway Property Trust have been held by:
  - ABN AMRO Investments Australia Limited (ABN 95 120 541 988), of 88 Phillip Street, Sydney, NSW 2000, in its capacity as trustee of an ABN AMRO CrossCity Tunnel Trust, which is wholly owned by the ABN AMRO Diversified Infrastructure Trust (46%)
  - ABN AMRO Infrastructure Capital Management Limited, of 250 Bishopsgate, London EC2/M 4AA, United Kingdom, on behalf of the UK-based ABN AMRO Global Infrastructure Fund (or, to be more specific, in its capacity as general partner of ABN AMRO Infrastructure Capital Equity Partners I–A, ABN AMRO Infrastructure Capital Equity Partners I–B, ABN AMRO Infrastructure Capital Equity Partners I–C, ABN AMRO Infrastructure Capital Equity Partners I–D and ABN AMRO Infrastructure Capital Equity Partners I, LP) (48%), and
  - Leighton Contractors Infrastructure Nominees Pty Limited (ABN 49 124 180 632), of 495 Victoria Avenue, Chatswood, NSW 2067, in its capacity as trustee of the



Leighton Contractors Infrastructure Trust (ABN 95 037 526 261) (6%).

- **CrossCity Motorway Pty Limited** (ABN 45 098 445 839) ('the **Company**'), of 131 Cathedral Street, Woolloomooloo, NSW 2011.

Since 27 September 2007 all the shares in the Company have been held by CCT Motorway Company Nominees Pty Limited (ABN 60 127 591 235), also of 131 Cathedral Street, Woolloomooloo, in its capacity as trustee of a CCT Motorway Company Holdings Trust (ABN 92 945 780 495), and, in turn,

- All the shares in CCT Motorway Company Nominees Pty Limited and all the units in the CCT Motorway Company Holdings Trust have been held by CCT Motorway Group Holdings Pty Limited, in its capacity as trustee of a CCT Motorway Company Trust (ABN 28 557 479 178), and
- All the shares in CCT Motorway Group Holdings Pty Limited and all the units in the CCT Motorway Company Trust have been held by:
  - ABN AMRO Investments Australia Limited, in its capacity as trustee of the ABN AMRO CrossCity Tunnel Trust (46%)
  - ABN AMRO Infrastructure Capital Management Limited, on behalf of the ABN AMRO Global Infrastructure Fund (48%), and
  - Leighton Contractors Infrastructure Nominees Pty Limited, in its capacity as trustee of the Leighton Contractors Infrastructure Trust (6%).
- The current immediate owner of the Trustee and the CrossCity Motorway Property Trust, **CCM Holdings Trust Pty Limited** ('the **Subsidiary Property Trustee**'), the current immediate owner of the Company, **CCT Motorway Company Nominees Pty Limited** ('the **Subsidiary Company Trustee**'), and the three current ultimate owners of the Trustee and the Company, **ABN AMRO Investments Australia Limited**, in its capacity as trustee of the ABN AMRO CrossCity Tunnel Trust, **ABN AMRO Infrastructure Capital Management Limited**, on behalf of the ABN AMRO Global Infrastructure Fund, and **Leighton Contractors Infrastructure Nominees Pty Limited**, in its capacity as trustee of the Leighton Contractors Infrastructure Trust (together, 'the **Equity Investors**').
- The *original* immediate owner of the Trustee and the CrossCity Motorway Property Trust, **CrossCity Motorway Nominees No 1 Pty Limited** (ABN 51 098 445 802) ('the **Original Holdings Trustee**'), in its capacities—at the time of execution of the relevant contracts on 27 September 2007—as the trustee of the CCT Motorway Property Trust (of which the Subsidiary Property Trustee is now the trustee) and as the trustee of a CrossCity Motorways Holdings Trust (ABN 18 769 316 792), and the original immediate owner of the Company (and also of the Original Holdings Trustee and the CrossCity Motorway Holdings Trust), **CrossCity Motorway Holdings Pty Limited** (ABN 34 098 445 802) ('the **Original Holdings Company**'), both in its own right and in its capacity—again at the time of execution of the relevant contract on 27 September 2007—as the trustee of the CCT Motorway Company Holdings Trust (of which the Subsidiary Company Trustee is now the trustee).
- **Bilfinger Berger AG** and **Baulderstone Hornibrook Pty Limited** ('the **Contractors**'), which formed a partnership trading as the 'Baulderstone Hornibrook Bilfinger Berger Cross City Tunnel Joint Venture' (ABN 85 947 915 435), with each party having joint and several obligations, to design, construct and commission the project for the Trustee and the Company, thereby enabling the Trustee and the Company to meet their design, construction and commissioning obligations to the RTA, SRA, RIC, RailCorp and EnergyAustralia.
- **Baulderstone Hornibrook Pty Limited** ('the **Original Operator**'), which operated, maintained and repaired the tollroad component of the project and maintained and repaired its surface works for the Company from the completion of the 'Stage 1' works on 28 August 2005 until the completion of the sale of the Trustee and the Company on 27 September 2007, thereby enabling the Trustee (through the Company) to meet its operational and maintenance obligations to the RTA during this period.
- **Leighton Contractors Pty Limited** (ABN 98 000 893 667) ('the **Operator**'), which replaced the Original Operator on 27 September 2007 and must now operate, maintain and repair the tollroad component of the project and maintain and repair its surface works for the Company until the tunnels are handed over to the RTA in 2035, thereby enabling the Trustee (through the Company) to meet its operational and maintenance obligations to the RTA.
- **Hyder Consulting (Australia) Pty Limited** (ABN 34 000 579 046) ('the **Independent Verifier**'), which had to independently verify the performance by the Trustee and the Company of their design, construction and commissioning, obligations and initial operating, maintenance and repair obligations to the RTA.
- **Airport Motorway Limited** (ABN 26 057 283 093) ('**AML**'), the operator and leasee of the Eastern Distributor, concerning arrangements for the connection of parts of the Cross City Tunnel to the Eastern Distributor:
- The Company, AML and other tollroad operators—**SWR Operations Pty Limited** (ABN 33 002 359 864), **Interlink Roads Pty Limited** (ABN 53 003 845 430), **The Hills Motorway Limited** (ABN 28 062 329 828), **Queensland Motorways Limited** (ABN 50 067 242 513), **WSO Co. Pty Limited** (ABN 73 102 757 924), **Connector Motorways Pty Limited** (ABN 70 103 411 052), **CityLink Melbourne Limited** (ABN 65 070 810 678), **ConnectEast Pty Limited** (ABN 101 213 263) and **RiverCity Motorway Pty Limited** (ABN 99 116 665 304)—concerning arrangements for the interoperability of tolling systems on the Cross City Tunnel and other Sydney, Melbourne and Brisbane tollroads.
- **CCT Motorway Finance Pty Limited** (ABN 17 127 367 935) ('the **Borrower**'), which since 27 September 2007 has been receiving funding for the project from the project's new debt financiers. The Borrower is wholly owned by CCM Holdings Trust Pty Limited, whose owners have been described above.

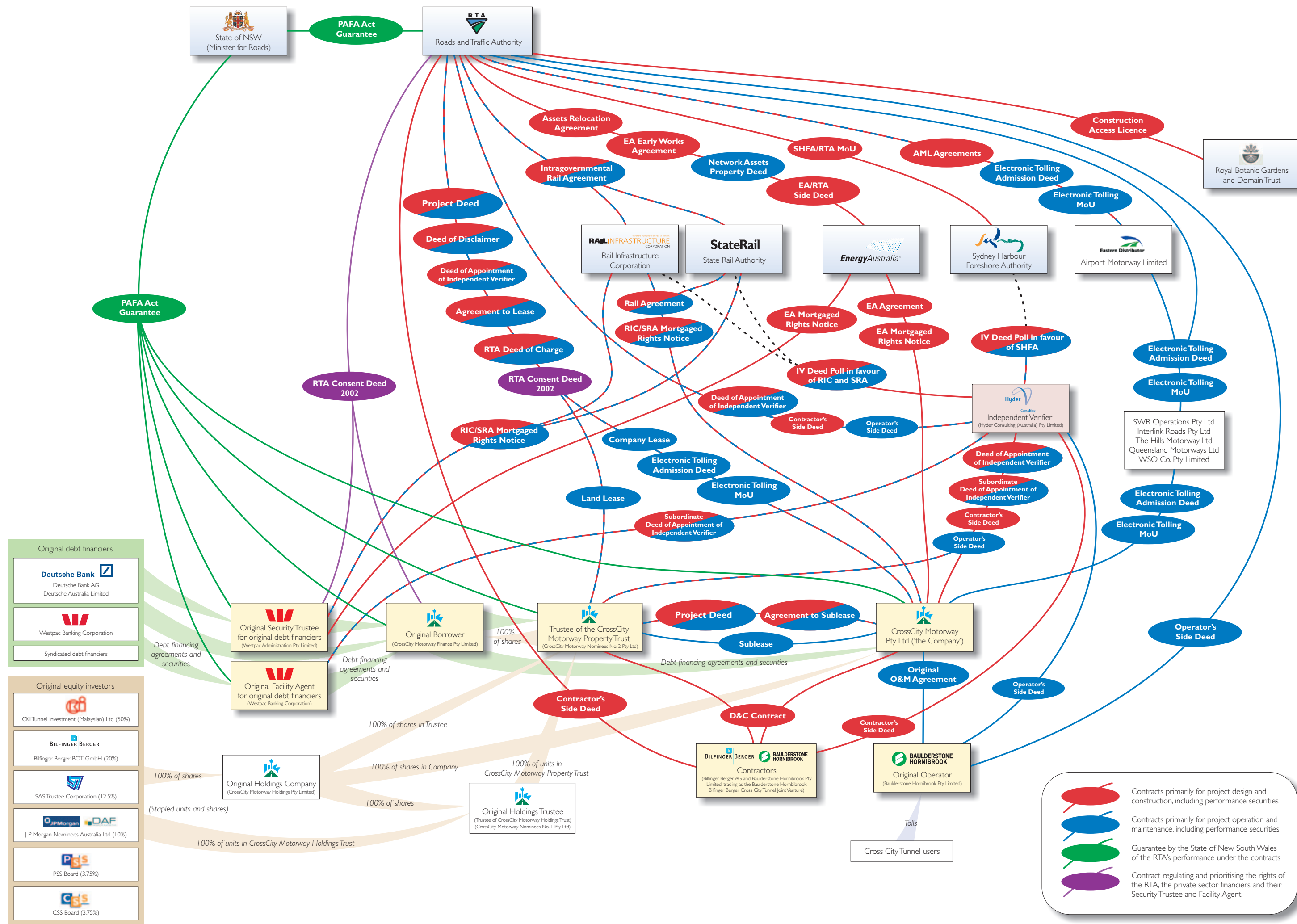


Figure 3(a). Overview of the original (December 2002) structure of the Cross City Tunnel contracts, from a public sector perspective. The equivalent current contractual structure is summarised in Figure 3(b).





- **CrossCity Motorway Finance Pty Limited** (ABN 34 100 070 013), which prior to 27 September 2007 received funding for the project from the project's original debt financiers ('the **Original Borrower**').
- **BNY Trust (Australia) Registry Limited** (ABN 88 000 334 636) ('the **Security Trustee**'), in its role as the security trustee for securities granted by the Trustee, the Company, the Borrower and others to the project's new debt financiers in order to secure their obligations under a series of debt financing documents.
- **Westpac Administration Pty Limited** (ABN 67 008 617 203), which prior to 27 September 2007 was the security trustee for the project's original debt financiers ('the **Original Security Trustee**').
- **ABN AMRO Australia Pty Limited** (ABN 78 000 862 797), as the intercreditor agent of the project's new debt financiers ('the **Intercreditor Agent**').
- **Westpac Banking Corporation** (ABN 33 007 457 141), as the agent of the project's original debt financiers ('the **Original Facility Agent**').

## 2.2 Contractual structure

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

The core contract is the **Cross City Tunnel Project Deed** between the RTA, the Trustee and the Company, dated 18 December 2002 ('the **Project Deed**'), as amended by:

- A **Cross City Tunnel Project First Amendment Deed** between the RTA, the Trustee and the Company, dated 23 December 2004 ('the **First Amendment Deed 2004–Project Deed and Agreement to Lease**'), and
- A **Cross City Tunnel Project Second Amendment Deed 2007–Project Deed** between the RTA, the Trustee and the Company, dated 27 September 2007 ('the **Second Amendment Deed 2007–Project Deed**').

The Project Deed sets out the terms under which:

- (a) **The Trustee and the Company were entitled to and had to finance, plan, design, construct and commission the Cross City Tunnel and associated surface road, property and services works**, using their best endeavours to complete 'Stage 1'—the tunnels and other specified works—by 18 October 2005 and all other works ('Stage 2') within eight months of the actual date of completion of Stage 1 on 28 August 2005 (i.e. by 27 April 2006).

Under the Project Deed construction site access had to be granted by the RTA as set out in a **Deed of Agreement to Lease (Cross City Tunnel)** between the RTA, the Trustee and the Company, dated 19 December 2002 ('the **Agreement to Lease**'). As part of its preparations to permit this access to be provided, the RTA had entered into a **Construction Access Licence** with the Royal Botanic Gardens and Domain Trust, dated 19 December 2002, for surface works east of the Art Gallery.

The design, construction and commissioning tasks imposed on the Trustee and the Company under the Project Deed included railway-related works specified in (and also required under) a **Rail Agreement** between RIC and the SRA (and thus, from 1 January 2004, RailCorp) and the Company, dated 18 December 2002, and electricity infrastructure works specified in (and also required under) a **CCT Project/EA Network Assets Co-ordination Deed** between EnergyAustralia and the Company, dated 18 December 2002 ('the **EA Agreement**'). The terms of the Rail Agreement were supplemented by a **Cross City Tunnel Intragovernmental Agreement** between the RTA, RIC and the SRA (and thus, from 1 January 2004, RailCorp), dated 17 December 2002 ('the **Intragovernmental Rail Agreement**'), while the terms of the EA Agreement were supplemented by a **Cross City Tunnel Project EA/RTA Side Deed** between the RTA and EnergyAustralia, dated 18 December 2002 ('the **EA/RTA Side Deed**').

For its part, the RTA had an obligation to the Trustee and the Company to comply with commitments it had made to:

- AML, in the '**AML Agreements**', two exchanges of letters concluded on 31 July 2001 and 18 December 2002, concerning Eastern Distributor interface works and operational interfaces
- The Sydney Harbour Foreshore Authority, in a **Cross City Tunnel Memorandum of Understanding** ('the **SHFA/RTA MoU**') dated 30 October 2002, concerning Darling Harbour land acquisitions by the RTA and Darling Harbour worksites and interface works, and
- EnergyAustralia, in an **Assets Relocation Agreement, an Agreement in Respect of the Works in Connection with the Cross City Tunnel CCT Project (Early Works Agreement)** ('the **EA Early Works Agreement**') and a **Network Assets Property Deed**, all dated 20 August 2001, concerning electricity infrastructure relocation works to be carried out by the RTA and EnergyAustralia in preparation for the Cross City Tunnel, with RTA funding support, and ongoing access by EnergyAustralia to electricity network assets in the area.

The RTA would have been liable to the Trustee and the Company if AML, the Sydney Harbour Foreshore Authority or EnergyAustralia had failed to comply with their own obligations to the RTA under any of these agreements.

The performance by the Trustee and the Company of their design, construction and commissioning obligations to the RTA under the Project Deed was independently verified by the Independent Verifier. The terms on which these construction-phase duties of the Independent Verifier had to be carried out were set out in the Project Deed, a **Deed of Appointment of Independent Verifier** between the RTA, the Trustee, the Company and the Independent Verifier, dated 18 December 2002, and two deed polls executed by the Independent Verifier on 18 December 2002, one in favour of RIC and the SRA (and thus, from 1 January 2004, RailCorp)

and the other in favour of the Sydney Harbour Foreshore Authority ('the **IV Deed Polls**').

The Trustee and the Company satisfied their design and construction obligations under the Project Deed through the performance by the Contractors of their obligations to the Trustee and the Company under a **Cross City Tunnel Design and Construction Contract**, dated 18 December 2002 ('the **D&C Contract**'), and the Independent Verifier independently verified the Contractors' performance under this D&C Contract in accordance with terms set out in a **Subordinate Deed of Appointment of Independent Verifier** between the Trustee, the Company, the Contractors, the Original Operator, the Original Facility Agent and the Independent Verifier, dated 18 December 2002.

Had the Project Deed been terminated by the RTA during the project's design and construction, under a **Contractor's Side Deed** between the RTA, the Trustee, the Company, the Contractors and the Independent Verifier, dated 18 December 2002, the RTA would have been able effectively to step into the shoes of the Trustee and the Company under the D&C Contract, and also the shoes of the Trustee, the Company and the Original Facility Agent under the Subordinate Deed of Appointment of Independent Verifier, so that independently verified design and construction work by the Contractors could have continued directly for the RTA.

- (b) **The Trustee was and is entitled to, has had to and must operate, maintain and repair the Cross City Tunnel and maintain and repair the associated surface road and property works and specified services** from the date of completion of the 'Stage 1' works (i.e. 28 August 2005) until 18 December 2035 or until any earlier termination of the Project Deed.

The operational, maintenance and repair tasks to be carried out by the Trustee under the Project Deed include tasks specified in the Rail Agreement.

The performance by the Trustee of its operational, maintenance and repair obligations to the RTA had to be independently verified by the Independent Verifier during the first two years of operations (i.e. until 27 August 2007), under terms set out in the Project Deed, the Deed of Appointment of Independent Verifier and the IV Deed Polls.

The Trustee has been and is satisfying most of its operational, maintenance and repair obligations under the Project Deed through the performance by the Company of operational, maintenance and repair obligations to the Trustee set out in a draft **Sublease** annexed to the Agreement to Sublease of 19 December 2002 between the Trustee and the Company.

In turn,

- The Company has been and is satisfying most of these obligations to the Trustee through the performance by the Original Operator (until 27 September 2007) and the Operator (since 27 September 2007) of their obligations to the Company under a **Cross City Tunnel Operations and Maintenance Agreement**, the original form of which

('the **Original O&M Agreement**') was executed by the Company and the Original Operator on 18 December 2002 (and was terminated on 27 September 2007) and the current form of which ('the **O&M Agreement**') was executed by the Company and the Operator on 27 September 2007, and

- The Independent Verifier has independently verified aspects of the Operator's performance under the Original O&M Agreement in accordance with terms set out in the Subordinate Deed of Appointment of Independent Verifier.

Under the Project Deed both the Trustee and the Company may make additional arrangements for the operation, maintenance and repair of the project, subject to requirements in the Project Deed.

Should the Project Deed be terminated by the RTA during the project's operational phase, under an **Operator's Side Deed** between the RTA, the Trustee, the Company, the Operator and the Independent Verifier dated 18 December 2002—as amended by a **Cross City Tunnel Project First Amendment Deed 2007—Operator's Side Deed** between the RTA, the Trustee, the Company, the Operator and the Independent Verifier dated 27 September 2007 ('the **First Amendment Deed 2007—Operator's Side Deed**')—the RTA will be able effectively to step into the shoes of the Company under the O&M Agreement, so that independently verified operational, maintenance and repair work by the Operator may continue directly for the RTA.

- (c) **The Trustee and the Company may collect and keep tolls** and impose other charges on tunnel users in vehicles not fitted with electronic tolling transponders.

Under a **Memorandum of Understanding, Electronic Toll Collection Amending Deed: Admission and Accession** between the RTA, the Company, AML, SWR Operations Pty Limited, Interlink Roads Pty Limited, The Hills Motorway Limited, Queensland Motorways Limited and WSO Co. Pty Limited, dated 18 December 2002 (the '**Electronic Tolling Admission Deed**'), the Company (and WSO Co. Pty Limited) became parties to an undated **Memorandum of Understanding: Management of Electronic Tolling on Tollroads** ('the **Electronic Tolling MoU**'), between all the other parties to the Amending Deed, concerning arrangements for the interoperability of tolling systems on Sydney and Brisbane tollroads.

Since then Connector Motorways Pty Limited (Lane Cove Tunnel), CityLink Melbourne Limited, ConnectEast Pty Limited (Melbourne) and RiverCity Motorway Pty Limited (Brisbane) have also become parties to the Electronic Tolling MoU, and the scope of this MoU has been extended to encompass the tolling systems of Melbourne tollroads.

- (d) **The Trustee and the Company must hand over the Cross City Tunnel to the RTA** on 18 December 2035 or upon any earlier termination of the Project Deed.

At the time of execution of the Project Deed on 18 December 2002, the RTA, the Trustee and the Company entered into a **Deed of Disclaimer** concerning information supplied to the Trustee and the Company by the RTA and the reliance of the Trustee and the Company on their own investigations, rather than this information, in entering into the project contracts. (This deed was broadly similar to the earlier deeds of disclaimer of 22 March 2001, referred to in section 1.3.2 above.)

Some of the rights and obligations of the RTA, the Trustee and the Company under the Project Deed were and are subject to restrictions or additional process requirements under an **RTA Consent Deed (Cross City Tunnel)** between the RTA, the Trustee, the Company, the Borrower and the Security Trustee, dated 18 December 2002 ('the **RTA Consent Deed 2002**'), as amended by a **Cross City Tunnel Project First Amendment Deed 2007–RTA Consent Deed 2002** between the RTA, the Trustee, the Company, the Borrower, the Original Borrower, the Security Trustee, the Original Security Trustee and the Intercreditor Agent, dated 27 September 2007 ('the **First Amendment Deed 2007–RTA Consent Deed 2002**').

Similarly, until 27 September 2007 some of the rights and obligations of RIC and the SRA (and thus, from 1 January 2004, RailCorp) under the Rail Agreement were subject to restrictions or additional process requirements under a **RIC/SRA Mortgaged Rights Notice** between RIC, the SRA, the Company and the Original Security Trustee, dated 18 December 2002, and until 27 September 2007 some of the construction-phase rights and obligations of Energy Australia under the EA Agreement were subject to restrictions or additional process requirements under an **EA Mortgaged Rights Notice** between Energy Australia, the Company and the Original Security Trustee, also dated 18 December 2002.

Since the completion of the Stage 1 works on 28 August 2005 the RTA has been and is obliged to lease the tunnel structures and the ramps into and out of the tunnels to the Trustee (under a **Land Lease**) and the land required for tunnel tolling gantries to the Company (under a **Company Lease**) until 18 December 2035. These leases must take the forms of draft leases annexed to the Agreement to Lease, as amended, in the case of the form of the Land Lease, by the Cross City Tunnel Project First Amendment Deed 2004–Project Deed and Agreement to Lease and then by a **Cross City Tunnel Project Second Amendment Deed 2007–Agreement to Lease** between the RTA, the Trustee and the Company, dated 27 September 2007 ('the **Second Amendment Deed 2007–Agreement to Lease**'). The latter amendments have completely replaced the former.

In turn, the Trustee will sublease the land it leases from the RTA under the Land Lease to the Company under a **Sublease**, which must take the form of the draft sublease annexed to an **Agreement to Sublease** between the Trustee and the Company.

Under an **RTA Deed of Charge (Cross City Tunnel)** between the RTA, the Trustee and the Company, dated 18 December 2002 ('the **RTA Deed of Charge**'), the obligations of the Trustee and the Company to the RTA under the Project Deed, the Agreement to Lease, the Land Lease, the Company Lease, the RTA Consent Deed 2002 and all other project contracts are secured by fixed and floating charges over their assets, undertakings and rights. Priorities between

these RTA securities and securities held by the project's debt financiers are governed by the RTA Consent Deed 2002, which also records the consents of the RTA and the Security Trustee to each others' securities and 'step in' rights under the project contracts and regulates the RTA's enforcement of its securities under the RTA Deed of Charge.

Similarly, until 27 September 2007 the **RIC/SRA Mortgaged Rights Notice** and the **EA Mortgaged Rights Notice** recorded the consents of RIC and the SRA (and thus, from 1 January 2004, RailCorp) and EnergyAustralia to the Original Security Trustee's securities over the Company's rights and obligations under the Rail and EA Agreements and the Original Security Trustee's rights to 'step in' under these agreements.

On 27 September 2007 the RTA granted its consent to the change of ownership of the Trustee and the Company described in section 1.4.2, the associated refinancing of the project—including the replacement of the Original Borrower and the Original Security Trustee by the Borrower and the Security Trustee, the introduction of the Intercreditor Agent and the associated replacement of the Original Operator by the Operator—in a **Deed of Consent–2007 Cross City Tunnel Sale** between:

- The RTA
- The Trustee, the Company, the Original Borrower, the Original Holdings Trustee and the Original Holdings Company, through their receivers and managers at that time
- The Original Security Trustee, and
- The Subsidiary Property Trustee, the Subsidiary Company Trustee and the Security Trustee,

dated 27 September 2007 ('the **RTA Consent Deed 2007 (CCT Sale)**').

On 27 September 2007 the RTA also agreed to an alternative arrangements for the satisfaction of the Project Deed's requirements for the Trustee to maintain professional indemnity insurance (see section 3.4.2), as set out in a **Professional Liability Insurance Arrangements Deed** between the RTA, the Trustee, the Company, the Original Holdings Trustee (through its receiver and manager), the Original Holdings Company (through its receiver and manager) and the three Equity Investors.

Until 27 September 2007 a **Public Authorities (Financial Arrangements) Act Deed of Guarantee** ('the **PAFA Act Guarantee**'), as originally executed on 18 December 2002 by the Minister for Roads (on behalf of the State of NSW), the RTA, the Trustee, the Company, the Original Borrower, the Original Security Trustee and the Original Facility Agent, provided a guarantee by the State of NSW, to the Trustee, the Company, the Original Borrower, the Original Security Trustee and the Original Facility Agent, of the RTA's performance of its obligations under the Project Deed, the Agreement to Lease, the Land Lease, the Company Lease, any lease of additional land as defined in the Agreement to Lease, the RTA Deed of Charge, the RTA Consent Deed 2002, the Deed of Appointment of Independent Verifier, the Contractor's Side Deed, the Operator's Side Deed and any other documents approved by the NSW Treasurer in the future.



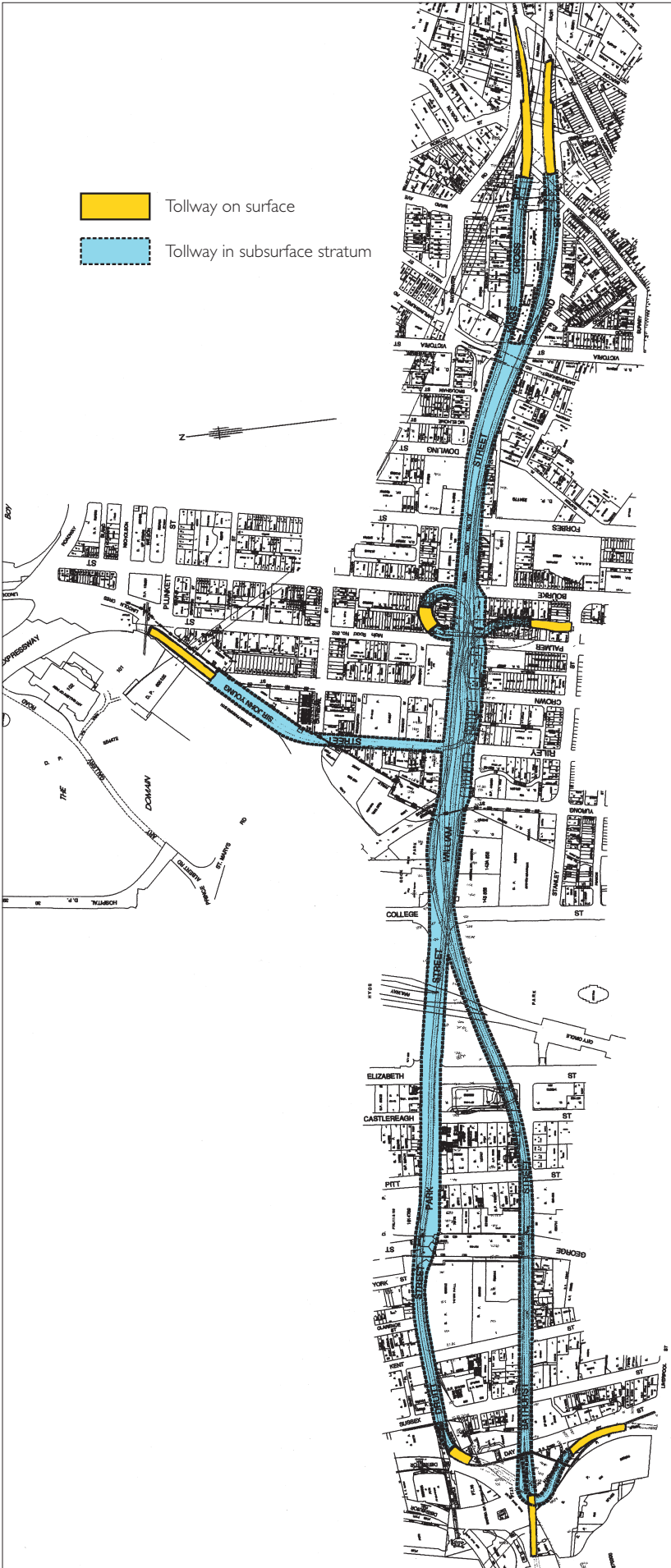


Figure 4. The Cross City Tunnel tollway, as declared by the Minister for Roads on 16 December 2002 under section 52 of the Roads Act.

Since 27 September 2007, when a **Cross City Tunnel Project First Amendment Deed 2007–PAFA Act Guarantee** (‘the **First Amendment Deed 2007–PAFA Act Guarantee**’) was executed by the Treasurer (on behalf of the State of NSW), the RTA, the Trustee, the Company, the Borrower, the Original Borrower, the Security Trustee, the Original Security Trustee and the Original Facility Agent, the beneficiaries of the PAFA Act Guarantee, as amended, have been changed and confined to the Trustee, the Company, the Borrower and the Security Trustee.

## 2.3 Conditions precedent

### 2.3.1 The 2002 contracts

Under their terms, most of the provisions of the Project Deed, the RTA Consent Deed 2002, the Rail Agreement, the EA Agreement, the Agreement to Lease, the Deed of Appointment of Independent Verifier and the IV Deed Polls, along with several other project contracts to which the RTA is not a party, did not become binding until:

- The RTA had received a certified copy of the Foreign Investment Review Board’s approval of the foreign ownership of the Trustee, the Company, the Borrower, CCM Holdings and the Holdings Trustee. This condition precedent was satisfied on 18 December 2002.
- The RTA had received a certified copy of a Private Tax Ruling on the project from the Australian Taxation Office. This ruling was issued on 6 December 2002, and the condition precedent was satisfied when the RTA received a copy of it the same day.
- The RTA had received and was satisfied with an audit of the Trustee’s and Company’s ‘base case financial model’ for the project. This condition precedent was satisfied on 19 December 2002.
- The RTA had received two of several security bonds to be provided to it by the Trustee under the Project Deed. This condition precedent was satisfied on 19 December 2002.
- The Trustee had effected insurance policies covering the design, construction and commissioning works to be undertaken by the Trustee and the Company, as specified in the Project Deed, and had provided certified copies of these policies to the RTA. This condition precedent was satisfied on 19 December 2002.
- RIC and the SRA had approved a *Rail Safety Plan* for the westbound tunnel works near Town Hall railway station, as required under the Rail Agreement. This condition precedent was satisfied on 16 December 2002.

- The Minister for Roads had declared specified parts of the Cross City Tunnel as a tollway, in accordance with section 52 of the Roads Act, and had directed the RTA to act as the roads authority for this tollway, in accordance with section 63 of the Roads Act. This condition precedent was satisfied on 16 December 2002, with the gazettal of a tollway declaration by the Minister for Roads for the proposed Cross City Tunnel roadways shown in **Figure 4** and the issuing of a section 63 direction the same day.
- All other necessary Ministerial consents and approvals, including the Treasurer's consent under section 20 of the Public Authorities (Financial Arrangements) Act, had been obtained. This condition precedent was satisfied on 16 December 2002.
- The Public Authorities (Financial Arrangements) Act Deed of Guarantee had been executed. This condition precedent was satisfied on 18 December 2002.
- All the other original major project contracts, other than the Land Lease, the Company Lease, the Agreement to Sublease, the Sublease and specified private sector debt financing securities, had been executed in a form satisfactory to the RTA and all of their conditions precedent—other than those applying for the Project Deed itself—had been satisfied. This condition precedent was satisfied on 19 December 2002.

In addition, under the terms of the RTA Consent Deed 2002 some of its provisions did not become binding until 'financial close', as

defined in the project's debt financing documents. This condition precedent was satisfied on 19 December 2002.

Accordingly, all of the contracts to which the RTA, RIC and/or the SRA are or were parties and which were subject to conditions precedent became binding on 19 December 2002.

The other 2002 contracts involving public sector parties have been binding since their dates of execution.

### **2.3.2 The 2004 amendment contract**

Under its terms, most of the provisions of the First Amendment Deed 2004—Project Deed and Agreement to Lease, executed on 23 December 2004, did not become binding until the project's equity investors (at that time) had subscribed at least \$35 million in additional securities in the Original Holdings Trustee and the Original Holdings Company and at least \$35 million of the proceeds from these subscriptions had been paid by the Original Holdings Trustee and the Original Holdings Company to the Trustee and the Company.

This condition precedent was satisfied on 17 January 2005.

### **2.3.3 The 2007 sale consent, amendment contracts and professional indemnity insurance arrangements contract**

The RTA Consent Deed 2007 (CCT Sale) was subject to a series of conditions precedent concerning the delivery of documents and a

## **Amendment contracts and other contracts with public sector parties since 2002**

### **2004 amendments:**

**Cross City Tunnel Project First Amendment Deed** between the RTA, the Trustee and the Company, dated 23 December 2004, amending the Project Deed and the form of the Land Lease annexed to the Agreement to Lease. (This contract is referred to in the Project Deed simply as 'the First Amendment Deed', but in order to avoid confusion with later 'first amendment deeds' it is referred to in this report as 'the **First Amendment Deed 2004—Project Deed and Agreement to Lease**').

### **2007 CCT sale consent and consequential amendments:**

**Deed of Consent—2007 Cross City Tunnel Sale** between the RTA, the Trustee, the Company, the Original Borrower (through its receiver and manager at that time), the Original Holdings Trustee (through its receiver and manager at that time), the Original Holdings Company (through its receiver and manager at that time), the Original Security Trustee, the Subsidiary Property Trustee (in its own right), the Subsidiary Company Trustee (in its own right) and the Security Trustee, dated 27 September 2007 ('the **RTA Consent Deed 2007 (CCT Sale)**'), granting the RTA's consent to the change of ownership of the Trustee and the Company, the associated refinancing of the project and the associated replacement of the Operator.

**Cross City Tunnel Project Second Amendment Deed 2007—Project Deed** between the RTA, the Trustee and the Company, dated 27 September 2007 ('the **Second Amendment Deed 2007—Project Deed**'), amending the Project Deed as a consequence of the sale.

**Cross City Tunnel Project Second Amendment Deed 2007—Agreement to Lease** between the RTA, the Trustee and the Company, dated 27 September 2007 ('the **Second Amendment Deed 2007—Agreement to Lease**'), amending the form of the Land Lease annexed to the Agreement to Lease (and replacing the amendments to the form of the Land Lease made by the First Amendment Deed 2004—Project Deed and Agreement to Lease).

**Cross City Tunnel Project First Amendment Deed 2007—Operator's Side Deed** between the RTA, the Trustee, the Company, the Operator and the Independent Verifier, dated 27 September 2007 ('the **First Amendment Deed 2007—Operator's Side Deed**'), novating and amending the Operator's Side Deed.

**Cross City Tunnel Project First Amendment Deed 2007—RTA Consent Deed 2002** between the RTA, the Trustee, the Company, the Borrower, the Original Borrower, the Security Trustee, the Original Security Trustee and the Intercreditor Agent, dated 27 September 2007 ('the **First Amendment Deed 2007—RTA Consent Deed 2002**'), novating and amending the RTA Consent Deed 2002.

**Cross City Tunnel Project First Amendment Deed 2007—PAFA Act Guarantee** between the Treasurer (on behalf of the State of NSW), the RTA, the Trustee, the Company, the Borrower, the Original Borrower, the Security Trustee, the Original Security Trustee and the Original Facility Agent ('the **First Amendment Deed 2007—PAFA Act Guarantee**'), novating and amending the PAFA Act Guarantee.

### **2007 alternative professional indemnity insurance arrangements:**

**Professional Liability Insurance Arrangements Deed** between the RTA, the Trustee, the Company, the Original Holdings Trustee (through its receiver and manager), the Original Holdings Company (through its receiver and manager) and the three Equity Investors (ABN AMRO Investments Australia Limited, ABN AMRO Infrastructure Capital Management Limited and Leighton Contractors Infrastructure Nominees Pty Limited, in their roles described in section 2.1.2), dated 27 September 2007.

revised financial model to the RTA, while the Second Amendment Deed 2007–Project Deed, the Second Amendment Deed 2007–Agreement to Lease, the First Amendment Deed 2007–Operator’s Side Deed, the First Amendment Deed 2007–RTA Consent Deed 2002 and the First Amendment Deed 2007–PAFA Act Guarantee were subject to conditions precedent requiring the completion of the sale of the Trustee and the Company to the new consortium under the sale contracts executed on 19 June 2007.

All of these conditions precedent had been satisfied on or before the date the contracts were executed, 27 September 2007, so all of the provisions of these contracts have been binding since that date.

The Professional Indemnity Insurance Arrangements Deed was not subject to any conditions precedent, and has been binding since it was executed on 27 September 2007.

## 2.4 Limits on the Trustee’s liabilities

---

The Project Deed, the RTA Deed of Charge, the Deed of Appointment of Independent Verifier, the Contractor’s Side Deed, the Operator’s Side Deed, the First Amendment Deed 2004–Project

Deed and Agreement to Lease, the Second Amendment Deed 2007–Project Deed, the Second Amendment Deed 2007–Agreement to Lease, the First Amendment Deed 2007–Operator’s Side Deed, the First Amendment Deed 2007–RTA Consent Deed 2002 and the First Amendment Deed 2007–PAFA Act Guarantee all contain standard provisions limiting the scope of the Trustee’s liabilities.

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

## 2.5 Upfront payment to the RTA in December 2002

---

In return for the RTA’s granting it the right to undertake the project, upon the satisfaction of the conditions precedent listed in section 2.3.1 the Trustee paid the RTA the sum of \$96,859,688 plus GST.



## 3 The Project Deed, the Rail and EA Agreements and verification, lease, insurance and novation arrangements

---

### 3.1 General obligations on and acceptance of risks by the Trustee and the Company

---

The main obligations of the Trustee to the RTA under the Project Deed were and are to:

- Finance, plan, design and construct all the project's tunnel, surface road, property, services and temporary works, except for specified plant and equipment works which are to be carried out by the Company.

The Trustee and the Company had to use their best endeavours to complete the Trustee's 'Stage 1' works, as defined in detailed *Scope of Works and Technical Criteria* documentation exhibited to the Project Deed and including the tunnels, by 18 October 2005, and then to complete all the other works for which the Trustee was responsible (the 'Stage 2 works') within eight months of the actual date of completion of Stage 1.

In practice, the 'Stage 1' works were completed on 28 August 2005 and the 'Stage 2' works' on 5 May 2006.

- Operate, maintain and repair the Cross City Tunnel, including its control centre and all associated plant and equipment, from the completion of Stage 1 until 18 December 2035 (or until 30 years and two months after the actual date of completion of 'Stage 1' if this had been later than 18 October 2005, or until any earlier termination of the Project Deed).
- Maintain and repair the project's local road and property works within a specified geographic area, plus any of the project's services works not handed over to or maintained by organisations other than the RTA, throughout this period.
- Yield possession of the Cross City Tunnel to the RTA on 18 December 2035 (or 30 years and two months after the actual date of completion of 'Stage 1' if this had been later than 18 October 2005, or upon any earlier termination of the Project Deed).

The main obligations of the Company to the RTA under the Project Deed were are to:

- Finance, plan, design, construct and commission specified 'Stage 1' plant and equipment works, and
- On 18 December 2035 (or 30 years and two months after the actual date of completion of 'Stage 1' if this had been later than 18 October 2005, or upon any earlier termination of the Project Deed), yield possession of the land it will lease from the RTA (under the Company Lease) to the RTA

The Trustee irrevocably appointed the Company as its agent to act on its behalf concerning the tunnel, surface road, property, services and temporary works that had to be financed, planned, designed and constructed by the Trustee under the Project Deed. The Company could, in turn, delegate this authority, including its authority to delegate, to sub-agents.

The Trustee has also contracted with the Company, under the Agreement to Sublease of 19 December 2002, for the Company, as an independent contractor rather than as the Trustee's agent, to carry out most of the Trustee's operational, maintenance and repair obligations to the RTA, on terms set out in the draft Sublease annexed to the Agreement to Sublease.

Each of the Trustee and the Company has unconditionally and irrevocably guaranteed the other's performance of its obligations to the RTA under the Project Deed and the other major project contracts, and has indemnified the RTA against any loss or damage if the other defaults.\*

Subject to specific terms in the Project Deed discussed below and in sections 3.2 to 3.5, the Trustee and the Company accepted and continue to accept all the risks associated with the project, including:

- All risks associated with the financing, design, construction, operation, maintenance and repair costs of the project
- The risks that traffic volumes or project revenues might be less than expected
- Income tax risks, and

---

\* All indemnities to be provided by the Trustee or the Company and all payments to be made by them for any loss suffered by the RTA under the Project Deed, the Agreement to Lease, the Land Lease and the Company Lease are to be reduced to the extent of any contribution to the claim or loss—including any negligent acts or omissions—by the RTA or its employees, agents or other contractors, *other than* acts or omissions by the RTA in exercising (or purporting in good faith to exercise) its rights or powers under these four contracts. Analogous provisions apply for any indemnities to be provided by the RTA or payments for losses to be made by the RTA under these contracts.

- The risks that their works or operational and maintenance activities might be disrupted by the lawful actions of other government and local government authorities or a court or tribunal.

The Project Deed expressly acknowledges that the RTA had and has made no representations or promises concerning Cross City Tunnel traffic levels. More generally, in the Deed of Disclaimer of 18 December 2002, exhibited to the Project Deed, the Trustee and the Company expressly warranted that they had not relied on the RTA's *Request for Proposals* of 8 June 2001 or specified information documents subsequently provided by the RTA, and that the RTA had made no representations or promises about the accuracy, adequacy, suitability or completeness of these documents, the designs in the *Scope of Works and Technical Criteria* or any other specifications or drawings in the Project Deed.

The Project Deed makes it clear, however, that the Trustee and the Company were and are not required to assume all the risks associated with the project. Some specific risks were and/or are allocated to or shared with the RTA, as discussed in sections 3.2 to 3.4 below, and if certain specified 'material adverse effect' circumstances arise the parties must negotiate in good faith with the aim of achieving a series of specified objectives, as described in section 3.5.

The Trustee and the Company have expressly acknowledged that nothing in the project's contracts will unlawfully restrict or otherwise unlawfully affect the RTA's rights to exercise any of its statutory powers and functions.

## 3.2 Design and construction

### 3.2.1 Scope of the Trustee's and Company's works

The works that had to be designed, constructed and commissioned by the Trustee and/or the Company comprised:

- The Cross City Tunnel itself, as specified in the *Scope of Works and Technical Criteria* appended to the Project Deed
- 'Property works', including adjustments to the Domain and the Domain Parking Station and access to other properties, as specified in the *Scope of Works and Technical Criteria*
- 'Local road works', including adjustments to existing local roads, footpaths, cycleways, open space and street landscaping and the introduction of bus lanes, cycle lanes and transit lanes, as specified in the *Scope of Works and Technical Criteria*
- 'Service works', to protect, adjust or enhance services infrastructure affected by the project, as specified in the *Scope of Works and Technical Criteria*
- Temporary works required only during the construction of the project
- Eastern Distributor interface works, as specified—in accordance with RTA commitments to AML in the AML Agreements—in a schedule to the Project Deed and in the Project Deed's *Scope of Works and Technical Criteria*

- Railway-related works as specified—in accordance with RTA commitments to RIC and the SRA (and thus, from 1 January 2004, RailCorp) in the Intragovernmental Rail Agreement—in the Rail Agreement and also, in part, in the Project Deed's *Scope of Works and Technical Criteria*, and
- Electricity network infrastructure relocation works as specified in the EA Agreement and also, in part, in the Project Deed's *Scope of Works and Technical Criteria*.

In addition to reflecting AML, RIC/SRA/RailCorp and Energy Australia requirements, the works and work methods specified in the Project Deed's *Scope of Works and Technical Criteria* also incorporated Sydney Harbour Foreshore Authority requirements agreed to by the RTA in the SHFA/RTA MoU.

The Project Deed's *Scope of Works and Technical Criteria*, the Rail Agreement and the EA Agreement set out detailed site investigation and surveying requirements, quality assurance and project verification requirements, performance and fitness for purpose requirements, design standards, construction method requirements, safety requirements and community involvement requirements for the Trustee and the Company. The Project Deed also imposed more general obligations for their works to be designed and constructed so that they were and would remain fit for their intended purposes and constructed with good workmanship and materials.

The respective responsibilities of the RTA, the Trustee and the Company for ensuring the project complied and continues to comply with the conditions of the Minister for Planning's approval of 12 December 2002 were and are detailed in the Project Deed and a schedule to that deed.

### 3.2.2 Changes to the scope of the Trustee's and Company's works

The RTA was entitled to change the works to be designed and constructed by the Trustee and/or the Company under the Project Deed, provided:

- The change would not adversely affect the use, patronage or capacity of the Cross City Tunnel or the ability to levy or collect tolls,\* and
- The change would not cause the Company to breach the Rail Agreement or the EA Agreement.

Within 25 business days of receiving a 'change order' from the RTA, the Trustee or the Company (as relevant) had to give the RTA detailed estimates of the likely costs and the implications of the proposed change for the functional integrity of the works, performance standards, quality standards, the date of completion of the works and any other obligations adversely affected by the change.

The RTA then had 15 business days to advise the Trustee or the Company whether it wished to proceed with the proposed change. If it decided to proceed, and the RTA agreed with the costings and advice of the Trustee or the Company, the RTA could notify the Trustee or the Company within this period and the change would

\* This proviso did not apply to any changes after the opening of the Cross City Tunnel necessitated by Department of Planning or other government or local government authority requirements imposed under certain conditions of the project's planning approval, discussed in section 3.3.3 below.

take effect in accordance with the Trustee/ Company costings and advice (i.e. with the notified amended standards etc). If the RTA disagreed with the Trustee/Company costings and/or advice, it could refer the matter for determination under dispute resolution procedures set out in the Project Deed, discussed in section 3.4.8 below; in the meantime, it could require the Trustee or the Company to implement the change, with the RTA paying the Trustee or the Company on the basis of the Trustee's or Company's cost estimates during this period.

Changes to the scope of works could also be proposed by the Trustee and/or the Company, which could be required by the RTA to certify that their proposed changes would not adversely affect the functional integrity of the works, performance standards, quality standards, the date of completion of the works or any of their other obligations to the RTA Under the EA Agreement, the Company also had to inform EnergyAustralia of any proposed design change and obtain its consent, which could not be unreasonably withheld.

The RTA had an absolute discretion whether to approve or reject any proposal by the Trustee and/or the Company for a change in the scope of works. If it approved the proposed change, the Trustee and the Company had to pay all the costs associated with the change, including those incurred by the RTA

If a change directed by the RTA increased the scope of works, the RTA had to pay the Trustee or the Company, as applicable,

- The costs to the Trustee or the Company reasonably arising from the change, including those associated with the Contractors' overheads and profits, and
- Any delay costs or equity holding costs.

Similarly, if a change in the scope of works directed by the RTA increased the Trustee's operation, maintenance and repair obligations during the operational phase of the project (see section 3.3.1), the RTA had to pay the Trustee:

- The costs to the Trustee reasonably arising from the change, including those associated with the overheads and profits of the Original Operator (and, since 27 September 2007, the Operator)
- Any delay costs or equity holding costs, and
- In the case of changes necessitated by Department of Planning or other government or local government authority requirements imposed under certain conditions of the project's planning approval, discussed in section 3.3.3 below, any loss of Trustee and/or Company revenue (reduced, if the requirements were imposed because of a breach by the Trustee or the Company of their obligations to the RTA, by the costs they would have incurred had they had to remedy the breach themselves).

If a change to the scope of works directed by the RTA decreased the scope of works and/or the Trustee's subsequent operation, maintenance and repair obligations and reduced the direct costs of the physical works, the RTA was entitled to receive 75% of the direct cost savings, excluding those related to overheads, margins and delay costs.

If a change in the scope of works directed by the RTA involved both increases and decreases in the scope of works, and/or both increases

and decreases in the Trustee's subsequent operation, maintenance and repair obligations, the RTA:

- Had to pay the Trustee or the Company, as applicable, all the costs associated with the increases in scope, including overhead, profit and delay costs, and
- Was entitled to receive 100% of the direct cost savings, excluding those related to overheads, margins and delay costs, associated with the decreases in scope and/or decreases in the Trustee's operational-phase obligations, up to the point where these direct cost savings from the work or obligations omitted equalled the direct costs of the work or obligations added, after which the RTA was entitled to receive 75% of any additional cost savings, again excluding those related to overheads, profits and delay costs.

If a change in the scope of work suggested by the Trustee or the Company and agreed to by the RTA resulted in cost savings, the RTA was entitled to receive 50% of the cost savings, excluding those related to overheads, profits and delay costs, estimated by the Trustee or the Company when it proposed the change.

Unless otherwise agreed,

- Any payments by the RTA to the Trustee and/or the Company under these arrangements had to be made progressively, within ten business days of the end of each month during which the relevant work had been undertaken, and
- Any payments to the RTA of a portion of any design and construction cost savings had to be made progressively, within 60 business days of the end of each month during which the omitted work would otherwise have been undertaken.

Any payments to the RTA of a portion of operational-phase cost savings had to be made in a manner and at a time to be agreed between the RTA, the Trustee and the Company. If they could not agree, the manner and timing of these payments had to be determined by an expert, who had to ensure that the timing would not make the cashflows of the Trustee or the Company worse than they would have been without the cost savings.

The RTA was not liable to the Trustee or the Company for any losses or claims arising from or otherwise associated with any changes in the scope of works suggested by the Trustee or the Company.

### **The December 2004 amendments for the funding of changes to the scope of the works**

During the design and construction of the project the RTA made a number of changes to the scope of the Trustee's and Company's works under the arrangements summarised above, principally in response to consultations with the community, local councils and other relevant 'stakeholders' required by conditions attached to the project's planning approval (see section 1.2).

By late 2004 it was evident that the costs likely to be incurred by the RTA as a result of these changes would exceed RTA estimates at the time the Project Deed was executed in December 2002.



Accordingly, on 23 December 2004 the RTA, the Trustee and the Company executed the First Amendment Deed 2004– Project Deed and Agreement to Lease, under which:

- From the date on which this First Amendment Deed's conditions precedent had been satisfied (see section 2.3.2), the Trustee and the Company would fund future changes to the project's works directed by the RTA, up to an aggregate of \$35 million (excluding GST) less:
  - \$4,979,888 which the Trustee and the Company had to (and did) pay to the RTA, on the date on which the First Amendment Deed's conditions precedent had been satisfied (in practice, 17 January 2005), refunding payments made to them by the RTA for changes to the scope of works prior to 23 December 2004, and
  - Any amounts which the Trustee and the Company had to pay to the RTA to refund 'interim' payments to them by the RTA for changes to the scope of works between 23 December 2004 and the date on which the First Amendment Deed's conditions precedent had been satisfied (in practice, there were no such 'interim' payments or refunds), and
- Within 20 business days of the completion date for 'Stage 2' of the works, the Trustee and the Company had to pay the RTA the lesser of (a) any unexpended and uncommitted portion of this amount and (b) \$5 million (again, in practice there were no such payments).

In return for these additional funding commitments by the Trustee and the Company,

- The maximum permissible tolls on tunnel users were increased, as described in section 3.3.6, and
- The rents potentially payable by the Trustee to the RTA under the Land Lease were adjusted to reflect associated revisions to the private sector participants' 'base case financial model' for the project, as described in section 3.3.7. (Following the sale of the Trustee and the Company in 2007, these adjustments have now been entirely replaced by adjustments made as a result of the sale.)

### **3.2.3 Challenges to the project's planning approval**

The RTA has acknowledged that the Trustee, the Company and their financiers have entered into the project contracts:

- Assuming the validity of the project's environmental assessment, the planning approval granted by the Minister for Planning on 12 December 2002, as subsequently modified, as described in section 1.2, and *State Environmental Planning Policy No 63—Major Transport Projects*, and
- On the basis that the RTA accepts the risks that this assessment, the planning approval and/or the *SEPP* might be subject to a legal challenge and might be found to be unlawful or invalid.

Accordingly, if there were a legal challenge concerning the environmental assessment, the planning approval or the *SEPP*,

- The Trustee and the Company would have to continue to perform their obligations to the RTA under the project contracts

unless they were ordered not to by a court (or another legal requirement) or by the RTA, or unless the RTA agreed that they need not continue to do so, and

- The RTA would have to indemnify the Trustee and the Company from and against:
  - All the costs they and their financiers reasonably incurred in making investigations and enquiries, including their legal costs
  - Any claims against or costs incurred by the Trustee or the Company arising out of any RTA agreement that they need not continue to perform their obligations, any court orders or other legal requirements, any court findings or any RTA directions, including their compliance with any changes to the planning approval or a new planning approval, and
  - Any claims against or costs incurred by the Trustee or the Company arising out of any court finding of invalidity of the environmental assessment, the planning approval or the *SEPP*.

These indemnities would extend to escalation, demobilisation and re-establishment costs, construction subcontract break costs, financial rearrangement and debt restructuring costs (provided, in the case of a court finding of invalidity of the environmental assessment, planning approval or *SEPP*, that the finding had or would have a material adverse effect on the ability of the Trustee and the Company to carry out the project) and all other costs to the Trustee and the Company, including delay costs other than those incurred during the first 30 days of any court order requiring the Trustee or the Company to cease performing its obligations under the Project Deed.

The RTA would not be liable, however, for any costs resulting from a failure by the Trustee or the Company to mitigate their losses or comply with RTA directions, or if the legal challenge succeeded solely because of a breach of the Project Deed by the Trustee or the Company.

### **3.2.4 Design obligations and intellectual property**

The principal design obligations of the Trustee and the Company were to satisfy the requirements of the *Scope of Works and Technical Criteria* and ensure the works would be, and would remain, fit for their intended purposes. Additional requirements, intended to protect railway and electrical infrastructure, operations and safety, were set out in the Rail Agreement and the EA Agreement.

The Trustee and the Company had to give the RTA, RIC and the SRA (and thus, from 1 January 2004, RailCorp), EnergyAustralia and the Independent Verifier the opportunity to comment on and monitor their design development and documentation, which had to comply with timeframes set out in a documentation schedule appended to the *Scope of Works and Technical Criteria*.

In the case of RIC and the SRA (and thus RailCorp), the Company had to use its best endeavours to incorporate RIC/ SRA/RailCorp submissions concerning railway-related aspects of the project's design into the designs, provided these submissions were consistent with the project contracts, did not necessitate the acquisition of extra land, did not necessitate a material change in the scope of

works (section 3.2.2 above) and would not have had a 'material adverse effect' on the project (see section 3.5 below).

In the case of EnergyAustralia, the EA Agreement set out detailed timeframes for EnergyAustralia reviews of various elements of the project's design documentation, EnergyAustralia's approval was required before construction of these elements could proceed, and the Company had to meet Energy Australia's reasonable costs in reviewing and approving the designs.

The design documentation for each discrete design element had to be certified by the Trustee, the Company or the Contractors and verified by the Independent Verifier as being suitable for construction and in compliance with the Project Deed and the *Scope of Works and Technical Criteria*, including, in particular, its durability and design life requirements.

The Trustee and the Company warranted to the RTA that at the time the Project Deed was executed they owned or were otherwise entitled to use all the project's existing design documentation. On 19 December 2002, ownership of and copyright in the existing design documentation owned by the Trustee or the Company passed to the RTA. The RTA also automatically gained ownership of and copyright in all the design documentation subsequently created by them for the project. In the case of design documentation owned by others, the Trustee and the Company had to grant the RTA an irrevocable, perpetual licence to use the documentation for the purposes of the project. Similarly, under the EA Agreement the Company had to grant EnergyAustralia an irrevocable licence to use all the design documentation relating to the electrical infrastructure works.

### **3.2.5 Construction access**

The RTA had to give the Trustee (and thereby the Company) access to construction sites defined in a 'site access schedule' annexed to the Agreement to Lease, under arrangements set out in the Project Deed and the Agreement to Lease. In return for these rights, the Trustee paid the RTA a 'licence fee' of \$10.

Timeframes for and restrictions on this access were set out in the site access schedule, in several appendices to the *Scope of Works and Technical Criteria*—one of them reproducing timeframes and arrangements to minimise disruption at Darling Harbour sites which were agreed between the Sydney Harbour Foreshore Authority and the RTA in the SHFA/RTA MoU—and in the EA Agreement and the Agreement to Lease.

In addition, under the Rail Agreement the Company had to give RIC and the SRA (and thus, from 1 January 2004, RailCorp) 20 business days' notice before commencing any work within 50 metres of any railway facility.

If the Trustee required additional land in order to construct the project's works, it had to procure this 'extra land' (or the use of this land) itself, at its own cost and at its sole risk.

If requested to do so by the Trustee, and if the Independent Verifier was satisfied the 'extra land' was essential, the RTA had to use its best endeavours, at the Trustee's cost, to assist the Trustee to obtain the use of this land. If necessary, this action by the RTA had to include the use of the RTA's statutory powers to acquire land, or, in the case of any extra land required for electricity network

relocations, action by the RTA to ensure Energy Australia used its equivalent statutory powers.

If the Trustee was prevented by a local council from accessing a footpath within a construction site, the RTA had to reasonably assist it in obtaining this access but was not obliged to compulsorily acquire any land. If these efforts were unsuccessful, preventing part of the local road works from being carried out, the RTA had to issue a 'change order' (see section 3.2.2 above) reducing the Trustee's scope of works accordingly.

Until the completion of all construction the RTA was entitled to access the construction sites and all other areas relevant to the works during business hours or on reasonable notice, subject to normal safety and security constraints, in order to observe the progress of the works, monitor the Trustee's and Company's compliance with the Project Deed and exercise its other rights and obligations under the contracts.

### **3.2.6 Latent conditions and contamination**

The Trustee and the Company accepted all the risks of losses or delay associated with the physical conditions and characteristics of the land used for the project, its surroundings and structures on the land, including water and sub-surface conditions. They also warranted that they had not relied on any RTA information about this land.

In the case of hazardous contamination, however, the risks accepted by the Trustee and the Company under the Project Deed and the Rail Agreement were limited to any disturbance of contaminants by their activities or any contamination otherwise associated with their activities. They had to remove and/or treat any contamination from these causes and remediate the land at their own expense, but the RTA had to indemnify them from and against any claims or losses associated with any other pre-existing contamination.

### **3.2.7 Environmental requirements and complaints**

In carrying out their design and construction obligations the Trustee and the Company had to comply with the project's planning approval of 12 December 2002, as modified on 26 February 2004 and 24 September 2004 (see section 1.2). More specifically, they had to comply with the conditions attached to the 12 December 2002 approval—many of them intended to reduce construction-phase environmental impacts—in accordance with an allocation of responsibilities detailed in a schedule to the Project Deed.

They also had to:

- Comply with other environmental requirements detailed in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
- Prepare and comply with *Environmental Management Plans*, again as detailed in the Project Deed's *Scope of Works and Technical Criteria*
- Indemnify the RTA from and against any claim or loss if they failed to meet these obligations
- Obtain all other State and local government approvals required for the project
- Take precautions to prevent the removal of or damage to any archaeological or other artefacts on the sites, notify the RTA

immediately if they discovered any such artefacts and comply with any resultant directions by any government authority at their own expense

- Notify the RTA immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance by them with the planning approval or other environmental requirements, their use or occupation of the land required for the project or any damage by them to third parties' property, and
- Resolve any such matters as soon as possible and keep detailed records of all complaints etc and their responses.

### **3.2.8 Native title claims**

If there had been a native title claim over any part of the project's construction sites, the Trustee and the Company would have had to continue to perform their design and construction obligations unless they were ordered not to by the RTA, a court or tribunal or any other legal requirement, in which case:

- The Trustee and the Company would have had to take all reasonable steps to mitigate the resultant costs and comply with all reasonable RTA directions concerning the native title claim and its consequences, and
- If the direction, order or requirement delayed the completion of Stage 1 or Stage 2 by more than 30 days, the RTA would have had to pay the Trustee and the Company the reasonable costs incurred by the Trustee, the Company and the Contractors, as a result of the direction, order or requirement, during the portion of the delay period commencing on its 31st day.

The costs to be paid by the RTA in these circumstances would have included the Trustee's, Company's and Contractors' overheads and delay costs.

To avoid double-counting, however;

- The costs to be paid by the RTA would not have included any amounts payable by the Trustee or the Company to the Contractors, and
- If a direction, order or legal requirement delaying the completion of 'Stage 2' had already delayed the completion of 'Stage 1', the RTA's payment liabilities associated with the 'Stage 2' delay would have been confined to the reasonable costs incurred by the Trustee, the Company and the Contractors, as a result of the direction, order or requirement, during any portion of the Stage 2 delay period that was after its first 30 days and after the 'Stage 2' delay had become longer than the earlier 'Stage 1' delay.

### **3.2.9 Third party claims**

Under the Project Deed the Trustee and the Company had to indemnify the RTA from and against any claim or loss arising from damage or injury to others, except for:

- Claims or losses arising from any pre-existing land contamination not associated with the activities of the Trustee or the Company (see section 3.2.6 above), and
- Third party claims for economic losses arising from the decision by the Government and the RTA to proceed with the project or

the existence or location of the Cross City Tunnel and/or local area traffic management measures in accordance with the planning approval.

Similarly,

- Under the Rail Agreement the Company had to indemnify RIC and the SRA (and thus, from 1 January 2004, RailCorp) from and against any claim or loss arising from damage or injury caused wholly or partly by the Company or by a Company breach of the Rail Agreement, including any damage to existing railway facilities, and had to rectify all damage to existing rail facilities at its own cost (this indemnity did not extend to losses or damage caused by negligence or a breach of the Rail Agreement by RIC, the SRA or RailCorp), and
- Under the EA Agreement the Company had to indemnify EnergyAustralia against and from all claims and losses arising from its electricity network relocation works for Energy Australia or any Cross City Tunnel works under the Project Deed which affected the relocation works or electricity network assets, again other than to the extent that the losses or damage were contributed to by EnergyAustralia's own negligence or breach of the EA Agreement.

Under a schedule to the Project Deed the Trustee and the Company had to make specified payments to the RTA whenever their Eastern Distributor interface works necessitated lane closures on the Eastern Distributor; its William Street or Macquarie Street ramps or the Cahill Expressway. The RTA, in turn, had to pay the same amounts to AML under the AML Agreements.

Unless the Trustee or the Company breached the Project Deed, was negligent or otherwise acted unlawfully, the Trustee and the Company had no other liabilities to the RTA or AML or its associates in carrying out their Project Deed obligations concerning the Eastern Distributor interface works.

However; the Trustee and the Company had to indemnify the RTA from and against any loss or claim associated with any physical damage to the Eastern Distributor; beyond that inherent in connecting the Cross City Tunnel to the Eastern Distributor; or any failure by the Trustee or the Company to carry out their Project Deed obligations concerning these connections.

The Company similarly agreed to indemnify the RTA from and against any loss or claim against the RTA by RIC, the SRA, RailCorp (from 1 January 2004) or EnergyAustralia arising from any failure by the Company to carry out its obligations under the Rail Agreement or the EA Agreement.

### **3.2.10 Traffic management during construction**

The Trustee was responsible for controlling, directing and protecting all traffic affected by the construction of the project, in accordance with detailed requirements set out in the Project Deed's *Scope of Works and Technical Criteria*, including a periodically updated *Traffic Management and Safety Plan*, and any directions by the RTA or other relevant authorities.

The RTA had authorised the Trustee, the Company and the Contractors to carry out these traffic management functions on its behalf, and had to continue to do so.



Specific arrangements for the closure of Eastern Distributor lanes and/or access ramps at different stages of construction were detailed in a schedule attached to the Project Deed. This schedule also set out payments to be made by the Trustee and the Company to the RTA when these closures occurred, so that the RTA could, in turn, make compensatory payments to AML in accordance with the second AML Agreement of 18 December 2002.

### **3.2.1.1 Project construction programs, plans, reports, reviews, inspections and rail safety suspensions**

An initial design and construction works program was exhibited to the Project Deed. This works program had to be progressively updated and detailed by the Trustee and the Company as set out in a 'Company documentation schedule' appended to the Project Deed's *Scope of Works and Technical Criteria*. In addition,

- Under the Rail Agreement the Company had to give RIC and the SRA an initial works program for all works within 50 metres of any railway facilities and then had to give them (or, from 1 January 2004, RailCorp) any subsequent amendments and updates of this program, along with monthly reports on all works conducted within these 50 metre 'protection zones'
- Under the EA Agreement the Company had to give Energy Australia a 'company works program' for the works it was undertaking for EnergyAustralia and a 'CCT program' for the Cross City Tunnel works that would affect or interface with EnergyAustralia's network assets.

Similarly, under the Project Deed an initial *Project Training Plan, Quality Plan, Project Management Plan, Environmental Management Plan, Design Plan, Construction Plan, O&M Plan, Community Involvement Plan, Incident Response Plan, Traffic Management and Safety Plan and Occupational Health, Safety and Rehabilitation Management Plan* appended to the *Scope of Works and Technical Criteria* had to be developed, amended and updated throughout the design and construction works (and, later, during the operation and maintenance of the project), again in accordance with detailed requirements specified in the *Scope of Works and Technical Criteria*, and submitted to the RTA.

The RTA was entitled, but not obliged, to review any of these project plans. The Trustee had to promptly submit an amended project plan if the RTA notified it within 15 business days that any of these plans did not comply with the Project Deed.

In addition,

- Before commencing any works within 50 metres of any railway facilities the Company had to prepare and obtain RIC and SRA approval (and thus, from 1 January 2004, RailCorp's approval) of a *Rail Safety Plan*, as specified in the Rail Agreement, for all works within the relevant rail 'protection zone'.

A draft of this plan had to be prepared and submitted to RIC and the SRA by 17 March 2003 and amended at the Company's cost until it had been agreed to by RIC and the SRA (as a 'preliminary' plan only, not the *Rail Safety Plan*).

The Company then had to prepare and submit the *Rail Safety Plan* itself at least three months before commencing any construction works within the relevant rail 'protection zone'. RIC and the SRA (and thus, from 1 January 2004, RailCorp) could agree to this plan, or withhold their agreement, in their absolute discretions, provided they took account only of specified rail safety issues and the contents of the preliminary plan, and could request amendments to and resubmission of the *Rail Safety Plan*, at the Company's expense, prior to providing their written agreement. They had to grant their approval if the amended plan adequately dealt with their reasons, as communicated to the Company, for rejecting or requesting amendment of the earlier plan. Time limits for RIC/SRA/RailCorp responses were set out in the Rail Agreement.

The *Rail Safety Plan* could not modify the Cross City Tunnel's design, but could require changes to the methods used to carry out the works.

Any disputes about the preparation or approval of the *Rail Safety Plan* had to be referred for resolution by the Director General of the NSW Ministry of Transport.\*

- Under the Project Deed the Trustee had to give the RTA an *Industrial Relations Plan*, as detailed in the Project Deed's *Scope of Works and Technical Criteria*, before commencing any construction works, and then had to resubmit this plan on a monthly basis for RTA implementation reviews, making all relevant records, including those of its Contractors, available to the RTA.
- The Company had to give RIC and the SRA (and thus, from 1 January 2004, RailCorp) regular written reports on all matters relevant to the Rail Agreement and RIC/SRA/RailCorp rail safety and future rail project requirements (as appended to the Project Deed's *Scope of Works and Technical Criteria*), including monthly reports on the progress of works within the rail 'protection zones' and any rail safety issues and reports on any non-compliances with the *Rail Safety Plan*.

Under the Project Deed the RTA was entitled, but not obliged, to inspect, review and monitor the works being carried out by the Trustee, the Company and the Contractors. If the RTA notified the Trustee of a defect, and the Independent Verifier agreed the notified works were not in accordance with the Project Deed, the Trustee and the Company had to correct this defect. If the Trustee or the Company disagreed with the RTA's notice, either could notify the RTA of this within 15 business days, in which case the RTA, the Trustee and the Company had to attempt to resolve the matter. If they could not do so within five business days, any of them could refer the matter for determination by the Independent Verifier within the following five business days.

Similarly, under the Rail Agreement RIC and the SRA (and thus, from 1 January 2004, RailCorp) could at any time inspect any of the works within the rail 'protection zones' and any other works affecting rail safety and/or possible future rail projects, provided they gave the Company prior written notice.

\* As indicated in section 2.3.1, one of the conditions precedent which had to be satisfied or waived before the Project Deed became binding was RIC and SRA approval, under the Rail Agreement, of a *Rail Safety Plan* for the westbound tunnel works near Town Hall railway station. This condition precedent was satisfied on 16 December 2002.

The Company had to immediately notify and confer with RIC and the SRA (or, from 1 January 2004, RailCorp) if it became aware of any likely or actual material detrimental effect from its works on rail safety, railway facilities, the users or occupants of rail facilities, rail operations or the rights of RIC or the SRA (or RailCorp) under the Rail Agreement or RIC/SRA/RailCorp rail safety and future rail project requirements (as appended to the Project Deed's *Scope of Works and Technical Criteria*).

RIC and/or SRA (or, from 1 January 2004, RailCorp) could suspend the Trustee's and Company's works within the rail 'protection zones' in these circumstances, or if there were any other threat to public safety or breach of the *Rail Safety Plan*, until the matter had been remedied. The Company had to endeavour to minimise the impact of the suspension by (for example) rescheduling and reprogramming its works, but the Company and the Contractors were not obliged to incur additional costs. RIC and the SRA (and thus, from 1 January 2004, RailCorp) had to indemnify the Company from and against all claims and losses arising from the suspension, unless:

- The events leading to the suspension had been caused wholly or partly by the Trustee's and Company's works or by the Company's negligence or breach of the Rail Agreement, or
- The total suspension period, for all suspensions by RIC, the SRA and/or RailCorp during the construction of the works, was less than five days for works not forming part of a 'critical path' or less than 12 days for works which were part of a 'critical path'.

### **3.2.12 Quality assurance and verification**

The Trustee and the Company assumed all responsibility for the quality and durability of their designs and works.

The Trustee had to implement a quality system for all its design and construction activities and works as specified in the Project Deed's *Scope of Works and Technical Criteria*, including the development and implementation of a *Quality Plan*. Its compliance with the *Quality Plan* had to be independently audited, by an auditor acceptable to the RTA, at least every six months during the design and construction of the project. Procedures for the correction of non-conformances were set out in the *Scope of Works and Technical Criteria*.

The Independent Verifier, which was obliged to act independently of the Trustee, the Company, the RTA, RIC, the SRA, RailCorp, the Sydney Harbour Foreshore Authority, the Contractors, the Operator, their subcontractors and the private sector financiers, had to:

- Verify that the works complied with the requirements of the Project Deed, including its quality and durability requirements
- Make a series of binding determinations, as set out in the Project Deed, and
- Undertake other design and construction review, certification and reporting responsibilities as set out in the Project Deed and listed in a schedule to the Deed of Appointment of Independent Verifier.

The Independent Verifier acknowledged in the Deed of Appointment of Independent Verifier and the IV Deed Polls that the RTA, RIC, the SRA, RailCorp, the Sydney Harbour Foreshore Authority, the Trustee and the Company would be relying on its skills and expertise, and warranted that it would perform its services

honestly, diligently, reasonably and with the professional care and skills expected of an expert providing these types of services within the construction industry generally and the construction of major engineering works in particular.

RIC and the SRA (and thus, from 1 January 2004, RailCorp) could make submissions to the Independent Verifier during the project's certification processes through the RTA.

### **3.2.13 Completion**

As already indicated, the Trustee and the Company had to use their best endeavours to complete the project's 'Stage 1' works, as defined in the Project Deed's *Scope of Works and Technical Criteria* and including the tunnels, by 18 October 2005 and the project's 'Stage 2' works—all the other works for which the Trustee was responsible—within eight months of the actual date of completion of 'Stage 1'.

If the Trustee and/or the Company were delayed in carrying out their work by any RTA act or omission in accordance with the Project Deed or the RTA's statutory powers, they had to notify the RTA within 15 business days and the RTA had to act immediately to end this delay.

If the Trustee or the Company became aware of any matter which would or might delay them in achieving completion by the due dates, they had to immediately notify the RTA of this in writing, providing details and a proposed corrective action plan involving, for example, changes to construction sequencing or methodologies. They also had to give the RTA a proposed corrective action plan if the RTA notified them that the RTA believed they would not achieve completion by the due dates.

The RTA then had five business days to notify the Trustee and the Company if it was not satisfied this plan would mitigate the effects of the delay. If it did so, an amended plan had to be submitted. If it did not, the Trustee and the Company had to implement the plan.

The Project Deed set out procedures for the advance notification of estimated completion dates for each stage of the project and the certification of completion by the Independent Verifier. Completion was subject to a series of pre-conditions, detailed in a schedule to the Project Deed, including:

- The provision of safety audits, quality reports, non-conformance documents, drainage design approvals, a series of certificates on specific works, copies of operation and maintenance manuals and plans, copies of all approvals for the operation of the tunnels, notification of traffic opening dates, notices from relevant authorities that the services and local road works had been completed, inventory details, operational phase security bonds (see section 3.3.4 below), 'as built' drawings (including drawings to be provided to RailCorp), releases concerning 'extra land' used for construction of the project (see section 3.2.5), copies of specified site investigation reports, property surveys, land surveys and property condition surveys, and details of the locations of all services
- NSW Fire Brigade approval of the tunnel structures, materials and systems

- RTA approval of the Trustee's asset management system and durability assessment reports
- Agreement between the RTA, the Trustee and the Company on operational phase air quality procedures (see section 3.3.1 below)
- In the case of 'Stage 2' completion, the correction of all 'Stage 1' defects notified to the Trustee or the Company a reasonable time before their final notification of the expected date for the completion of 'Stage 2' (see section 3.2.14 below)
- The removal of construction phase signage, and
- The vacation and reinstatement of all land used for temporary works.

All lanes of the Cross City Tunnel had to be opened for traffic as soon as practicable after the completion of 'Stage 1'.

In addition to these Project Deed requirements, under the Rail Agreement:

- The completion of each stage under the Project Deed was subject to a pre-condition that the Independent Verifier had certified that the works complied with the Rail Agreement and RIC/SRA/RailCorp rail safety and future rail project requirements (as appended to the Project Deed's *Scope of Works and Technical Criteria*), and
- The Company had to prepare an *Operations Rail Safety Plan* to RailCorp's satisfaction before the tunnels were opened to traffic (see section 3.3.1 below).

As already indicated, in practice 'Stage 1' was completed on 28 August 2005 and 'Stage 2' was completed on 5 May 2006.

### **3.2.14 Correction of defects**

The Trustee and the Company had to correct all defects existing at the time of certification of completion as soon as practicable.

More specifically, all 'Stage 1' defects notified to the Trustee or the Company a reasonable time before their final notification of the expected date for the completion of 'Stage 2' (ten business days before this date) had to be corrected as a pre-condition for the completion of 'Stage 2'.

Within 'defects correction periods' ending 12 months after the completion of 'Stage 2', the Trustee then had to correct all defects in its local road works, service works and property works notified by the RTA, within the times specified by the RTA, and a new 12-month defects correction period commenced for each of the corrected works upon the completion of each correction.

If the Trustee disagreed with an RTA direction to carry out corrective works, it had to notify the RTA of this, in writing, within ten business days and the RTA and the Trustee had to attempt to resolve their differences. If they could not do so within ten business days, either could refer the matter for final, binding determination by the Independent Verifier:

If the Trustee did not comply with a direction by the RTA or the Independent Verifier to carry out corrective works, the RTA could employ others to carry out these works and recover its costs and any other losses from the Trustee as a debt.

As described in section 3.3.1 below, the Trustee and the Company have ongoing obligations throughout the operating term of the Cross City Tunnel to correct all defects—including any defects in Eastern Distributor interface works handed over to AML—as soon as possible.

### **3.2.15 Design and construction security bonds**

In addition to the security granted to the RTA under the RTA Deed of Charge (see section 4.1),

- The Trustee gave the RTA two unconditional bank guarantees in favour of the RTA, one for \$20 million and the other for \$5 million, to secure the Trustee's and the Company's performance of their obligations to the RTA under the Project Deed and RIC and the SRA (and thus, from 1 January 2004, RailCorp) under the Rail Agreement, and
- The Company gave EnergyAustralia an unconditional bank guarantee in favour of EnergyAustralia, for \$1 million, to secure its performance of its obligations under the EA Agreement.

If they were not drawn upon,

- The EnergyAustralia bank guarantee had to be released within six months and 14 days of the completion of the Company's works for EnergyAustralia, or within 14 days of the completion of the 'Stage 1' Cross City Tunnel works under the Project Deed if this were later
- The \$20 million RTA bank guarantee had to be released within 20 business days of the completion of the 'Stage 2' works under the Project Deed, and
- The \$5 million RTA bank guarantee had to be released within 20 business days of the end of the defects correction periods (i.e. within one year and 20 days of the completion of 'Stage 2'), or upon the RTA's receipt of 'work as executed' drawings and computer models, as specified in the Agreement to Lease (see section 3.3.5 below), if this occurred later.

## **3.3 Operation and maintenance**

### **3.3.1 Scope of the Trustee's operation, maintenance and repair obligations**

The Trustee has had to and must:

- Operate maintain and repair the Cross City Tunnel, including its control centre and all associated plant and equipment, and
- Maintain and repair the project's local road and property works within a specified geographic area, plus any of the project's services works not handed over to or maintained by organisations other than the RTA,

from the completion of 'Stage 1' until 18 December 2035 (or until 30 years and two months after the actual date of completion of 'Stage 1' if this had been later than 18 October 2005), or until any earlier termination of the Project Deed, so that:

- All lanes of the Cross City Tunnel were opened for traffic as soon as practicable after the completion of 'Stage 1' and are kept open at all times, regardless of whether tolling systems are operational,

unless the RTA agrees otherwise, in writing, or it is necessary to close the tunnels or any part of any lane because of:

- A legal requirement, the requirements of a relevant government or local government authority or the requirements of any easement over the land (as defined in the agreement to Lease or the Land Lease)
  - The occurrence of a *force majeure* event (see section 3.4.11)
  - A material threat to public health or safety,
  - Emergency maintenance or repairs
  - Access by the RTA
  - Traffic management measures in response to congestion or abnormal incidents on the road network around the tunnels, in accordance with protocols to be agreed with the RTA
  - A suspension of tunnel operations directed by RailCorp under the Rail Agreement (see below), or
  - Traffic management measures in response to air quality problems, in accordance with protocols which had to be agreed with the RTA prior to the completion of 'Stage 1', as set out in a schedule to the Project Deed (see section 3.3.3)
- The Cross City Tunnel and the local road, property and services works meet and maintain performance standards, design life standards and handover conditions specified in the Project Deed's *Scope of Works and Technical Criteria*, and otherwise remain fit for their intended purposes at all times
  - All defects—including any defects in Eastern Distributor interface works handed over to AML—are corrected as soon as possible, and
  - The conditions of the project's planning approval and other environmental requirements set out in an appendix to the *Scope of Works and Technical Criteria* are met at all times (as already indicated in section 3.2.7, RTA and Trustee responsibilities for meeting the conditions of the 12 December 2002 planning approval have been allocated in a schedule to the Project Deed).

Minimum standards, tasks and obligations for the Trustee to fulfil these general obligations are detailed in the *Scope of Works and Technical Criteria*. If further measures are needed, the Trustee must implement them at its own cost. It has had to and must also:

- Develop an *Operation and Maintenance Plan* and *Operation and Maintenance Manuals*, as detailed in the *Scope of Works and Technical Criteria*, prior to the completion of 'Stage 1', and maintain and implement them throughout the project's operating term, and
- Prepare an *Operations Rail Safety Plan*, addressing rail safety issues specified in the Rail Agreement, to the satisfaction of RailCorp prior to opening the tunnels to traffic, and conduct regular testing and review of this plan's effectiveness at least once every six months throughout the project's operating term, in consultation with RailCorp.

The Trustee has warranted that its operation, maintenance and repair works will use workmanship and materials of the highest

standard and fit for their intended purposes, that any replacement parts will be of equal quality and fit for their intended purposes and that its *Operation and Maintenance Manuals* will also be fit for their intended purposes.

Quality assurance and verification requirements, including monitoring, auditing, testing and reviews by the Independent Verifier, are analogous to those described in section 3.2.12 above for the design and construction phase. Independent quality audits, by auditors acceptable to the RTA, must be conducted at least once every 12 months.

The Trustee's operation, maintenance and repair obligations extend to upgrading of the Cross City Tunnel by incorporating advances in technology or operation and maintenance practices when replacements are made in accordance with a 'replacement and refurbishment schedule' appended to the *Scope of Works and Technical Criteria*.

The Trustee is responsible for controlling, directing and protecting all traffic affected by its operation, maintenance and repair activities, in accordance with detailed requirements set out in the *Scope of Works and Technical Criteria*, including the periodically updated *Traffic Management and Safety Plan*, and any directions by the RTA or other relevant authorities.

The RTA has authorised the Trustee, the Company, the Original Operator (Boulderstone Hornibrook, until 27 September 2007) and now the Operator (Leighton Contractors, from 27 September 2007) to carry out these traffic management functions on its behalf, and must continue these authorisations of the Trustee, the Company and the Operator.

Advertising and other promotional signage is not permitted.

If the Trustee or its employees, agents or contractors cause any damage to property or services while carrying out any operational, maintenance or repair tasks, the Trustee must promptly fix the damage at its own cost and pay any compensation which must be paid because of the damage.

All Cross City Tunnel fixtures, fittings and dedicated equipment not leased to the Trustee under the Land Lease (see section 3.3.5) must be either owned by the Trustee or the Company or, if leased or on hire purchase, able to be transferred to the RTA if necessary (see sections 3.6.4 and 3.6.5).

The RTA, the Trustee and the Company must comply with:

- Mechanisms for collecting data on carbon monoxide concentrations within the tunnels and ambient (external) carbon monoxide, nitrogen dioxide, fine particulate and volatile organic compound concentrations, as had to be agreed between them by no later than 18 June 2003
- Protocols designed to prevent any breaches of the air quality goals set for these pollutants in conditions 258, 259, 267 and 271 of the project's planning approval of 12 December 2002 and to mitigate the consequences of any such exceedances.

These protocols, which had to be agreed between the RTA, the Trustee and the Company prior to the completion of the 'Stage 1' works, had to include assistance by the RTA in the clearing of traffic from the tunnels if this is an appropriate prevention or



mitigation measure for high tunnel carbon monoxide levels, and also had to recognise the constraints imposed by the ventilation stack's location and height and tunnel noise emissions on the ability of the Trustee and the Company to mitigate any high ambient air pollution levels.

- Requirements for the Trustee and the Company to operate the tunnels' ventilation system so as to achieve a specified minimum discharge velocity at the top of the Darling Harbour ventilation stack during the first five years of operations, and then to continue to do so if requested by the RTA, subject to the RTA's paying the Trustee \$100,000 per year, indexed to the CPI from 18 December 2002, after the first five years.

The Trustee and the Company will be in breach of their obligations to the RTA to comply with the planning approval's air quality standards only if any exceedance arises from the design, construction, operation, maintenance or repair of the tunnels or a failure to comply with the agreed protocols, and not from an emergency, a monitoring equipment fault, defined extraordinary events such as bushfires and traffic accidents, high pollution levels from other causes, such as high pollution levels throughout the Sydney basin, or defined third party actions, such as RTA contractual breaches or negligence, a court order or a change in law (see section 3.4.7).

The Trustee and the Company (as the Trustee's contractor) must ensure that any entity carrying out substantial operation, maintenance and/or repair obligations for them on the Cross City Tunnel is reputable and has sufficient experience, expertise, skills and resources, including financial resources and commercial standing, and must give the RTA prior written details of any such appointments and any changes in the terms of these appointments.

The Trustee and the Company must obtain the RTA's prior written consent before appointing a replacement Operator for the tunnels. The RTA may not unreasonably withhold or delay its consent. More specifically, it may not withhold its consent if the replacement operator meets the criteria described above, the terms and conditions of the appointment or novation are reasonably acceptable to the RTA, the proposed Operator has agreed to be bound by the terms of the contracts binding the existing Operator (now Leighton Contractors) or other terms reasonably agreed to by the RTA, and all the RTA's costs associated with the proposed appointment or novation have been met by others.

In practice, the RTA issued such a consent, for the replacement of the Original Operator by the Operator, when it executed the RTA Consent Deed 2007 (CCT Sale) on 27 September 2007.

The RTA and its agents may inspect and observe the Trustee's operation, maintenance and repair activities and performance at any time during business hours or after giving reasonable notice.

The Trustee must promptly give the RTA detailed written reports on any damage or disrepair and the corrective action it proposes to take, and any incidents or other accidents causing injuries or damage in the tunnels or on the local road, property services works it is maintaining and repairing.

Similarly, under the Rail Agreement the Company must immediately notify and confer with RailCorp if it becomes aware of any likely or actual material detrimental effect from the operation, maintenance or repair of the Cross City Tunnel on rail safety, railway facilities, the

users or occupants of rail facilities, rail operations, RailCorp's rights under the Rail Agreement or RailCorp's rail safety and future rail project requirements (as appended to the Project Deed's *Scope of Works and Technical Criteria*).

RailCorp may suspend the operation, maintenance and/or repair of the portions of the Cross City Tunnel within 50 metres of any railway facilities if this is the only way to overcome an imminent threat to the safety of the public and/or other authorised users of RailCorp facilities. Any such suspension may last only until the rail safety threat has been remedied.

The Trustee and the Company may not make or permit any structural changes to the Cross City Tunnel, or any other changes outside the *Scope of Works and Technical Criteria*, without the RTA's prior written approval, which may not be withheld if the changes are required to comply with the project's planning approval, as modified from time to time (see sections 1.2 and 3.3.3).

More specific obligations leading up to the handover of the Cross City Tunnel to the RTA are discussed in section 3.3.10.

If the Trustee fails to comply with its operation, maintenance and repair obligations under the Project Deed, the RTA may at any time issue a notice requiring it to rectify specified non-conformances within 12 months. If the Trustee fails to do so, it may be required to provide an unconditional bank guarantee of \$5 million, indexed to the CPI from 18 December 2002, to secure its operation, maintenance and repair obligations to the RTA, as discussed in section 3.3.4.

### **3.3.2 Changes to the Trustee's operation, maintenance and repair obligations**

If any changes to the Trustee's or the Company's design and construction obligations (section 3.2.1) affect the scope or costs of the Trustee's subsequent operation, maintenance and repair obligations, the cost-sharing/savings-sharing arrangements described in section 3.2.2 will apply.

There are no equivalent *generally applicable* procedural or cost/benefit-sharing provisions in the Project Deed concerning changes to the scope of the Trustee's operation, maintenance and repair obligations which do not arise out of changes to the project's design and construction works.

However, specific arrangements apply for changes necessitated by any directions issued by the Minister for Planning or the Director General of the Department of Planning in accordance with the conditions of the project's planning approval, as set out in section 3.3.3 below.

### **3.3.3 Compliance with planning approval conditions and directions issued under these conditions**

In fulfilling its operation, maintenance and repair obligations the Trustee must comply with the conditions of the Minister for Planning's approval, as modified from time to time, in accordance with an allocation of responsibilities detailed in the Project Deed and, for the planning approval of 12 December 2002, a schedule to that deed.

It has had to and must also:

- Comply with other environmental requirements detailed in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
- Prepare and comply with *Environmental Management Plans*, again as detailed in the Project Deed's *Scope of Works and Technical Criteria*
- Indemnify the RTA from and against any claim or loss if they fail to meet these obligations
- Obtain all other State and local government approvals required for the operation, maintenance and repair of the tunnels and the other works
- Notify the RTA immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance with the planning approval or other environmental requirements, its use or occupation of the tunnel or maintenance land or any damage by it to third parties' property, and
- Resolve any such matters as soon as possible and keep detailed records of all complaints etc and its responses.

A number of the conditions attached to the project's planning approval contemplate changes to the Cross City Tunnel and/or its operation, maintenance or repair, including specified expenditures by the RTA, if certain events occur, and in particular if the project produces traffic congestion in specified parts of the Sydney CBD or if air quality goals are exceeded. RTA, Trustee and Company responsibilities for addressing any such changes are set out in the Project Deed and a schedule to this deed, as follows:

- (a) If there is significant infiltration of traffic from the western portal of the westbound tunnel at Harbour Street into the area east of George Street, as revealed by traffic assessments which have had to and must be undertaken by the Company 12 months, three years and ten years after opening of the tunnels in accordance with condition 24 of the planning approval and a schedule to the Project Deed, the Trustee and the Company must consult with the RTA to develop local area traffic management measures to mitigate this infiltration.

If the Minister for Planning or the Director General of the Department of Planning requires the imposition of a 'congestion toll' to mitigate the infiltration, also in accordance with condition 24,

- The works required to install additional toll collection equipment will be treated and paid for as an RTA-directed change under the arrangements described in section 3.3.2 above
- The Trustee or the Company must promptly pay any 'bonus revenue' to the RTA, which must apply it to public transport, pedestrian, cyclist, air quality and other amenity improvements (in other words, the extra revenue, if any, will not be part of the tolls discussed in section 3.3.6 below), and
- The renegotiation provisions described in section 3.5 below may apply.

- (b) If carbon monoxide concentrations within the tunnels exceed any of the goals specified in conditions 258 and 259 of the planning approval because of a breach by the Trustee or the Company of their Project Deed obligations to the RTA to comply with these air quality standards (subject to the provisions on this described in section 3.3.1 above), and the Director General of the Department of Planning, the EPA or any other government or local government authority imposes requirements on the RTA in response to an *Environmental Impact Audit Report* submitted to the Department of Planning in accordance with condition 22 of the planning approval,
- The Trustee and the Company must comply with the requirements up to the greater of the cost of rectifying the problem and preventing recurrences, as determined by an independent expert under the dispute resolution processes described in section 3.4.8 below, and the cost of complying with the requirements, again as determined by the expert, up to an aggregate limit \$5 million above the cost of rectification and prevention
  - The RTA must meet any costs of complying with the requirements that exceed this limit, and issue any necessary 'change orders' under the arrangements described in section 3.3.2 above, and
  - The renegotiation provisions described in section 3.5 below may apply.
- (c) If carbon monoxide concentrations within the tunnels exceed any of the goals specified in conditions 258 and 259 of the planning approval because of a breach by the Trustee or the Company of their Project Deed obligations to the RTA to comply with these air quality standards (subject to the provisions on this described in section 3.3.1 above), and the Director General of the Department of Planning directs the RTA to prepare and implement a strategy to improve in-tunnel and external air quality in accordance with condition 261 of the planning approval, the Trustee and the Company must pay the RTA the full amount the RTA is required to expend under condition 261 (i.e. up to \$50,000, indexed to the CPI, for each day on which any of the limits has been exceeded), but only until their total payments to the RTA for the RTA's air quality improvement strategy reach \$5 million.
- (d) If ambient carbon monoxide, nitrogen dioxide or fine particulate concentrations exceed any of the goals specified in condition 267 of the planning approval because of a breach by the Trustee or the Company of their Project Deed obligations to the RTA to comply with these air quality standards (subject to the provisions on this described in section 3.3.1 above), and the Director General of the Department of Planning, the EPA or any other government or local government authority imposes requirements on the RTA in response to an *Environmental Impact Audit Report* submitted to the Department of Planning in accordance with condition 22 of the planning approval,
- The Trustee and the Company must comply with the requirements up to the greater of the cost of rectifying the problem and preventing recurrences, as determined

by an independent expert under the dispute resolution processes described in section 3.4.8 below, and the cost of complying with the requirements, again as determined by the expert, up to an aggregate limit \$5 million above the cost of rectification and prevention

- The RTA must meet any costs of complying with the requirements that exceed this limit, and issue any necessary 'change orders' under the arrangements described in section 3.3.2 above, and
- The renegotiation provisions described in section 3.5 below may apply.

(e) If ambient carbon monoxide, nitrogen dioxide or fine particulate concentrations exceed any of the goals specified in condition 267 of the planning approval, or if the concentrations of carbon monoxide, nitrogen dioxide, fine particulates or volatile organic compounds emitted from the ventilation stack exceed any of the limits specified in condition 271, in either case because of a breach by the Trustee or the Company of their Project Deed obligations to the RTA to comply with these air quality standards (subject to the provisions on this described in section 3.3.1 above), and the Director General of the Department of Planning imposes requirements on the RTA in accordance with condition 268 or 272 of the planning approval (such as requirements to change ventilation systems or add other pollution control systems),

- The Trustee and the Company must meet the greater of the cost of rectifying the problem and preventing recurrences, as determined by an independent expert under the dispute resolution processes described in section 3.4.8 below, and the cost of complying with the requirements, again as determined by the expert, up to an aggregate limit \$5 million above the cost of rectification and prevention
- The RTA must meet any costs of complying with the requirements that exceed this limit, and issue any necessary 'change orders' under the arrangements described in section 3.3.2 above, and
- The renegotiation provisions described in section 3.5 below may apply.

(f) If:

- The Director General of the Department of Planning, the EPA or any other government or local government authority imposes requirements on the RTA in response to an *Environmental Impact Audit Report* submitted to the Department of Planning in accordance with condition 22 of the planning approval for any reason other than an exceedance of the air quality goals in conditions 258, 259 and 267
- The Director General of the Department of Planning imposes requirements on the RTA in response to a *Hazard Review* submitted to the Department of Planning in accordance with condition 215 of the planning approval, or

- The Director General of the Department of Planning imposes requirements on the RTA in response to a fire safety review submitted to the Department of Planning by a committee with representatives from the RTA, the Fire Brigade, the Police, State Emergency Services and the Department of Planning in accordance with condition 245 of the planning approval

and this arises from a breach by the Trustee or the Company of the Project Deed (including its environmental requirements) or any applicable law,

- The Trustee and the Company must comply with the requirements up to the cost of rectifying the problem and preventing recurrences, but will be deemed to have satisfied this obligation if they satisfy any relevant prescriptive requirements already in the Project Deed or the Independent Verifier determines they have met the required performance outcomes
- The RTA must meet any additional costs of complying with the requirements, and issue any necessary 'change orders' under the arrangements described in section 3.3.2 above, and
- The renegotiation provisions described in section 3.5 below may apply.

### **3.3.4 Operation, maintenance and repair security bonds**

In addition to the security granted to the RTA under the RTA Deed of Charge (see section 4.1),

- Prior to the completion of the project's 'Stage 1' works, the Trustee had to give the RTA an unconditional bank guarantee for \$1 million to secure the performance by the Trustee and the Company of their potential obligations to make payments to the RTA for any air quality improvement strategy they are required to prepare and implement, under a direction made by the Department of Planning in accordance with condition 261 of the project's planning approval, following a breach by the Trustee or the Company of their Project Deed obligations which leads to an exceedance of carbon monoxide goals within the tunnels (see section 3.3.3 above).

If this guarantee is not drawn upon, it is to be released five years after the completion of the 'Stage 1' works (i.e. on 28 August 2010), or as soon as the Trustee's and the Company's air quality improvement strategy payments to the RTA total \$5 million.

- If:
  - The RTA is subject to a direction from the Department of Planning under condition 261 of the planning approval during the initial five years of tunnel operations, again following a breach by the Trustee or the Company of their Project Deed obligations which leads to an exceedance of carbon monoxide goals within the tunnels, and
  - The RTA has made a demand or demands for all of the initial \$1 million security bond provided for this purpose,

the Trustee must provide the RTA with an additional unconditional bank guarantee for \$1 million to secure the same

payment obligations, unless the Trustee has already made air quality improvement strategy payments to the RTA totalling \$5 million, including the amounts called by the RTA under the initial bank guarantee.

If this additional guarantee is not drawn upon, it is to be released five years after the completion of the 'Stage 1' works, or as soon as the Trustee's and the Company's air quality improvement strategy payments to the RTA total \$5 million, including any amounts called by the RTA under the first bank guarantee.

- If the RTA is subject to two or more directions from the Department of Planning under condition 261 of the planning approval during any 12-month period after the initial five years of tunnel operations (i.e. from 28 August 2010), again following breaches by the Trustee or the Company of their Project Deed obligations which lead to exceedances of carbon monoxide goals within the tunnels, the Trustee must—unless it has already made air quality improvement strategy payments to the RTA totalling \$5 million, including any amounts called by the RTA under the two earlier bank guarantees—provide the RTA with a further unconditional bank guarantee for \$1 million to secure the Trustee's and the Company's payment obligations. This requirement to give the RTA an extra security bond for this purpose applies only once, even if there are further breaches and further Department of Planning directions in subsequent 12-month periods.

If this additional guarantee is not drawn upon, it is to be released five years after it is issued, or as soon as the Trustee's and the Company's air quality improvement strategy payments to the RTA total \$5 million, including any amounts called by the RTA under the various bank guarantees provided for this purpose.

- If the Trustee fails to comply with its operation, maintenance and repair obligations under the Project Deed and then fails fully to rectify specified non-conformances within 12 months of an RTA notice requiring it to do so, the RTA may require the Trustee to provide an unconditional bank guarantee of \$5 million, indexed to the CPI from 18 December 2002, to secure its operation, maintenance and repair obligations to the RTA.

If this guarantee is not drawn upon, it is to be released within 20 business days of the final handing over of the Cross City Tunnel to the RTA on 18 December 2035.

### **3.3.5 Preparations for and granting of the Land Lease and the Company Lease**

The Agreement to Lease sets out procedures for:

- The RTA to ensure, before the completion of the project's 'Stage 1' works, that the land to be leased to the Trustee and the Company was free of all encumbrances other than specified easements, the Land Lease and the Company Lease
- The Trustee to conduct an 'as built' engineering survey within six months of the completion of 'Stage 1' and deliver specified drawings and a three-dimensional computer model to the RTA, certified as being adequate for the RTA to determine all the boundaries of the land to be leased to the Trustee and the Company

- The RTA to create specified easements and register plans of consolidation or subdivision within 24 months of the Trustee's survey and provision of these drawings and model, or within an extended timeframe agreed to by the Trustee
- The RTA to grant and the Trustee to accept the Land Lease, which must be on the terms set out in a draft of this lease annexed to the Agreement to Lease, as amended by the Second Amendment Deed 2007–Agreement to Lease
- The RTA to grant and the Company to accept the concurrent Company Lease, which must be on the terms set out in a draft of this lease annexed to the Agreement to Lease
- The RTA to give the Trustee and the Company registrable forms of these leases following the registration of the necessary plans of consolidation or subdivision
- The Trustee, the Company and the RTA to execute and register the leases, and
- The RTA to create other specified easements as required and as requested by the Trustee.

Under the RTA Consent Deed 2002 the RTA has promised the debt financiers' Security Trustee that it will perform all of its land ownership, survey, consolidation/subdivision and lease execution and registration obligations within the timeframes set out in the Agreement to Lease, and expressly acknowledges the importance to the debt financiers and the Security Trustee of the lessees' being granted and registered as soon as practicable. If the RTA fails to perform these obligations the Security Trustee may seek an order for specific performance.

The land to be leased to the Trustee and the Company under the Land Lease and the Company Lease includes some of the land which the RTA previously undertook to lease to AML in accordance with the Eastern Distributor Project Deed of 27 June 1997. In the second AML Agreement of 18 December 2002, between the RTA and AML, AML agreed to the removal of these areas from the Eastern Distributor lease area, and agreed to procure a similar agreement by the responsible entity of the Airport Motorway Trust to execute appropriate amendments to the Eastern Distributor Project Deed.

The Land Lease and the Company Lease must commence on the date of completion of 'Stage 1' and have terms of between 30 years and two months and 33 years in duration, unless they are terminated earlier—and automatically—upon any early termination of the Project Deed. Pending their execution and registration, the RTA, the Trustee and the Company will be bound by the draft forms of the leases annexed to the Agreement to Lease, as amended by the Second Amendment Deed 2007–Agreement to Lease.

### **3.3.6 Tolls and administrative charges**

The Trustee may levy and retain tolls on motor vehicles using the Cross City Tunnel, or any part of it, in accordance with a toll calculation schedule to the Project Deed, as amended by:

- The First Amendment Deed 2004–Project Deed and Agreement to Lease, which since 17 January 2005 has permitted higher tolls than previously applied, in return for the Trustee's and Company's funding of changes to the project's scope of works under the arrangements described in section 3.2.2, and



- The Second Amendment Deed 2007–Project Deed, which renumbered some clauses but made no substantive changes to this schedule.

The details of the tolling system which must be used to collect these tolls electronically and systems to identify vehicles not fitted with electronic tolling transponders are specified in the Project Deed's *Scope of Works and Technical Criteria*. In addition, under the Electronic Tolling MoU—to which the Company became a party as a result of the execution of the Electronic Tolling Admission Deed—the Cross City Tunnel's electronic tolling system and associated operational, data transfer, security and privacy policies must be interoperable and compatible with those of other tollroads in NSW, Melbourne and Brisbane.

For vehicles without electronic tolling transponders, the Trustee may levy not only the tolls applying for all vehicles—or, in the case of vehicles using the Sir John Young Crescent exit ramp, higher tolls as described below—but an additional 'casual user' administrative charge, under arrangements which are also set out in the Project Deed's toll calculation schedule, as amended.

There are no tolls for buses providing regular public transport services or for any other vehicles exempted under the Roads Act or its Regulations.

For other vehicles the tolls which may be charged may not exceed 'theoretical tolls', as specified in the toll calculation schedule for 'passenger' vehicles (defined as all vehicles up to 2.8 metres high and up to 12.5 metres long) and 'heavy' vehicles (all other vehicles except buses etc), rounded to the nearest whole cent.

These 'theoretical tolls' are equal to defined 'base tolls', theoretically applying for the March quarter of 1999, as escalated at the end of each quarter by the greater of:

- The percentage increase in the Consumer Price Index (CPI) during the quarter before the quarter which has just finished, and
- A quarterly increase equivalent, on a compound basis, to an annual rate of increase of 4% per annum (for the calculation of theoretical tolls for all quarters up to the June quarter of 2012) or 3% per annum (from then until the June quarter of 2018).

The 'base' tolls (for the March quarter of 1999) for vehicles other than buses etc are:

- For vehicles using the main tunnels to and from Darling Harbour, including vehicles entering from or exiting to the Eastern Distributor, \$2.65 for all passenger vehicles and \$5.30 for all heavy vehicles, including GST (prior to 17 January 2005, these 'base' tolls were \$2.50 and \$5.00, respectively)
- For vehicles entering the westbound tunnel at Rushcutters Bay and then using the Riley Street tunnel to exit onto Sir John Young Crescent, \$1.25 for passenger vehicles with electronic tolling transponders, \$2.65 for passenger vehicles without transponders, \$2.50 for heavy vehicles with transponders and \$5.30 for heavy vehicles without transponders, all including GST (prior to 17 January 2005, these 'base' tolls were \$1.10, \$2.50, \$2.20 and \$5.00, respectively).

If the rate of GST changes in the future, the theoretical tolls will automatically increase or decrease to match this change.

The Trustee must give the RTA at least 20 business days' notice of any change in the tolls it actually imposes.

The administrative charge levied on 'casual users' (vehicles without transponders) during each quarter, in addition to the tolls described above, must be determined by the Trustee and the Company, in consultation with the RTA, so as to recover the actual direct and indirect costs of processing, administering and collecting revenue from these users.

In determining these charges, the Trustee and the Company must take account of the 'casual user' products they wish to implement, actual and anticipated numbers of casual users and toll and charge recovery rates and the objective of encouraging the fitting of transponders.

The Trustee and the Company may review the administrative charge once each quarter. If they wish to change it, they must give the RTA at least 20 business days' notice and provide reasonable details of their calculations.

Under condition 24 of the project's planning approval of 12 December 2002, it is possible that in the future the Minister for Planning or the Director General of the Department of Planning may require a 'congestion toll'—on top of the tolls described above—to be charged for traffic exiting from the westbound tunnel onto Harbour and Bathurst Streets, to help reduce congestion in the western CBD (see section 3.3.3(a) above).

If this occurs,

- The RTA must pay for the extra equipment and systems required
- The Trustee or the Company must promptly pay any 'bonus revenue' to the RTA, which must apply it to public transport, pedestrian, cyclist, air quality and other amenity improvements, and
- The renegotiation provisions described in section 3.5 below may apply.

### **3.3.7 Rent payments to the RTA**

Under the Land Lease—as amended by the Second Amendment Deed 2007–Agreement to Lease, which, in combination with the Second Amendment Deed 2007–Project Deed, has entirely replaced relevant earlier amendments to the form of the Land Lease made by the First Amendment Deed 2004–Project Deed and Agreement to Lease—the Trustee must make the following rent payments to the RTA for the first 12 months of the lease, each successive six month period during the lease and then the final period of the lease, in each case within 20 business days of the end of the relevant period:

- \$1, *plus*
- 35% of the actual gross revenue of the Trustee and the Company—less any amount collected for GST or other taxes or government charges, other than income tax—from any non-toll business uses of the tunnels or the land leased by the Trustee, such as the use of the tunnels or land for telecommunications infrastructure (the prior written approval of the RTA is required before any such non-toll businesses may be conducted), *plus*
- If the Trustee's actual toll and administrative charge revenue (see section 3.3.6) for the relevant period—less any amount collected

**Table 1. The RTA's share of any unexpectedly high revenues—generally over six-month periods—from tolls and administrative charges (i.e. additional charges for 'casual' tunnel users without electronic tolling vehicle transponders).**

Actual revenue, as a percentage of forecast revenue	RTA's share of this portion of the actual revenue (to be paid by the Trustee as part of its rent under the Land Lease)
up to 110%	0%
110%–120%	10%
120%–130%	20%
130%–140%	30%
140%–150%	40%
more than 150%	50%

for GST or other taxes or government charges—is more than 10% higher than that forecast by the private sector participants' 'base case financial model' for the project at the time the sale of the Trustee and the Company was completed on 27 September 2007, a progressively increasing share of this extra revenue, as set out in **Table 1**.

Under the Company Lease, the Company must pay the RTA \$5 rent for each 12-month period wholly within the term of the lease and then for the remaining period of the lease, again within 20 business days of the end of each period.

### 3.3.8 Traffic management and road network changes

Under the Project Deed the RTA, the Trustee and the Company have had to and must develop and implement traffic management protocols which recognise the Cross City Tunnel's 'importance in the traffic system', the objective of maintaining free traffic flows, including flows into and out of the tunnels, and fire and safety risk management.

More specifically, before the tunnels were opened they had to develop and implement a protocol for managing the merging of traffic using the northbound tunnel ramp from Sir John Young Crescent to the Cahill Expressway with traffic using the northbound ramp from Cowper Wharf Roadway to the Cahill Expressway, so as to reduce the amount of traffic from Cowper Wharf Roadway if this would help prevent or relieve congestion and queuing of traffic from the tunnel. Other requirements for this protocol were set out in a schedule to the Project Deed.

In the second AML Agreement of 18 December 2002 the RTA and AML agreed to develop complementary traffic management measures concerning the operational interfaces between the Cross City Tunnel and the Eastern Distributor, including emergency and incident management procedures, temporary reductions in the volume of traffic permitted to enter the Cross City Tunnel and the Eastern Distributor from Bourke Street to relieve traffic congestion in the Cross City Tunnel, and consultations to develop longer term solutions if this is a frequent occurrence or if the Cross City Tunnel traffic management measures cause traffic congestion on the northbound Cahill Expressway, affecting the free flow of northbound traffic on and out of the Eastern Distributor.

The Project Deed and the other Cross City Tunnel project contracts do not limit or restrict the powers of the RTA or the NSW Government to develop the NSW road network in any way.

The RTA, the Trustee and the Company have expressly acknowledged, however, that:

- The 'Stage 2' works carried out by the Trustee and the Company—prior to the surface roadworks carried out by the RTA between July and September 2006, as described in section 1.2—included a specified series of local road works which would restrict the traffic capacities of surface roads in the area and the existing Kings Cross Tunnel
- The private sector participants' 'base case financial model' assumes that a number of traffic connections to the Cross City Tunnel, as specified in the Project Deed, will be maintained throughout its operating term, except during special events, emergencies or road maintenance or repair works or if there is a material threat to public health or safety, and
- The project's planning approval contemplates the possibility of future restrictions on the traffic capacities of a number of specified roads feeding into or taking traffic away from the Cross City Tunnel.

Accordingly, the renegotiation provisions described in section 3.5 below may apply if:

- Any of the specified 'Stage 2' traffic restrictions have been or are removed, through the post-'Stage 2' surface roadworks permitted by the 7 July 2006 modification of the project's planning approval (section 1.2) or otherwise
- Any of the specified connections to the tunnels are not maintained, except under the circumstances listed above, or
- The numbers of general traffic and transit lanes on specified sections of the Western Distributor, Anzac Bridge, Ocean Street, New South Head Road and Harbour Street are reduced below levels specified in the Project Deed.

The renegotiation provisions described in section 3.5 may also apply if:

- A new arterial road directly connecting New South Head Road in Kings Cross with the Western Distributor in Darling Harbour is opened prior to the end of the Cross City Tunnel's operating term
- A toll is imposed on the southbound ramp from the Cross City Tunnel to the Eastern Distributor; or on the southbound Eastern Distributor south of this connection, or
- The posted speed limits in the Cross City Tunnel are reduced by the RTA—*other than* as a short-term response to an incident or because a breach of the Project Deed by the Trustee or the Company has meant the tunnel(s) are not safe for the efficient and continuous passage of vehicles—to less than 80 km/h in the main tunnels or less than 60 km/h in the tunnel to the Sir John Young Crescent exit ramp.

The RTA is expressly entitled to make road and pedestrian access connections to the Cross City Tunnel, provided this does not permit untolled use of the tunnels, reduce access to the tunnels or reduce their traffic capacity.

If the RTA proposes to make such a connection, or if it proposes any other road, tunnel or infrastructure in the vicinity, it must give the Trustee reasonable notice and the RTA, the Trustee and the Company must cooperate to minimise any adverse impacts on the Cross City Tunnel, give the RTA or its contractors adequate access, coordinate their activities, facilitate the connection and make any necessary adjustments to the Land Lease and the Company Lease. The RTA must indemnify the Trustee and the Company against any losses arising from physical damage to the Cross City Tunnel, but will not be liable for any other losses, including any changes in their toll revenue.

### 3.3.9 Consultations on future railway projects

Under the Rail Agreement the Company must liaise and cooperate with RailCorp, throughout the Cross City Tunnel's operating term, on the design and construction of:

- A possible future Metro West railway link between Central and Wynyard stations, with tunnels under Sussex and Kent Streets—passing immediately above the Cross City Tunnel's eastbound tunnel and immediately below its westbound tunnel, as shown in *Figure 2*—and a new station near Bathurst Street, above the eastbound tunnel
- A possible future Metro Pitt rail link north from Central station through the CBD, with tunnels under Pitt Street at the locations they would pass over the Cross City Tunnel's tunnels
- Possible future improvements to Town Hall station's access and safety management systems, and
- All associated or related works,

as described in an appendix to the Project Deed's *Scope of Works and Technical Criteria*.

For its part, in conducting these projects or constructing, altering or modifying any other future rail facilities, RailCorp must take due account of the location, use and requirements of the Cross City Tunnel.

### 3.3.10 Expiration of the operating term and final handover to the RTA

During the final three months of the operating term of the Cross City Tunnel under the Project Deed—that is, during the three months leading up to 18 December 2035—the Trustee must train RTA personnel, or others nominated by the RTA, in all aspects of the operation, maintenance and repair of the Cross City Tunnel and the local road, property and service works being maintained by the Trustee.

At the end of the operating term, or upon any earlier termination of the Project Deed, the Trustee and the Company must:

- Surrender the Cross City Tunnel, the land leased under the Land Lease and all rights and interests in them to the RTA in a fully functional condition, complying with the Project Deed's *Scope of Works and Technical Criteria* and the *Operation and Maintenance Manuals*
- Deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and

repair the Cross City Tunnel and maintain and repair the local road, property and services works

- Pay the RTA any unexpended insurance proceeds and assign the Trustee's insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 below and provided the debt financiers' Security Trustee is satisfied the insurers have no outstanding liabilities to the Trustee or the Company, and
- Do everything reasonably necessary for the RTA to operate the Cross City Tunnel at least to the same level as that achieved just before the end of the operating term.

At the end of the operating term the remaining life of each Cross City Tunnel asset and each local road, property and services asset maintained and repaired by the Trustee must be no less than the relevant residual design life specified and determined in accordance with the Project Deed's *Scope of Works and Technical Criteria*. The RTA is to assess compliance with this requirement within 60 business days of the end of the operating term. If it believes any asset does not comply, the RTA may notify the Trustee of this, specifying the shortfall in the expected life of the asset and the cost of rectifying this shortfall. The Trustee may then either:

- Carry out the necessary rectification work within a reasonable time and by no later than 60 business days of the RTA's notice, or
- Pay the RTA the cost determined and notified by the RTA, as a debt due to the RTA.

Before a final handover to the RTA may occur,

- The training of RTA personnel (or other nominated) personnel must be completed to the RTA's reasonable satisfaction
- The Trustee must have complied with its obligations to rectify or pay for any shortfalls in the life of the tunnel, local road, property or services assets
- There must be no immediate repair works required and no defects
- The Trustee and the Company must transfer ownership of all operational, maintenance and repair plant and equipment owned by them, or for which they have an option to obtain ownership, to the RTA or its nominee, and
- The Trustee must give the RTA all the spare parts and special tools needed for the next 12 months of operations, maintenance and repair.

Once the Trustee believes it has satisfied these conditions, it must notify the RTA. The RTA will then have five business days to advise the Trustee of its agreement or otherwise, providing reasons if it considers the conditions have not yet been met.

During the first 12 months after the end of the operating term the Trustee must make competent, experienced personnel available to consult with the RTA on any aspect of tunnel, local road, property or services operations, maintenance or repair.

## 3.4 Miscellaneous general provisions

### 3.4.1 Rates, levies and taxes

The Trustee has had to and must pay all land-based rates, taxes and charges associated with the land it will lease under the Land Lease from the completion of 'Stage 1', but:

- If the Trustee's and the Company's total land tax and water, sewerage and drainage rates (excluding water use charges) exceed \$170,000 per year, indexed to the CPI from September 2001, the RTA must reimburse the excess, and
- The RTA must pay or reimburse the Trustee or the Company, on demand, for any local government rates or charges levied on the land they will lease under the Land Lease and the Company Lease.

The Trustee has also had to and must pay all other taxes levied on the project, subject to GST input tax credits and other GST-specific arrangements.

If a local council imposes an annual charge on the Trustee or the Company under Local Government Act provisions concerning tunnels etc under public places, the Trustee and the Company must appeal to the Land and Environment Court, at the RTA's expense, if the RTA requests them to do so.

### 3.4.2 Loss or damage and insurance

The Trustee and the Company bore the risk of loss or damage to their construction works and now, until the termination of the Project Deed, bear the risk of loss or damage to the completed Cross City Tunnel.

Before the Trustee or the Company commenced design and construction of the project the Trustee had to effect the following insurance policies:

- Contract works or construction risks insurance, as reasonably required by the RTA and as described in an exhibit to the Project Deed, continuing until the completion of 'Stage 2'
- Transit insurance, until the completion of 'Stage 2'
- Third party liability insurance for at least \$200 million for each occurrence and with no aggregate limit, plus an additional \$300 million per occurrence for any loss, damage or injury to the RTA, RIC and the SRA (and thus, since 1 January 2004, RailCorp) and EnergyAustralia, again with no aggregate limit, until the end of the last defects liability period
- Professional indemnity insurance for at least \$50 million per claim, until the end of the project's operating term but subject, since 27 September 2007, to the possibility of alternative arrangements set out in the Professional Indemnity Insurance Arrangements Deed, as described below
- Workers' compensation insurance, until the completion of 'Stage 2'
- Motor vehicle third party property damage insurance, for at least \$20 million per claim and with no aggregate limit, until the completion of 'Stage 2'

- Advance business interruption insurance covering debt and other costs for 36 months, and
- Directors' and officers' liability insurance for at least \$10 million per occurrence, until the end of the project's operating term.

From the completion of 'Stage 1' and throughout the project's operating term the Trustee has had to and must effect and maintain the following insurance policies for the Cross City Tunnel:

- Industrial special risks insurance for the full replacement and reinstatement value of the project
- Third party liability insurance for at least \$100 million for each occurrence and with no aggregate limit, plus an additional \$100 million per occurrence for any loss, damage or injury to the RTA, RIC, the SRA and EnergyAustralia, again with no aggregate limit
- Workers' compensation insurance
- Motor vehicle third party property damage insurance, for at least \$20 million per claim and with no aggregate limit
- Business interruption insurance covering losses of future income for 36 months
- Directors' and officers' liability insurance for at least \$10 million per occurrence, and
- Any other insurance policies reasonably required by the RTA and commonly effected by land owners, lessees or contractors in the position of the Trustee or the Company, provided they can be obtained for reasonable premiums.

All these insurance policies have had to and must be with insurers approved by the RTA and on terms set out in the Project Deed or otherwise approved by the RTA (without affecting the RTA's rights concerning 'uninsurable events', described below). If the Trustee had difficulties obtaining a renewal of its construction-phase third party liability insurance or has difficulties obtaining any operational phase insurance policy it had to or must notify the RTA and follow procedures set out in the Project Deed. If the Trustee fails to effect or maintain any of the required policies or pay any premium, the RTA may do so instead and recover its costs from the Trustee as a debt.

The contract works/construction risks, transit, industrial special risks, third party liability and motor vehicle policies have had to and must be in the joint names of the RTA, the Trustee, the Company and others with insurable interests under the project's contracts, including RIC, the SRA, RailCorp, Energy Australia, the Security Trustee, the Sydney Harbour Foreshore Authority, AML, the security trustee for the Eastern Distributor's debt financiers and, for the Domain car park only, the Royal Botanic Gardens and Domain Trust and South Sydney City Council.

As indicated above, since 27 September 2007, when the Professional Indemnity Insurance Arrangements Deed was executed, alternative arrangements for achieving the equivalent of the \$50 million of professional indemnity insurance cover required by the Project Deed have been available to the Trustee and the Company.

Under these alternative arrangements—which are deemed to satisfy the Project Deed's requirements—the project's three Equity Investors deposited \$40 million into specified retention bank accounts on 27 September 2007 (in practice, as part of their



payments in purchasing the Trustee and the Company) and procured letters of credit for an additional \$10 million. This \$50 million was available to provide protection equivalent to that available to the beneficiaries of a professional indemnity insurance policy, had it been in place in accordance with the Project Deed.

Notwithstanding these arrangements, the Trustee had to and must use its best endeavours to seek professional indemnity insurance as required by the Project Deed. If it obtained or obtains part or all of the required \$50 million cover, the retention and letter of credit amounts required under the Professional Indemnity Insurance Arrangements Deed were to be, or will be, proportionally or wholly reduced, subject to provisions for meeting any unsatisfied claims. In accordance with these arrangements, on 8 May 2008 the Trustee obtained \$25 million of professional indemnity insurance cover, reducing the amounts that had to be held in the retention bank accounts to \$25 million and eliminating the need for the letters of credit.

Although the Trustee (under its original owners) failed to renew its professional indemnity insurance policy as required by the Project Deed between 1 July 2006 and the introduction of the alternative arrangements on 27 September 2007, the original immediate owners of the Trustee and the Company—the Original Holdings Trustee and the Original Holdings Company—warranted to the RTA on 27 September 2007 that they knew of no claims during this period, and on this basis the RTA agreed that this breach of the Project Deed by the Trustee had been remedied.

The Trustee and the Company have had to and must deposit any insurance proceeds they receive for any loss or damage to the construction works or the completed Cross City Tunnel in a special purpose account for which the only signatory, prior to the repayment of all the project debt, is the private sector debt financiers' Security Trustee or its agent.

If there was or is any loss or damage to the construction works or (until the termination of the Project Deed) the completed Cross City Tunnel, the Trustee and the Company had to or must promptly make good the loss or damage unless:

- It resulted or has resulted from an 'uninsurable event', as defined in the Project Deed, and there was, has been or has started to be a material adverse effect on the project, as defined and discussed in section 3.5 below.

In these circumstances, the Trustee's and the Company's obligations to make good the loss or damage would have been or will be suspended until the RTA, the Trustee and the Company had or have reached agreement under the renegotiation provisions described in section 3.5 or, failing this, a final, binding determination had or has been made by an independent expert, an arbitrator or a court.

In addition, while the suspension continued or continues the RTA could or may terminate the Project Deed, if it chose or chooses to do so in its absolute discretion, simply by issuing a notice to this effect to the Trustee or the Company, as discussed in section 3.6.5 below.

- The insurance proceeds were or are reasonably expected to exceed \$100 million, indexed to the CPI from 17 December 2002.

In these circumstances, the obligations to make good the loss or damage would have been or will be suspended until:

- The insurance proceeds had or have been received and:
  - The insurance proceeds and any other sources of funds acceptable to the Security Trustee were or are sufficient to repair or reinstate the works or the tunnel within a reasonable time, *and*
  - The Borrower would or will be able to meet its obligations to repay the debt financiers substantially in accordance with its debt financing arrangements, and its ability to refinance the project debt was or is not materially prejudiced, *and*
  - It was or is economically viable to repair or reinstate the works or the tunnel, *or*
- The insurance proceeds had or have been received, and:
  - These three requirements had or have not been satisfied within three months of the event(s) causing the loss or damage, or any longer period agreed to by the Security Trustee, *and*
  - As permitted under the RTA Consent Deed 2002 in this situation, the Security Trustee applied or applies part or all of the insurance proceeds to repay the debt financiers, with the balance, if any, then being paid by the Trustee and the Company to an account established by them with the RTA, *or*
- 12 months after the event(s) causing the loss or damage, whichever of these three possibilities occurred or occurs first.

In complying with their obligations to make good any loss or damage, except in circumstances suspending these obligations, the Trustee and the Company have had to and must:

- Immediately start clearing any debris and carrying out initial repairs
- Promptly consult with the RTA and take all steps necessary to promptly repair or replace the loss or damage and continue to comply with their obligations under the project's contracts
- Minimise the impacts of these activities on the works or the tunnel's operations
- Keep the RTA fully informed of progress
- If the insurance proceeds are \$100 million or less, indexed to the CPI from 17 December 2002, apply these proceeds to their repair and replacement works, and
- If the insurance proceeds are more than \$100 million, indexed to the CPI from 17 December 2002, apply the insurance proceeds to their repair and replacement works if but only if:
  - The insurance proceeds and any other sources of funds acceptable to the Security Trustee are sufficient to repair or reinstate the works or the tunnel within a reasonable time, *and*
  - The Borrower will be able to meet its obligations to repay the debt financiers substantially in accordance with its debt

financing arrangements, and its ability to refinance the project debt is not materially prejudiced, and

- It is economically viable to repair or reinstate the works or the tunnel.

As already indicated, if the insurance proceeds are more than \$100 million, indexed to the CPI from 17 December 2002, and the three requirements listed above are *not* satisfied within three months of the event(s) causing the loss or damage, or any longer period agreed to by the Security Trustee,

- The Security Trustee may apply part or all of the insurance proceeds to repay the debt financiers, with the balance, if any, then being paid by the Trustee and the Company to an account established by them with the RTA, and
- Any suspension of the Trustee's and the Company's repair and reinstatement obligations created by an *expectation* that the insurance proceeds could exceed \$100 million (indexed to the CPI) will automatically be lifted.

### 3.4.3 Accounting and financial reporting

The Project Deed sets out requirements for the Trustee and the Company to:

- Maintain accounts and other records, have them audited annually, make them available for RTA inspections and audits at any reasonable time
- Provide financial statements to the RTA on each six months' and year's performance
- Give the RTA copies of all ASIC and ASX documents they receive and any other information reasonably required by the RTA
- Immediately notify the RTA when the project's debt financiers have been fully repaid
- Immediately notify the RTA if the Trustee receives any non-toll revenue or if its actual revenue during any six-month period exceeds 110% of that forecast in the private sector participants' 'base case financial model' for the project of 27 September 2007 (as described in section 3.3.7, either event will result in additional rent liabilities to the RTA under the Land Lease), and
- Give the RTA specified daily, monthly and annual reports on traffic numbers and toll revenues in the tunnels.

### 3.4.4 Restrictions on assignments, encumbrances and refinancing

Except as provided in the private sector debt financing agreements and in RTA Consent Deed 2002 provisions described below, the Trustee and the Company could not and may not:

- Sell, transfer, assign, novate or otherwise deal with their interests in the Cross City Tunnel or any of the main project contracts, other than between themselves
- Encumber these interests
- Replace the Operator

- Change or permit any change in the original ownership of the Trustee, the Company, the Original Holdings Trustee or the Original Holdings Company, other than as contemplated in a private sector securities agreement or under the proposed listing of the Trustee and the Company on the Australian Stock Exchange, until after the completion of the 'Stage 2' works
- Since the completion of the 'Stage 2' works, change or permit a change of more than 50% in the original ownership of the Trustee or the Company, compared with the situation on 19 December 2002, other than under their proposed listing on the Australian Stock Exchange, or
- Since the completion of the sale of the Trustee and the Company on 27 September 2007, change or permit a change of more than 50% in the ownership of the Trustee or the Company, compared with the situation on 27 September 2007, other than under their proposed listing on the Australian Stock Exchange,

without the prior written permission of the RTA, which could not and may not unreasonably withhold or delay its consent after the completion of the 'Stage 1' works (or, for assignments of any of the project's private sector debt financing documents, at any time).

As already indicated in section 2, the RTA consented to the sale of the Trustee and the Company by its original owners to the current owners on 27 September 2007, by executing the RTA Consent Deed 2007 (CCT Sale).

In the case of a proposed transfer or assignment of any of the project's private sector debt financing documents—other than the sale or assignment of bonds in accordance with these documents or transactions of specified types involving the transfer of the rights and/or obligations of the financiers' monoline insurer, for which the RTA's consent is not required—the RTA Consent Deed 2002, as amended by the First Amendment Deed 2007–RTA Consent Deed 2002, stipulates that:

- The debt financier's Security Trustee must promptly notify the RTA
- The RTA will be deemed to have consented if the proposed transferee satisfies a series of specified criteria, including specified minimum S&P or Moody's ratings
- The RTA must consent if the proposed transferee's obligations are guaranteed or indemnified, on terms reasonably satisfactory to the RTA, by a financial institution satisfying the same minimum ratings, and
- If the RTA consents to a transfer of any of the Security Trustee's or Intercreditor Agent's rights and obligations, the RTA must promptly execute a deed with the transferee and the other parties on substantially the same terms as the RTA Consent Deed 2002.

In the case of encumbrances, the RTA has already consented, in the RTA Consent Deed 2002, as amended by the First Amendment Deed 2007–RTA Consent Deed 2002, to a series of financiers' securities (see section 4) and, in the Project Deed, to the encumbering of the Trustee's toll revenues.

In the case of a proposed replacement of the Operator, the RTA *must* give its consent in circumstances already described in section

3.3.1 above, and has already consented to the replacement of the Original Operator by the Operator on 27 September 2007, by executing the RTA Consent Deed 2007 (CCT Sale).

The RTA's consent is also required before the Trustee, the Company and the Borrower may refinance any or all of the project debt and/or enter into any new financing, except for:

- A refinancing of bonds, in accordance with the debt financing documents, which does not increase the overall project debt, or
- The provision of subordinated debt, ultimately funded by an investor or investors in the CCT Motorway Property Holdings Trust or the CCT Motorway Company Holdings Trust (see section 2.1.2), for the sole purpose of curing defaults under the debt financing documents.

This consent may not be unreasonably withheld, and the RTA must grant its consent if:

- The incoming private sector financiers or their agents execute a deed substantially the same as the RTA Consent Deed 2002, as amended by the First Amendment Deed 2007–RTA Consent Deed 2002
- The refinancing is an arm's-length commercial arrangement
- All material information is fully disclosed to the RTA a reasonable time before its consent is requested, and
- The refinancing does not weaken the RTA's position under the project contracts.

For its part, the RTA:

- Has acknowledged that the Trustee and the Company may assign or novate their contracts with the RTA only in accordance with the debt financing documents, and has agreed that any assignment or novation not complying with these requirements will be ineffective
- May not transfer, sell, assign or otherwise deal with its own rights and obligations under any of its contracts with private sector parties without the prior written consent of the Trustee, the Company and the Security Trustee, which may not unreasonably withhold or delay their consent and must grant their consent if conditions set out in the Project Deed and the RTA Consent Deed 2002 are satisfied, and
- May not transfer, sell, assign or otherwise deal with its interests in the land to be leased to the Trustee and the Company under the Land Lease and the Company Lease without the prior written consent of the Security Trustee, which may not unreasonably withhold its consent.

### **3.4.5 Restrictions on amendment of the contracts**

The Trustee and the Company could not and may not at any time materially amend, terminate or surrender the First Amendment Deed 2004–Project Deed and Agreement to Lease, the Second Amendment Deed 2007–Project Deed, the RTA Consent Deed 2002, the First Amendment Deed 2007–RTA Consent Deed 2002, the RTA Deed of Charge, the PAFA Act Guarantee, the First Amendment Deed 2007–PAFA Act Guarantee, the Deed of Appointment of Independent Verifier, the D&C Contract, the Subordinate Deed of Appointment of Independent Verifier, the

Contractor's Side Deed, the O&M Agreement, the Operator's Side Deed, the First Amendment Deed 2007–Operator's Side Deed, the Professional Indemnity Insurance Arrangements Deed, the Second Amendment Deed 2007–Agreement to Lease, the Agreement to Sublease, the Sublease, the trust deed establishing the CrossCity Motorway Property Trust or the constitutions of the Trustee, the Company and the Borrower; without first obtaining the RTA's consent, in accordance with procedures set out in the Project Deed.

Similarly, the Trustee and the Company could not, at any time before the completion of the 'Stage 2' works, materially amend, terminate or surrender a specified series of other private sector equity documents without first obtaining the RTA's consent, again in accordance with procedures set out in the Project Deed. In the case of any such amendments etc proposed for after the completion of the 'Stage 1' works, the RTA could not unreasonably withhold or delay its consent.

In addition, the Trustee, the Company, the Borrower, the Security Trustee and the Intercreditor Agent may not, at any time, amend or replace any of the project's private sector debt financing documents in a way which would:

- Increase the principal of the project debt
- Bring forward repayments of this principal, or
- Give the payment of rent to the RTA under the Land Lease a lower priority than the meeting of project operating costs, or impose any additional restrictions on the payment of this rent

without the RTA's prior written consent, which may not be unreasonably withheld or delayed. Any such amendment or replacement of any debt financing document without the RTA's consent will not, however, affect the RTA's liabilities under the any of the project contracts.

The RTA has already expressly consented, in the RTA Consent Deed 2002, to any other amendments or replacements of the debt financing documents which might arise, following any legal challenge to the validity of the project's environmental impact assessment, its planning approval or *SEPP No 63* (see section 3.2.3), from court or RTA directions to the Trustee or Company, from any other legal requirements, from any changed or new planning approval or from any claims against or losses suffered by the Trustee or the Company following any court finding of invalidity.

For its part, the RTA:

- Has acknowledged that the Trustee and the Company may amend, replace, terminate or waive their rights under their contracts with the RTA only in accordance with the debt financing documents, and has agreed that any amendments etc not complying with these requirements will be ineffective, and
- May not amend or replace any of its contracts with the project's private sector participants without the Security Trustee's prior written consent, which may not be unreasonably withheld or delayed.

### **3.4.6 Confidentiality and publicity**

The project contracts and specified associated documents are subject to confidentiality restrictions.

Specified exemptions to these restrictions include the release of information as required by the law or for legitimate government purposes, the release of information to aid investors, financiers and insurers and the publication of this *Summary of Contracts*. The ability of the NSW Auditor-General to carry out audit functions under the Public Finance and Audit Act (NSW) has not been diminished by removing or limiting access to records or other information that should otherwise be available.

The Trustee and the Company may make statements about the project to the media only with the RTA's prior written consent, which may not be unreasonably withheld or delayed.

### 3.4.7 Changes in law

The renegotiation provisions described in section 3.5 below may apply if:

- A change to the project's planning approval, or a new planning approval, necessitates a change in the works to be designed and constructed—beyond a change in the project's temporary works and/or a change in design and construction processes—or a change to the completed Cross City Tunnel
- The Director General of the Department of Urban and Transport Planning directs the RTA, under condition 271 of the planning approval, to reduce the concentrations and/or total quantities of air pollutants in emissions from the ventilation stack, and this necessitates a change in the works to be designed and constructed—beyond a change in the project's temporary works and/or a change in design and construction processes—or a change to the completed Cross City Tunnel
- There is a change to State law—as a result of a court decision, a statute, a regulation, a by-law or, after the completion of the Stage 2 works, an approval (other than the planning approval) issued or changed by a government or local government authority, but excluding any new approvals which were already required on 18 December 2002, and also excluding any requirements imposed by RIC or the SRA under the Rail Agreement, EnergyAustralia under the EA Agreement or the Sydney Harbour Foreshore Authority under the SHFA/RTA MoU—or a change to the application or interpretation of any such State law, and this change:
  - Affects the project and increases the cost of the Trustee's operation, maintenance and repair obligations, or
  - Specifically and only affects the project alone or the project and other NSW tollroads (this expressly includes a State tax on tolls), or
  - Would reasonably be seen, either alone or in conjunction with other State laws, as being intended to discriminate against the project—either alone or with other NSW tollroads—in comparison with businesses generally (again, this expressly includes a State tax on tolls), or
  - Necessitates a change to the project's design and construction works or the completed Cross City Tunnel, or
- A Commonwealth law necessitates the installation, modification or enhancement of the project's air quality or other pollution

control measures, and this necessitates a change to the project's design and construction works or the completed Cross City Tunnel.

Except as a result of any renegotiation of the contracts, or under the Project Deed's land tax, water rates and local government rates provisions summarised in section 3.4.1 above, the RTA will not be liable to the Trustee or the Company for the consequences of any such changes in law.

### 3.4.8 Dispute resolution under the Project Deed

The Project Deed sets out detailed procedures which must be followed whenever there is a dispute between the RTA and the Trustee and/or the Company concerning the Project Deed, the project's design and construction works or its operation, maintenance and repair works, whether an event has had a 'material adverse effect' on the project (one of the triggers for the renegotiation provisions described in section 3.5 below), the outcomes of any renegotiation of the project contracts, the Agreement to Lease, the Land Lease and the Company Lease.

In addition, if there is a dispute between RailCorp and the Company under the Rail Agreement which involves issues that also arise under a Project Deed dispute between the Company and the RTA, and procedures set out in the Rail Agreement are followed, RailCorp must either agree to the consolidation of the disputes procedures or agree with the Company on some other way of dealing with both disputes.

The Project Deed dispute resolution procedures follow the following sequence:

- (i) First, at the request of any of the parties, negotiation of the dispute between the chief executive officers of the RTA, the Trustee and the Company, or their nominees.

The Security Trustee may attend and participate in these negotiations, and the Contractors and/or Operator may also do so if the RTA consents.

If the negotiations resolve the dispute, the decision of the CEOs or other representatives of the parties will be binding.

- (ii) If these negotiations fail to resolve the dispute within five business days, and the dispute concerns:
  - A determination by the Independent Verifier, or
  - A failure by the parties to agree within 90 business days on whether an event potentially triggering the renegotiation provisions described in section 3.5 has had or is starting to have a 'material adverse effect' on the project, or
  - A failure by the parties to agree within 90 business days on the outcomes of any such renegotiations, or
  - A disagreement about the costings and/or advice provided by the Trustee or the Company in response to a 'change order' issued by the RTA under the change-of-scope arrangements described in section 3.2.2 and referred to in section 3.3.2, or



- A direction by the RTA to the Trustee or the Company to comply with an RTA 'change order' even though such a disagreement about the costings and/or advice has yet to be resolved, again under the arrangements described in section 3.2.2, or
- The manner and timing of payments to be made to the RTA if a change to the project's operation, maintenance and repair works, as directed by the RTA or proposed by the Trustee, results in cost savings, under the arrangements described in section 3.3.2.

the dispute may be referred by any of the relevant parties, within ten business days, for determination by an independent expert, selected as specified in the Project Deed, in accordance with rules set out in the Project Deed.

The Security Trustee may attend, participate in and make submissions to the hearings, and the Contractors and/or Operator may also do so if the RTA consents.

The RTA must meet 50% of the costs of the expert, the Trustee and the Company must meet the other 50%, and each party must bear its own costs.

The decision of the expert will be final and binding, unless one of the parties involved notifies the other(s), within 20 business days, that it is not satisfied and intends to refer the matter to arbitration.

- (iii) If a dispute is not of the types able to be referred to expert determination, as listed in (ii) above, and has not been resolved by the negotiations described in (i) within five business days, or if the dispute has been referred to expert determination but this has not resulted in its resolution to the satisfaction of all the parties, any party may refer the matter for final and binding arbitration, again in accordance with procedures and rules set out in the Project Deed (for disputes already considered by an expert, expedited arbitration rules will apply).

The Security Trustee may attend, participate in and make submissions to the arbitration, and the Contractors and/or Operator may also do so if the RTA consents.

Notwithstanding the existence of any dispute, the RTA, the Trustee and the Company must continue to perform their obligations under the Project Deed.

The procedures outlined above do not prevent any party from seeking summary or urgent relief from a court.

### **3.4.9 Dispute resolution under the Rail Agreement**

An analogous three-tier sequence of dispute resolution procedures applies for disputes between RailCorp and the Company under the Rail Agreement, except for:

- Disputes where the procedures are consolidated with those under the Project Deed, as described above, and
- Disputes about the preparation, approval, testing or review of the *Rail Safety Plan* (see section 3.2.11) or the *Operations Rail Safety Plan* (section 3.3.1), which must be determined by the Director General of the NSW Ministry of Transport.

These Rail Agreement procedures involve:

- (i) Negotiations between the chief executive officers of RailCorp and the Company, or their nominees.
- (ii) Independent expert determination if these negotiations are unsuccessful *and* the dispute involves:
  - Any other matter arising out of the *Rail Safety Plan*, or
  - The RIC/SRA/RailCorp rail safety and future projects requirements appended to the Project Deed's *Scope of Works and Technical Criteria*, or
  - A suspension of the Company's works or operations by RailCorp, or
  - Any other rail safety matter.
- (iii) Arbitration if the dispute is not of the types able to be referred to expert determination and has not been resolved by the negotiations described in (i) within five business days, or if the dispute has been referred to expert determination but this has not resulted in its resolution to the satisfaction of all the parties.

The details of these procedures, including the timeframes and the rules to be applied, are substantially the same as those applying under the Project Deed.

Notwithstanding the existence of any dispute, RailCorp and the Company must continue to perform their obligations under the Rail Agreement, and the dispute resolution procedures do not prevent any party from seeking summary or urgent relief from a court.

### **3.4.10 Dispute resolution under the EA Agreement**

The dispute resolution procedures set out in the EA Agreement differed from those described above.

For all disputes between EnergyAustralia and the Company other than those concerning the preparation and review of the Company's design documentation and the preparation of 'layout' design documentation by EnergyAustralia,

- The dispute had to be notified, with details, in writing
- If the parties' project managers could not resolve the dispute within ten days, either party could refer the matter to mediation, by a mediator selected using procedures set out in the EA Agreement, and
- If (but only if) the dispute was not resolved by mediation within six months, either party could commence court action.

Notwithstanding the existence of any dispute, EnergyAustralia and the Company had to continue to perform their obligations under the EA Agreement.

For design documentation disputes,

- The dispute had to be notified, with details, in writing
- The parties then had to agree within five days on an expert to make a final, binding determination (if they could not, one was to be proposed by the Institution of Engineers, Australia), and

- The expert had to be appointed within a further five days and had to determine the matter within 28 days of his or her appointment.

### 3.4.11 *Force majeure* under the Project Deed

*Force majeure* events are defined in the Project Deed as any:

- (a) Earthquake, cyclone, fire, explosion, flood, natural disaster, sabotage, riot, malicious damage, act of a public enemy, civil disobedience, civil commotion, terrorism, war, revolution, radioactive contamination or toxic or dangerous chemical contamination
- (b) Confiscation, nationalisation, requisition or property damage under the order of any government prior to the opening of the tunnels, or
- (c) Event after the opening of the tunnels which is not itself, or does not arise from, a breach of the Project Deed by the Trustee or the Company

which is beyond the reasonable control of the Trustee and the Company and which could not have been prevented by them (or had its effects on the project prevented) by taking the steps of a prudent, experienced and competent concessionaire, designer, constructor or operator:

If the Trustee and the Company allege *force majeure* has occurred, they must promptly notify the RTA in writing, providing details of the event, its effects on their obligations, the actions they have taken or propose to remedy the situation, the time they are unlikely to be able to carry out their affected obligations, the estimated costs of remediation and the insurance proceeds upon which they will be able to rely.

The RTA, the Trustee and the Company must then meet within five business days to determine how long the *force majeure* is likely to continue.

The Trustee and the Company must remedy the effects of the *force majeure* promptly, in accordance with the reinstatement provisions and associated qualifications described in section 3.4.2 above.

The Trustee's and the Company's Project Deed obligations affected by a *force majeure* event will be suspended, but only to the extent and for so long as the *force majeure* continues to affect these obligations.

More specifically, their obligations to keep all traffic lanes in the tunnels open, subject to the exceptions listed in section 3.3.1 above, will be suspended only if the *force majeure* event prevents the safe passage of vehicles.

Similarly, their obligations to the RTA to comply with conditions 258, 259, 267 or 271 of the project's planning approval, concerning air quality goals and limits for the tunnels, the external atmosphere and ventilation stack emissions, will not be suspended as a result of any *force majeure* event of type (c) above that does not cause material physical damage to the tunnels or affect the normal operation of their plant and equipment.

They will not be in breach of the Project Deed, however, if, following a *force majeure* event of type (c) above,

- Their express obligation under the Project Deed to take reasonable measures to ensure they do comply with conditions 258, 259, 267 or 271 of the project's planning approval necessitates the temporary closure of the tunnels or traffic lanes in the tunnels, or
- They fail to carry out their obligations under the Project Deed to remedy or mitigate a breach of conditions 258, 259, 267 or 271 of the project's planning approval, or any other obligation arising from such a breach, because the *force majeure* event prevents them from doing so, even if there is no physical damage to the tunnels.

### 3.4.12 *Force majeure* under the EA Agreement

Under the EA Agreement, *force majeure* events were defined very similarly to (a) and (b) of the definition under the Project Deed (section 3.4.11 above), except that these types of events were envisaged as potentially affecting the performance by either party of its obligations under the EA Agreement.

In addition, for EnergyAustralia but *not* for the Company, *force majeure* events under the EA Agreement also included any other event beyond EnergyAustralia's reasonable control, with express examples being any emergency load management, any emergency relating to electricity works, any problems for Energy Australia resulting from the detection of electricity network assets which would need to be relocated but were not included in the EA Agreement's scope of works (including any requirement to acquire additional land), and any need to prohibit the disconnection of network items during peak load months and/or during daily peak load periods. (These additional types of EA Agreement *force majeure* events, applying only to the performance of EnergyAustralia's obligations, were termed 'EA *force majeure*' in the Project Deed.)

If EnergyAustralia or the Company alleged *force majeure* under the EA Agreement had occurred, it had to promptly notify the other party, providing reasonable details on the nature of the event, which of its EA Agreement obligations had been affected and the estimated time during which it would be unable to carry out these obligations. It then had to use reasonable efforts to mitigate the effect of the *force majeure* event and had to keep the other party regularly informed.

If the Company or EnergyAustralia were delayed in or prevented from performing its EA Agreement obligations by a *force majeure* event of a type applying to it, as described above, these obligations—other than any obligation to make a payment—were to be suspended, but only to the extent and for so long as the *force majeure* affected these obligations.

Similarly, if a *force majeure* event delayed or prevented Energy Australia from disconnecting any live cables or connecting other cables for the works, its obligations to do so were to be suspended, but again only to the extent and for so long as the *force majeure* continued to affect these obligations.

In the case of the additional types of EA Agreement *force majeure* events applying under the EA Agreement only to the performance

of Energy Australia's obligations, termed 'EA *force majeure*' in the Project Deed,

- Any such suspension of EnergyAustralia's EA Agreement obligations was not to apply during the first seven days of the effect of the 'EA *force majeure*' event, if the Company issued a written notice to this effect and indemnified EnergyAustralia for its reasonable costs in accelerating its works so as to overcome the effect of this seven days on EnergyAustralia's meeting of timeframes set out in the EA Agreement.
- The Trustee or the Company had to notify the RTA of the 'EA *force majeure*' event within seven days. Provided this was done, the RTA was to pay the Trustee, the Company and the Contractors their reasonable costs—other than any amounts payable by the Trustee or the Company to the Contractors, but including their overhead costs, delay costs, the Borrower's debt holding costs and the Trustee's and the Company's equity holding costs—resulting from the 'EA *force majeure*' event, to the extent that this event delayed the completion of the 'Stage 1' Project Deed works by more than 60 days.

### 3.5 Renegotiation provisions

In addition to the Project Deed's provisions for amendment of its *Scope of Works and Technical Criteria* discussed in sections 3.2.2, 3.3.2 and 3.3.3 and the general restrictions on amendments to the project's contracts summarised in section 3.4.5, the Project Deed expressly envisages a range of circumstances under which the project's contracts might need to be renegotiated and/or other changes might need to be negotiated.

If:

- There is significant infiltration of traffic from the western portal of the westbound tunnel at Harbour Street into the area east of George Street, and the Minister for Infrastructure and Planning or the Director General of the Department of Urban and Transport Planning requires the imposition of a 'congestion toll' to mitigate this infiltration, in accordance with condition 24 of the project's planning approval (see section 3.3.3), *or*
- Any of a specified series of 'Stage 2' local road works which restrict or were to restrict the traffic capacities of surface roads in the area and the existing Kings Cross Tunnel (see section 3.3.8) are or have been removed, *or*
- Any of a specified series of traffic connections to the Cross City Tunnel are not maintained except during special events, emergencies or road maintenance or repair works or if there is a material threat to public health or safety (see section 3.3.8), *or*
- The numbers of general traffic and transit lanes on any of a series of specified sections of the Western Distributor, Anzac Bridge, Ocean Street, New South Head Road and Harbour Street are reduced below specified levels (see section 3.3.8), *or*
- A new arterial road directly connecting New South Head Road in Kings Cross with the Western Distributor in Darling Harbour is opened prior to the end of the Cross City Tunnel's operating term, *or*

- A toll is imposed on the southbound ramp from the Cross City Tunnel to the Eastern Distributor; or on the southbound Eastern Distributor south of this connection, *or*
- The posted speed limits in the Cross City Tunnel are reduced by the RTA—*other than* as a short-term response to an incident or because a breach of the Project Deed by the Trustee or the Company has meant the tunnel(s) are not safe for the efficient and continuous passage of vehicles—to less than 80 km/h in the main tunnels or less than 60 km/h in the tunnel to the Sir John Young Crescent exit ramp, *and* this reduction occurs five or more years after the opening of the tunnels *or* is not greater than 5 km/h, *or*
- Any of the types of changes in law listed in section 3.4.7 occurs, *or*
- The location of the ventilation stack is changed or its height is increased, in accordance with conditions 248 and 249 of the project's planning approval, *or*
- The Director General of the Department of Urban and Transport Planning, the Environment Protection Authority or any other government or local government authority imposes requirements on the RTA, the Trustee or the Company under conditions 22, 215, 245, 268 or 272 of the project's planning approval, following any exceedances of the project's air quality and air pollutant goals and standards (see section 3.3.3(b) to(f)), *or*
- An 'uninsurable event', as defined in the Project Deed, occurs (see section 3.4.2), *or*
- A court or tribunal issues an injunction or makes a final determination, not subject to appeal or no longer able to be appealed, which affects the collective ability of the Trustee and the Company to undertake the project substantially in accordance with the main project contracts, and this injunction or determination does *not* arise from:
  - Any contractual breach or other wrongful act or omission by the Trustee, the Company or their contractors
  - Any industrial dispute relating solely to the project or solely involving employees of the Trustee, the Company, the Contractors or their contractors and subcontractors, *or*
  - Any failure by the Trustee and the Company to remove, treat and remediate any hazardous contamination disturbed by or otherwise associated with their activities (see section 3.2.6)

**and** this event or circumstance has had, or is starting to have, a material adverse effect on:

- The collective ability of the Trustee and the Company to undertake the project in accordance with the main project contracts, *or*
- The ability of the Borrower, the Trustee or the Company to repay its debt financiers substantially in accordance with its debt financing arrangements, *or*

- The nominal after-tax returns of:
  - Prior to 27 September 2007, the project's original equity investors (i.e. the equity investors as at 19 December 2002), or
  - Since 27 September 2007, the project's equity investors as at that date,

the Trustee and the Company must use all reasonable endeavours to mitigate the adverse consequences and may seek negotiations with the RTA under the arrangements described below.

If they notify the RTA of the event or circumstance, providing full details of its effects on the project, the RTA, the Trustee and the Company must enter into good faith negotiations, as soon as practicable but in any event within 20 business days of this notice, aimed at enabling the Trustee, the Company and the Borrower to:

- Repay their debt financiers in accordance with the project's debt financing arrangements, and
- Give the project's equity investors—treated as if they were all among the project's equity investors as at 27 September 2007—the lower of:
  - The after-tax equity return they would have received had the event or circumstance not occurred, and
  - The after-tax equity return they were originally predicted to receive, in the private sector participants' 'base case financial model' of 27 September 2007.

If the Trustee, the Company and the Borrower were not able to repay their debts in accordance with the project's debt financing arrangements or provide the 'base case financial model' equity returns *before* the event or circumstance, these negotiations must instead aim simply to restore their abilities to those applying before the event or circumstance.

The RTA, the Trustee and the Company have agreed to take a flexible approach in any negotiations following an event or circumstance having a material adverse effect on the project. Among other things, they have agreed they would have to consider amendments to the contracts to which the RTA is a party and consequential amendments to other project contracts, a change in the project's operating term, changes to the contributions to the project by the RTA, the Trustee and the Company (including their financial contributions) and adjustments to the project's tolls.

The Trustee and the Company must also use all reasonable endeavours to ensure the negotiation processes and results are efficiently applied and structured (for example, by not increasing taxation liabilities).

The debt financiers' Security Trustee must be notified of all negotiation meetings and given copies of all relevant communications, and may attend, participate in and make submissions to the negotiations.

If the negotiations have arisen because an 'uninsurable event' has occurred, the negotiations:

- Must produce an outcome enabling the Trustee and the Company to meet all the reinstatement costs that each must pay, *but*

- May not involve any consideration of a change to the RTA's financial contribution if the loss or damage:
  - Does not exceed \$50 million (indexed to the CPI), and
  - Occurs during the project's operating term or after the expiry—if it is earlier; because it cannot be renewed—of the project's construction phase third party liability insurance (see section 3.4.2)

*unless* other approaches have already been considered in good faith.

In addition to negotiations following a 'material adverse effect' event or circumstance of one or more of the types listed above, a requirement for negotiations may also arise if the posted speed limits in the Cross City Tunnel are reduced by the RTA—*other than* as a short-term response to an incident or because a breach of the Project Deed by the Trustee or the Company has meant the tunnel(s) are not safe for the efficient and continuous passage of vehicles—to less than 80 km/h in the main tunnels or less than 60 km/h in the tunnel to the Sir John Young Crescent exit ramp, and this reduction occurs *within* five years of the opening of the tunnels *and* is greater than 5 km/h.

In this situation,

- The Trustee and the Company must again use all reasonable endeavours to mitigate the adverse consequences, and
- If they notify the RTA of the reduction in the speed limit(s), providing full details of its effect on the project, the RTA, the Trustee and the Company must again enter into good faith negotiations, as soon as practicable but in any event within 20 business days of this notice, and
- These negotiations are not to extend to renegotiation of the project's contracts, but instead the RTA must pay the Trustee and the Company, every six months or otherwise as agreed, amounts which will enable the Trustee, the Company and the Borrower to:
  - Repay their debt financiers in accordance with the project's debt financing arrangements, and
  - Give the project's equity investors—treated as if they were all among the project's initial equity investors—the after-tax equity return they would have received had the speed limit(s) not been lowered.

The results of any negotiations between the RTA, the Trustee and the Company following a reduction in the tunnel's speed limits—whether covered by the 'material adverse effect' arrangements or the more specific arrangements for reductions of more than 5 km/h within the first five years of operations—must be annually reviewed by the RTA, the Trustee and the Company, and will cease to apply if the original speed limits are subsequently restored.



## 3.6 Defaults under and termination of the Project Deed

### 3.6.1 General RTA power to 'step in' following any unremedied Trustee or Company Project Deed default

If the Trustee and the Company fail to perform *any* of their obligations to the RTA under the Project Deed, and do not remedy this failure within a reasonable period of time after receiving a written notice from the RTA requiring them to do so, the RTA may take any action necessary to remedy the default.

This expressly includes the imposition of a requirement by the RTA for part or all of the Cross City Tunnel to be closed and the entry by the RTA onto construction and maintenance sites and any land being used for construction, operational, maintenance or repair activities.

Any losses reasonably incurred by the RTA in taking this action—except for any losses caused by negligence or misconduct by the RTA or its agents or contractors (other than the Trustee and the Company)—will be recoverable from the Trustee and the Company as a debt.

The debt financiers' Security Trustee has expressly acknowledged the RTA's right to 'step in' in these circumstances.

This general right of the RTA to 'step in' is in addition to more specific rights for the RTA to 'step in', as described in sections 3.6.2 and 3.6.3 below, following more narrowly defined 'events of default' and other circumstances potentially leading to termination of the Project Deed and other contracts.

### 3.6.2 RTA notification and Trustee and Company remediation of Trustee or Company 'events of default'

'Events of default' are defined in the Project Deed as:

- Any failure by the Trustee and the Company, collectively, to commence the project, or any display by them of an intention to permanently abandon the project
- After the opening of the tunnels, any failure to keep all their traffic lanes open, except in expressly permitted circumstances (see section 3.3.1)
- Any material failure by the Trustee or the Company to operate, maintain, repair or insure the Cross City Tunnel in accordance with the Project Deed
- Any other material default by the Trustee or the Company under the Project Deed or any of their other contracts with the RTA
- Any of a defined series of 'events of insolvency' concerning the CrossCity Motorway Property Trust, the Trustee (if it is not replaced within 30 business days by another entity reasonably acceptable to the RTA) or the Company, even if the Trustee and the Company are not in breach of the Project Deed
- Any 'event of insolvency' concerning the Contractors or the Operator; if this has a material adverse effect on the collective ability of the Trustee and the Company to carry out the project in accordance with their contracts with the RTA

- Any breach by the Trustee or the Company of a warranty or representation made by it under the Project Deed, if this has a material adverse effect on the collective ability of the Trustee and the Company to carry out the project in accordance with their contracts with the RTA
- Any cancellation of the project's existing debt financing arrangements and subsequent failure by the Trustee and the Company to provide evidence, within three months, of sufficient replacement funding, on terms reasonably satisfactory to the RTA, for them to complete the design and construction of the project.

If any of these 'events of default' occurs, the RTA may give the Trustee or the Company a written notice requiring it to remedy the default or overcome its consequences within:

- Ten days if both lanes of the main eastbound or westbound tunnel are closed
- 20 days if there is a lesser failure to keep all tunnel traffic lanes open, or
- For all other defaults, a reasonable period of time, as judged by the RTA and specified in the notice, but not more than six months (if the default is a failure to pay money, the parties have already agreed a reasonable time will be ten business days).

The RTA must give a copy of this notice to the debt financiers' Security Trustee.

The Trustee and the Company must then comply with this notice. Unless urgent action is required, or the default is a failure to pay money, they must give the RTA a program to remedy the default, the RTA must consult with the Trustee and the Company on this program in good faith, and the Trustee and the Company must then comply with the settled remedial program.

The Trustee and the Company must keep the Security Trustee informed on all the measures they are taking or intend to take to remedy the default. If it is requested to do so, the RTA must give the Security Trustee copies of all notices and other documents it issues to the Trustee or the Company concerning the default and/or must meet with the Security Trustee, or any receiver, manager, administrator, controller, agent or attorney appointed by the Security Trustee, to discuss the remedying of the default.

If the Trustee and the Company fail to remedy the default, or if urgent action is necessary, the RTA may take any action it considers appropriate to remedy the default, and the Trustee and the Company must indemnify the RTA from and against any claims or losses it reasonably incurs in doing so.

The debt financiers' Security Trustee has expressly acknowledged this RTA right to 'step in' in these circumstances.

If the Trustee and the Company believe, in good faith, that the time for remedying the default specified by the RTA's notice to them is not reasonable, they must immediately notify the RTA of this in writing, providing reasons, and the RTA must then review the specified time as soon as practicable.

If the Trustee and the Company are diligently carrying out a program to remedy the default, *and*

- The tunnels are open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed, *or*

- The tunnels are not open to the public to the extent that would be safe, but:
  - The Trustee or the Company has given the RTA a written 'step in' notice requiring it to assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open as required under the Project Deed, *and*
  - The Trustee and the Company are doing everything they can to allow the RTA to do this,

the time specified in the RTA's notice must be extended by the time reasonably required to remedy the default, but not by more than 12 months, and this revised time to remedy the default must be notified in writing.

This process of requesting and obtaining extensions of time to remedy the default may be repeated, but the total extension of time granted may not exceed 12 months.

If the RTA has been required by the Trustee or the Company to 'step in' and assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open, as described above,

- The Trustee and the Company must pay the RTA's costs and indemnify the RTA against any claim or loss it suffers as a result of carrying out these tasks, and
- The Trustee may resume the performance of these tasks—and must be permitted to do so—provided the tunnels are then immediately open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed.

If the Trustee and the Company believe, in good faith, that the time for remedying the default specified by the RTA in an extension-of-time notice issued under the arrangements described above is still not reasonable, they may refer the matter for expert determination, and if necessary then for arbitration, under the Project Deed's dispute resolution procedures described in section 3.4.8 above. The maximum aggregate extension of time an expert or arbitrator may grant for remedying a default is 12 months.

While the 'event of default' remains unremedied the Trustee or the Company must obtain the RTA's consent before replacing the Operator (by novating the O&M Agreement, or by terminating this agreement and making a new agreement), in accordance with procedures and criteria set out in the RTA Consent Deed 2002. These procedures and criteria are the same as those applying at *all* times under the Project Deed, as already described in section 3.3.1.

If the 'event of default' is not remedied within the notified or determined period, as extended, or if at any time during this period:

- The Trustee and the Company are not diligently carrying out a program to remedy the default, or
- The tunnels are not open to the public, to the extent that it would be safe for this to occur, *and* the Trustee and the

Company have not given the RTA a written 'step in' notice requiring it to assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open as required under the Project Deed, *or* are not doing everything they can to allow the RTA to do this,

the RTA may initiate procedures to terminate the Project Deed, as described in section 3.6.4 below, subject to a potential further extension of the time to remedy the default if the debt financiers' Security Trustee intervenes under the arrangements summarised in section 3.6.3.

### **3.6.3 Security Trustee remediation of Trustee or Company 'events of default' and other potential triggers for termination**

In addition to the rights and obligations of the Trustee and the Company under the Project Deed to remedy 'events of default' as discussed above, under the RTA Consent Deed 2002 the Security Trustee has the right to remedy or procure the remedy of:

- The 'events of default' listed in section 3.6.2, and
- Any other event or circumstance potentially entitling the RTA to terminate any or all of the contracts to which the RTA is a party\* by 'stepping in' and:
  - Exercising the rights of the Trustee and the Company under the main project contracts, including the Project Deed (as amended), the Rail Agreement, the EA Agreement, the Deed of Appointment of Independent Verifier, the Agreement to Lease (as amended), the Land Lease (as amended), the Company Lease, the RTA Deed of Charge and the RTA Consent Deed 2002 (as amended)
  - Appointing a receiver, manager, administrator, controller, agent or attorney to perform some or all of the Trustee's and the Company's obligations under these agreements
  - Engaging (or permitting such a receiver etc to engage) other persons or organisations, reasonably acceptable to the RTA, to perform some or all of the Trustee's and the Company's obligations under the agreements, or
  - Assigning, novating or otherwise disposing of any or all of the Trustee's and the Company's rights and obligations under the agreements, or permitting a receiver etc to do so.

The RTA has expressly acknowledged and consented to these rights of the Security Trustee (and receivers etc) in these circumstances, along with all the other rights of the Security Trustee and the debt financiers under the project's private sector debt financing securities.

(Similarly, prior to 27 September 2007 the consents of RIC and the SRA, and thus RailCorp, concerning the Rail Agreement and the rights of the Original Security Trustee were recorded in the RIC/SRA Mortgaged Rights Notice, and the consent of Energy Australia concerning the EA Agreement and the rights of the Original Security Trustee was recorded in the EA Mortgaged Rights Notice. As

\* This includes any event or circumstance that might become an 'event of default' if it were not remedied. The Security Trustee 'step in' provisions described in this section 3.6.3 do not, however, apply if an 'uninsurable event' has had or has started to have a material adverse effect on the project and the obligations of the Trustee and the Company to make good the loss or damage have been suspended pending negotiations under the arrangements described in section 3.5 (see sections 3.4.2), and they do not affect the right of the RTA, in these circumstances, to terminate the Project Deed at any time and in its absolute discretion (see section 3.6.5).

discussed in sections 3.7 and 3.8 below, the Original Security Trustee could also 'step in' under the Rail Agreement or the EA Agreement, following a default or potential default by the Company under those agreements, even if there had been no default or potential default under the Project Deed.)

If any event entitling the Security Trustee etc to 'step in' occurs, or if the Security Trustee etc has a right under the project's debt financing documents to *prevent* its occurrence, the RTA must:

- Give the Security Trustee etc and its agents, consultants and contractors all necessary access to the relevant sites or land if they notify the RTA of their intention to access these areas, subject to the provisions of the Agreement to Lease, any lease of additional construction land, the Land Lease and the Company Lease, and
- In response to reasonable requests, give the Security Trustee etc all relevant information in the RTA's possession.

If the Security Trustee has 'stepped in' to attempt to remedy an 'event of default' or any other event or circumstance potentially entitling the RTA to terminate contracts, it must advise the RTA of its remediation plans at least once every month, and also whenever reasonably requested by the RTA, providing details of the alternatives it is considering, estimated timeframes, any material changes to its plans and the progress being made in implementing the plans.

While the 'event of default' or other event remains unremedied the Security Trustee must obtain the RTA's consent before:

- Replacing the Operator (by novating the O&M Agreement, or by terminating this agreement and making a new agreement), or
- Disposing of the Trustee's and the Company's rights and obligations under the project contracts or the Company's shares or the CrossCity Motorway Property Trust's units

in accordance with procedures and criteria set out in the RTA Consent Deed 2002. The RTA Consent Deed 2002 also sets out requirements for the RTA to execute a series of novation and other agreements following any such replacement or disposal.

Under the RTA Consent Deed 2002 the RTA's rights under the Project Deed to terminate that deed for an unremedied 'event of default', following the procedures described in section 3.6.4 below, may not be exercised:

- During the remedy period notified by the RTA to the Trustee and the Company, as extended under the Project Deed provisions described in section 3.6.2, provided the Trustee and the Company are diligently carrying out a program to remedy the default, or
- During an additional period of up to 10 months, provided the Security Trustee or a receiver, manager, administrator, controller, agent or attorney appointed by the Security Trustee is diligently trying to remedy the 'event of default'—this expressly includes a recapitalisation if the 'event of default' is an 'event of insolvency'—or attempting to overcome its consequences, *and*
  - The tunnels are open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed, *or*

- The tunnels are not open to the public to the extent that would be safe, but:
  - The Security Trustee or receiver etc has given the RTA a written 'step in' notice requiring the RTA to assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open as required under the Project Deed, *and*
  - The Security Trustee or receiver etc has done or is doing everything it can to allow the RTA to do this.

These RTA Consent Deed 2002 provisions do not affect the RTA's rights under the Project Deed to terminate the Project Deed following an 'uninsurable event' during any period of suspension of the obligation of the Trustee and the Company to make good the loss or damage.

If the RTA has been required by the Security Trustee or receiver etc to 'step in' and assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open, as described above,

- The Security Trustee or receiver etc must pay the RTA's costs and indemnify the RTA against any claim or loss it suffers as a result of carrying out these tasks, excluding any part of the losses caused by a breach of contract or negligence by the RTA or its agents or contractors, and
- The Security Trustee or receiver etc may issue a 'step out' notice requiring the RTA to cease performing these tasks on a specified date that must allow the RTA a reasonable amount of time. The RTA must comply with this notice if the tunnels will then immediately be open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed.

### 3.6.4 Termination of the Project Deed by the RTA following an 'event of default'

If an 'event of default' as defined in section 3.6.2 is not remedied and its consequences overcome within the notified or determined period, as extended, or if at any time during this period:

- The Trustee and the Company are not diligently carrying out a program to remedy the default, or
- The tunnels are not open to the public, to the extent that it would be safe for this to occur, *and* the Trustee and the Company have not given the RTA a written 'step in' notice requiring it to assume whatever operation, maintenance and repair tasks are needed to open the tunnels and keep them open as required under the Project Deed, or are not doing everything they can to allow the RTA to do this,

the RTA may—subject to a possible extension of the remedy time if the Security Trustee 'steps in' as just described—give the Trustee or the Company, and the Security Trustee, 20 business days' notice, in writing, that the RTA intends to terminate the Project Deed.

If the 'event of default' is not remedied within this 20 business day period, the RTA may then immediately terminate the Project Deed, unless the 'event of default' or its continuation have been caused by a material breach by the RTA of any of its obligations under the project contracts.

If the RTA does terminate the Project Deed for an unremedied 'event of default',

- The Agreement to Lease will automatically be terminated, except for provisions requiring the RTA to give the Company access so that it can fulfil its obligations under the Rail Agreement (see below)
- The Land Lease and the Company Lease will automatically be terminated
- The RTA will be entitled to recover any losses it may suffer as a result of the termination, plus any other damages arising from breaches of contract by the Trustee or the Company
- The RTA will not be liable to pay any compensation or other money to the Trustee, except for any damages payable because of any breach of contract by the RTA
- The RTA may require the novation of the O&M Agreement in accordance with the Operator's Side Deed, with the RTA effectively stepping into the shoes of the Company under the O&M Agreement, so that independently verified operational, maintenance and repair work by the Operator may continue directly for the RTA
- The Company must:
  - Remove any rail safety monitoring devices if required to do so by RailCorp, and
  - Carry out any works that are needed—in accordance with the safety and rail operational objectives of the Rail Agreement, or otherwise as required by the Director General of the NSW Ministry of Transport—to ensure railway facilities are not left unsecured, unsupported or unsafe
- Once the Company has completed these tasks, RailCorp or the Company may terminate the Rail Agreement (in RailCorp's case, it must give the Security Trustee 20 business days' notice of its intention to do so)
- The Trustee and the Company must execute documents transferring all their interests in the project and its assets to the RTA
- The Trustee and the Company must surrender the Cross City Tunnel, the land leased under the Land Lease and all rights and interests in them to the RTA
- The Trustee and the Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and repair the Cross City Tunnel and maintain and repair the local road, property and services works
- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign the Trustee's insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 and provided the Security Trustee is satisfied the insurers have no outstanding liabilities to the Trustee or the Company
- The Trustee and the Company must hand over their accounts and all other records relating to the project, and

- The Trustee and the Company must do everything else they can to enable the RTA to complete the construction of the project or operate, maintain and repair the project.

### **3.6.5 Termination of the Project Deed by the RTA following an 'uninsurable event'**

As already indicated in sections 3.4.2 and 3.6.3, if an 'uninsurable event' has had or has started to have a material adverse effect on the project and the obligation of the Trustee and the Company to make good the loss or damage have been suspended pending negotiations under the arrangements described in section 3.5, the RTA may terminate the Project Deed, in its absolute discretion, simply by giving the Trustee or the Company a notice to this effect.

If the RTA does terminate the Project Deed in these circumstances,

- The Agreement to Lease will automatically be terminated, except for provisions requiring the RTA to give the Company access so that it can fulfil its obligations under the Rail Agreement (see below)
- The Land Lease and the Company Lease will automatically be terminated
- The RTA must pay the Trustee, within 30 days,
  - An amount equal to the project's total private sector debt on the date of termination, and
  - An amount that will permit the Trustee and the Company to give the project's equity investors—treated as if they were all among the project's equity investors as at 27 September 2007—the after-tax equity return they would otherwise have been expected to receive to the date of termination, taking account of previous payments since 27 September 2007, and the obligations of the Trustee and the Company to make termination payments to their contractors
- The RTA must release any security bonds provided to it by the Trustee
- The RTA, the Trustee and the Company will continue to be liable for any damages payable because of a breach of contract
- The RTA may require the novation of the O&M Agreement in accordance with the Operator's Side Deed, with the RTA effectively stepping into the shoes of the Company under the O&M Agreement, so that independently verified operational, maintenance and repair work by the Operator may continue directly for the RTA
- The Company must:
  - Remove any rail safety monitoring devices if required to do so by RailCorp, and
  - Carry out any works that are needed—in accordance with the safety and rail operational objectives of the Rail Agreement, or otherwise as required by the Director General of the NSW Ministry of Transport—to ensure railway facilities are not left unsecured, unsupported or unsafe



- Once the Company has completed these tasks, RailCorp or the Company may terminate the Rail Agreement (in RailCorp's case, it must give the Security Trustee 20 business days' notice of its intention to do so)
- The Trustee and the Company must surrender the Cross City Tunnel, the land leased under the Land Lease and all rights and interests in them to the RTA
- The Trustee and the Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and repair the Cross City Tunnel and maintain and repair the local road, property and services works
- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign the Trustee's insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 and provided the Security Trustee is satisfied the insurers have no outstanding liabilities to the Trustee or the Company, and
- The Trustee and the Company must do everything reasonable necessary for the RTA to operate the Cross City Tunnel.

### 3.6.6 Termination of the Project Deed by the Trustee and the Company

The Trustee and the Company may terminate the Project Deed, by giving the RTA 30 business days' notice in writing, if:

- A court or tribunal makes a final determination, not subject to appeal or no longer able to be appealed, in response to a legal challenge to the project's environmental assessment or planning approval or *SEPP No 63* (see section 3.2.3), and this determination:
  - Prevents the Trustee and the Company, collectively, from undertaking the project, and
  - Does *not* arise from any contractual breach or other wrongful act or omission by the Trustee, the Company or their contractors, or
- A court or tribunal makes any other final determination, not subject to appeal or no longer able to be appealed, which:
  - Prevents the Trustee and the Company, collectively, from undertaking the project, and
  - Does *not* arise from any contractual breach or other wrongful act or omission by the Trustee, the Company or their contractors,

and the RTA fails to overcome the effect of the determination within 12 months of being notified about it by the Trustee or the Company,\* or
- The NSW Government enacts legislation which has the effect of prohibiting the Trustee and the Company, collectively, from

undertaking the project substantially in accordance with the project contracts, or

- Any government or local government authority resumes any part of the land to be leased to the Trustee under the Land Lease, other than under the arrangements discussed in section 3.3.8 for future road and pedestrian connections to the tunnels or the development of other roads, tunnels or infrastructure in the vicinity, and this has a material adverse effect on the ability of the Trustee and the Company, collectively, to undertake the project in accordance with the project contracts, or
- The RTA breaches the Project Deed, the Agreement to Lease, the Land Lease or the Company Lease—or, in the case of an RTA default under the Project Deed arising from a default by AML under the AML Agreement, a default by the Sydney Harbour Foreshore Authority under the SHFA/RTA MoU or a default by EnergyAustralia under the Assets Relocation Agreement or the EA Early Works Agreement, the RTA is *still* in default six months after the default was first notified to the RTA by the Trustee or the Company—and
  - This breach has or will have a *substantial* (i.e. significantly greater than merely 'material') adverse effect on the ability of the Borrower, the Trustee and the Company, collectively, to undertake the project in accordance with the project contracts or pay their private sector debt financiers, and
  - The RTA does not remedy the breach:
    - Within 20 business days of a written notice to do so from the Trustee or the Company, if the breach is a failure to pay money, or
    - Otherwise, within 12 months of such a notice.†

The RTA may, however, suspend the Trustee's and the Company's rights to terminate the Project Deed for up to 12 months from the date of their original notice of termination, by giving them a written notice to this effect within 30 business days.

During this period of suspension,

- The Trustee and the Company must continue to perform their obligations under the Project Deed if it is lawful and practicable for them to do so, and
- The RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place each of them in the net (after tax) position they would have been in had the event giving them the right to terminate never occurred.

If the relevant event has not been remedied by the RTA at the end of the suspension period, the Project Deed will automatically terminate on that date, and

- The Agreement to Lease will automatically be terminated, except for provisions requiring the RTA to give the Company access so that it can fulfil its obligations under the Rail Agreement

\* During this 12-month period the RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place each of them in the net (after tax) position they would have been in had the court or tribunal not made its determination.

† During this 12-month period the RTA must pay the Trustee and the Company, monthly in arrears, amounts sufficient to place each of them in the net (after tax) position they would have been in had the breach not occurred.

- The Land Lease and the Company Lease will automatically be terminated
- The RTA must pay the Trustee, within 30 days,
  - An amount equal to the project's total private sector debt on the date of termination, and
  - An amount that will permit the Trustee and the Company to give the project's equity investors—treated as if they were all among the project's equity investors as at 27 September 2007—the after-tax equity return they would otherwise have been expected to receive to the date of termination, taking account of previous payments since 27 September 2007 and the obligations of the Trustee and the Company to make termination payments to their contractors
- The RTA must release any security bonds provided to it by the Trustee
- The RTA, the Trustee and the Company will continue to be liable for any damages payable because of a breach of contract
- The Company must:
  - Remove any rail safety monitoring devices if required to do so by RailCorp, and
  - Carry out any works that are needed—in accordance with the safety and rail operational objectives of the Rail Agreement, or otherwise as required by the Director General of the NSW Ministry of Transport—to ensure railway facilities are not left unsecured, unsupported or unsafe
- Once the Company has completed these tasks, RailCorp or the Company may terminate the Rail Agreement (in RailCorp's case, it must give the Security Trustee 20 business days' notice of its intention to do so)
- The Trustee and the Company must surrender the Cross City Tunnel, the land leased under the Land Lease and all rights and interests in them to the RTA
- The Trustee and the Company must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and repair the Cross City Tunnel and maintain and repair the local road, property and services works
- The Trustee and the Company must pay the RTA any unexpended insurance proceeds and assign the Trustee's insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 and provided the Security Trustee is satisfied the insurers have no outstanding liabilities to the Trustee or the Company, and
- The Trustee and the Company must do everything reasonable necessary for the RTA to operate the Cross City Tunnel.

### 3.7 Defaults under and termination of the Rail Agreement

If the Company defaults on any of its obligations to RailCorp under the Rail Agreement, RailCorp may give the Company a written notice requiring it to remedy the default or overcome its consequences within a period of time, as judged by RailCorp and specified in the notice.

If the default is a failure to pay money, the parties have already agreed a reasonable time will be ten business days. For other defaults, the remedy time must be at least 30 business days.

Any default notice to the Company must specify whether the default is a 'material default'. These are defined in the Rail Agreement as defaults involving:

- A failure to suspend construction work within 50 metres of a railway facility when required to do so by RailCorp (see section 3.2.11)
- A failure to stop construction works or operations when this is required under the RIC/SRA/RailCorp rail safety and future rail project requirements appended to the Project Deed's *Scope of Works and Technical Criteria*
- A breach of rail safety monitoring requirements set out these RIC/SRA/RailCorp rail safety and future rail project requirements, as modified by the *Rail Safety Plan* (see section 3.2.11)
- A material detrimental effect on:
  - The safety and support of rail facilities, other than as expressly permitted by the Rail Agreement
  - The safety of rail passengers, station patrons and other authorised users of rail facilities, or
  - RailCorp's continued functions, or
- Any other default or series of defaults of the Company's material obligations under the Rail Agreement.

If the default is a 'material default',

- The Company must comply with the RailCorp notice, and
- Unless urgent action is required, or the default is a failure to pay money, the Company must give RailCorp a program to remedy the default, RailCorp must consult with the Company on this program in good faith, and the Company must then comply with the settled remedial program.

If the Company believes, in good faith, that the time for remedying a 'material default' specified by the RailCorp notice is not reasonable, it must immediately notify RailCorp of this in writing, providing reasons, and RailCorp must then review the specified time as soon as practicable.

If the Company is diligently carrying out a program to remedy the default, the time specified in the RailCorp notice must be extended by the time reasonably required to remedy the default, but not by

more than six months, and this revised time to remedy the default must be notified in writing.

This process of requesting and obtaining extensions of time to remedy the default may be repeated, but the total extension of time granted may not exceed six months.

(In addition to these arrangements for the Company to remedy any 'material default' by it under the Rail Agreement, under the RIC/SRA Mortgaged Rights Notice the Original Security Trustee had the right, until 27 September 2007, to 'step in'—not only following a default, but also if there were a *potential* for a default—and take any steps to remedy or prevent the default, both under the Rail Agreement and under any other arrangements satisfactory to RIC and the SRA (and thus, from 1 January 2004, RailCorp), including the payment of compensation.)

If a 'material default' is not remedied by the Company within the notified remedy period, as extended,

- RailCorp may direct the RTA, in accordance with its obligations to RailCorp under the Intragovernmental Rail Agreement, to call upon the bank guarantees provided to the RTA under the Project Deed (see sections 3.2.15 and 3.3.4), to the extent of the loss suffered by RailCorp, and/or
- RailCorp may, in its absolute discretion, give the Company and the Security Trustee 20 business days' notice, in writing, that it intends to terminate the Rail Agreement.

If a notice of termination is issued and the material default is not remedied within this 20 business day period, RailCorp may then immediately terminate the Rail Agreement.

If it does so,

- RailCorp will be entitled to recover any losses it may suffer as a result of the termination, plus any other damages arising from breaches of contract by the Company, and
- RailCorp will not be liable to pay any compensation or other money to the Company, except for any liabilities that arose before the termination.

The Rail Agreement may also be terminated by RailCorp or the Company following any termination of the Project Deed under the arrangements already described in sections 3.6.4, 3.6.5 and 3.6.6.

These termination provisions entirely displace any rights of termination RailCorp would otherwise have had under the common law.

Under the Rail Agreement, the Company's liabilities to RailCorp under the agreement, for negligence or for any other breach of law are limited, in the case of insured risks, to the Company's insurance coverage (see section 3.4.2). In the case of other risks, the Company is not liable for indirect, consequential or pure economic losses.

## 3.8 Defaults under and termination of the EA Agreement

If EnergyAustralia or the Company reasonably considered the other was in breach of the EA Agreement, or was likely to be in breach, it could give the other party a written notice specifying:

- A reasonable date by which the breach or anticipated breach had to be rectified, or
- If rectification was not possible, reasonable requirements to overcome or mitigate its effects.

In the case of a default or potential default by the Company, EnergyAustralia also had an obligation, until 27 September 2007, to notify the Original Security Trustee.

The party in breach or expected to be in breach then had to comply with the notice and, if rectification was not possible, submit a plan to overcome or mitigate the effects.

If it failed to do so, the other party could take any action it considered reasonably appropriate to rectify the breach or anticipated breach or overcome or mitigate its effects, and the party in breach had to compensate it for all its reasonable costs in doing so.

The Company had to indemnify EnergyAustralia against and from any claims and losses it suffered as a result of a breach or anticipated breach by the Company that could not be rectified, provided EnergyAustralia had notified it of this breach or anticipated breach.

(In addition to these arrangements for the Company to remedy any default or potential default by it under the EA Agreement, under the EA Mortgaged Rights Notice the Original Security Trustee had the right, until 27 September 2007, to 'step in' and take any steps to remedy or prevent the default, both under the EA Agreement and under any other arrangements satisfactory to EnergyAustralia, including the payment of compensation.)

If the Company failed to comply with an EnergyAustralia notice concerning a material breach of the EA Agreement, and Energy Australia advised it that it did not intend to rectify the breach itself, at the end of the notified remedy period EnergyAustralia could give the Company and the Security Trustee 20 business days' notice, in writing, that it intended to terminate the EA Agreement.

If it did so, the Company had to indemnify EnergyAustralia against all claims and losses, to the extent that this would place EnergyAustralia in the position it would have been in had the breach never occurred.

The Company could request an extension of the 20 business day notice period. Provided it did so before the end of this period, and EnergyAustralia was satisfied the Company was diligently implementing a rectification program approved by Energy Australia, EnergyAustralia was obliged, at the end of the 20 business day notice period, to give the Company a reasonable additional period to rectify the breach or overcome its consequences. Unless Energy Australia agreed otherwise, the total rectification period could not exceed six months.

If the breach was not rectified or its consequences overcome by the Company and/or the Original Security Trustee within the 20

business day notice period or any extended rectification period, EnergyAustralia could terminate the EA Agreement.

These termination provisions entirely displaced any rights of termination EnergyAustralia would otherwise have had under the common law.

The Company could terminate the EA Agreement only if it was entitled to do so under the common law. It had to give Energy Australia at least 40 business days' notice of its intention to do so, and EnergyAustralia had the right to remedy its breach during this period.

In addition to these arrangements for terminations following breaches of the EA Agreement, if the Project Deed had been terminated during the construction phase of the project under the arrangements described in sections 3.6.4, 3.6.5 or 3.6.6,

- The Company and EnergyAustralia would have been obliged, in good faith, to meet, discuss and agree on possible changes to the EA Agreement and its scope of works, taking account of the need to maintain the supply and integrity of the electricity distribution network at all times and 'the fact that the Cross City Tunnel will not proceed', and
- Once the Company and EnergyAustralia had satisfied their agreed remaining obligations under the EA Agreement, the EA Agreement would automatically have terminated.

### 3.9 Finance defaults

Under the RTA Consent Deed 2002 the debt financiers' Security Trustee:

- Must promptly notify the RTA if it becomes aware of any default under the project's debt financing agreements of a type defined in those agreements
- If requested to do so by the RTA, must give the RTA copies of all the documents issued by the Security Trustee or any of the debt financiers to the Borrower, the Trustee or the Company concerning such a finance default
- May send representatives to observe meetings of a senior project group, established by the RTA, the Trustee and the Company under the Project Deed to monitor and assist the progress of the project, if a finance default or potential finance default has not been remedied or if the Security Trustee has notified the RTA it has a substantial concern regarding the project or the ability of the Borrower, the Trustee or the Company to meet its debt financing obligations, and
- Must give the RTA at least ten days' written notice—or at least 24 hours' written notice if the Security Trustee reasonably believes any delay could materially harm the debt financiers—before the Security Trustee or any of the debt financiers declares any debts due and payable or takes any action to enforce the debt financiers' securities or recover any of the money secured (see section 4.2).

In enforcing the debt financiers' securities, under the RTA Consent Deed 2002—and also, where relevant, under the RIC/SRA Mortgaged Rights Notice and the EA Mortgaged Rights Notice—the Security Trustee may, among other things,

- Exercise the rights of the Trustee and the Company under the main project contracts, including the Project Deed, the Rail Agreement, the EA Agreement, the Deed of Appointment of Independent Verifier, the Agreement to Lease, the Land Lease, the Company Lease, the RTA Deed of Charge and the RTA Consent Deed 2002
- Appoint a receiver, manager, administrator, controller, agent or attorney to perform some or all of the Trustee's and the Company's obligations under these agreements
- Engage (or permit such a receiver etc to engage) other persons or organisations, reasonably acceptable to the RTA, to perform some or all of the Trustee's and the Company's obligations under the agreements, or
- Assign novate or otherwise dispose of any or all of the Trustee's and the Company's rights and obligations under the agreements, or permit a receiver etc to do so.

The RTA has expressly acknowledged and agreed that the Security Trustee and any receiver etc appointed by the Security Trustee under the debt financiers' securities may exercise the rights of the Trustee or the Company under the project contracts.

In addition, the RTA has agreed that if the Land Lease or the Company Lease has not been registered by the time it receives a notice from the Security Trustee concerning any proposed enforcement action, it will take high priority action, under the arrangements described in section 3.3.5, to ensure registrable leases are executed and given to the Trustee and/or the Company as soon as possible and by no later than the dates specified in the Agreement to Lease, as extended.

In exercising its rights under the debt financiers' securities the Security Trustee must obtain the RTA's consent before:

- Replacing the Operator (by novating the O&M Agreement, or by terminating this agreement and making a new agreement), or
- Disposing of the Trustee's and the Company's rights and obligations under the project contracts or the Company's shares or the CrossCity Motorway Property Trust's units

in accordance with procedures and criteria set out in the RTA Consent Deed 2002.

The RTA Consent Deed 2002 also sets out requirements for the RTA to execute a series of novation and other agreements following any such replacement or disposal.

Any dealings with the Cross City Tunnel or the land to be leased under the Land Lease under the debt financiers' securities must be subject to the requirements of the Project Deed for the surrender of the project and land to the RTA at the end of the project's operating term, as described in section 3.3.10.



## 4 The RTA Deed of Charge and interactions between RTA and private sector securities

---

### 4.1 The RTA Deed of Charge

---

Under the RTA Deed of Charge of 18 December 2002, between the RTA, the Trustee and the Company, each of the Trustee and the Company has granted the RTA a fixed and floating charge\* over all its present and future assets, undertakings and rights—in the Trustee's cases, as trustee of the CrossCity Motorway Property Trust, as discussed in section 2.4—as security for the satisfaction of all its obligations to the RTA under the Project Deed, the Agreement to Lease, the Land Lease, the Company Lease, the RTA Consent Deed 2002 and all other project contracts.

Under the RTA Consent Deed 2002, however, until the project's debt financiers have been fully repaid each of these charges will operate only as a floating charge—even for property over which the charge is fixed from the outset under the terms of the RTA Deed of Charge—except to the extent that the asset in question is also subject to a fixed charge, at the same time, under any of the debt financiers' securities under the project's private sector debt financing arrangements.

The Trustee and the Company have warranted in the RTA Deed of Charge that there are and will be no encumbrances over their charged property other than mortgages, charges and collateral securities in favour of the Security Trustee under the private sector debt financing arrangements, specified permitted liens, easements, licences and encumbrances (such as encumbrances under vehicle hire purchase agreements) and encumbrances in favour of the RTA.

They have also undertaken not to create any other encumbrances, or to sell, transfer or otherwise deal with any of their property subject to the fixed charges in favour of the RTA, other than by way of a mortgage, charge or collateral security in favour of the Security Trustee or another of the expressly permitted types of encumbrances.

The relative priorities of the charges created by the RTA Deed of Charge and the project debt financiers' securities are governed by the RTA Consent Deed 2002, as discussed in section 4.2 below. The charges created by the RTA Deed of Charge rank behind the debt financiers' securities but ahead of all other securities affecting the property of the Trustee and the Company.

Subject to the priorities between securities under the RTA Consent Deed 2002, the restrictions on enforcement also imposed under that deed (section 4.2) and any law requiring a period of notice or a

lapse of time, the charges created by the RTA Deed of Charge may be immediately enforced by the RTA if:

- The RTA becomes entitled to terminate the Project Deed under the arrangements described in section 3.6.4 or 3.6.5
- Any of the debt financiers' securities is enforced and this enforcement is not withdrawn within five business days, or
- The Trustee or the Company fails to comply with its Project Deed obligations to the RTA, at the end of the operating term, or upon any earlier termination of the Project Deed, to surrender the Cross City Tunnel, the land leased under the Land Lease and all rights and interests in them to the RTA and fulfil other obligations listed in section 3.3.10, and the Trustee or the Company fails to comply within 20 business days with an RTA notice requiring it to remedy this breach or overcome its consequences.

In these circumstances, and again subject to the RTA Consent Deed 2002, the RTA may:

- Appoint a receiver or a receiver and manager of the charged property, exercising powers set out in the RTA Deed of Charge,
- Exercise any of these powers itself, along with any other powers conferred on the RTA by the project contracts, by statutes or by law or equity, and/or delegate its powers to agent(s) of the RTA, and
- Do anything it considers necessary or expedient to remedy a failure by the Trustee or the Company to comply with its obligations under the project contracts.

Each of the Trustee and the Company has irrevocably appointed the RTA as its attorney, able to do all the acts required of them under the RTA Deed of Charge and take whatever additional action the RTA thinks necessary or desirable to better secure the payment of any money owing under the contracts.

### 4.2 Consents to and priorities between the RTA and debt financiers' securities

---

The RTA Consent Deed 2002 formally records the RTA's consent to the debt financiers' securities under the project's private sector debt

---

\* The Trustee and the Company may deal with the parts of their property subject only to a floating charge in the ordinary course of their businesses, but may not deal with the parts of their property subject to a fixed charge, except as described below.

financing documents and the Security Trustee's consent to the RTA's securities under the RTA Deed of Charge.

With the exception of what are termed 'RTA priority moneys'—any amounts the Trustee or the Company owe to the RTA because it has taken action to remedy a Project Deed default by the Trustee or the Company after a failure by them to remedy the default themselves, as described in sections 3.6.1 and 3.6.2—each of the debt financiers' securities has priority over any RTA security over the same property.

Accordingly, any money received by the Security Trustee, the RTA or any receiver, receiver/manager, agent or attorney on enforcement of a debt financiers' security or an RTA charge, as the case may be, must be applied:

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

Similarly, any action by the Security Trustee or a receiver etc under the debt financiers' securities will take precedence over any

enforcement action by the RTA. In particular, if the Security Trustee or a receiver etc appointed under the debt financiers' securities takes possession of any property under these securities, it may immediately, upon notice to the RTA, assume control of that property from any receiver or controller appointed under the RTA charges.

The RTA must obtain the consent of the Security Trustee before it may:

- Enforce the RTA charges or exercise any of its other rights under the RTA Deed of Charge, including any action to crystallise a floating charge or appoint a receiver or receiver/ manager, or
- Take any steps to sell or take possession of any property of the CrossCity Motorway Property Trust, the Trustee or the Company.

In addition, the RTA may not take any action that initiates, supports or is otherwise connected with any insolvency, winding up, liquidation, reorganisation, administration or dissolution proceedings or voluntary arrangements concerning the CrossCity Motorway Property Trust, the Trustee or the Company.

## 5 NSW Government guarantee of the RTA's performance

---

Under the Public Authorities (Financial Arrangements) Act Deed of Guarantee of 18 December 2002 ('the PAFA Act Guarantee'), as novated and amended by the First Amendment Deed 2007–PAFA Act Guarantee, the State of NSW has unconditionally and irrevocably guaranteed, to the Trustee, the Company, the Borrower and the Security Trustee, the RTA's performance of all its obligations under the Project Deed, the Agreement to Lease, the Land Lease, the Company Lease, any lease of additional land as defined in the Agreement to Lease, the RTA Deed of Charge, the RTA Consent Deed 2002, the Deed of Appointment of Independent Verifier, the Contractor's Side Deed, the Operator's Side Deed and any other documents approved by the NSW Treasurer in the future.

This guarantee is a continuing obligation. It will remain in force until seven months after the term of these contracts or seven months

after any earlier termination of the contracts, even if the RTA is discharged from any or all of its guaranteed obligations under the contracts for any reason whatsoever.

The State must satisfy its obligations under the guarantee within 21 days of a demand being made by the Trustee, the Company, the Borrower and the Security Trustee. Such a demand may be made if a demand has previously been made on the RTA and the RTA has failed to perform within 21 days.

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



RTA/Pub. 09.113  
ISBN 978-1-921598-36-4

---