

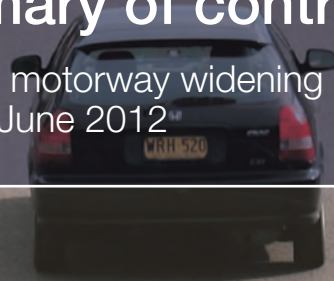


Transport
Roads & Maritime
Services



M5 South West motorway: Summary of contracts

Including motorway widening contracts,
as at 25 June 2012





Transport
Roads & Maritime
Services

**M5 South West motorway:
Summary of contracts**



Contents

1	Introduction	1
1.1	The scope of this report	1
1.2	A brief description and history of the M5 motorway	1
1.2.1	Early works by the public sector (1983–85)	2
1.2.2	The original motorway (Stages 1 and 2) (1991–92)	2
1.2.3	The “M5 Western Link” (1993–94)	4
1.2.4	Wattle Grove noise barriers and Henry Lawson Drive tolled ramps (1994–95)	5
1.2.5	Introduction of “Cashback” toll “refunds”	6
1.2.6	King Georges Road–Fairford Road duplication and sale of the RTA’s loans (1997–1999)	6
1.2.7	RTA commitments on amplification of the M5 between Prestons and Casula and construction of a Hume Highway off-ramp at Casula (1997)	8
1.2.8	Introduction of GST (2000)	9
1.2.9	Agreement with other tollroad operators on the interoperability of electronic tolling systems (2001)	9
1.2.10	Moorebank Avenue interchange and associated works (2001–03)	9
1.2.11	Interfaces with the Westlink M7 motorway (2002–05)	9
1.2.12	RTA consents to other ownership changes and debt refinancings (1996 to 2009)	9
1.2.13	Widening of the motorway (2012–15)	11
1.3	The structure of this report	13
2	Overview of the project’s contracts	14
2.1	The parties to the contracts.	14
2.1.1	The public sector parties.	14
2.1.2	The private sector parties	14
2.2	The current contractual structure	17
2.2.1	The Project Deed	17
2.2.2	The M5 Western Link Project Deed	19
2.2.3	Interfaces with the Westlink M7 motorway	20
2.2.4	Leases	21
2.2.5	Electronic tolling interoperability arrangements.	22
2.2.6	The “M5 West widening” contracts	22
2.2.7	The Call Option Deed	24
2.3	Conditions precedent.	24

3	Objectives and general allocations of risks	26
3.1	Policy objectives	26
3.2	The Company's principal obligations	26
3.3	RMS's principal obligations	27
3.4	General acceptance of risks by the Company	27
3.5	General releases and indemnities by the Company	28
3.6	Interactions with RMS's and other authorities' statutory function and powers	29
4	Design and construction of the "M5 West widening" works	31
4.1	Scope of the widening works	31
4.2	Changes in the scope of the widening works and associated potential extensions of the motorway's concession term	32
4.3	Compliance with and amendments and challenges to the widening project's planning approval	33
4.4	Design obligations, intellectual property and moral rights	34
4.5	General construction obligations	35
4.6	Construction access	35
4.7	Latent conditions and land contamination	36
4.8	Artefacts and native title claims	36
4.9	Other environmental requirements	37
4.10	General responsibilities to third parties	38
4.11	Traffic management during construction and connections with the M5 East and the M7	38
4.12	Design and construction programs, plans, reports, reviews, inspections and administration	39
4.13	Quality assurance and verification	40
4.14	Subcontracting	40
4.15	Payments between RMS and the Company	41
4.16	Loss or damage to and insurance of the widening works	41
4.17	Completion of the widening works	42
4.18	Correction of defects	43
5	Operation, maintenance and repair of the motorway	44
5.1	The Company's general operation, maintenance and repair obligations	44
5.1.1	Overview of principal obligations	44
5.1.2	Traffic obligations	45
5.1.3	Other obligations	46
5.1.4	Interactions with RMS	47
5.2	The leases	47
5.3	Tolls	47
5.4	Service centres	49
5.5	Loss or damage and insurance requirements	49
6	Revenue sharing, compensation and call option rights	52
6.1	Current arrangements for compensation if tolls were introduced on the M5 East	52
6.2	Current arrangements for sharing profits	52
6.3	Revised arrangements for sharing toll revenue following any duplication of the M5 East	52
6.4	Compensation if the "Cashback" scheme were changed or ended	53
6.5	RMS's rights to buy shares in the Company or its business	54
7	Miscellaneous general provisions of the contracts	55
7.1	Rates, levies and taxes	55
7.2	Interest on overdue payments	55
7.3	Setting off	55
7.4	Miscellaneous reporting and accounting obligations	55
7.5	Confidentiality, privacy protection and publicity	56

7.6	Restrictions on changes of ownership or control, assignments, encumbrances and refinancings	57
7.6.1	Changes of ownership or control of the Company	57
7.6.2	Assignments etc of the Company's rights and interests	57
7.6.2.1	Project Deed, M5 Western Link Project Deed, Lease, Moorebank Avenue Lease, Bridge Works Lease and M5 Western Link Lease restrictions	57
7.6.2.2	M5 West Widening Deed restrictions	58
7.6.2.3	RMS General Security Deed restrictions	58
7.6.2.4	Call Option Deed restrictions	58
7.6.3	Encumbrances over the Company's rights and interests	58
7.6.3.1	Project Deed, M5 Western Link Project Deed, Lease, Moorebank Avenue Lease, Bridge Works Lease and M5 Western Link Lease restrictions	58
7.6.3.2	M5 West Widening Deed restrictions	59
7.6.3.3	RMS General Security Deed restrictions	59
7.6.4	Assignments etc of RMS's rights and interests	59
7.6.5	Refinancing	59
7.7	Updating of the Company's "base case" financial model	60
7.8	Amendments and waivers	60
7.9	Cumulative rights	60
7.10	<i>Force majeure</i> under the M5 West Widening Deed	60
7.11	Dispute resolution under the Project Deed and the M5 Western Link Project Deed	61
7.12	Dispute resolution under the M5 West Widening Deed	61

8 Renegotiation provisions 63

8.1	"Material adverse effect" renegotiations under the Project Deed	63
8.2	"Material adverse effect" renegotiations under the M5 West Widening Deed	64

9 Defaults under and termination of the Project Deed and the M5 Western Link Project Deed 67

9.1	Actions to remedy Company breaches and "events of default"	67
9.1.1	RMS's general powers to "step in" to remedy a Company breach	67
9.1.1.1	RMS's powers under the Project Deed, the M5 Western Link Project Deed, the leases and the RMS Consent Deed—2012	67
9.1.1.2	RMS's powers under the RMS General Security Deed, the F-5 Tollroad Project Deed of Charge and the RMS Consent Deed—2012	68
9.1.2	Procedures for the Company to remedy a Project Deed or M5 Western Link Project Deed "event of default"	68
9.1.3	More general limits on RMS's rights to respond to a Company breach	69
9.1.4	The Security Trustee's powers to "step in" and take other actions to remedy a Company breach or a Project Deed or M5 Western Link Project Deed "event of default"	70
9.2	Termination by RMS for a Project Deed or M5 Western Link Project Deed "event of default"	70
9.3	Termination by the Company	72

10 Defaults under and termination of the M5 West Widening Deed 75

10.1	RMS's general powers to remedy any unremedied Company failure to perform its M5 West Widening Deed obligations	75
10.1.1	Powers under the M5 West Widening Deed and the RMS Consent Deed—2012	75
10.1.2	Powers under the RMS General Security Deed and the RMS Consent Deed—2012	76
10.2	Remediation of M5 West Widening Deed "events of default" by the Company	76
10.3	Remediation of Company breaches and M5 West Widening Deed "events of default" by the Security Trustee	77
10.4	Notifications of "stepping in" by RMS or termination of the M5 West Widening Deed for an unremedied "event of default"	77
10.5	"Stepping in" by RMS to remedy an M5 West Widening Deed "event of default"	78
10.5.1	General "step in" and "step out" arrangements	78
10.5.2	Changes to the widening works during a "default step-in" by RMS	80
10.5.3	M5 West Widening Side Deed provisions concerning "stepping in" by RMS	81
10.5.4	Payments to RMS for its "step-in" costs	83

10.6	Other motorway reinstatement arrangements	84
10.7	Termination of the M5 West Widening Deed by RMS	84
10.7.1	Consequences of an automatic termination of the M5 West Widening Deed upon a termination of the Project Deed and/or the M5 Western Link Project Deed for a Company default	85
10.7.2	Consequences of a termination of the M5 West Widening Deed for an extended “migratory contamination”, artefact or native title delay	86
10.7.3	Consequences of a termination of the M5 West Widening Deed for an unremedied “event of default”	86
10.7.4	Novation of the M5 West Widening Design and Construction Contract to RMS	87
10.8	Termination of the M5 West Widening Deed by the Company	87
10.8.1	Consequences of an automatic termination of the M5 West Widening Deed upon a termination of the Project Deed and/or the M5 West Widening Deed by the Company	88
10.8.2	Processes and consequences of a direct termination of the M5 West Widening Deed by the Company	89

11 RMS’s securities and related provisions of the RMS Consent Deed—2012 91

11.1	RMS’s securities under the F-5 Tollroad Project Deed of Charge	91
11.2	RMS’s securities under the RMS General Security Deed	92
11.3	Ranking of RMS and private sector debt financiers’ securities in the RMS Consent Deed—2012	93

1 Introduction

1.1 The scope of this report

This report summarises the main contracts, from a public sector perspective, for the M5 South West motorway (“the M5 motorway” or “the M5”) in southwestern Sydney, as at 25 June 2012, the date on which a series of new and amended contracts associated with the widening of this motorway became effective.

It has been prepared by NSW Roads and Maritime Services (“RMS”) in accordance with the public disclosure provisions of the NSW Government’s December 2006 *Working with Government Guidelines for Privately Financed Projects*, which have been incorporated within the *National Public Private Partnership Guidelines* adopted by the Council of Australia Governments on 29 November 2008. The relevant public disclosure provisions of the December 2006 *Working with Government Guidelines* are essentially the same as those now set out in the NSW Government’s August 2012 *NSW Public Private Partnerships Guidelines*, which took effect after the execution of the contracts summarised in this report.

The original contracts for the M5 motorway were executed in February 1991, before the introduction of public disclosure requirements in the NSW Government’s March 1995 *Guidelines for Private Sector Participation in the Provision of Public Infrastructure* and the adoption of broadly equivalent public disclosure requirements in the initial (November 2001) form of the *Working with Government Guidelines for Privately Financed Projects*.

Accordingly, this report is the first publicly available summary of the contracts for the M5 motorway.

The trigger for the preparation of this report has been the execution in June 2012 of a series of contract amendments and new contracts for the widening of the motorway.

This report is not confined to these latest changes to the project, but rather presents a comprehensive summary of the contracts as a whole.

In doing so, however, this report:

- Presents only a high-level overview of the history of the multiple amendments of, additions to and replacements for the project’s contracts associated with the progressive development and refinancing of the motorway over the last 21½ years. Instead, it focuses on providing a detailed

“snapshot” of the contracts, as amended, as they stood on 25 June 2012.

- Presents little or no detail on several provisions which, while still included in the current (25 June 2012) contracts, have little or no continuing application and are now primarily of historical interest, such as provisions governing the original design and construction of the motorway in the early 1990s.

In addition, in line with the *National Public Private Partnership Guidelines*, the December 2006 *Working with Government Guidelines for Privately Financed Projects* and the August 2012 *NSW Public Private Partnerships Guidelines*, this report:

- Focuses on the project contracts to which the State of New South Wales (represented by the Minister for Roads and Ports or his predecessors) and/or RMS (in many cases as the successor to the Roads and Traffic Authority of New South Wales (“RTA”)) are parties, or which otherwise have an actual or potential impact on public sector benefits or risks. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector’s exposure.
- Does not disclose any matters which are expressly confidential under the contracts or any other “commercial in confidence” provisions of the contracts. The *Guidelines* define the latter as any provisions revealing the contractors’ financing arrangements, cost structures, profit margins, “base case” financial model(s), intellectual property or “any matter whose disclosure would place the contractors at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future”.

This report should not be relied upon for legal advice or used as a substitute for any of the M5 motorway contracts.

Amendments of or additions to the M5 motorway’s contracts taking effect after 25 June 2012, other than future amendments and additions specified in the contracts already in effect on 25 June 2012, are not reflected in this report.*

1.2 A brief description and history of the M5 motorway

The M5 motorway is a 21 km road link, generally of four lanes, between the F5 Freeway (Hume Highway) in Prestons and King Georges Road and the M5 East freeway in Beverly Hills (**Figure 1.1**).

* The main contracts for the widening of the M5 motorway, other than specified provisions that are “commercial in confidence” as defined in the Government Information (Public Access) Act 2009 (NSW), may be downloaded from www.rta.nsw.gov.au/doingbusinesswithus/downloads/contracts/class3_disclosure-files_m5w.html.

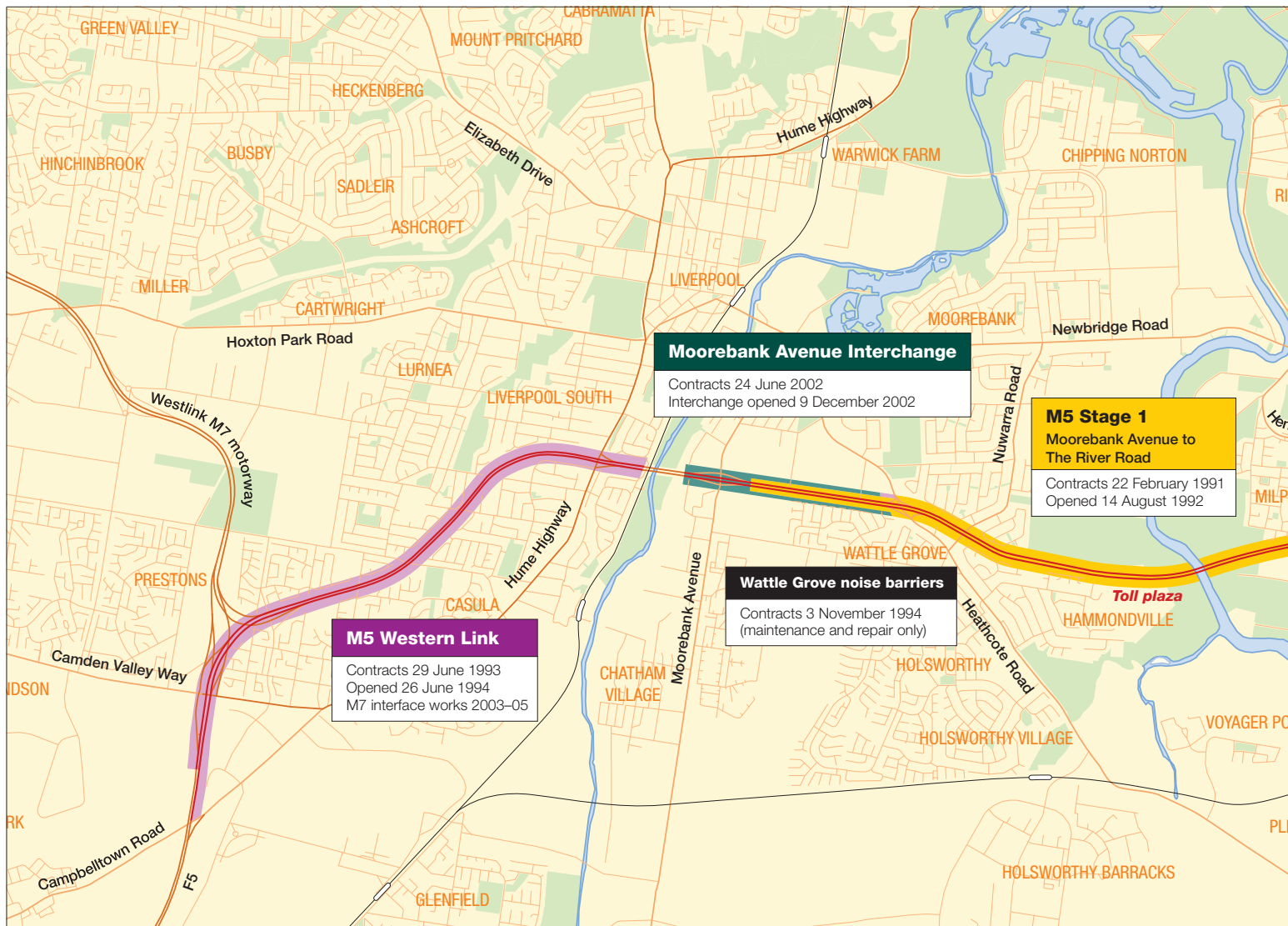


Figure 1.1. The stages of development of the M5 motorway from 1991 to 2005. The current widening works are shown in Figure 1.3.

It forms part of the Sydney Orbital road network, which comprises the M5, the Westlink M7 motorway (originally known as the Western Sydney Orbital), the M2 motorway, the Lane Cove Tunnel tollroad, the Gore Hill freeway, the Warringah freeway, the Sydney Harbour Bridge and Tunnel tollroads, the Eastern Distributor tollroad, Southern Cross Drive, General Holmes Drive and the M5 East freeway (Figure 1.2).

Under the M5 motorway’s contracts the M5 has had to and must be financed, designed, constructed, operated, maintained and repaired by Interlink Roads Pty Limited until 22 August 2023, after which it will revert to the public sector. Once the current widening works on the motorway are completed, this concession term will be extended to 10 December 2026 or to a later date in specified circumstances described later in this report.

1.2.1 Early works by the public sector (1983–85)

The westernmost portion of what has become the M5 motorway, south of Camden Valley Way at Prestons, was originally constructed by the NSW Department of Main Roads (“DMR”), the predecessor of the RTA and RMS, as part of the

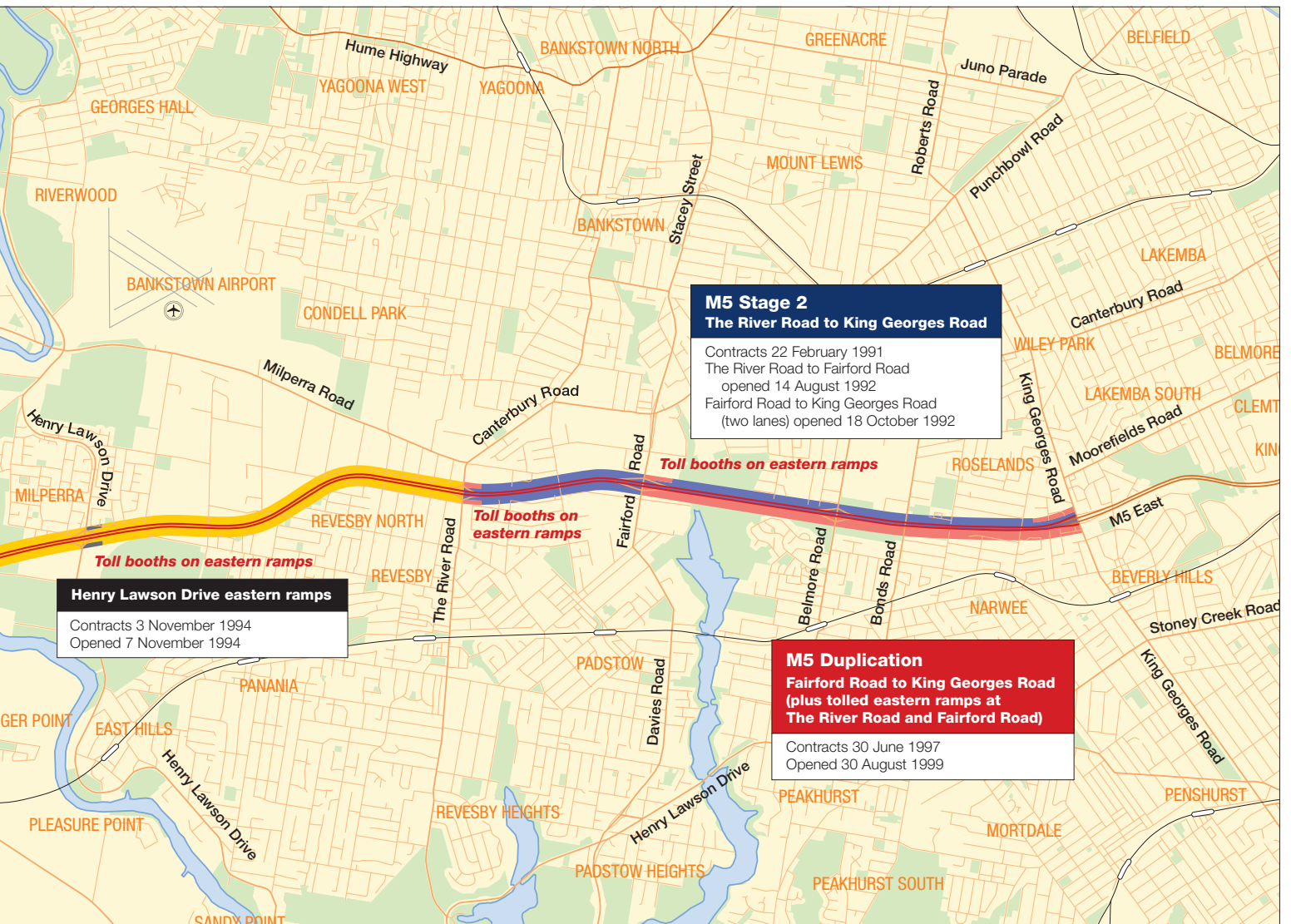
Raby Road–Camden Valley Way section of the F5 South Western Freeway, which was opened for service in October 1983.

Another section of what has become the M5, a new road link across the Georges River between Heathcote Road in Moorebank and the Hume Highway in Casula, was commissioned by the DMR in February 1985.

This link across the Georges River has since been significantly augmented and upgraded as part of the progressive construction of the M5, and all of it, apart from a section from west of Moorebank Avenue to the railway line just west of the river, now forms part of the M5 motorway, as described later in this report.

1.2.2 The original motorway (Stages 1 and 2) (1991–92)

In October 1985 the DMR exhibited an *Environmental Impact Statement* on a proposal for a further section of the F5 freeway, from King Georges Road in Beverly Hills to Heathcote Road in Moorebank.



In 1986 the Commissioner for Main Roads, after considering a DMR *Environmental Impact Assessment Report* on the project (*Freeway No 5—South Western Freeway, King Georges Road, Heathcote Road*), made a determination under the Environmental Planning and Assessment Act 1979 to proceed with the western portion of this proposal, a dual carriageway from Fairford Road in Padstow to Heathcote Road. This work did not proceed, however, because of a lack of funds. A decision on the eastern (King Georges Road–Fairford Road) portion of the 1985 proposal was deferred.

In April 1989 the RTA advertised for expressions of interest in the financing, design, construction, operation, maintenance and repair of the F5 between King Georges Road and Heathcote Road as a tollroad. Final, firm offers for this project were invited by the RTA on 12 December 1989.

The successful bidder was Interlink Roads Pty Limited (“Interlink”), a company established and at that time owned 50:50 by Leighton Contractors Pty Ltd and the Commonwealth Bank of Australia.

In parallel with these arrangements, a second *Environmental Impact Assessment Report* on the portion of the motorway between King Georges Road and Moorebank Avenue was

prepared by the RTA. On 21 February 1991, the Chief Executive of the RTA made a determination under the Environmental Planning and Assessment Act approving the development of the King Georges Road to Moorebank Avenue section of the motorway, subject to conditions set out in the second *Environmental Impact Assessment Report*, with a dual carriageway west of Fairford Road and a single carriageway between King Georges Road and Fairford Road. This determination was challenged by Liverpool City Council in the Land and Environment Court, but was upheld by that court in December 1991.

Contracts for this original form of the M5 motorway were executed by the Minister for Roads, the RTA and Interlink on 22 February 1991, and Interlink commenced construction later that month.

In August 1991 the Chief Executive of the RTA made a further determination under the Environmental Planning and Assessment Act, approving the location of the motorway’s toll plaza immediately to the west of Georges River.

Most of the costs of designing and constructing the original motorway were funded by the private sector, but the RTA contributed a \$10 million “construction grant” for works beyond

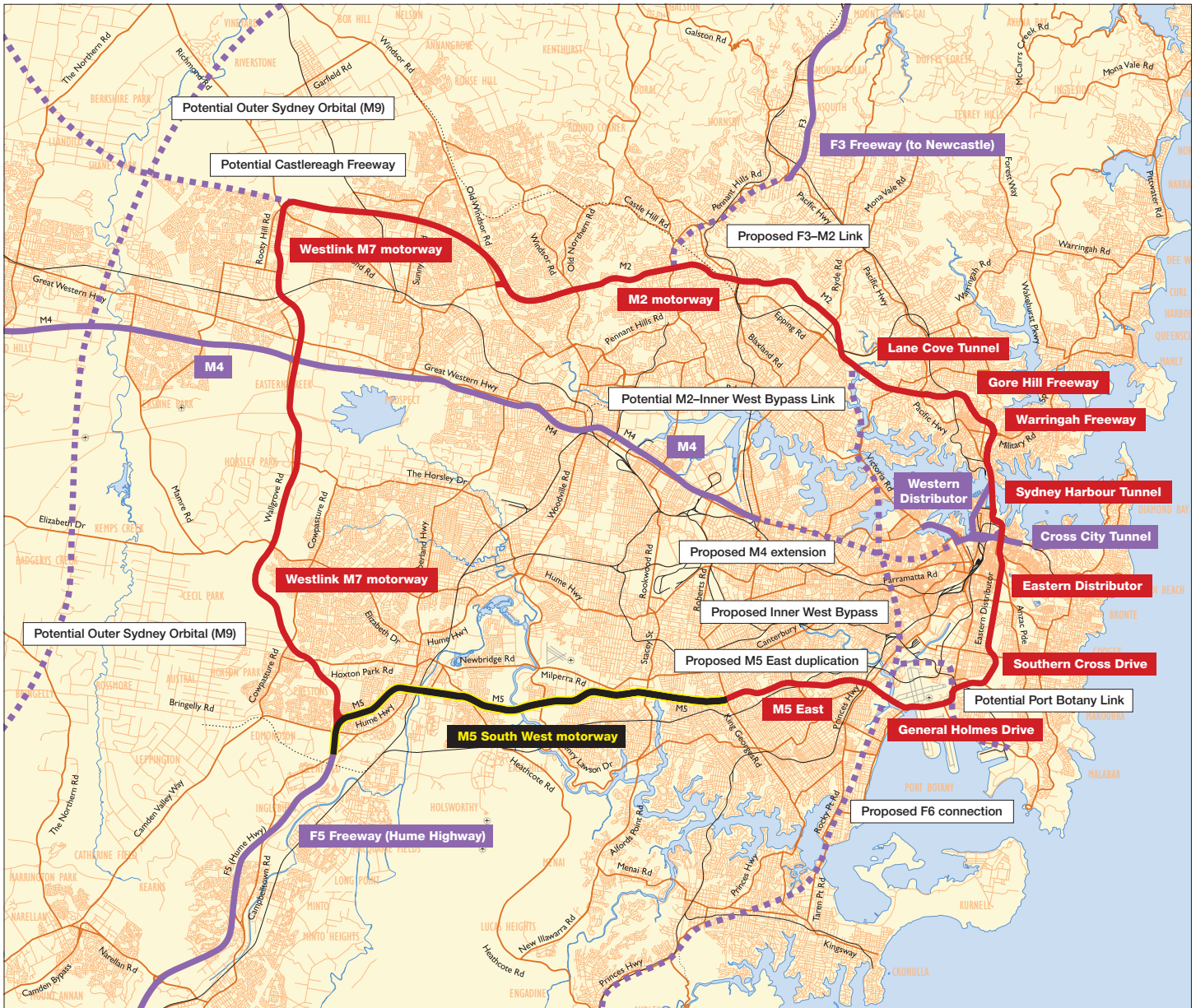


Figure 1.2. The M5 motorway is an important part of the Sydney Orbital. (The dashed routes shown here for proposed and “potential” future motorways, as specified in the NSW Government’s September 2012 Draft NSW Long Term Transport Master Plan, are indicative only.)

the scope of works contemplated in the RTA’s 1989 tender documents (\$7 million of this was paid on 15 July 1991 and \$3 million on 15 July 1992), a \$13 million “construction loan” (\$3 million advanced on 15 July 1992, \$5 million advanced on 15 July 1993 and \$5 million advanced on 15 July 1994) and a \$22 million “land acquisition loan” (advanced upon the commencement of construction in February 1991, in the form of the provision of land for the motorway).

The construction of “Stage 1” of the original form of the M5 motorway, between The River Road and Moorebank Avenue (Figure 1.1), was completed by Interlink and opened to traffic on 14 August 1992.

One section of “Stage 2” of the original motorway, between Fairford Road and The River Road, was also opened on that date, but the remaining section of “Stage 2”, the single carriageway section between King Georges Road and Fairford Road, was not completed and opened until 18 October 1992.

Under the original contracts of February 1991, Interlink was to have operated, maintained and repaired the original King Georges Road–Moorebank Avenue M5 motorway throughout a concession period of 22 years from the opening of “Stage 1” (i.e. until 14 August 2014).

1.2.3 The ‘M5 Western Link’ (1993–94)

In June 1992, Interlink proposed to the RTA that Interlink should extend the M5 motorway by approximately 5 km from Moorebank Avenue to Camden Valley Way at Prestons—thereby completing the “missing link” between the bridge over the Georges River and the northern end of the F5 freeway to Campbelltown—and operate and maintain this new link as part of the M5 motorway.

The Government and the RTA decided that the February 1991 contractual arrangements for the M5 motorway made it impossible to conduct a competitive, open tender on an equal basis for the design and construction of this western extension.

To help protect the public interest during negotiations with Interlink in these circumstances, the RTA commissioned engineering consultants Evans and Peck to independently assess the price offered by Interlink (and later to audit actual construction costs) and financial advisers ANZ Capel Court to independently examine the financial structure of Interlink's offer. In addition, the Independent Commission Against Corruption reviewed and provided advice on the proposed arrangements towards the end of the negotiation period, in May 1993.

An *Environmental Impact Statement* for the proposed "M5 western link" was exhibited by the RTA early in 1993, and an *Environmental Impact Assessment Report* was finalised by the RTA on 8 June 1993. The Chief Executive of the RTA made a determination under the Environmental Planning and Assessment Act, approving the proposal subject to a series of conditions set out in this *Environmental Impact Assessment Report*, on 11 June 1993.

Contracts for the "M5 Western Link" and associated works, including a new eastbound off-ramp at Heathcote Road, were executed by the Minister for Roads, the RTA, Interlink, the Commonwealth Bank and Leighton Contractors Pty Ltd (which was to design and construct the new link and other works for Interlink) on 29 June 1993.

As part of a restructuring of the motorway's finances, consented to by the RTA, the RTA lent Interlink a further \$50 million, under a "variation loan", with \$35 million of this being advanced on 30 June 1993, \$5 million on 31 July 1994 and \$10 million on 31 July 1995. These additional RTA loan funds were used by Interlink to refinance some of its debt to the Commonwealth Bank, and the "M5 Western Link" works themselves were funded through an issue of infrastructure bonds by an associated private sector party, Infravest (No 1) Pty Limited.

The "M5 Western Link" contracts made several changes to the original contractual arrangements for the M5, including a reduction in current and future tolls, an extension of the concession term (from 22 years after the opening of Stage 1 of the original motorway to 28 years after the completion of the "Western Link", other than the off ramp at Heathcote Road) and new provisions for the sharing of any windfall profits. In addition, the RTA was granted an option to purchase Interlink's business or shares if Interlink achieved a specified financial return.

The "M5 Western Link" (other than the off ramp at Heathcote Road) was opened to traffic on 26 June 1994. The end of the concession term for the M5 motorway was therefore extended from the originally agreed 14 August 2014 to 26 June 2022. The off-ramp at Heathcote Road was opened to traffic on 15 February 1995.

1.2.4 Wattle Grove noise barriers and Henry Lawson Drive tolled ramps (1994–95)

In April 1994 the RTA completed a *Review of Environmental Factors* for the provision of noise barriers between the M5 motorway and the Wattle Grove residential development area immediately south of the motorway near Holsworthy, and in June 1994 it completed a *Review of Environmental Factors* for



M5 motorway duplication works at King Georges Road in 1997–98.



The same location in 2010, looking west along the M5 motorway, immediately west of its connection with the M5 East freeway, from the King Georges Road overpass.



Looking west from the bridge over Penshurst Road, Narwee, on the King Georges Road–Fairford Road section of the motorway duplicated in 1997–99.

the construction and operation of tolled ramps between the motorway and Henry Lawson Drive in Milperra, on the eastern side of Henry Lawson Drive. (The western ramps at this location were built as part of the original motorway.)

On 3 November 1994 the Minister for Roads, the RTA, Interlink and the Commonwealth Bank of Australia amended Interlink's scope of works under the original February 1991 contracts, as amended in June 1993, to incorporate the maintenance of these



Looking southwest from the Beaconsfield Street bridge over the M5 in Revesby, on the original Stage 1 section of the motorway constructed in 1991–92.



Looking west (above) and east (below) from the Horsley Road bridge over the M5 in Panania, on the original Stage 1 section of the motorway, early during an afternoon peak in July 2002, with traffic starting to bank up on the approaches to the main toll plaza 2½ km to the west.



Looking west across the Georges River at Milperra, on the original Stage 1 section of the motorway. The main toll plaza (inset) is ½ km to the west.



vehicles registered in NSW for private use, operating an electronic tolling account and registered with the RTA/RMS are entitled to claim a quarterly “refund” of the tolls they have paid to Interlink for using the M5 on non-business trips, other than the GST component of these tolls.

Since then these “refunds” have been paid by the RTA and now continue to be paid by the RTA’s successor, RMS.

noise barriers, as erected at the RTA’s cost by the RTA, and the design, construction, operation, maintenance and repair of the tolled ramps, as described in the *Reviews of Environmental Factors*. There were no changes to the motorway’s concession term associated with Interlink’s additional works.

The Henry Lawson Drive ramps were completed and opened to traffic by Interlink on 7 November 1994, and the Wattle Grove noise walls were completed by the RTA in 1995.

1.2.5 Introduction of ‘Cashback’ toll ‘refunds’

In January 1997 the NSW Government set up the “Cashback” scheme, under which M5 motorway users who are driving

1.2.6 King Georges Road– Fairford Road duplication and sale of the RTA’s loans (1997–1999)

In 1994 the RTA exhibited an *Environmental Impact Statement* for the then-proposed form of the M5 East motorway and duplication of the two-lane, single-carriageway section of the existing M5 motorway between King Georges Road and Fairford Road. A *Supplement* to this *Environmental Impact Statement* was exhibited in 1996.

The NSW Government subsequently announced that it intended to finance, design, construct, operate and maintain the M5 East,

from the eastern extremity of the M5 motorway at King Georges Road to General Holmes Drive at Sydney Airport, as an untolled freeway.

In line with this decision,

- Interlink decided to duplicate the M5 motorway between King Georges Road and Fairford Road and construct tolled ramps between the M5 motorway and Fairford Road and The River Road on the eastern sides of these roads, in the expectation that these works would be able to be funded through tolls on additional traffic using the M5 once the M5 East had opened, and
- The RTA decided to dispose of the loans it had made to Interlink in 1991 and 1993 and apply the proceeds towards the cost of constructing the M5 East.

On 30 June 1997 the Minister for Roads, the RTA, Interlink, the two organisations acquiring the RTA's loans (the Commonwealth Bank and the Trust Company of Australia Ltd, the latter as trustee for the Infrastructure Trust of Australia I), M5 Holdings Pty Ltd (which in December 1996 had purchased Leighton Contractors Pty Ltd's interests in the project, as described in section 1.2.12 below), Infravest (No 1) Ltd (formerly known as Infravest (No 1) Pty Ltd) and CBA Corporate Services (NSW) Pty Ltd (which on 27 June 1997 had become the security trustee for Interlink's debt financiers) executed contracts under which:

- The Minister for Roads and the RTA undertook, subject to the obtaining of relevant planning approvals, to finance, construct, operate and maintain the M5 East freeway, and to construct this freeway, including grade separation works at King Georges Road, before the Sydney Olympics, if possible, and by no later than 30 June 2001.
- Interlink undertook to finance, design, construct, operate, maintain and repair the M5 motorway's duplication works. These works excluded the King Georges Road overbridge and grade separation works at the connection with the M5 East but included new and modified western ramps at King Georges Road, the new tolled eastern ramps at The River Road and Fairford Road and alterations to noise barriers between King Georges and Fairford Roads.
- The RTA and Interlink agreed on the interface works to be carried out by each of them at King Georges Road if the M5 and M5 East were to pass over King Georges Road, as was originally proposed. They also agreed that if the M5 and M5 East were to pass under King Georges Road, as ultimately constructed, the costs to be borne by Interlink for works at King Georges Road would not be changed. (The precise scopes of RTA and Interlink works at King Georges Road under the revised design were later finalised and agreed in September 1998.)
- The RTA agreed to compensate Interlink for any reduction in the toll revenue it receives from the M5 motorway as a result of any RTA levying and collection of tolls on traffic using the M5 East at any time while Interlink remains the operator of the M5 motorway.



The Moorebank Road interchange, constructed in 2002 and 2003.



Looking west from the Hume Highway bridge over the M5 at Casula, on the "M5 Western Link" section of the motorway constructed in 1993–94.

- The RTA's interests in and obligations under all the loans it had made to Interlink in 1991–94 were transferred to the Commonwealth Bank of Australia and Infrastructure Trust of Australia I, each of which paid the RTA \$56,603,800 on 30 June 1997, and associated amendments were made to the 1991 and 1993 contracts setting out the relative priorities of Interlink's various borrowings.

Planning approval for the M5 motorway's duplication works (other than the eastern ramps at The River Road) and the M5 East was granted by the Minister for Urban Affairs and Planning in December 1997, subject to 150 conditions. The RTA completed a *Review of Environmental Factors* for the ramps at The River Road in June 1998, and planning approval for these works was granted later in 1998.

The M5 duplication works were completed by Interlink and fully opened to traffic on 30 August 1999.

The M5 East was opened to traffic on 9 December 2001, some six months ahead of the schedule set under the August 1998 design, construct, operate and maintain contracts entered into by the RTA for the M5 East but 162 days after the 30 June 2001 deadline originally set in the principal 30 June 1997 contract for the M5 motorway duplication.



Looking southwest in 2002 from the Beech Road bridge over the M5 in Casula, on the “M5 Western Link” section of the motorway constructed in 1993–94.



Looking northeast in 2002 from the Beech Road bridge over the M5 in Casula, with the Box Road footbridge in the distance, on the “M5 Western Link” section of the motorway constructed in 1993–94.



The same view in 2006, following the completion of the interchange with the Westlink M7 motorway, previously known as the Western Sydney Orbital, in late 2005. The flyover shown here is a ramp from the southwestbound M5 to the northbound M7.



The same view in 2006, following the completion in late 2005 of new off-ramps for southwestbound M5 traffic to Beech Road and the northbound Westlink M7 motorway, just visible on the right of this photograph, and a new on-ramp from the southbound M7 to the northeastbound M5, at left.

In accordance with that contract’s provisions for liquidated damages for late completion of the M5 East, the RTA paid Interlink liquidated damages of almost \$5.9 million in total.

1.2.7 RTA commitments on amplification of the M5 between Prestons and Casula and construction of a Hume Highway off-ramp at Casula (1997)

On 30 June 1997 the RTA advised Interlink, in a letter confirming earlier oral advice, that:

- The RTA would endeavour to construct an extra northbound/eastbound lane on the M5 motorway between Camden Valley Way at Prestons and the Hume Highway at Casula, by no later than 30 June 2001

- This amplification would not prevent Interlink from constructing additional eastbound and westbound lanes in the median strip in the future, and
- The RTA would not open an off-ramp for eastbound traffic from the M5 motorway to the Hume Highway at Casula, on the western side of the Hume Highway, until the new RTA-constructed lane had been opened to traffic.

(The planned construction of this off-ramp was originally announced by the Minister for Roads in July 1993, with the ramp then to be opened two years after the opening of the Prestons–Casula “M5 Western Link”.)

Neither the extra lane nor the Hume Highway off-ramp has subsequently been constructed by the RTA or its successor, RMS. An extra lane in each direction will now be constructed by Interlink as part of the overall 2012–14 “M5 West widening” works described in section 1.2.13 below.

1.2.8 Introduction of GST (2000)

The tolling regime stipulated in the original 1991 contracts and the amended tolling regime introduced in 1993 did not provide for the possible introduction of a goods and services tax or any similar tax. On 26 May 2000, however, the RTA advised Interlink (and other tollroad operators in Sydney) that it had “noted” proposals to increase tolls as a result of the GST, and since 1 June 2000 the tolls charged by Interlink have been increased to include a GST component.

1.2.9 Agreement with other tollroad operators on the interoperability of electronic tolling systems (2001)

In June 2001 the RTA, as the operator of the Sydney Harbour Bridge and toll collector for the Sydney Harbour Tunnel, and Interlink, as the operator of the M5 motorway, entered into an agreement with SWR Operations Pty Ltd, the then operator of the M4 motorway, The Hills Motorway Ltd, the operator of the M2 motorway, Airport Motorways Ltd, the operator of the Eastern Distributor, and Queensland Motorways Ltd, the operator of the Logan and Gateway motorways in Brisbane, aimed at ensuring the interoperability of electronic tolling systems on tollroads in Sydney and Brisbane.

In subsequent years CrossCity Motorway Pty Ltd (the Cross City Tunnel), WSO Co Pty Ltd (the Westlink M7 motorway), Connector Motorways Pty Ltd (originally known as Lane Cove Tunnel Pty Ltd) (the Lane Cove Tunnel, until its sale on 9 August 2010), LCT–MRE Pty Ltd (the Lane Cove Tunnel, since 10 August 2010), CityLink Melbourne Ltd (the CityLink tollroads in Melbourne), ConnectEast Pty Ltd (the EastLink tollroad in Melbourne), RiverCity Motorway Pty Ltd (the CLEM7 motorway in Brisbane), Brisbane City Council (the Go Between Bridge in Brisbane) and BrisConnections Operations Pty Ltd (the Airport Link motorway in Brisbane) have become parties to this agreement, while SWR Operations is no longer a party, because its M4 concession ended at midnight on 15 February 2010 and there has been no tolling on the M4 since 16 February 2010.

1.2.10 Moorebank Avenue interchange and associated works (2001–03)

On 20 November 2001 Interlink submitted a proposal for the construction and operation of a grade-separated interchange between the M5 motorway and Moorebank Avenue in Moorebank, the widening of the M5 between Heathcote Road and Moorebank Avenue from four to six lanes and associated works.

On 27 December 2001 the RTA and Interlink agreed, pending a decision by the RTA on this proposal, that Interlink could commence the construction of defined preliminary works (shoulder widening and pavement repairs on the M5 West). On 18 February 2002 the RTA and Interlink agreed, again pending the execution of contracts for the works, that Interlink would construct the new Moorebank Avenue interchange and the additional lanes on the M5 West.

On 21 March 2002 the Chief Executive of the RTA made a determination on the proposals set out in the *Review of Environmental Factors*. Following the granting of planning approval under the Environmental Planning and Assessment Act, works at the site commenced on 27 May 2002.

On 15 May 2002 and 24 June 2002 the Minister for Roads, the RTA, Interlink and CBA Corporate Services (NSW) executed a series of contracts, replacing the earlier letters of 21 December 2001 and 18 February 2002, under which:

- Interlink had to finance, design and construct the interchange, the new lanes and other works, including the preliminary works already underway, by 24 January 2004, and subsequently operate, maintain and repair these works (the expected design and construction cost of the works was \$31 million)
- The design and maintenance criteria for the entire M5 motorway other than its “Western Link”, originally established in 1991 and updated in minor ways in 1994 and 1997, were comprehensively updated to reflect contemporary practices and standards, and
- The concession period for the whole motorway, which since 1993 had been set to terminate on 26 June 2022, was to be extended by approximately 13½ months, to around mid-August 2023, with the precise extension depending on the final cost of the works as approved by the RTA.

The interchange was opened to traffic on 9 December 2002. Following audits of the costs of construction, which quantified the total cost at \$32,020,637.39 as at 26 January 2003, the end of the concession period for the whole motorway was extended to 22 August 2023.

1.2.11 Interfaces with the Westlink M7 motorway (2002–05)

On 14 December 2002 the RTA and Interlink entered into an agreement governing the interfaces between the M5 motorway and the then-proposed Westlink M7 motorway (then known as the Western Sydney Orbital), both during the design and construction of the M7 and its connections with the M5 Western Link in Prestons and during the subsequent operation of both motorways.

The M7 was opened to traffic on 16 December 2005.

1.2.12 RTA consents to other ownership changes and debt refinancings (1996 to 2009)

Over the last two decades, in addition to the RTA’s consent to the June 1993 refinancing of the project associated with the “M5 Western Link” (see section 1.2.3) and the June 1997 sale by the RTA of its loans to Interlink (section 1.2.6) but prior to the most recent refinancing of the project in association with the motorway’s 2012–14 widening works (section 1.2.13 below), the RTA and the Minister for Roads have consented to:

- The sale in December 1996 of Leighton Contractors Pty Ltd’s 50% equity interest in Interlink to M5 Holdings Pty Ltd, then a

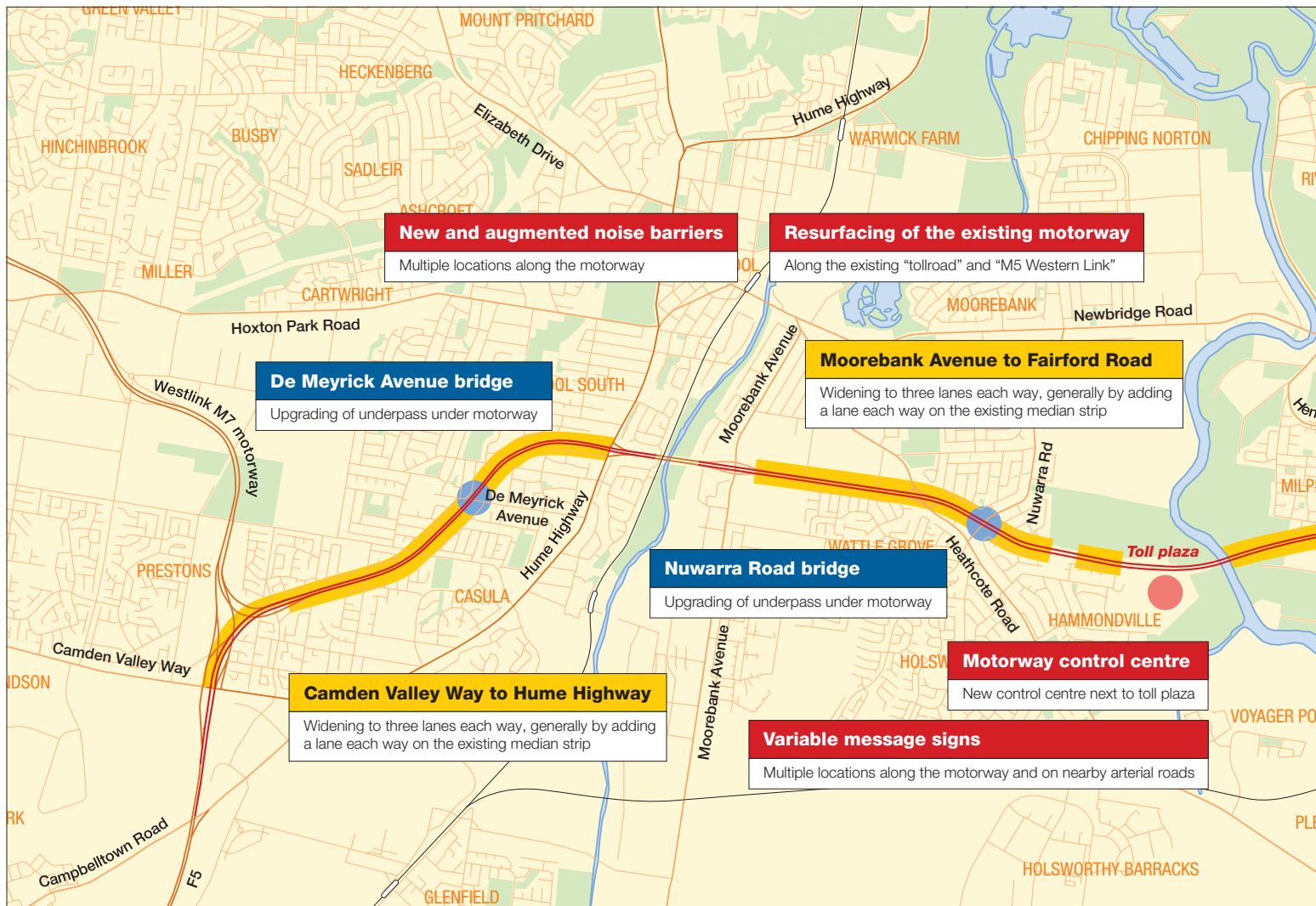


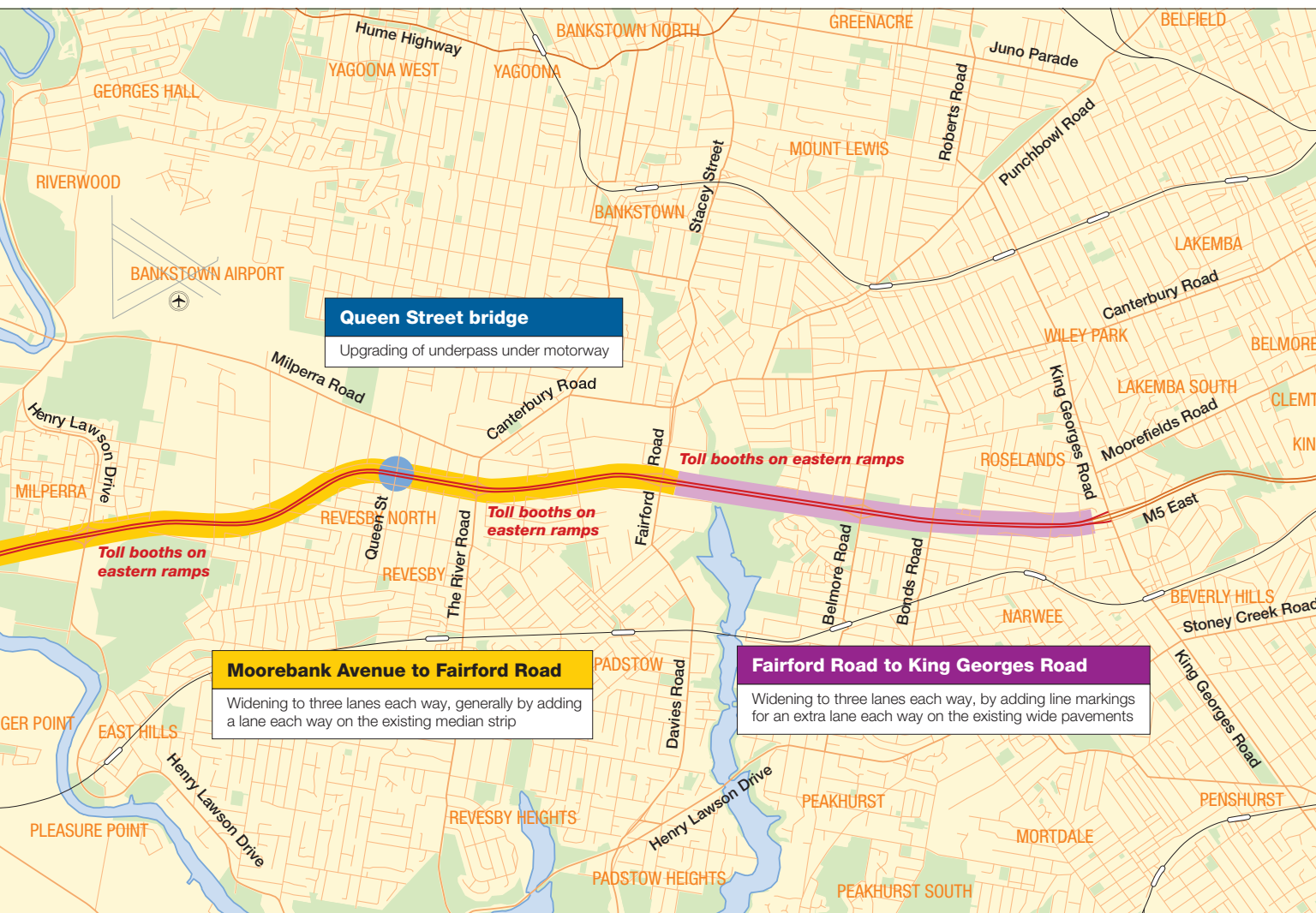
Figure 1.3. Overview of the 2012–15 “M5 West widening” works contracted for in June 2012 (the widening project’s temporary works are not shown).

fully owned subsidiary of Macquarie Bank Ltd, and an associated transfer of Leighton Contractors’ rights and obligations under a “mezzanine” loan it had made to Interlink

- The sale in 1998 of M5 Holdings’ interest in the “mezzanine” finance loan to Infrastructure Trust of Australia I
- The subsequent sale in 1998 of Infrastructure Trust of Australia I’s interests in the “subordinated” loans purchased from the RTA in June 1997, and the “mezzanine” loan purchased from M5 Holdings, to the Commonwealth Bank
- A June 1998 restructuring of Interlink’s debts in order to permit earlier “shareholders’ loan” distributions to its shareholders (at that time the Commonwealth Bank and M5 Holdings), reduce debt costs (by consolidating all the loans into one finance agreement with the Commonwealth Bank and a new “mezzanine” debt facility) and fund the motorway duplication and ramp works described above
- The sale in December 1998 of the Commonwealth Bank’s 50% equity interest in Interlink to:
 - ♦ Utilities of Australia Pty Ltd, as the trustee of the Utilities Trust of Australia, and Development Australia Nominees Ltd, which is now known as Industry Funds Management (Nominees) Ltd, as the trustee of the

Development Australia Fund, now known as IFM Infrastructure Funds (in total, approximately 34.6% of Interlink’s shares), and

- ♦ AMP Investment Services Pty Ltd (as the trustee of the AMP Infrastructure Equity Fund) (approximately 15.4% of Interlink’s shares),
- along with the sale of the Commonwealth Bank’s interests in the new “shareholders’ loan” arrangements and the new “mezzanine” loan to Perpetual Trustees Victoria Ltd, as the trustee of the Australian Infrastructure Fund, and associated changes to the parties to the RTA’s 1993 option to purchase Interlink’s business or shares if Interlink achieves a specified financial return
- The sale in 1999 of some of AMP Investment Services Pty Ltd’s shares to Retail Employees Superannuation Pty Ltd, as the trustee of the Retail Employees Superannuation Trust, and Sunsuper Pty Ltd, as the trustee of the Sunsuper Superannuation Fund, and any associated transfers of these shares between nominated related parties
 - A refinancing of the project in June 2005
 - The August 2006 purchase by Sydney Roads Ltd of all of the shares in M5 Holdings Pty Ltd



- The May 2007 purchase by Transurban Holdings Ltd of all of the shares in M5 Holdings Pty Ltd, which continues to hold 50% of the shares in Interlink, and
- A refinancing of the project in December 2009.

1.2.13 Widening of the motorway (2012–15)

In March 2003 Interlink presented an unsolicited proposal to the RTA for the widening of the M5 motorway. Revised proposals were submitted in September 2004, February 2005 and September 2008.

In November 2009 the RTA released a *Preliminary Overview Report* on the initial findings of a joint NSW and Commonwealth funded *M5 Transport Corridor Feasibility Study*, which had commenced in May 2008, into options both for upgrading the M5 motorway and for duplicating the M5 East.

Public submissions on this report were invited, with submissions closing in March 2010.

On 10 March 2010 the RTA released a *Preliminary Environmental Assessment* of concepts for widening about 20 km of the M5 motorway to three lanes each way, and the Minister for Planning declared this widening a “major project” under section 75B(1)(b) of the Environmental Planning and

Assessment Act, thereby making the Minister for Planning the approval authority for the project under Part 3A of that Act, and a “critical infrastructure project” under section 75C of the Act.

The RTA subsequently applied for planning approval for this “M5 West widening” project under Part 3A on 6 April 2010. An updated formal proposal for Interlink to undertake the project was submitted to the RTA by Interlink on 23 April 2010.

Because the existing contracts for the M5 motorway rendered public sector delivery of the proposed widening works impracticable, the NSW Government authorised the RTA to negotiate with Interlink, with a series of independent reviews to assess the project’s “value for money” and protect the public interest. This involved a review of design and construction costs by M Raven Consulting Pty Ltd, reviews of operational and maintenance costs by the RTA’s Motorway Projects Branch and Everything Infrastructure, a review of traffic projections by KPMG, a review of the proposed financial model by Ernst and Young and an overall independent review, for the Department of Finance and Services, by KPMG.

A detailed *Environmental Assessment* report on the proposed project was released by the RTA for public comments on 22 September 2010, with submissions closing on 29 October 2010, and an RTA *Submissions and Preferred Project Report*,

addressing a number of changes to the proposals, was released on 18 May 2011, with public submissions closing on 1 June 2011.

The *Environmental Assessment* report included a summary of the findings of a 2010 Ernst and Young study of the project's likely economic performance, taking account of the project's capital costs, operating and maintenance costs, its indirect costs, such as the costs of traffic and local business disruptions during construction and amenity, noise, visual, road congestion, air pollution and natural environment impacts on nearby residents, its direct benefits, including freight and passenger travel time savings, reductions in vehicle operating costs and accident costs for motorway users and reductions in environmental emissions, and its indirect, external benefits to the community, including the benefits derived by other transport users from the expansion of the road network, reductions in travel times, congestion costs and accident costs on surrounding road links used by other road users, and the benefits derived by neighbouring businesses and communities through better access to their businesses, retail outlets, workplaces and leisure activities.

This study suggested the "M5 West widening" project would have a net present value (at a 7% pa discount rate) of around \$633 million and a benefit:cost ratio of 2.5.

Planning approval for the amended "M5 West widening" project was granted by the Minister for Planning and Infrastructure, under Part 3A of the Environmental Planning and Assessment Act, on 9 November 2011, subject to 83 conditions.

The approved "M5 West widening" project (**Figure 1.3**) will provide:

- An additional lane each way on the M5 Motorway for most of its length, through pavement widenings, generally utilising the existing central median, and, between King Georges Road and Fairford Road, new line markings on the existing wider pavement
- A new operations management control system on and near the motorway, including a new control building next to the main toll plaza in Hammondville and variable message signs on the motorway and surrounding arterial roads
- Bridge widenings, with new infill decking in the central median, between the existing bridges over Queen Street and Nuwarra Road, and an upgrading of underpass structures at De Meyrick Avenue (the other bridges along the motorway will not need structural modifications)
- New and augmented drainage basins, and
- Upgraded noise attenuation measures, including new and higher noise barriers, at various locations along the motorway.

A *Public Interest Evaluation* of the "M5 West widening" project, conducted for RMS (which has replaced the RTA since 1 November 2011) in accordance with the specifications and criteria of Appendix 2 of the December 2006 *Working with*

Government Guidelines for Privately Financed Projects, concluded in May 2012 that:

- The project responds to numerous relevant NSW Government objectives, including budget, service, delivery, policy, project synergy, economic growth and regional development objectives. It will comply with both RMS and central Government policies, provide synergies with concurrent Government initiatives and be consistent with the budget, to the extent that it will be primarily funded by the concessionaire (Interlink).
- The project represents "reasonable" value for money. The contractual entitlements of the concessionaire mean there is no practical alternative to deliver the project during the concession term, so there is no relevant "public sector comparator", but the financial components of the project are reasonable and user charges will be "appropriate".
- The project's community consultation strategies, as documented in the September 2010 *Environmental Assessment*, comply with community consultation requirements. They have identified the impacts of the project and the parties who will be affected, they have been implemented throughout the environmental assessment process, and the concessionaire will be contractually required to continue to implement these strategies throughout the project's delivery.
- The project will comply with consumer rights requirements, to the extent that existing consumer rights will not be affected.
- RMS has implemented "appropriate" accountability and transparency strategies. These include provisions for the communication of appropriate information to the community, the commitment of an appropriately structured management team with clear responsibilities and accountabilities, and the implementation of a *Governance and Probity Plan*.
- Adequate public access arrangements will be incorporated in the project, including increased access for motor vehicles, continued access for cyclists and the retention of pedestrian access across the motorway.
- The project adequately responds to relevant health and safety requirements and complies with legal requirements and relevant standards. The concessionaire will be required to ensure public health and safety standards will be met, and the Government will have numerous civil rights, including a right to "step in", if they are not.
- The project will comply with the Government's privacy requirements, with privacy protection mechanisms being identical to those applying for the existing motorway.
- The project therefore reasonably complies with the *Working with Government Guidelines*' public interest evaluation criteria and will be in the public interest.

As described in sections 2.2 and 2.3 of this report, contracts for the widening works and associated changes to the project and its financing, including an increase in truck tolls and a further extension of the end of Interlink's concession term for the

motorway from 22 August 2023 to 10 December 2026 (or a later date in specified circumstances summarised later in this report), were executed by the Minister for Roads and Ports, RMS, Interlink and other parties on 9 May 2012 and 19 June 2012, and became fully effective on or before 25 June 2012.

The “M5 West widening” project has been costed at approximately \$400 million (April 2011 prices). Interlink must finance all of the project, except for approximately \$50 million in RMS payments comprising:

- RMS contributions of up to \$34,290,459 in total (excluding GST) for specified drainage and noise wall works and for the third eastbound lane from Fairford Road to King Georges Road
- Other specified (but “commercial in confidence”) RMS payments to cover Interlink’s cost escalations between 1 April 2011 and 25 June 2012, and
- A further RMS payment of \$730,125 (excluding GST) for specified additional costs arising from the project’s planning approval conditions.

Conversely, on 25 June 2012 Interlink had to and did pay RMS \$5,236,912.65 (excluding GST) to cover payments previously

made to Interlink by the RTA following the cessation of earlier negotiations on the widening of the motorway.

Interlink must use its best endeavours to achieve final completion of the “M5 West widening” works by 24 March 2015.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the M5 motorway project as at 25 June 2012, and outlines the inter-relationships of the various agreements between the public and private sector parties. **Sections 3 to 11** then summarise the main features of the key agreements currently or potentially affecting public sector rights and liabilities and the sharing of the project’s benefits and risks.

Unless otherwise expressly indicated, these summaries are “snapshots” of the contracts as they stood at 25 June 2012.

They do not report the history of amendments to individual contract provisions since February 1991, and provide only very brief coverage of contract provisions which are now largely or wholly “spent”, such as provisions governing the design and construction of the original motorway and the various additions to and upgrades of the motorway between 1993 and 2005.

2 Overview of the project's contracts

2.1 The parties to the contracts

2.1.1 The public sector parties

The public sector parties to the M5 motorway contracts, as at 25 June 2012 (*Figure 2.1*), are:

- The **Minister for Roads and Ports**, for and on behalf of the **State of New South Wales**, and
- **Roads and Maritime Services** (ABN 76 236 371 088) ("**RMS**") a NSW Government agency constituted under Part 6 of the Transport Administration Act 1988 (NSW).

As already indicated, RMS replaced the former **Roads and Traffic Authority** ("**RTA**") on 1 November 2011. In doing so it inherited all of the RTA's assets, rights and liabilities, including those arising under the M5 motorway contracts executed by the RTA.

RMS's powers in relation to the M5 motorway project arise from the Transport Administration Act 1988 (NSW), which empowers RMS to conduct any business and enter into contracts or arrangements for the carrying out of works and the performance of services, and the Roads Act 1993 (NSW).

Under the Roads Act the Minister for Roads may declare tollways, RMS and its agents and contractors may carry out road works and RMS may lease land it owns. Under the Transport Administration Act, RMS 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.

2.1.2 The private sector parties

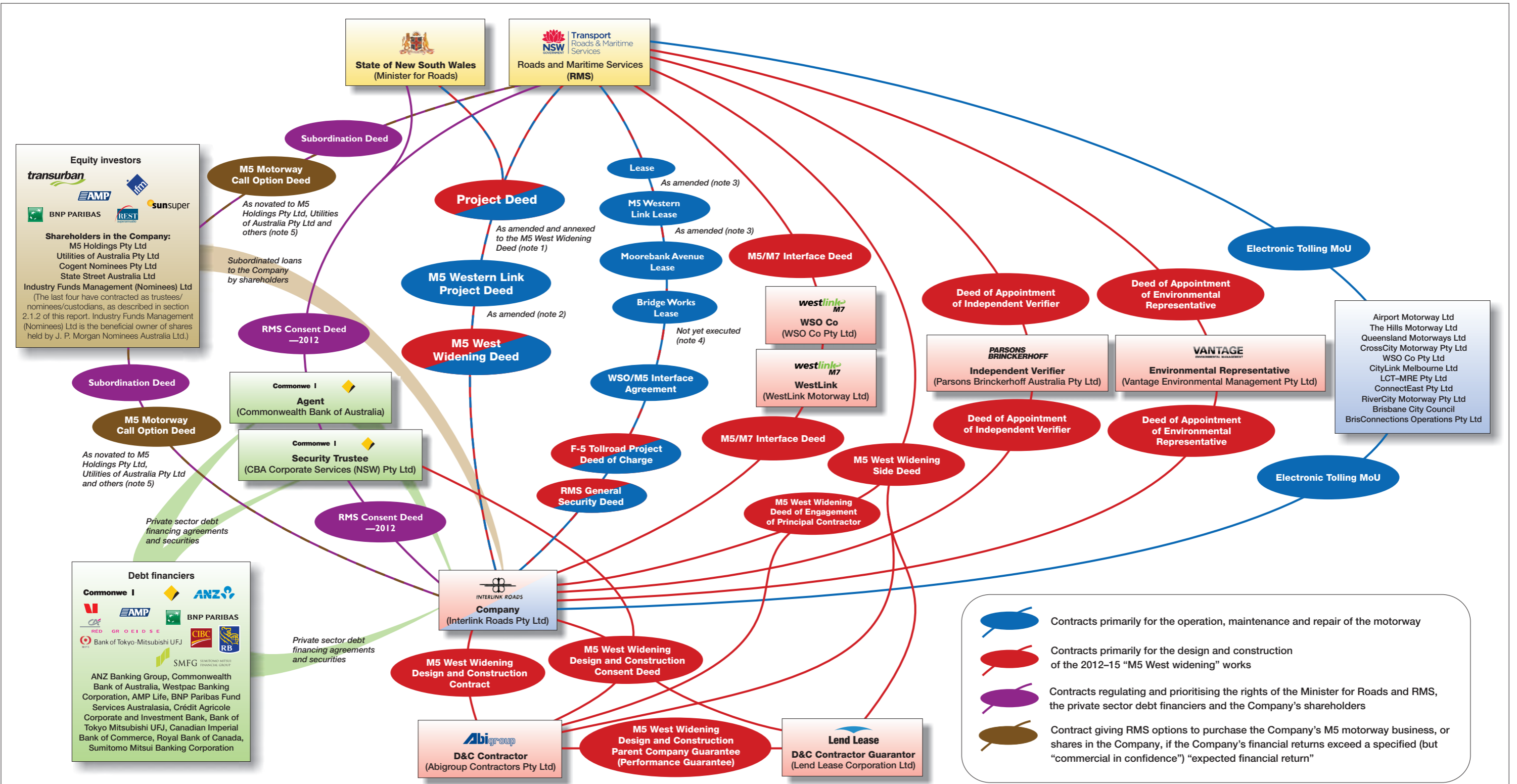
The private sector parties to the contracts to which the Minister for Roads and RMS are also parties and which still have or might have a practical effect, again as at 25 June 2012 (*Figure 2.1*),* are:

- **Interlink Roads Pty Ltd** (ACN 003 845 430, ABN 53 003 845 430), a special purpose company whose sole business, unless RMS agrees otherwise, is the financing, design, construction, operation, maintenance and repair the M5 motorway project, including the "M5 Western Link", and the financing, design and construction of specified ancillary works.

In section 1 of this report this company has been referred to, for convenience, simply as "Interlink", but in the rest of this report it is referred to, consistently with most but not all of the project's contracts, as "**the Company**".

- Four of the Company's five current registered shareholders and the beneficial owner of the rest of the Company's shares:
 - ♦ **M5 Holdings Pty Ltd** (ACN 073 922 620, ABN 57 073 922 620), which holds exactly 50% of the Company's shares. M5 Holdings is a fully owned subsidiary of Transurban Holdings Ltd (ACN 098 143 429, ABN 86 098 143 429).
 - ♦ **Utilities of Australia Pty Ltd** (ACN 063 384 127, ABN 55 063 384 127), in its capacity as trustee of the Utilities Trust of Australia (ABN 81 104 406 256). Utilities of Australia holds approximately 19.23% of the Company's shares. It is currently owned by eleven superannuation and investment-related organisations.
 - ♦ **Cogent Nominees Pty Ltd** (ACN 084 150 023, ABN 54 084 150 023), which changed its name to **BNP Paribas Nominees Pty Ltd** on 7 August 2012 and was known as AMP Nominees Pty Ltd prior to 6 May 2002, in its capacity as the nominee of BNP Paribas Fund Services Australasia Pty Ltd (ACN 002 655 674, ABN 71 002 655 674, formerly known as AMP Investment Administration Pty Ltd), the custodian for AMP Investment Services Pty Ltd (ACN 063 986 989, ABN 71 063 986 989), which is the trustee of the AMP Capital Infrastructure Equity Fund (ABN 51 728 262 954). Cogent Nominees/BNP Paribas Nominees holds approximately 8.24% of the Company's shares. It is wholly owned by BNP Paribas Fund Services Australasia, a wholly owned subsidiary of BNP Paribas (ARBN 000000117).
 - ♦ **State Street Australia Ltd** (ACN 002 965 200, ABN 21 002 965 200), in its capacity as the custodian for the Retail Employees Superannuation Trust (ABN 62 653 671 394, APRA RSE 1000016) (approximately 4.4% of the Company's shares) and also in its capacity as the custodian for the Sunsuper Superannuation Fund (ABN 98 503 137 921, APRA RSE 1000337)

* This listing does not include parties whose rights and obligations under the motorway's contracts are now, in practical terms, exhausted, even though in some cases other parties to the same contracts continue to have rights and obligations under other provisions of these contracts. For example, the parties to the F-5 Tollroad Project Works Commitment and Novation Deed of 30 June 1997 which purchased the RTA's loans to Interlink ("the Company") in accordance with that contract (see section 1.2.6) are not listed, but the listing does include the parties to that contract which still have ongoing rights and obligations under other provisions of that contract.



Notes:

1. The F-5 Tollroad Project Deed ("the Project Deed"), originally executed on 22 February 1991, has been amended on numerous occasions since then. Amendments which still have a practical effect, as at 25 June 2012, have been made under the F-5 Tollroad Project Amendment Deed of 29 June 1993, the F-5 Tollroad Project Amendment Deed (Tolled Ramps and Wattle Grove Noise Barriers) of 3 November 1994, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairfield Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairfield Road Duplication) of 30 June 1997, the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 4 April 2012, the RTA Consent Deed—2009 of 22 December 2009, and the M5 West Widening Deed of 19 June 2012. The current consolidated form of the Project Deed is set out in Annexure C to the M5 West Widening Deed. Some of the amendments introduced by the M5 West Widening Deed will take effect only upon the completion of the "M5 West widening" works, as set out in Annexure B to the M5 West Widening Deed.
2. The M5 Western Link Project Deed, originally executed on 29 June 1993, has been amended by the WSO/M5 Interface Agreement of 14 December 2002, the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 4 April 2012 and the M5 West Widening Deed of 19 June 2012.
3. The terms of the Lease, executed on 21 February 1995, and the M5 Western Link Lease, executed on 14 June 2004, have been extended to 22 August 2023 by the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 4 April 2012.
4. The Bridge Works Lease must be granted by RMS upon the completion of the "M5 West widening" works, apart from minor defects. The form of this lease is attached to Schedule 10 to the Project Deed.
5. The M5 Motorway Call Option Deed has been amended and novated under a series of contracts as described in section 2.2.7 of this report.

Figure 2.1. Overview of the 25 June 2012 structure of the M5 motorway contracts from a public sector perspective, focussing on the contracts which continue to have a practical effect and which either have public sector parties or otherwise directly affect public sector benefits and risks.

(approximately 2.75% of the Company's shares). State Street Australia is a wholly owned subsidiary of State Street Corporation.

- ♦ **Industry Funds Management (Nominees) Ltd** (ACN 003 969 891, ABN 56 003 969 891), formerly known as Development Australia Fund Management Ltd and before that as Development Australia Nominees Ltd, in its capacity as the trustee of IFM Infrastructure Funds, formerly known as the Development Australia Fund (ABN 91 157 945 930, APRA RSE 1005370). Industry Funds Management (Nominees) is the beneficial owner of approximately 15.38% of the Company's shares. The registered owner of these shares is J. P. Morgan Nominees Australia Ltd (ACN 002 899 961, 75 002 899 961), the sub-custodian of IFM Infrastructure Funds and a wholly owned subsidiary of JPMorgan Chase & Co.
- The **Commonwealth Bank of Australia** (ACN 123 123 124, ABN 48 123 123 124), as the agent of the Company's current debt financiers ("**the Agent**").
- **CBA Corporate Services (NSW) Pty Ltd** (ACN 072 765 434, ABN 25 072 765 434), as the security trustee of the Company's current debt financiers ("**the Security Trustee**").
- **Abigroup Contractors Pty Ltd** (ACN 000 201 516, ABN 40 000 201 516), which has been engaged by the Company to design and construct the "M5 West widening" works ("**the D&C Contractor**"). The D&C Contractor is a wholly owned subsidiary of Lend Lease Corporation Ltd (ACN 000 226 228, ABN 32 000 226 228).
- **Lend Lease Corporation Ltd** (ACN 000 226 228, ABN 32 000 226 228), which has provided a parent company guarantee to the Company of the D&C Contractor's performance of its design and construction obligations and has contracted with RMS, the Company and the D&C Contractor concerning arrangements for RMS to "step in" and cure defaults under the contracts for the design and construction of the widening works ("**the D&C Contractor Guarantor**")
- **WSO Co Pty Ltd** (ACN 102 757 924, ABN 73 102 757 924) ("**WSO Co**") and **WestLink Motorway Ltd** (ACN 096 512 300, ABN 63 096 512 300) ("**WestLink**"), which have entered into an agreement with RMS and the Company concerning construction-phase interfaces between the "M5 West widening" works and the Westlink M7 motorway.

Under the M7 motorway's contracts WSO Co is responsible to RMS for the operation, maintenance and repair of the M7, and both WSO Co and WestLink were responsible to the RTA for financing, designing and constructed that motorway.

WestLink has contracted with RMS and the Company concerning the M7–M5 interfaces both in its own capacity and as the nominee and agent for a WestLink Motorway Partnership formed by its shareholders. The current members of this partnership are WSO Investment Management No 3

Pty Ltd (ACN 1434 324 520, ABN 21 134 324 520), both as trustee of a Western Sydney Orbital Holding Trust (ABN 84 641 031 335) and in its own capacity, Transurban Nominees Pty Ltd (ACN 103 029 269, ABN 103 029 269), both as trustee of the Transurban WSO Trust (ABN 56 360 773 461) and in its own capacity, and, in their own capacities, LMI WestLink Partner No 1 Pty Ltd (ACN 102 790 063, ABN 28 102 790 063), LMI WestLink Partner No 2 Pty Ltd (ACN 103 147 717, ABN 32 103 147 717), LMI WestLink Partner No 3 Pty Ltd (ACN 103 147 833, ABN 59 103 147 833), LMI WestLink Partner No 4 Pty Ltd (ACN 103 147 888, ABN 57 103 147 888), Abbey WestLink Partner No 1 Pty Ltd (ACN 103 141 135, ABN 26 103 141 135), Abigroup WestLink Partner No 2 Pty Ltd (ACN 103 141 153, ABN 30 103 141 153), Abbey WestLink Partner No 3 Pty Ltd (ACN 103 141 162, ABN 32 103 141 162) and Abigroup WestLink Partner No 4 Pty Ltd (ACN 103 141 180).

- **Parsons Brinckerhoff Australia Pty Ltd** (ACN 078 004 798, ABN 80 078 004 798), which has been appointed by RMS and the Company as an independent verifier for the design and construction of the "M5 West widening" works ("**the Independent Verifier**").
- **Vantage Environmental Management Pty Ltd** (ACN 124 916 605), which has been appointed by RMS and the Company as their "environmental representative" for the design and construction of the "M5 West widening" works ("**the Environmental Representative**").
- **The Hills Motorway Ltd** (ABN 28 062 329 828) (the operator of the M2 motorway), **Airport Motorway Ltd** (ABN 26 057 283 093) (the Eastern Distributor), **Queensland Motorways Ltd** (ABN 50 067 242 513) (the Gateway Bridge and Logan Motorway in Brisbane), **CrossCity Motorway Pty Ltd** (ABN 45 098 445 839) (the Cross City Tunnel), **WSO Co** (the Westlink M7 motorway), **LCT–MRE Pty Ltd** (ABN 34 143 401 870) (the Lane Cove Tunnel), **CityLink Melbourne Ltd** (ABN 65 070 810 678) (the CityLink tollroads in Melbourne), **ConnectEast Pty Ltd** (ABN 99 101 213 263) (the EastLink tollroad in Melbourne), **RiverCity Motorway Pty Ltd** (ABN 99 116 665 304) (the CLEM7 motorway in Brisbane), **Brisbane City Council** (ABN 72 002 765 795) (the Go Between Bridge in Brisbane) and **BrisConnections Operations Pty Ltd** (ABN 69 128 615 547) (the Airport Link motorway in Brisbane), with which RMS and the Company have contracted concerning the interoperability of tolling systems on the M5 motorway and other Sydney, Brisbane and Melbourne tollroads.

If any authority, institution, association or body referred to in the main contracts for the project, the F-5 Tollroad Project Deed and the M5 Western Link Project Deed, is reconstituted, renamed or replaced, or if its powers or functions are transferred to another organisation, or if it ceases to exist and another organisation serves the same purpose or objective, the F-5 Tollroad Project Deed and the M5 Western Link Project Deed refer to the new organisation.

2.2 The current contractual structure

The current (25 June 2012) contractual structure of the M5 motorway project—inasmuch as the contracts affect or potentially affect or affected public sector risks and benefits—is summarised in *Figure 2.1*.

2.2.1 The Project Deed

The core contract is the **F-5 Tollroad Project Deed** (“the **Project Deed**”) between the Minister for Roads (for and on behalf of the State of NSW), the RTA (now RMS) and the Company, originally executed on 22 February 1991.

The original form of this contract set out the terms under which the Company was (and, subject to amendments described below, still is) obliged to:

- Finance, design and construct the original motorway, between King Georges Road and just east of Moorebank Avenue, and associated “ancillary works” on local roads, adjacent properties and traffic signals
- Operate, maintain and repair the original motorway, between King Georges Road and just east of Moorebank Avenue, from the opening of “Stage 1” of the original motorway (*Figure 1.1*) on 14 August 1992 until the end of the motorway’s concession term, which was originally set to continue until 14 August 2014 (unless the Project Deed is terminated earlier for a default or on other grounds, under provisions described in section 10 of this report), and
- Give up possession of the motorway to the RTA/RMS at the end of the concession term or upon any earlier termination of the Project Deed.

Since then, the Project Deed has been amended by:

- An **F-5 Tollroad Project Amendment Deed** between the Minister for Roads, the RTA (now RMS), the Company and the Commonwealth Bank of Australia, dated 29 June 1993.

This deed was one of several contracts associated with the financing, design and construction of the “M5 Western Link” in 1993–94 (see section 1.2.3), and amended the Project Deed by, among other things, reducing the permitted tolls on the M5, extending the ending of the motorway’s concession term from 14 August 2014 to 26 June 2022 and introducing new provisions for the sharing of any windfall profits.

(The main contract provisions for the design, construction, operation, maintenance and repair of the “M5 Western Link” itself were (and still are) set out in another contract, the **M5 Western Link Project Deed**, dated 29 June 1993, rather than the Project Deed, as described in section 2.2.2 below.)

- An **F-5 Tollroad Project Amendment Deed (Tolled Ramps and Wattle Grove Noise Barriers)** between the Minister for Roads, the RTA (now RMS), the Company and the Commonwealth Bank of Australia, dated 3 November 1994.

This deed, associated with the works described in section 1.2.4, extended the Project Deed’s financing, design,

construction, operation, maintenance and repair provisions to also encompass:

- The financing, design and construction by the Company of tolled east-facing ramps linking the original motorway and Henry Lawson Drive, and
 - The operation, maintenance and repair of these ramps, plus the maintenance and repair of new noise barriers built by the RTA along the motorway at Wattle Grove, until the end of the motorway’s concession term.
- A **Deed of Consent and Novation** between the Minister for Roads, the RTA (now RMS), the Company, Leighton Contractors Pty Ltd, M5 Holdings Pty Ltd, the Commonwealth Bank of Australia and Intravest (No 1) Ltd, dated 21 August 1996.

This deed was associated with the December 1996 sale of Leighton Contractors Pty Ltd’s 50% equity interest in the Company to M5 Holdings Pty Ltd and an associated transfer of Leighton Contractors’ rights and obligations under a “mezzanine” loan it had made to the Company (see section 1.2.12). It made minor amendments to relevant financing definitions in the Project Deed, all of which, following later refinancings, have subsequently been deleted, so these amendments no longer have any practical effect.

- An **F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication)**, between the Minister for Roads, the RTA (now RMS), the Company, the Commonwealth Bank of Australia, Trust Company of Australia Ltd (as the trustee of the Infrastructure Trust of Australia I), M5 Holdings Pty Ltd, Infravest (No 1) Ltd and CBA Corporate Services (NSW) Pty Ltd (as the security trustee of the project’s debt financiers at that time), dated 30 June 1997.

This deed was associated with the RTA’s sale of the loans it had made to the Company and the Company’s works to duplicate the King Georges Road to Fairford Road section of the motorway, as described in section 1.2.6. It extended the Project Deed’s financing, design, construction, operation, maintenance and repair provisions to also encompass:

- The financing, design and construction of defined “M5 motorway duplication” works (the duplication of the M5 between King Georges Road and Fairford Road, east-facing tolled ramps at Fairford Road and The River Road, revised and new west-facing ramps and other works at King Georges Road, noise barriers between King Georges Road and Fairford Road and associated ancillary works on local roads), and
 - The operation, maintenance and repair of these “M5 motorway duplication” works until the end of the motorway’s concession term.
- An **F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road**

Duplication), between the Minister for Roads, the RTA (now RMS), the Company, the Commonwealth Bank of Australia and Trust Company of Australia Ltd (as trustee of the Infrastructure Trust of Australia I), also dated 30 June 1997.

This was another deed associated with the RTA's sale of the loans it had made to the Company and the Company's works to duplicate the motorway (section 1.2.6). It set out:

- ♦ Arrangements for the sale of the loans, including the deletion of provisions in the Project Deed governing these loans
- ♦ Commitments by the RTA (and now RMS) to finance, construct, operate and maintain the M5 East freeway and to compensate the Company for any reduction in the toll revenue it receives from the M5 motorway if RMS were to levy and collect tolls on traffic using the M5 East at any time while the Company remains the operator of the M5 motorway, and
- ♦ Commitments by the Company to finance, design, construct, operate, maintain and repair the "M5 motorway duplication" in accordance with the amended Project Deed and timeframes specified in the Works Commitment and Novation Deed.

As already discussed in section 1.2.6, the precise scopes of the works to be carried out at King Georges Road and the associated interface between the M5 and the M5 East were subsequently clarified through exchanges of letters between the RTA and the Company on 30 June 1997 and 16 and 21 September 1998.

- **A Consent Deed—M5 Project Documents**, between the Minister for Roads, the RTA (now RMS), the Company, the Commonwealth Bank of Australia (in its own capacity and as the agent of the project's debt financiers at that time), CBA Corporate Services (NSW) Pty Ltd (as the security trustee for the project's debt financiers at that time) and Trust Company of Australia Ltd (as the trustee of the Infrastructure Trust of Australia I), dated 26 June 1998.

This deed was primarily concerned with the June 1998 refinancings described in section 1.2.12. It also made minor amendments to Project Deed provisions concerning the adequacy of the Company's funding of its maintenance of the motorway.

- **A Deed of Consent and Novation: Sale of CBA Shares**, between the Minister for Roads, the RTA (now RMS), the Company, the Commonwealth Bank of Australia (in its own capacity and as the agent of the project's debt financiers at that time), Perpetual Trustees Victoria Ltd (as the trustee of the Australian Infrastructure Fund), Utilities of Australia Pty Ltd (as the trustee of the Utilities Trust of Australia), Development Australia Nominees Ltd (now known as Industry Funds Management (Nominees) Ltd, and then acting as the trustee of the Development Australia Fund), AMP Investment Services Pty Ltd (then acting as the trustee of the AMP Infrastructure Equity Fund), M5 Holdings Pty Ltd, Trust Company of Australia Ltd (as the trustee of the Infrastructure

Trust of Australia I), CBA Corporate Services (NSW) Pty Ltd (as the security trustee for the project's debt financiers at that time) and Infravest (No 1) Ltd (in its own capacity and as the project's infrastructure bond lender at that time), dated 15 December 1998.

This deed was primarily concerned with the December 1998 sale of the Commonwealth Bank's interests in the project, as described in section 1.2.12. It committed the Minister for Roads, the RTA (now RMS), the Company and the other parties to make any necessary associated changes to the Project Deed and other project contracts as soon as practicable, but later changes in the ownership of the Company, refinancings of its debts and amendments to the project's contracts have again meant this requirement no longer has any practical effect.

- **An F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works)**, between the Minister for Roads, the RTA (now RMS), the Company and CBA Corporate Services (NSW) Pty Ltd (as the security trustee for the project's debt financiers at that time), dated 24 June 2002.

This deed, associated with the works described in section 1.2.10, extended the Project Deed's financing, design, construction, operation, maintenance and repair provisions to also encompass:

- ♦ The financing, design and construction by the Company of defined "Moorebank Avenue interchange" works, and associated works to widen the M5 from four to six lanes between Heathcote and Moorebank Roads, widen the motorway's shoulders near the new grade-separated interchange and repair its pavement in this area, and
- ♦ Operate, maintain and repair these new works until the end of the motorway's concession term.

It also updated the design and maintenance standards applying for the entire M5 motorway apart from the "M5 Western Link".

- **An F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works)**, between the Minister for Roads, the RTA (now RMS) and the Company, also dated 24 June 2002.

This was another deed associated with the "Moorebank Avenue interchange" works and associated works (section 1.2.10). Among other things, it set out:

- ♦ Commitments by the Company to finance, design, construct, operate, maintain and repair these works in accordance with the amended Project Deed and timeframes and other additional requirements specified in the Works Commitment Deed, and
- ♦ Arrangements and formulae for a further extension of the term of the Company's M5 motorway concession, including the execution of a deed formalising this

extension following the completion and costing of these works.

- An **F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works)**, between the Minister for Roads, RMS, the Company and CBA Corporate Services (NSW) Pty Ltd (as the security trustee for the project’s debt financiers at that time), dated 4 April 2012.

In accordance with the Works Commitment Deed provisions described above, this deed amended the Project Deed to formalise the extension of the term of the Company’s M5 motorway concession following the completion of the “Moorebank Avenue interchange” and associated works. The end of the concession period for the whole motorway was extended from 26 June 2022 to 22 August 2023.

- An **RTA Consent Deed—2009**, between the Minister for Roads, the RTA (now RMS), the Company, Commonwealth Bank of Australia (as the agent of the project’s debt financiers at that time) and CBA Corporate Services (NSW) Pty Ltd (as the security trustee for the project’s debt financiers at that time), dated 22 December 2009.

This deed was associated with the December 2009 refinancing of the project (section 1.2.12), and made several minor amendments to the Project Deed’s financing provisions to reflect the project’s amended debt financing structure.

- An **M5 West Widening Deed**, between the Minister for Roads, RMS and the Company, dated 19 June 2012.

This is one of several deeds associated with the 2012–15 “M5 West widening” works described in section 1.2.13.

In addition to setting out detailed provisions governing the design and construction of the widening works themselves, extending the motorway’s concession term and revising a number of tolling, compensation and revenue-sharing arrangements under the Project Deed and other contracts, as outlined in section 2.2.6 below, the M5 West Widening Deed has extended and amended the Project Deed’s overall operation, maintenance and repair provisions so that they also encompass the operation, maintenance and repair of most of a series of defined “M5 West widening” works, once they are completed except for minor defects, until the end of the motorway’s concession term. (The design and construction of the “M5 West widening” works are primarily governed by a separate *Design, Construction and Commissioning of the M5 West Widening* annexure to the M5 West Widening Deed, as described in section 2.2.6 below.)

Some of the M5 West Widening Deed’s amendments to the Project Deed took effect as soon as the M5 West Widening Deed became fully effective on 25 June 2012 (see section 2.3), while others will take effect only when the construction of the widening works has been completed.

Once the widening works have been completed, except for minor defects, the end of the concession period for the

whole motorway will be extended once more, from 22 August 2023 to 10 December 2026, or to a later date in specified circumstances summarised later in this report (see sections 4.2 and 4.3).

2.2.2 The M5 Western Link Project Deed

The principal contract governing the financing, design, construction, operation, maintenance and repair of the existing four-lane “M5 Western Link” (*Figure 1.1*)—between the Main South railway line, just west of the Georges River, and the northern end of the F5 freeway in Prestons (for the southbound lanes of the “M5 Western Link”, at Campbelltown Road, and for the northbound lanes, about 420 m further north)—is the **M5 Western Link Project Deed**, executed by the Minister For Roads, the RTA (now RMS) and the Company on 29 June 1993.

As already indicated in section 2.2.1, this deed was accompanied by the **F5 Tollroad Project Amendment Deed** of 29 June 1993, which made associated amendments to the Project Deed.

The M5 Western Link Deed set out the terms under which the Company was (and, subject to amendments described below, still is) obliged to:

- Finance, design and construct the original four-lane “M5 Western Link”
- Finance, design and construct associated “ancillary works” on local roads, adjacent properties and traffic signals
- Operate, maintain and repair the four-lane “M5 Western Link” until the end of the M5 motorway’s concession term (as described in section 2.2.1 above), and
- Give up possession of the “M5 Western Link” to RMS at the end of the concession term or upon any earlier termination of the M5 Western Link Project Deed.

It should be noted that the definition of the “M5 Western Link” does not encompass the two additional lanes between the Hume Highway and Prestons, or other new works along this section of the motorway, that are to be constructed under the M5 West Widening Deed of 19 June 2012. The financing, design, construction, operation, maintenance and repair of these components of the “M5 West widening” works is and will continue to be governed by the M5 West Widening Deed and the Project Deed, as already indicated in section 2.2.1, and not by the M5 Western Link Project Deed (see **Figure 2.2**).

Since its execution in 1993 the M5 Western Link Project Deed has been amended by:

- The **WSO/M5 Interface Agreement**, between the RTA (now RMS) and the Company, dated 14 December 2002, which, even though the Minister for Roads was not a party, has been regarded by the RTA/RMS and the Company as having effectively amended the M5 Western Link Project Deed’s definition of the “M5 Western Link land” to be leased to the Company by the RTA/RMS in accordance with the M5 Western Link Project Deed, so that excised portions of this land could be transferred instead to the Westlink M7

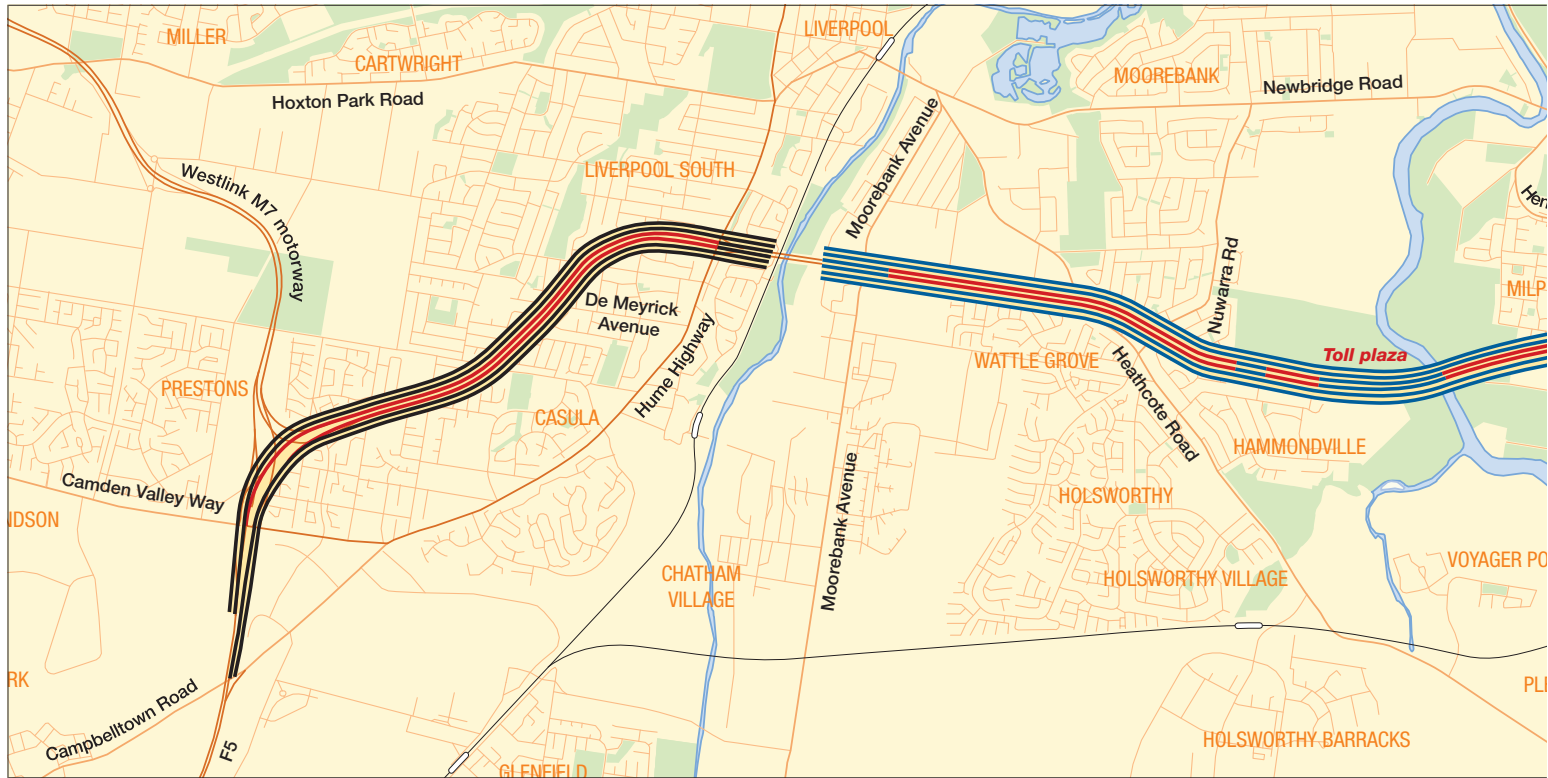


Figure 2.2. Existing and future M5 motorway “tollroad” lanes subject to the Project Deed and existing M5 motorway lanes subject instead to the M5 Western

motorway’s land (see sections 2.2.3 and 2.2.4 below). (The M7 was known as the “Western Sydney Orbital” or “WSO” at that time.)

- The **F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works)** of 4 April 2012, which, as already indicated in section 2.2.1, formalised the extension of the concession term for the entire M5 motorway, following the completion of the “Moorebank Avenue interchange” and associated works, from 26 June 2022 to 22 August 2023.
- The **M5 West Widening Deed** of 19 June 2012, which:
 - ♦ From 25 June 2012, has amended several provisions to reflect the 2012 refinancing of the M5 motorway project and introduced new provisions concerning early termination of the M5 Western Link Project Deed, and
 - ♦ Upon the completion of the “M5 West widening” works, except for minor defects, will, among other things,
 - Add a requirement for the Company to resurface the “M5 Western Link” during the last three years of the concession term (the M5 West Widening Deed’s amendments to the Project Deed will introduce an equivalent requirement for the rest of the motorway), and
 - Extend the concession term for the M5 Western Link, which currently ends on 22 August 2023, so that it will end on 10 December 2026 or on a later date in specified circumstances summarised later in this report (see sections 4.2, 4.3, 5.3 and 8).

2.2.3 Interfaces with the Westlink M7 motorway

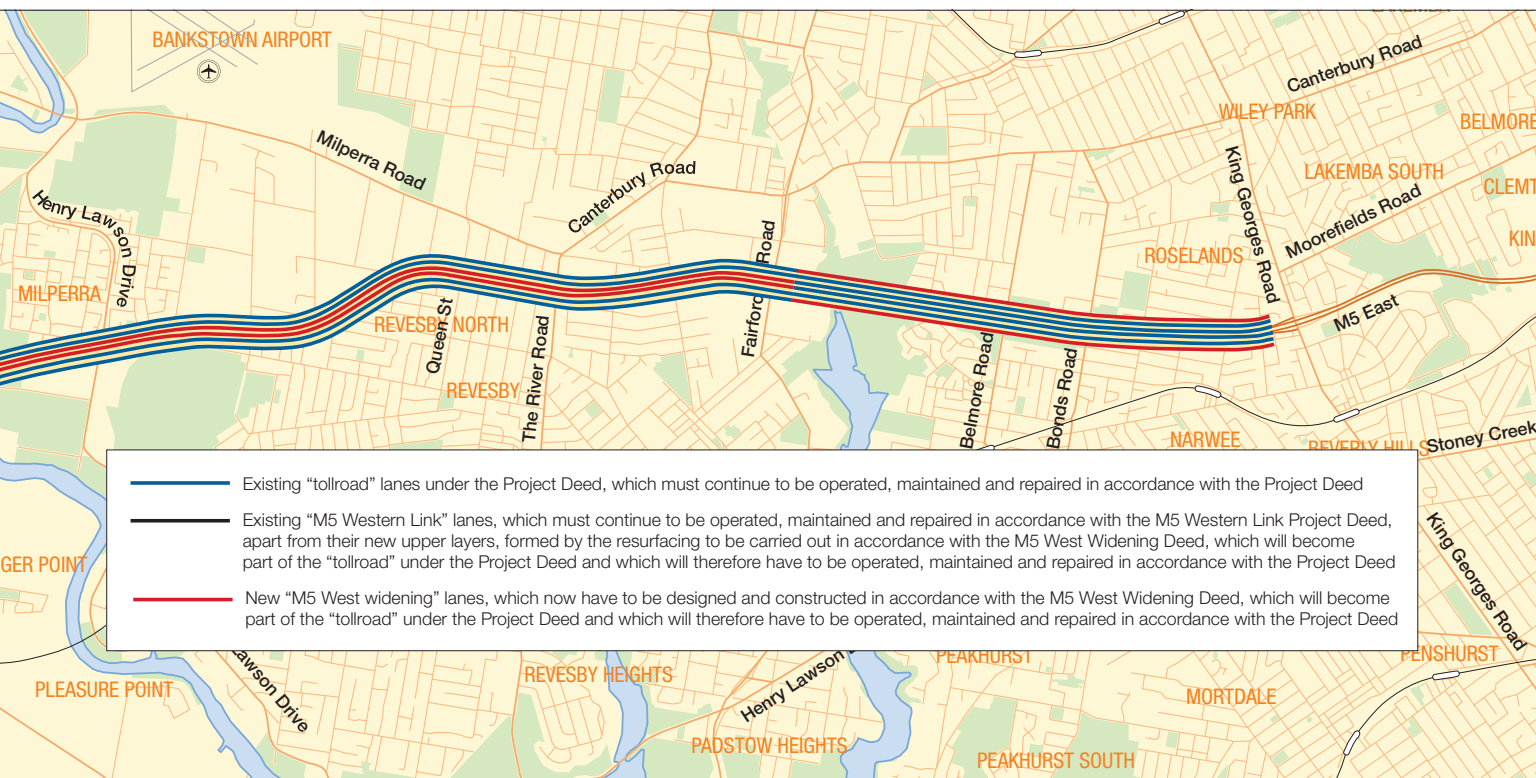
In addition to amending the M5 Western Link Project Deed, as described above, the 14 December 2002 **WSO/M5 Interface Agreement**, between the RTA (now RMS) and the Company, set out arrangements for the RTA and the Company, in conjunction with the then yet-to-be-determined successful tenderer for the M7 motorway project, to:

- Permit the connection of the Westlink M7 motorway to the M5
- Facilitate and manage the impacts of the design and construction of M7 motorway works at and near its connections with the M5 motorway in Prestons, and
- Subsequently manage the ongoing operation, maintenance and repair of these interfaces, including any parts of the M7 motorway on “M5 Western Link land”.

The WSO/M5 Interface Agreement’s operation, maintenance and repair provisions continue to apply today.

These general provisions have now been supplemented, as part of arrangements for the 2012–15 “M5 West widening” project (sections 1.2.13 and 2.2.6), by an **M5/M7 Interface Deed**, between RMS, the Company, WSO Co and WestLink, dated 19 June 2012, which:

- Permits the connection of the “M5 West widening” works to the Westlink M7 motorway
- Facilitate and manage the impacts of the Company’s design and construction of “M5 West widening” works at and near the connections between the M5 and the M7 in Prestons, and



Link Project Deed. Please note that this map is diagrammatic only, and at some locations with wider pavements not all of the existing lanes are shown.

- Subsequently manage the ongoing operation, maintenance and repair of these interfaces.

2.2.4 Leases

The land occupied by the original motorway (i.e east of the western Georges River crossing, but excluding some of the land now occupied by the Moorebank Avenue interchange) has been leased by the RTA (now RMS) to the Company under a **Lease** dated 21 February 1995. This lease is based on a draft “Annexed Lease” which had originally been exhibited to the original form of the Project Deed of 22 February 1991 and which had later been amended by the F-5 Tollroad Project Amendment Deed of 29 June 1993 to reflect the extended term of the motorway concession at that time (to 26 June 2022).

The term of the Lease has subsequently been further extended (to end on 22 August 2023) by the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 4 April 2012.

The land occupied by the “M5 Western Link”, as amended by the 14 December 2002 WSO/M5 Interface Agreement (see section 2.2.2), has been leased by the RTA (now RMS) to the Company in an **M5 Western Link Lease**, which is undated but which was executed by the Company on 14 June 2004. This lease is based on a draft lease which had originally been exhibited to the M5 Western Link Project Deed of 29 June 1993. Its term was originally to have ended on 27 June 2022, but it has subsequently been extended (to end on 22 August 2023) by the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 4 April 2012.

The land occupied by the 2001–03 Moorebank Avenue interchange works (section 1.2.10) has been leased by the RTA (now RMS) to the Company in a **Moorebank Avenue Lease** dated 4 April 2012. This lease, which is referred to in some contracts simply as “the Moorebank Lease”, has replaced a construction-phase licence over the same land granted by the RTA under a **Licence (Construction of Moorebank Avenue Interchange and Associated Works)** between the RTA (now RMS) and the Company, dated 15 May 2002. It is based on a draft “new lease” exhibited to the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, but its term has been extended to end on 22 August 2023, in line with the extensions made to the terms of the Lease and the M5 Western Link Lease.

The terms of all three of these leases will be extended upon the completion of the 2012–15 “M5 West widening” works, except for minor defects, in accordance with the M5 West Widening Deed of 19 June 2012 (to end on 10 December 2026, or on a later date in specified circumstances summarised in sections 4.2, 4.3, 5.3 and 8 of this report).

Once the “M5 West widening” works have been completed, except for minor defects, RMS must grant the Company a further lease, termed the **Bridge Works Lease**, over specified land required for the widening of the motorway’s bridges over Queen Street and Nuwarra Road (*Figure 1.3*). The term of this lease, the form of which is set out in a new Schedule added to the Project Deed by the M5 West Widening Deed, is to end on 10 December 2026 or on a later date in specified circumstances summarised in sections 4.2, 4.3, 5.3 and 8 of this report.

2.2.5 Electronic tolling interoperability arrangements

A Memorandum of Understanding: Management of Electronic Tolling on Tollroads (“the Electronic Tolling MoU”), originally executed (as “version 14”) in June 2001 or thereabouts and amended on several occasions since then, sets out arrangements for the interoperability of tolling systems on Sydney, Brisbane and Melbourne tollroads.

The parties to the original form of this agreement were the RTA (now RMS), the Company, SWR Operations Pty Ltd (the M4 motorway), Airport Motorway Ltd (the Eastern Distributor), The Hills Motorway Ltd (the M2 motorway) and Queensland Motorways Ltd (the Gateway Bridge and Logan Motorway in Brisbane).

Other parties joining these cooperative arrangements since then have been CrossCity Motorway Pty Ltd (the Cross City Tunnel), WSO Co Pty Ltd (the Westlink M7 motorway), Connector Motorways Pty Ltd (previously known as Lane Cove Tunnel Company Pty Ltd) (the Lane Cove Tunnel, until its sale on 9 August 2010), LCT-MRE Pty Ltd (the Lane Cove Tunnel, since 10 August 2010), CityLink Melbourne Ltd (the CityLink tollroads in Melbourne), ConnectEast Pty Ltd (the EastLink tollroad in Melbourne), RiverCity Motorway Pty Ltd (the CLEM7 motorway in Brisbane), Brisbane City Council (the Go Between Bridge in Brisbane) and BrisConnections Operations Pty Ltd (the Airport Link motorway in Brisbane). SWR Operations is no longer a participant, following the ending of its M4 motorway concession at midnight on 15 February 2010 and the absence of tolling on the M4 since 16 February 2010.

2.2.6 The ‘M5 West widening’ contracts

The **M5 West Widening Deed**, between the Minister for Roads, RMS and the Company, dated 19 June 2012, sets out:

- Detailed requirements for the Company to finance, plan, design, construct, commission and complete specified “M5 West widening” works and associated temporary works, as specified in a *Design, Construction and Commissioning of the M5 West Widening* annexure to the M5 West Widening Deed.

These works include so-called “agency works” for which RMS must pay the Company up to \$34,290,459 in total (excluding GST) (see sections 4.1 and 4.15 below).

To assist the Company to satisfy its “M5 West widening” design and construction obligations to RMS,

- ♦ The Company has entered into an **M5 West Widening Design and Construction Contract** with the D&C Contractor, dated 19 June 2012, with the debt financiers’ Security Trustee approving this arrangement in a **Contractor Tripartite Deed (“the M5 West Widening Design and Construction Consent Deed”)** between the Company, the D&C Contractor, the D&C Contractor Guarantor and the Security Trustee, dated 19 June 2012, and

- ♦ The D&C Contractor Guarantor has provided a parent company guarantee to the Company of the D&C Contractor’s performance of its obligations under that contract, in a **Performance Guarantee (“the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee)”)** between the Company, the D&C Contractor and the D&C Contractor Guarantor, again dated 19 June 2012.

- Detailed “step in” provisions and arrangements for the termination of the M5 West Widening Deed in the event of defaults.
- Amendments to and a consolidated restatement of the Project Deed, including its *F5 Tollroad Project Scope of Works and Design Criteria*, with some of these amendments taking effect as soon as the M5 West Widening Deed became fully effective on 25 June 2012 and others taking effect when the construction of the widening works has been completed.

In addition to the extension of the motorway’s concession term to 10 December 2026 or a later date and the other changes outlined in section 2.2.1 above, these amendments include:

- ♦ Minor amendments to references to the private sector parties’ financing arrangements, reflecting the 2012 refinancing of the project
- ♦ Increases in the tolls able to be charged for heavy vehicles (see section 5.3)
- ♦ New provisions, effectively confining the scope of existing provisions in the Project Deed, making it clear that the Company will not be entitled to be consulted by RMS concerning the effects on the M5 motorway of any proposed extension of the M5 and that the Company will not be entitled to compensation or other relief associated with:
 - Any new road network enhancements or changes introduced by RMS or the NSW Government after 20 December 2011, expressly including any Moorebank intermodal freight interchange and any extensions of the M4 motorway, including any extensions to Port Botany, *other than* any opening of an eastbound off-ramp from the M5 motorway at the Hume Highway at Casula, or
 - The South West Rail Link from Glenfield to Leppington
- ♦ New provisions for RMS to make compensation payments to the Company if the “Cashback” scheme were phased out or ended, if its “refund” rates were reduced or if different “refund” rates were introduced for peak and non-peak traffic, and
- ♦ New provisions specifying that if the M5 East freeway were duplicated, or more generally if any new arterial road or tunnel, whether for all classes of vehicles or for only restricted classes of vehicles (e.g. only for heavy

vehicles), were connected to the eastern end of the M5 motorway,

- Current Project Deed arrangements for the sharing of the Company's after-tax profits if it achieves an after-tax financial return of a specified rate or higher after the Company's bank debts have been fully repaid (see section 6.2) would be replaced by new "upside sharing" arrangements under which the Company would have to pay RMS a specified portion of any M5 motorway toll revenues exceeding revenue forecasts prepared by experts jointly appointed by RMS and the Company (see section 6.3), and
- The current requirement in the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997 for RMS to compensate the Company for any reduction in its M5 toll revenue resulting from any introduction by RMS of tolls on the M5 East (sections 1.2.6, 3.6 and 6.1) would no longer apply.
- Amendments to the M5 Western Link Project Deed, including its *M5 Western Link Scope of Works and Design Criteria*, almost all of them taking effect when the construction of the widening works has been completed, as outlined in section 2.2.2 above.
- Amendments to the terms of the Lease, the M5 Western Link Lease and the Moorebank Avenue Lease and requirements for the new Bridge Works Lease, as outlined in section 2.2.4.

The M5 West Widening Deed, which is referred to in some contracts as "the M5 West Widening Project Deed", has been accompanied by:

- The **M5/M7 Interface Deed**, already outlined in section 2.2.3.
- An **M5 West Widening Side Deed** between RMS, the Company, the D&C Contractor and the D&C Contractor Guarantor, dated 19 June 2012, concerning (among other things) cooperation arrangements and possible novations of the M5 West Widening Design and Construction Contract, the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee) and an associated deed appointing an independent verifier if RMS "steps in" to cure a Company default or if the M5 West Widening Deed is terminated (see section 10.5).
- An **M5 West Widening Deed of Engagement of Principal Contractor** between RMS, the Company and the D&C Contractor, dated 19 June 2012, appointing the D&C Contractor as RMS's "principal contractor" for the "M5 West widening" works under the Work Health and Safety Regulation 2011 (NSW).
- A **Deed of Appointment of Independent Verifier** between RMS, the Company and the Independent Verifier, dated 19

June 2012, setting out arrangements for the Independent Verifier to provide specified independent verification services for the design and construction of the "M5 West widening" works. This deed has replaced an earlier **Interim Design and Independent Verification Deed** between RMS, the Company and the Independent Verifier, dated 9 May 2012, under which the Independent Verifier had been obliged to provide analogous services for preliminary aspects of the widening of the motorway.

- A **Deed of Appointment of Environmental Representative** between RMS, the Company and the Environmental Representative, dated 19 June 2012, setting out arrangements for the Environmental Representative to provide specified environmental management services for the design and construction of the "M5 West widening" works.
- A **Subordination Deed** between RMS, the Company and the Company's current shareholders (as listed in section 2.1), dated 19 June 2012, under which the Company may not make payments to its shareholders, including any amounts owing under loans made to it by the shareholders, if the Company owes money to RMS under the Project Deed or the M5 West Widening Deed, if the Company is or would become insolvent or if specified circumstances arise after RMS has "stepped in" to undertake the "M5 West widening" works following a default by the Company (see section 10.5).
- A **General Security Deed** between RMS and the Company, dated 19 June 2012 ("**the RMS General Security Deed**"), which has supplemented an **F-5 Tollroad Project Deed of Charge**, executed by the RTA (now RMS) and the Company, dated 22 February 1991.

The original 1991 Deed of Charge granted RMS fixed and floating charges over the Company's undertakings, assets and rights to secure its obligations to RMS under the Project Deed, the Lease and the Deed of Charge. The new RMS General Security Deed has:

- Extended RMS's security to cover all of the Company's obligations to RMS, expressly including its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Amendment Deed of 29 June 1993, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the M5 West Widening Deed, the M5 West Widening Side Deed, the Subordination Deed, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed, an RMS Consent Deed—2012 (see below), any agreement amending, supplementing,

replacing or novating any of these agreements, any letters or undertakings relating to any of these agreements and any documents or agreements concerning the terms of payments to be made by the Company to RMS or the terms on which any of the Company's obligations are to be performed, and

- Made amendments reflecting requirements introduced by the Personal Property Security Act 2009 (Cth).

Under the Project Deed RMS must discharge the F-5 Tollroad Deed of Charge, at the Company's cost, as soon as reasonably practicable after 19 December 2012, if the Company asks it to do so, provided RMS is satisfied that the discharge will not adversely affect RMS's security position concerning the M5 motorway project and provided other specified conditions have been met.

- An **RMS Consent Deed—2012** between the Minister for Roads, RMS, the Company, the Agent and the Security Trustee, dated 19 June 2012, which, among other things,
 - Records the consents of the Minister for Roads and RMS to the main contracts for the "M5 West widening" works and the associated refinancing of the motorway
 - Regulates some of the rights of the Minister for Roads and RMS under the Project Deed and other project contracts, including their rights to respond to breaches of the project's contracts by the Company and RMS's rights to enforce its securities under the RMS General Security Deed and the F-5 Tollroad Project Deed of Charge, which (apart from some exceptions described later in this report) are subordinated to the rights of the private sector debt financiers to enforce their own securities under the project's financing contracts, and
 - Sets out requirements for the Company to obtain RMS's consent before refinancing or restructuring its debts or incurring new debts, notify RMS of other changes in the project's debt finance documents, provide RMS with specified accounts and other financial information and apply the proceeds of some of its insurance policies in specified ways.

The RMS Consent Deed—2012 has replaced the broadly equivalent RTA Consent Deed—2009, executed at the time of the previous refinancing of the project in 2009, and a series of earlier RTA consent deeds that have been executed, in some cases amended and then all ultimately replaced at various stages since 1991.

2.2.7 The Call Option Deed

An **M5 Motorway Call Option Deed** between the RTA (now RMS), the Company and the Company's shareholders, dated 29 June 1993, has granted RMS an option for RMS or its nominee to purchase shares in the Company, or the Company's assets and undertakings, if the Company achieves a specified (but "commercial in confidence") "expected" after-tax financial return or a higher rate of return, calculated on a quarterly basis, at any

time after 26 June 2019 and after the Company's bank debts have been fully repaid.

At the time this deed was originally executed the shareholder parties to the Call Option Deed were Leighton Contractors Pty Ltd and the Commonwealth Bank of Australia. Since then, the Call Option Deed has been amended by:

- The Deed of Consent and Novation of 21 August 1996, which novated Leighton Contractors' rights and obligations to M5 Holdings Pty Ltd
- The F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, which made minor amendments to reflect the Company's revised debt financing arrangements at that time
- The Deed of Consent and Novation: Sale of CBA Shares of 15 December 1998, which novated the Commonwealth Bank of Australia's rights and obligations to Utilities of Australia Pty Ltd (acting as the trustee of the Utilities Trust of Australia), Development Australia Nominees Ltd (now known as Industry Funds Management (Nominees) Ltd, acting as the trustee of the Development Australia Fund, which is now known as IFM Infrastructure Funds) and AMP Investment Services Pty Ltd (acting as the trustee of the AMP Infrastructure Equity Fund), and
- A **REST and Sunsuper Deed of Consent and Novation** of 1 November 1999, which added Retail Employees Superannuation Pty Ltd (as the trustee of the Retail Employees Superannuation Trust) and Sunsuper Pty Ltd (as the trustee of the Sunsuper Superannuation Fund), which at that time were purchasing some of AMP Investment Services Pty Ltd's shares, as shareholder parties to the Call Option Deed, and amended the obligations of the shareholder parties to make them several rather than joint and several.

Development Australia Nominees Ltd/Industry Funds Management (Nominees) Ltd, AMP Investment Services Pty Ltd, Retail Employees Superannuation Pty Ltd and Sunsuper Pty Ltd are no longer registered owners of any shares in the Company. However, as already described in section 2.1.2, one of the current registered shareholders, J. P. Morgan Nominees Australia Ltd, has connections with Development Australia Nominees Ltd/Industry Funds Management (Nominees) Ltd, while another, Cogent Nominees Pty Ltd/BNP Paribas Nominees Pty Ltd, has connections with AMP Investment Services Pty Ltd, and a third, State Street Australia Ltd, holds its shares as the trustee of the Retail Employees Superannuation Trust and as the trustee of the Sunsuper Superannuation Fund.

2.3 Conditions precedent

Many of the contracts described above did not become fully binding until conditions precedent set out in these contracts had been satisfied or waived.

In the case of the most recently executed set of contracts, those associated with the "M5 West widening" works (section 2.2.6), the M5 West Widening Deed, the M5/M7 Interface Deed, the

Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative and the RMS Consent Deed—2012 were not to become fully effective until:

- All of these contracts, plus the Interim Design and Independent Verification Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Side Deed, the M5 West Widening Deed of Engagement of Principal Contractor and the RMS General Security Deed, had been executed by all of their parties in a form satisfactory to RMS and were either fully binding or would become so once the M5 West Widening Deed had become fully binding
- The RMS General Security Deed had been delivered to RMS, along with all the documentation, information and funding reasonably required by RMS to have the RMS General Security Deed stamped and registered
- Specified private sector equity and debt financing documents had been executed by all of their parties in a form satisfactory to RMS, with copies delivered to RMS, and were either fully binding or would become so once the M5 West Widening Deed had become fully binding
- The NSW Treasurer had approved RMS's entry into the "M5 West widening" arrangements, under section 20 of the Public Authorities (Financial Arrangements) Act 1987 (NSW), and all other necessary Ministerial consents had been obtained
- The Company's "base case" financial model had been agreed to by the Minister for Roads, RMS and the Company and audited by an independent auditor acceptable to RMS
- Specified insurance policies for the design and construction of the "M5 West widening" works had been obtained, with copies and certificates of currency delivered to RMS
- The Company had given RMS satisfactory evidence that it had obtained Foreign Investment Review Board approval to enter the M5 West Widening Deed or that the FIRB's approval was not required
- RMS and the Company had received satisfactory evidence that the Agent and the Security Trustee had consented to the M5 West Widening Deed
- The Minister for Roads had directed RMS, under section 63 of the Roads Act, to assume responsibility as a roads authority for the "M5 West widening" project, and
- The security trustee for the Westlink M7 motorway's debt financiers had consented to the M5/M7 Interface Deed, as required under one of the contracts for the M7 motorway project.

These conditions precedent were all satisfied on or before 25 June 2012. Accordingly the M5 West Widening Deed and the other contracts listed above have all been fully effective from that date.

3 Objectives and general allocations of risks

3.1 Policy objectives

The policy of the NSW Government in entering into the Project Deed, the M5 Western Link Project Deed, the contracts for the Moorebank Avenue interchange works, the Lease and (following the completion of the “M5 West widening” works) the M5 West Widening Deed and the Bridge Works Lease, as stated in the Project Deed, was and will be to “increase private sector participation in the provision of essential infrastructure (including the NSW road system)”.

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

- Enhance and modernise NSW public infrastructure for the benefit of the people of NSW
- Safeguard the public interest in infrastructure projects in which the private sector participates
- Reduce the cost to the Government of providing such infrastructure
- Increase infrastructure operational efficiencies, and
- Provide sound opportunities for private sector investment.

The explicitly stated intention of the parties in entering into the contracts and leases listed above was and will be to meet these policy objectives more quickly than would otherwise be economically feasible for the Government, in a way assisting the Company to repay its debts under the project’s debt financing arrangements, with the aim of funding the design, construction, operation and maintenance of the motorway from tolls paid by the motorway’s users.

3.2 The Company’s principal obligations

As already indicated, the main contractual obligations of the Company have been and are:

- In accordance with the Project Deed, the M5 Western Link Project Deed and several of the amendment and “works commitment” contracts described in sections 1.2.2 to 1.2.10 and 2.2.1 to 2.2.3, to finance, design and construct:
 - ♦ The original motorway, between King Georges Road and just east of Moorebank Avenue, and associated “ancillary works” on local roads, adjacent properties and traffic signals (1991–92)
 - ♦ The “M5 Western Link” and associated “ancillary works”(1993–94)

- ♦ The tolled east-facing ramps at Henry Lawson Drive (1994)
- ♦ The King Georges Road to Fairford Road duplication (1997–99), and
- ♦ The Moorebank Avenue interchange and associated works (2002–05).

Because these works have all long been completed, most of the relevant contract provisions are now essentially only of historical interest, and these “spent” provisions are not summarised further in this report.

- In accordance with the M5 West Widening Deed, to finance, design and construct the 2012–15 “M5 West widening” works and associated temporary works (sections 1.2.13 and 2.2.6), using its best endeavours to complete these works, apart from minor defects, by a specified “date for construction completion”, 24 December 2014, and to achieve “final completion” by 24 March 2015, as summarised in more detail in **section 4** of this report.
 - In accordance with the Project Deed, to operate, maintain and repair the motorway works which fall within the Project Deed’s definition of “**the tollroad**”, *meaning*:
 - ♦ All of the permanent works, constructed in accordance with the Project Deed, which are on the land currently leased to the Company under the Lease or the Moorebank Avenue Lease or the land that is to be leased to the Company under the Bridge Works Lease (sections 2.2.4 and 5.2). These works include the original motorway built in 1991 and 1992, the tolled east-facing ramps at Henry Lawson Drive (1994), the King Georges Road to Fairford Road duplication (1997–99) and the Moorebank Avenue interchange (2002–05) (see *Figures 1.1 and 2.2*), and
 - ♦ From the date on which the “M5 West widening” works are completed, apart from minor defects, all of these works other than specified local road works and service works (as shown indicatively in *Figure 2.2*),
- until the end of the Project Deed’s concession term, which is currently 22 August 2023 but which will be extended to 10 December 2026, or a later date in specified circumstances described in sections 4.2 and 4.3, once the “M5 West widening” works are completed, apart from minor defects (**section 5** of this report).
- In accordance with the M5 Western Link Project Deed, to operate, maintain and repair the motorway’s “M5 Western

Link” until the end of the M5 Western Link Project Deed’s concession term, which is currently 26 June 2022 but which will be extended to 10 December 2026, or a later date in specified circumstances, once the “M5 West widening” works are completed, apart from minor defects (**section 5** of this report).

- To comply with its obligations under the Lease, the Moorebank Avenue Lease and the M5 Western Link Lease during the terms of these leases (**section 5**).
- To accept the Bridge Works Lease once the “M5 West widening” works are completed, except for minor defects, and comply with the Company’s obligations under this lease during the term of this lease (**section 5**).
- At the end of the terms of the Project Deed, the M5 Western Link Project Deed and the leases, or upon any earlier termination of these contracts, to surrender the “tollroad” (as defined in the Project Deed), the M5 Western Link’s fixtures and all plant, machinery, equipment, fixtures, fittings and other improvements on the “tollroad” and its land to RMS, without payment or compensation to the Company (**sections 5 and 9**).
- In specified circumstances, to share a portion of its revenues with RMS under arrangements set out in the Project Deed (**sections 6.2 and 6.3**).

3.3 RMS’s principal obligations

RMS’s main continuing obligations under the M5 motorway contracts as at 25 June 2012—that is, ignoring earlier RTA/RMS obligations that are now “spent”, such as the RTA’s various obligations to assist the Company’s design and construction activities from 1991 to 2005 (section 1.2)—are:

- In accordance with the M5 West Widening Deed, to assist the Company’s design and construction of the 2012–15 “M5 West widening” works (**section 4**) by:
 - ♦ Ensure the Company and its contractors have sufficient access to specified worksites
 - ♦ Accepting specified responsibilities for compliance with specified conditions attached to the planning approval for these works
 - ♦ Accepting responsibilities concerning specified costs associated with any discovery of artefacts, any native title claims, any contamination migrating onto the worksites during the design and construction of the works and court orders arising from any challenges to the validity of the “M5 West widening” project’s planning approval, and
 - ♦ Paying the Company agreed amounts for the costs of specified “agency works” as part of the “M5 West widening” project, cost escalations for the “M5 West widening” project and specified additional costs arising from the “M5 West widening” project’s planning approval conditions. If RMS fails to make any of these

payments, the payment must be made by the Minister for Roads, on behalf of the State of NSW.

- In accordance with the Project Deed, to compensate the Company if the “Cashback” scheme is phased out or ended, if its “refund” rates are reduced or if different “refund” rates are introduced for peak and non-peak traffic (section 6.4).

3.4 General acceptance of risks by the Company

Subject to specific terms in the Project Deed, the M5 Western Link Project Deed, the M5 West Widening Deed, the leases and other M5 motorway contracts, discussed later in this report, the Company has accepted all the risks associated with:

- The financing, design, construction, operation, maintenance and repair of the motorway’s “tollroad” and the motorway’s “M5 Western Link”, and
- The financing, design and construction of ancillary works on land not subject to the Lease, the Moorebank Avenue Lease or the M5 Western Link Lease, the “M5 West widening” works and temporary works associated with the “M5 West widening”.

More specifically, the Company has accepted:

- The risks that the actual costs of the projects might be higher than estimated
- The risks that the Company’s revenues from the projects might be less than estimated, and
- In the case of the “M5 West widening” project,
 - ♦ The risk that traffic volumes might be less than estimated
 - ♦ The risks that tax liabilities might be greater than estimated
 - ♦ All interest rate risks
 - ♦ All implementation, cost and revenue risks associated with the introduction of cashless tolling, as is now contemplated by the Project Deed under new provisions added by the M5 West Widening Deed
 - ♦ All risks that Company might incur costs, losses, damages, liabilities or delays in performing its obligations under the M5 West Widening Deed.

The Project Deed and the other contracts make it clear, however, that the Company is not required to assume all the risks relevant to the costs of the motorway’s non-RMS components and the revenue generated in all possible future circumstances. Some specific risks are allocated to RMS, as discussed in the rest of this report, and if certain specified circumstances arise the parties may be obliged to renegotiate the motorway’s contracts, or take other action, as described in section 8 of this report.

The Project Deed, the M5 Western Link Project Deed and the M5 West Widening Deed expressly acknowledge that RMS and

the Minister for Roads have made no representations or promises about traffic volumes on the motorway.

More generally,

- The Company has acknowledged that the Minister for Roads and RMS have made no representations or promises concerning the accuracy, completeness or suitability of any information concerning the “tollroad” or the “M5 Western Link” provided to the Company by or on behalf of RMS, and
- The Company has released and indemnified RMS from and against any claims, liabilities or losses connected with specified information documents concerning the “M5 West widening” project provided to the Company by RMS or any failure by RMS to provide information about this project to the Company, and has warranted that it has entered the M5 West Widening Deed on the basis of its own investigations, information and determinations, without relying on any information provided by or on behalf of RMS.

3.5 General releases and indemnities by the Company

The Company has released RMS, to the extent permitted by the law, from all claims and demands resulting from any accident, damage, injury or death on the motorway’s “tollroad” or “M5 Western Link” or their land, apart from accidents, damage, injuries or deaths caused or contributed to by RMS’s negligence or wilful default.

The Company has also indemnified RMS against any claims or losses it incurs as a result of any:

- Negligent use, misuse or waste of utility services or facilities on the “tollroad”, the “M5 Western Link” or their land by the Company or its employees, agents or tenants
- Water overflows or leaks on or from the “tollroad”, the “M5 Western Link” or their land caused or contributed to by the Company or its employees, agents or tenants
- Loss, damage, injury or death on the “tollroad”, the “M5 Western Link” or their land not caused by RMS’s negligence or wilful default
- Claim or demand by the Company other than as provided for in the Project Deed, the M5 Western Link Project Deed, the Lease, the M5 Western Link Lease, the Moorebank Avenue Lease or the Bridge Works Lease
- Breach by the Company of its warranties to RMS that it owns or is entitled to use all the drawings, specifications and designs used to construct the motorway, or
- Claim that RMS is not entitled to use these drawings, specifications and designs,

subject, in the case of the motorway’s “tollroad” component and its land, to separate indemnities set out in the M5 West Widening Deed.

Under these M5 West Widening Deed provisions, the Company must indemnify RMS and the Minister for Roads against any claims or losses they incur as a result of:

- (a) Any—
- Loss, damage, destruction, injury, illness, death or disruption to utility services
 - Economic loss by RMS or a third party, or
 - Claim by an owner or occupier of any additional land required for the “M5 West widening” project

that is caused by or connected with the Company’s performance or non-performance of its obligations under the M5 West Widening Deed.

However, except in the case of a Company breach of its M5 West Widening Deed obligations concerning the RMS-funded “agency works” components of the “M5 West widening” works (see section 4.1 below), the Company’s indemnities concerning economic losses suffered by third parties do not extend to pure economic losses resulting from—

- The decision by the NSW Government or RMS to proceed with the “M5 West widening” project, or
- The existence or location of this project or associated local area traffic management measures in accordance with the widening project’s planning approval,

and are also subject to a cap of a specified (but “commercial in confidence”) amount in total.

- (b) Any claims or losses they suffers as a result of, or in connection with, any breach by the Company of the M5 West Widening Deed or the Interim Design and Independent Verification Deed.

However, except in the cases of—

- A Company breach of its M5 West Widening Deed obligations concerning the RMS-funded “agency works” components of the “M5 West widening” works (see section 4.1)
- A failure by the Company to pay RMS “default step-in costs” or comply with its other obligations concerning RMS’s “default step in rights” following an RMS default under arrangements described in section 10
- A failure by the Company to reinstate the motorway following a Company default (see section 10), or
- A failure by the Company to comply with its obligations following a termination of the M5 West Widening Deed by RMS in response to a Company default (see section 10)

the Minister for Roads and RMS may not claim against the Company for:

- Any losses arising from an “event of default”, as defined in the M5 West Widening Deed, for which

RMS may exercise or has exercised its “default step-in rights” (section 10), or

- Any “special, indirect or consequential” losses of income, revenue, profits, financial opportunities, business, business opportunities, contracts, goodwill, use, production or value of the M5 motorway, or failures to realise anticipated savings, cost reductions or other benefits, which are suffered by the Minister for Roads or RMS, beyond a cap for all such indirect losses of a specified (but “commercial in confidence”) amount *plus* any amount indemnified (or required to be indemnified) under an insurance policy the Company is obliged to effect for the “M5 West widening” project (see section 4.16).

The Company’s liabilities to indemnify RMS under these M5 West Widening Deed provisions are reduced, however, to the extent that any claim or loss is contributed to by a breach of the “M5 West widening” project’s contracts by the Minister for Roads or RMS or by any other act or omission by RMS or its employees, agents or contractors (other than the Company, the Independent Verifier and the Environmental Representative) that is not authorised by the M5 West Widening Deed, including negligence.

3.6 Interactions with RMS’s and other authorities’ statutory function and powers

Except for RMS’s express contractual obligations under the Project Deed, the M5 Western Link Project Deed, the M5 West Widening Deed, the M5/M7 Interface Deed, the M5 West Widening Side Deed, the M5 West Widening Deed of Appointment of Principal Contractor, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the RMS General Security Deed and the RMS Consent Deed—2012, these contracts do not in any way fetter RMS’s exercise of its statutory functions and powers.

The Company has also acknowledged that in operating, maintaining and repairing the motorway it must comply with the lawful requirements of all relevant governmental authorities and that, subject to any express provisions in the M5 West Widening Deed, it bears the risk that government, administrative and judicial authorities other than RMS and owners of utility services might exercise their statutory functions and powers in ways that might interfere with the Company’s performance of its obligations under the M5 West Widening Deed. However, if such an action by an authority increases the cost of performing the Company’s obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease or the M5 Western Link Lease, in some circumstances the Minister for Roads, RMS and the Company might become obliged to renegotiate the motorway’s contracts, or take other action, as described in section 8 of this report.

More specifically, the Company has expressly acknowledged that:

- RMS may maintain and repair all existing toll-free roads, including those with “alternative but similar” routes to the M5, although if this involves any “upgrading” of a toll-free road RMS must “have regard to the fact that the M5 Western Link is a principal arterial road of the road system of NSW”.

(A previous requirement for RMS also to have regard to the M5’s Project Deed “tollroad” component as “a principal arterial road” does not apply to road network enhancements introduced by RMS of the NSW Government after 20 December 2011. Similarly, a previous requirement for RMS to consult with the Company in good faith concerning any proposal for a tolled or toll-free extension of the “tollroad”, having regard to the traffic and other effects of the extension on the “tollroad”, does not apply to any proposals introduced after 20 December 2011.)

- RMS may develop a new “Liverpool bypass” between Orange Grove Road and the M5 Western Link, and/or a new eastbound off-ramp from the M5 Western Link to the Hume Highway at Casula, provided it gives the Company reasonable notice and cooperates with the Company in minimising the impacts of the bypass and/or off-ramp on “the operation and use of the M5 Western Link” and coordinates all the construction activities, in which case the Company must give RMS sufficient access to the M5 Western Link for the new works to be built.

However, in the case of the Hume Highway off-ramp the Minister for Roads, RMS and the Company might become obliged to renegotiate the motorway’s contracts, or take other action, as described in section 8.1 below.

- The NSW Government and/or RMS may at any time, in their absolute discretion, duplicate the M5 East freeway, connect any new arterial road or tunnel to the eastern end of the M5 motorway and/or, after doing either of these, introduce tolls on any part of the duplicated M5 East or the new arterial road or tunnel (see also sections 6.1 and 6.3).
- The NSW Government and/or RMS may at any time, in their absolute discretion, phase out or end the “Cashback” scheme (section 1.2.5), reduce the rates of the “refunds” under this scheme and/or introduce different refund rates for peak and non-peak traffic (see section 6.4).
- More generally, and as already indicated, the Company will not be entitled to compensation or any other relief associated with:
 - Any new road network enhancements or other changes “introduced” by RMS or the NSW Government after 20 December 2011, expressly including any Moorebank intermodal freight interchange and any extensions of the M4 motorway, including any extensions to Port Botany, *other than* any opening of an eastbound off-ramp from the M5 Western Link to the Hume Highway at Casula, or

- ♦ The South West Rail Link from Glenfield to Leppington.

Further, the Company must cooperate with RMS and the Government, as much as reasonably practicable, to facilitate these activities by, among other things, permitting the connection of any road network enhancements to the M5 motorway's "tollroad" and "M5 Western Link" and giving RMS and its nominees access to the M5 for associated investigations and pre-construction, construction and operational activities.

In contrast to the RMS entitlements acknowledged by the Company in these provisions, and once more as already indicated, under the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, if RMS introduces tolls on the M5 East freeway at any time while the Company remains the operator of the M5 motorway, without having first duplicated the M5 East or more generally without having first connected any new arterial road or tunnel to the eastern end of the M5

motorway, RMS must compensate the Company for any reduction in the toll revenue it receives from the M5 motorway as a result, as agreed by RMS and the Company or, if they cannot agree, as determined by an expert agreed between them or, failing this, an expert appointed by the President (or equivalent) of the Australian Bankers' Association, using procedures set out in that deed. If this compensation is assessed at \$500,000 or less in any financial year the expert's determination for that year will be final and binding. If it is more and RMS and the Company still disagree about the quantum, or if they disagree about the expert's methodology, the Project Deed's dispute resolution mechanisms will then apply (see section 7.11).

These M5 East "toll compensation" arrangements will be scrapped if the M5 East is duplicated or more generally if any new arterial road or tunnel, whether for all classes of vehicles or for only restricted classes of vehicles (e.g. only for heavy vehicles), is connected to the eastern end of the M5 motorway (see sections 6.1 and 6.3).

4 Design and construction of the ‘M5 West widening’ works

Under the M5 West Widening Deed between the Minister for Roads, RMS and the Company, executed on 19 June 2012 and fully effective from 25 June 2012, the Company must design, construct, commission and complete defined “M5 West widening works” and associated “temporary works” in accordance with the requirements of a detailed *Annexure A* to the M5 West Widening Deed. (As already indicated, most of the Project Deed’s design and construction provisions do not apply to the design and construction of the 2012–15 widening works.)

As already indicated in section 3.2, the Company must use its best endeavours to complete these works, apart from minor defects, by a specified “date for construction completion”, 24 December 2014, and to achieve “final completion” by 24 March 2015 (for more details, see sections 4.17 and 4.18 below).

Again as already indicated (section 2.2.6), to assist it in satisfying its design and construction obligations under the M5 West Widening Deed the Company has engaged the D&C Contractor under the M5 West Widening Design and Construction Deed dated 19 June 2012.

The terms of this subcontract, and the supporting parent company guarantee of the D&C Contractor’s performance provided to the Company by the D&C Contractor Guarantor in the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee), may be amended or waived only with RMS’s prior written consent. Similarly, the D&C Contractor may transfer, encumber or otherwise deal with its interest in the M5 West Widening Design and Construction Deed only with RMS’s prior written consent and only if the transferee or encumbrancee enters into a deed equivalent to the M5 West Widening Side Deed.

4.1 Scope of the widening works

The “M5 West widening works” to be designed and constructed by the Company comprise:

- The “M5 West widening” itself (i.e. works to widen the motorway), as broadly described in section 1.2.13 of this report and as defined in detail in a *Scope of Works and Technical Criteria* document annexed to the M5 West Widening Deed (this document is separate from the *Scope of Works and Design Criteria* for the “tollroad”, exhibited to the Project Deed, and the *Scope of Works and Design Criteria* for the “M5 Western Link”, exhibited to the M5 Western Link Project Deed)

- “Property works”, “service works” and “local road works” associated with these widening works, again as detailed in the M5 West Widening Deed’s *Scope of Works and Technical Criteria*, and
- Works to resurface the existing pavements of the current “tollroad” and the “M5 Western Link”, once more as detailed in the M5 West Widening Deed’s *Scope of Works and Technical Criteria*.

The Company must also carry out “temporary works”, meaning any temporary physical works performed for the purpose of planning, designing, constructing, commissioning and completing the above works but not themselves forming part of the defined “M5 West widening works”, include temporary works described in the *Scope of Works and Technical Criteria*.

The M5 West Widening Deed’s *Scope of Works and Technical Criteria* document sets out a detailed series of standards and other requirements to be met by the Company in designing and constructing its works, including basic requirements for each element of the works, quality and verification requirements, requirements for site investigations, condition surveys and other surveys, performance requirements for the various components of the works, property, local road and service works requirements, detailed design requirements, construction method requirements and community involvement requirements.

As already indicated, most of the works to be carried out by the Company must be financed by the Company, but three elements of the “M5 West widening works”, termed the “agency works”, are to be planned designed, constructed, commissioned and completed out by the Company as RMS’s agent and paid for by RMS (see section 4.15 below). These “agency works” are all the works necessary for the provision of:

- Three traffic lanes and associated road shoulders eastbound from Fairford Road to King Georges Road
- Specified additional cross drainage infrastructure on this section of the motorway, and
- Specified new and modified noise walls along the motorway.

Even though it has been appointed as RMS’s agent for carrying out the “agency works”, the Company:

- Remains primarily liable to RMS for all the risks associated with these works—including the risks that the cost of these works might exceed the fixed payment to be made by RMS and the risks that integrating and delivering the “agency

works” might delay or increase the costs of other “M5 West widening works” and/or the “temporary works”—apart from any claims for the agreed payments for the “agency works” by RMS (up to the fixed amount), any express contractual rights to compensation or other relief concerning these works as part of the “M5 West widening works” and any rights available to the Company under the common law or in equity

- Must administer the M5 West Widening Design and Construction Contract as if it had entered this contract as the principal for the “agency works” and not as RMS’s agent
- Has provided the same warranties and undertakings to RMS concerning the “agency works” as it has provided for all the “M5 West widening works”
- Has provided a further series of indemnities to RMS and the Minister for Roads concerning any claims or losses they incur in connection with the “agency works” and the associated arrangements, and
- Remains solely responsible for procuring the “agency works” and the suitability and adequacy of the M5 West Widening Design and Construction Deed for this purpose.

The Company may not delegate its agency concerning the “agency works”.

If there are any demands or court proceedings connected with the “agency works” or the Company’s appointment as RMS’s agent, the Company must do everything RMS may require to defend or bring proceedings. If a court invalidates the agency arrangements and this decision is not subject to appeal, the Company must still plan, design, construct, commission and complete the “agency works” as if they had always been part of the “M5 West widening works”, but as a principal, and RMS must pay the Company the same amount as under the agency arrangements (section 4.15).

4.2 Changes in the scope of the widening works and associated potential extensions of the motorway’s concession term

Subject to a requirement in the RMS Consent Deed—2012 that it must first obtain the prior written consent of the debt financiers’ Security Trustee, RMS may require changes to be made to the works to be carried out by the Company, other than the “temporary works”, using procedures set out in *Annexure A* to the M5 West Widening Deed. These changes may include additions to, deletions from and/or the demolition or removal of the widening works, but unless RMS and the Company agree otherwise any changes directed by RMS may not:

- Adversely affect the use, patronage or capacity of the existing or widened motorway or the Company’s ability to levy and collect tolls

- Prevent the Company from completing the construction of the works, except for minor defects, by 24 December 2014, or
- Adversely and materially affect the Company’s tax liabilities, if RMS and the Company have first met and negotiated in good faith to avoid or address such a consequence.

Within 15 business days of receiving a “change order” from RMS, the Company must give RMS detailed estimates of the likely costs or savings, details on the implications of the proposed change for the functional integrity of the widening works, performance standards, quality standards, the dates of completion of the works, any other obligations adversely affected by the change (including its obligations under the Project Deed and the M5 Western Link Project Deed) and any other information requested in the “change order”.

RMS will then have 15 business days to advise the Company whether it wishes to proceed with the proposed change.

If it decides to proceed, and RMS agrees with the costings and advice provided by the Company, RMS may notify the Company of this within this period and the change will take effect in accordance with the costings and advice provided by the Company (i.e. with the notified amended standards etc).

If RMS disagrees with the costings and/or advice provided by the Company, RMS may refer the matter for determination under dispute resolution procedures set out in the M5 West Widening Deed, discussed in section 7.12 below. In the meantime, it may require the Company to implement the change, with RMS paying the Company on the basis of RMS’s cost estimates during this period.

Changes to the scope of the widening works may also be proposed by the Company, which may be required by RMS to certify that its proposed changes will not adversely affect the functional integrity of the motorway, the widening works, performance standards, quality standards, the date of completion of the works, the operation, maintenance and repair of the motorway or any of its other obligations to RMS under the Project Deed, the M5 Western Link Project Deed and the M5 West Widening Deed.

RMS has an absolute discretion whether to approve or reject any proposal by the Company for a change in the scope of works. If RMS approves the proposed change, the Company must pay all the costs associated with proposing, assessing and implementing the change, including those incurred by RMS, unless RMS agrees otherwise in writing, and RMS will not be liable to the Company for any costs, losses, damages, liabilities or claims associated with the change.

If a change in the scope of works initiated and directed by RMS:

- Increases the scope or costs of the widening works
- Increases the motorway’s operating and maintenance costs under the Project Deed and/or the M5 Western Link Project Deed, or
- Prevents the Company from completing the widening works, except for minor defects, by 24 December 2014 (except to

the extent that the Company and its subcontractors have not taken all reasonable steps to mitigate the delay), and the Company incurs delay costs in carrying out the change,

RMS must either:

- (a) Pay the Company the costs it reasonably incurs as a result of the change (“**the change costs**”), including any increased financing, construction, operating and maintenance costs associated with the motorway and the widening works and, more particularly, including:
- The reasonable direct costs of the D&C Contractor plus 27% of these costs, on account of the D&C Contractor’s overheads and profit margins, and
 - A further 6% on account of the Company’s own overheads and profit margins.

Unless otherwise agreed, any such payments by RMS to the Company must be made progressively, within ten business days of the end of each month during which the relevant work has been undertaken.

or

- (b) Notify the Company that these “change costs” are to be funded by the Company, with an associated extension of the motorway’s concession term.

In the latter case, the Company must reasonably endeavour to fund the “change costs” itself, and if it is able to do so it must notify RMS and the terms of the Project Deed, the M5 Western Link Project Deed, the Lease, the M5 Western Link Lease, the Moorebank Avenue Lease and the Bridge Works Lease—all of which are currently, with effect from the completion of “M5 West widening” works apart from minor defects, set to end on 10 December 2026—will then be extended, *pro rata*, by a specified (but “commercial in confidence”) number of days for each of a specified (but “commercial in confidence”) amount of the “change costs”.

If the Company is unable to fund the “change costs”, it must notify RMS of this and RMS must then pay the Company as set out in (a).

If a change in the scope of works initiated and directed by RMS decreases the scope or costs of the widening works, RMS is entitled to receive all of the cost savings resulting from the change, including any acceleration savings and reductions in financing, construction, operating and/or maintenance costs associated with the motorway and the widening works. In calculating the amount to be paid to RMS for any construction cost savings, 10% is to be added to the reasonable costs of the construction work as the total margin for overheads and profits.

On the other hand, if the scope or costs of the widening works are decreased (or are expected to be decreased) as a result of a change in the scope of works suggested by the Company and agreed to by RMS, RMS is entitled to receive 50% of the actual cost savings, calculated in the same way, or 50% of the cost savings as originally estimated by the Company when it proposed the change (whichever is the higher amount).

Any such payments by the Company to RMS of some or all of any savings on the design and construction of the widening works must either be made progressively, within ten business days of the end of each month during which the omitted work would otherwise have been undertaken, or set off against any “change costs” payable by RMS.

Any payments by the Company to RMS of some or all of any operational, maintenance and repair cost savings for the motorway must be made in a manner and at a time to be agreed between RMS and the Company. If they cannot agree, the manner and timing of these payments must be determined by an expert under the M5 West Widening Deed’s dispute resolution procedures, which are described in section 7.12.

4.3 Compliance with and amendments and challenges to the widening project’s planning approval

The respective responsibilities of RMS and the Company for complying with the conditions of the M5 West widening project’s planning approval of 9 November 2011 are detailed in *Annexure A* to the M5 West Widening Deed and a schedule to *Annexure A*.

RMS may, however, seek to satisfy any of its obligations under this schedule by directing a change in the scope of the widening works to be undertaken by the Company, under the arrangements described in section 4.2.

The Company has warranted to RMS that the *Scope of Works and Technical Criteria* annexed to the M5 West Widening Deed, and its concept design for the widening works, which is set out in several appendices to the *Scope of Works*, and other “early design documentation” prepared by the Company, again as annexed to the M5 West Widening Deed, comply with the planning approval.

If:

- Further hydrological and hydraulic modelling based on the Company’s designs, as required under one of the planning approval’s conditions for which the Company is responsible, necessitates additional drainage design or other work beyond that required by the *Scope of Works and Technical Criteria*, or
- The project approval is modified, a new planning approval is issued or any such new approval is modified—other than as a result of a breach of the planning approval or any of the M5 West widening contracts by the Company or the D&C Contractor or in response to an application by the Company and/or the D&C Contractor or a change to the widening project’s scope of works proposed by the Company and approved by RMS under the arrangements described in section 4.2—and this necessitates a change to the “M5 West

widening works” (other than the widening project’s “temporary works” or its design and construction processes),

then:

- The change must be addressed as if RMS had directed the change by issuing a “change order” under the arrangements described in section 4.2, except that in the latter case the Company’s “change costs” associated with any inability to complete the widening works (except for minor defects) by 24 December 2014 will be limited to the Company’s delay costs and its lost and/or delayed receipts of revenue, with no margin being applied to the latter
- The Company must take all reasonable steps to mitigate the costs of the change, comply with all reasonable RMS directions concerning the change and its consequences and ensure the D&C Contractor and its subcontractors do likewise
- RMS’s liabilities arising from a modified or new planning approval will be reduced to the extent that the Company fails to comply with these cost mitigation obligations, and
- In some circumstances the renegotiation provisions described in section 8.2 may apply.

If there is a legal challenge to the “M5 West widening” project’s planning approval, the Company must continue to perform its obligations under the M5 West Widening Deed unless the Company or the D&C Contractor is ordered not to by a court.

If a court does issue such an order to RMS, the Company and/or the D&C Contractor,

- The Company must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RMS directions concerning the legal challenge and its consequences, and ensure the D&C Contractor does likewise.
- RMS must pay the Company for any reasonable costs—including any reasonable interest, fees or other amounts payable under the project’s debt financing arrangements during the delay, other delay costs and the D&C Contractor’s reasonable on-site overheads—directly incurred as a result of the court order by:
 - ♦ The Company (other than any amounts payable to a related entity of the Company, the D&C Contractor or a related entity of the D&C Contractor) and, without double-counting,
 - ♦ The D&C Contractor (other than any amounts payable, except on an arms-length, commercial basis, to the Company, a related entity of the Company or a related entity of the D&C Contractor),

but *not* for:

- ♦ Any delay costs if the court order will not or does not prevent the completion of the widening works, apart from minor defects, by 24 December 2014
- ♦ The D&C Contractor’s off-site overheads or profit margins

- ♦ Any costs incurred by the Company or the D&C Contractor as a result of a failure by the Company to mitigate the costs or comply with RMS directions, or
- ♦ Any costs resulting from the initiation or upholding of the legal challenge or issuing of the court order because of a breach of the M5 West Widening Deed by the Company.

- In some circumstances the renegotiation provisions described in section 8.2 may apply.

4.4 Design obligations, intellectual property and moral rights

The Company has warranted to RMS that:

- The widening project’s *Scope of Works and Technical Criteria* is proper, adequate and fit for its intended purposes
- The Company bears the risk of any ambiguities or inconsistencies in or between the widening project’s *Scope of Works and Technical Criteria*, the Company’s concept design for the widening works, the other “early design documentation” prepared by the Company prior to the execution of the M5 West Widening Deed and the widening project’s planning approval
- The Company bears the risks of any reliance on its concept design for the widening works or its other “early design documentation”, including associated cost risks if changes are required in order to ensure its works are fit for their intended purposes and comply with the M5 West Widening Deed
- The design documentation it will prepare for the widening works will satisfy the requirements of the *Scope of Works and Technical Criteria* and other requirements of the M5 West Widening Deed, and will be fit for its intended purposes
- Construction in accordance with its design documentation will also satisfy the requirements of the *Scope of Works and Technical Criteria* and other requirements of the M5 West Widening Deed
- The widening works will satisfy the requirements of the M5 West Widening Deed when they are completed, apart from minor defects (see section 4.17)
- These works (other than the works to resurface the existing pavements of the current “tollroad” and the “M5 Western Link”) will be fit for their intended purposes when they are completed, apart from minor defects (section 4.17), and
- They will not adversely affect the standard, repair and functionality of the “tollroad” as required by the Project Deed or the “M5 Western Link” as required by the M5 Western Link Project Deed, or allow the ongoing functionality of the “tollroad” or the “M5 Western Link” to be adversely affected.

These warranties will not be affected by the fact that design work was carried out by others prior to the execution of the M5 West Widening Deed, by any RMS direction to change the widening works under the provisions described in section 4.2 or

by any RMS reviews, consultations or comments on the Company's design documentation.

The Company must give RMS and the Independent Verifier the opportunity to comment on and monitor its design development and documentation, which must comply with timeframes set out in a documentation schedule appended to the widening project's *Scope of Works and Technical Criteria*.

The design documentation for each discrete design element must be certified by the Company and verified by the Independent Verifier as being appropriate for construction and in compliance with the M5 West Widening Deed and the *Scope of Works and Technical Criteria*, including, in particular, the latter's durability and design life requirements.

The Company must hold regular design development meetings with the Independent Verifier, with RMS attending if it chooses to do so.

The Company has assigned all its intellectual property rights in its concept design and the "early design documentation" to RMS. RMS will automatically own and have all intellectual property rights in all the design documentation (and a *Maintenance Manual* described in sections 4.17 and 5.1.1) subsequently created by the Company for the widening project, and the Company must ensure that the D&C Contractor, its subcontractors and agents and any other third parties creating any part of the design documentation or the *Maintenance Manual* similarly assign their intellectual property rights to RMS upon the creation of these materials.

The Company has also granted RMS a perpetual, irrevocable and royalty-free non-exclusive licence to use and sub-license any computer software incorporated into or provided as part of its widening works. If requested by RMS, it must place the source code for any of this software into escrow with an escrow agent on terms reasonably approved by RMS and with RMS paying reasonable fees to the escrow agent for this service.

The Company must use its best endeavours to obtain, from the authors of the widening project's "artistic works" and "literary works" as defined in the Copyright Act 1968 (Cth),

- Irrevocable and unconditional written consents to any non-attribution or false attribution of these works by RMS, the Company or their licensees or authorised representatives and any RMS or Company repairs, maintenance, additions, refurbishments, alterations, relocations, destruction or replacements affecting these works, and
- Irrevocable and unconditional written waivers, for the benefit of RMS and the Company, of their moral rights concerning these works under any applicable laws outside Australia.

The Company has warranted to RMS that its design documentation, *Maintenance Manual*, software, widening works and methods of working will not infringe any intellectual property or moral rights, and must indemnify RMS against any claims or losses it incurs as a result of any such infringement, except to the extent that the claim or loss is caused by unlawful conduct or wilful misconduct by RMS.

4.5 General construction obligations

The principal construction obligations of the Company under the M5 West Widening Deed are to construct the "M5 West widening works" and the associated "temporary works" (see section 4.1):

- In accordance with the M5 West Widening Deed, including the *Scope of Works and Technical Criteria*, any relevant design documentation certified by the Company, submitted to RMS and verified by the Independent Verifier (section 4.4) and any changes directed by RMS (section 4.2)
- With good workmanship and materials
- In accordance with legal requirements
- In a safe manner, so no damage is caused to any person
- Without adversely affecting the structural integrity of any existing structures
- Without disrupting or interfering with the free movement of traffic onto, from, around or on the widening project's construction sites and the motorway's existing "tollroad" and "M5 Western Link", except as expressly permitted by the M5 West Widening Deed and subject to RMS's reasonable directions (sections 4.11 and 5.1.2)
- Without causing any unavoidable inconvenience to motorway users
- In a manner consistent and coordinated with the Company's obligations under the Project Deed and the M5 Western Link Project Deed, including the immediate repair of any damage caused to the motorway's existing physical infrastructure, and
- Without closing or materially reducing any connections with the M5 East freeway or the Westlink M7 motorway, except as expressly permitted under the widening project's *Scope of Works and Technical Criteria* and the M5/M7 Interface Deed (section 4.11),

so that these widening and temporary works (other than the works to resurface the existing pavements of the current "tollroad" and the "M5 Western Link") will be fit for their intended purposes when they are completed, apart from minor defects (section 4.17), will not adversely affect the standard, repair and functionality of the "tollroad" as required by the Project Deed or the "M5 Western Link" as required by the M5 Western Link Project Deed, and will not allow the ongoing functionality of the "tollroad" or the "M5 Western Link" to be adversely affected.

4.6 Construction access

RMS must give the Company, the D&C Contractor and its subcontractors, suppliers and consultants access, at no cost but at the Company's risk, to construction sites and temporary works areas defined in a *Site Access Schedule* annexed to the M5 West Widening Deed, and to any necessary parts of the existing motorway's leased land, to allow them to carry out the Company's widening works, including the correction of any defects as described in section 4.18.

The *Site Access Schedule* sets out times, protocols and other restrictions on this access to individual sites.

If RMS fails to provide access in accordance with these provisions, the Company must take all reasonable steps to mitigate any resultant delay in its works and any other effects of RMS's failure, including changes to the sequencing, timing and/or methodology of its works.

If the Company requires additional land in order to construct the widening project's works, beyond the land parcels listed in the *Site Access Schedule* and the existing motorway's leased land, it must procure this "**extra land**" (or the use of or other rights over this land) itself, at its own cost and at its sole risk.

The Company must ensure its use and rehabilitation of any "extra land" is satisfactory to the relevant land owners and lessees, RMS and all relevant government and local government authorities.

Until the "final completion" of all construction (section 4.17) RMS may access the construction sites and all other areas relevant to the works during business hours or on reasonable notice (or immediately during emergencies), subject to reasonable safety and security constraints, in order to observe the progress of the works, monitor compliance by the Company with its obligations under the M5 West Widening Deed and exercise RMS's other rights and obligations under the widening project's contracts.

4.7 Latent conditions and land contamination

Apart from exceptions described below, the Company has accepted all the risks of losses or delay associated with the physical conditions and characteristics of the land used for the widening project, its surroundings and structures on the land, including water, atmospheric and sub-surface conditions and any hazardous contamination.

It has also confirmed that RMS has made no representations or promises about the condition of this land.

If a latent defect on any widening construction site, temporary work area or "extra land" leads the Company to propose alternative design solutions to achieve the functionality, durability and quality requirements of the widening project's *Scope of Works and Technical Criteria*, and RMS reasonably believes it is not feasible for the Company to carry out the widening works as originally envisaged, taking account of any additional capital and operating costs, RMS must consider the change proposed by the Company in good faith under the change provisions described in section 4.2 above, and cooperate with the Company in assessing its alternative design solutions.

The Company must remove and/or treat any contamination and remediate the land (in the case of the temporary work areas not to a standard better than was originally the case, unless it is legally obliged to do more).

The Company must do this at its own expense, and indemnify RMS against any claims or losses arising from the contamination, unless the contamination is "**migratory**

contamination", meaning it originated outside the land, has migrated onto the land after 19 June 2012 and prior to "construction completion" of the M5 West widening works (see section 4.17), has not been caused by a default by the Company, the D&C Contractor or any of their subcontractors and could not have been prevented by them had they implemented measures that would have been taken by a competent and experienced contractor to prevent or minimise the migration.

If "migratory contamination" arises, RMS must pay the Company the reasonable contamination removal and/or treatment costs and land remediation costs—including any reasonable interest, fees or other amounts payable under the project's debt financing arrangements during the delay, other delay costs and the D&C Contractor's reasonable on-site overheads—directly incurred by:

- The Company (other than any amounts payable to a related entity of the Company, the D&C Contractor or a related entity of the D&C Contractor) and, without double-counting,
- The D&C Contractor (other than any amounts payable, except on an arms-length, commercial basis, to the Company, a related entity of the Company or a related entity of the D&C Contractor, and not for the D&C Contractor's off-site overheads or profit margins).

This RMS payment will be the Company's sole right to a payment of money in any way connected with the "migratory contamination".

The Company must take all reasonable steps to mitigate the costs incurred and comply with all reasonable RMS directions concerning the "migratory contamination" and its consequences, and must ensure the D&C Contractor does likewise. RMS will not be liable to pay for any costs arising from a failure by the Company to comply with these obligations.

If "migratory contamination" prevents the Company from carrying out its widening works for more than six months, RMS may terminate the M5 West Widening Deed, in its absolute discretion, by giving the Company a written notice to this effect (see section 10.7).

4.8 Artefacts and native title claims

Any "artefacts" (including fossils, bones, coins, antique articles, artefacts, structures or other remains or things of scientific, geological, historical, archaeological or aboriginal interest or otherwise of value) discovered on or under the surface of any widening construction site, temporary work area or "extra land" will, as between RMS and the Company, be the absolute property of RMS.

The Company must:

- At its own expense, take every precaution to prevent the removal or damaging of any artefacts
- Allow RMS and others authorised by RMS to watch and examine their excavations at any time
- Immediately notify RMS of any discovery of any artefact, and

- Comply with any directions concerning a discovered artefact imposed on RMS, the Company and/or the D&C Contractor by any relevant authority.

If there is a native title claim over any part of any widening construction site or temporary works area, the Company must continue to perform its widening design and construction obligations unless it is ordered not to by RMS, a court or tribunal or any other legal requirement.

In the event of any direction concerning an artefact by a relevant authority or any order for the Company to cease performing its design and construction obligations because of a native title claim,

- The Company must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RMS directions concerning the artefact or the native title claim and its consequences, and ensure the D&C Contractor does likewise.
- RMS must pay the Company for any reasonable costs directly incurred as a result of the order or requirement—including any reasonable interest, fees or other amounts payable under the project’s debt financing arrangements during the delay, other delay costs and the D&C Contractor’s reasonable on-site overheads—by:
 - ♦ The Company (other than any amounts payable to a related entity of the Company, the D&C Contractor or a related entity of the D&C Contractor) and, without double-counting,
 - ♦ The D&C Contractor (other than any amounts payable, except on an arms-length, commercial basis, to the Company, a related entity of the Company or a related entity of the D&C Contractor),

but *not* for:

- ♦ Any delay costs if the court order will not or does not prevent the completion of the widening works, apart from minor defects, by 24 December 2014
- ♦ The D&C Contractor’s off-site overheads or profit margins, or
- ♦ Any costs arising from a failure by the Company to mitigate the costs or comply with RMS directions.

This RMS payment will be the Company’s sole right to a payment of money in any way connected with the artefact or the native title claim.

- In some circumstances the renegotiation provisions described in sections 8.1 and/or 8.2 may apply.

If the Company is prevented from carrying out its widening works for more than six months as a result of a direction concerning an artefact by a relevant authority or an order to cease performing its design and construction obligations because of a native title claim, RMS may terminate the M5 West Widening Deed, in its absolute discretion, by giving the Company a written notice to this effect (see section 10.7).

4.9 Other environmental requirements

As already indicated, the Company must comply with the conditions of the widening project’s planning approval—many of which were and are intended to reduce construction-phase environmental impacts—in accordance with an allocation of responsibilities detailed in a schedule to the M5 West Widening Deed (section 4.3), and take specified actions to prevent the removal of or damage to artefacts (section 4.8).

It must also:

- Obtain all other government and local government approvals required for the widening project
- Comply with the requirements of these approvals and all other legal requirements
- Except in the case of the conditions of the widening project’s planning approval for which RMS has accepted responsibility, pay all fees, effect all insurances, provide all bonds and execute any agreements required by any authority concerning any approval for the widening project
- Carry out its widening works in an environmentally responsible manner, so as to protect the environment
- More specifically,
 - ♦ Take all measures necessary to protect people and property, avoid unnecessary interference with the passage of people and vehicles, prevent avoidable nuisances and minimise noise and disturbance
 - ♦ Accept responsibility, on these and other matters, for all the acts and omissions of the D&C Contractor, the employees and subcontractors of the Company and the D&C Contractor, and anyone else for whom they are responsible, in the course of carrying out the Company’s widening works
 - ♦ Engage an “environmental manager” with specified responsibilities, including quarterly certification of the Company’s compliance with environmental standards and RMS’s specifications
 - ♦ Prepare and comply with *Environmental Management Plans*, as detailed in the M5 West Widening Deed’s *Scope of Works and Technical Criteria*, and have its compliance with these plans independently audited, by auditors acceptable to RMS, at least every six months during the design and construction of the widening works.
- Notify RMS immediately of any breach or potential breach of its obligations under the planning approval or any other environment-related legal requirement
- Indemnify RMS from and against any claim or loss if the Company fails to meet its environmental obligations
- Notify RMS immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance by the Company with the planning approval

or other environmental requirements, the Company's use or occupation of any land for the widening project or any damage by the Company to third parties' property, and

- Resolve any such matters as soon as possible and keep detailed records of all such complaints, proceedings, letters of demand, orders and directions and its responses.

RMS must use its best endeavours to assist the Company to obtain any approvals required as prerequisites for the Company's construction activities, but only to the extent that doing so is consistent with RMS's functions, duties and status as a Government agency.

The Company must give the Environmental Representative all the information, documents, access and attendance at meetings it needs (or the Environmental Representative or RMS reasonably requires) to perform its obligations as contemplated by the Deed of Appointment of Environmental Representative. Although the Environmental Representative's appointment under that deed is being funded by the Company, the Environmental Representative must act independently of the Company, RMS, the D&C Contractor and any of their subcontractors, and nothing it does or fails to do will entitle the Company to make any claim against RMS.

4.10 General responsibilities to third parties

The Company's responsibilities to third parties in carrying out the widening works are the same as those it would have if it were the freehold owner of the widening project's construction sites and temporary works areas.

As already described in section 3.5, under the M5 West Widening Deed the Company must indemnify the Minister for Roads and RMS against any claims or losses they incur as a result of any loss, damage, destruction, injury, illness, death or disruption to utility services, any economic loss by a third party and any claim by an owner or occupier of "extra land" caused by or connected with the Company's performance or non-performance of its obligations.

The Company must also, at its own cost, promptly repair any third party property damage caused by or connected in any way with its widening works or a breach of its obligations under the M5 West Widening Deed or for which it is otherwise legally liable, or pay reasonable compensation to the affected person if they agree to this instead. If the Company fails to do so, RMS may carry out these repairs or pay the compensation and recover its costs from the Company as a debt.

RMS may also take urgent action itself if this is required to avoid death, injury, loss or damage, and again recover the costs from the Company as a debt.

4.11 Traffic management during construction and connections with the M5 East and the M7

As already indicated in section 4.5, the Company must undertake its widening works:

- Without disrupting or interfering with the free movement of traffic onto, from, around or on the widening project's construction sites and the motorway's existing "tollroad" and "M5 Western Link", except as expressly permitted by the M5 West Widening Deed and subject to RMS's reasonable directions
- Without causing any unavoidable inconvenience to motorway users, and
- Without closing or materially reducing any connections with the M5 East freeway or the Westlink M7 motorway, except as expressly permitted under the widening project's *Scope of Works and Technical Criteria* and the M5/M7 Interface Deed.

The Company is responsible for controlling, directing and protecting all traffic affected by the widening project, in accordance with detailed requirements set out in the M5 West Widening Deed's *Scope of Works and Technical Criteria*, including a periodically updated *Traffic Management and Safety Plan*, *Traffic Management Plans* as specified in the *Scope of Works and Technical Criteria*, *Road Occupancy Licences* issued by RMS in accordance with the *Scope of Works and Technical Criteria* and any other directions by RMS or other relevant authorities, including the NSW Police Service.

However, before it may interfere with traffic flows on any existing roadway, including local roads, the existing M5 motorway and any completed parts of the widening works, the Company must:

- Give RMS details of the arrangements it proposes and obtain RMS's consent
- Give the public sufficient notice, and
- Prepare any *Traffic Management Plan* required under the *Scope of Works and Technical Criteria* and give it to RMS, along with an application for a *Road Occupancy Licence*, for RMS's review and approval, at least ten business days before the proposed date of the relevant works.

The Company must then carry out these works only in accordance with the *Road Occupancy Licence* issued by RMS and any instructions issued by the police.

RMS and any other relevant authority, including the police, may direct the Company to cease any its widening works and re-open a road lane or shoulder that has been closed, even if the closure is in accordance with a *Road Occupancy Licence*. The police may issue such a direction at any time, while RMS and other authorities must give the Company reasonable notice unless there is an emergency.

Under the *Scope of Works and Technical Requirements* more specific requirements, including requirements for longer notice

periods and other approvals, apply before the Company may undertake any work on the M5 East freeway, as part of its M5 motorway widening works near King Georges Road, and before it may undertake any work on the Westlink M7 motorway, as part of its widening works at the western end of the M5.

The M5/M7 Interface Deed supplements these requirements by more fully setting out reciprocal arrangements between RMS, WSO Co, WestLink and the Company for the connection of the M5's widening works and the M7. These arrangements include:

- An express agreement by WSO Co and WestLink that the Company may connect the M5 West widening project's M5–M7 interface works to the M7
- Acknowledgements by WSO Co and WestLink that these interface works are a “permitted RTA activity” under the main contract between RMS, WSO Co and WestLink for the M7 motorway, and that if RMS performs its obligations under the M5/M7 Interface Deed it will satisfy its obligations to them, under this M7 contract, to coordinate all the interface works and minimise any interference with the operation and use of the M7
- Agreed parameters for the Company's design and construction of the interface works, concerning, among other things, the timing of these works, the maintenance of traffic flows, the prevention of any untolled use of the M7, the coordination of all activities, the provision to WSO Co and WestLink of the Company's design documentation and construction, traffic management and safety plans, the rectification of defects, responses to their comments on these documents, the Company's access to the M7, its reinstatement of the parts of the M7 affected by its works, the provision of surveillance camera feeds, insurance requirements, occupational health and safety requirements and the management of the opening of the interface works
- The Company's liability to pay WSO Co and/or WestLink specified “lane occupancy fees” to compensate them for the effects of traffic disruptions directly caused by the interface works
- A series of indemnities by the Company in favour of WSO Co and WestLink
- The handing over of the completed interface works to WSO Co, and
- The subsequent operation and maintenance of the interface works by WSO Co, in accordance with the main contract for the M7 motorway.

WSO Co and WestLink have agreed that the “lane occupancy fees” payable by the Company and the indemnities provided to them by the Company are their sole remedies against RMS and the Company for any claims or losses they incur in connection with the interface works.

4.12 Design and construction programs, plans, reports, reviews, inspections and administration

An initial *Overall D&C Program* setting out timeframes for the widening project's design and construction activities is annexed to the M5 West Widening Deed. This program must be progressively updated by the Company and supplemented by a series of *Subsidiary D&C Programs*, which must themselves be progressively updated, as set out in *Annexure A* to the M5 West Widening Deed and a documentation schedule appended to that deed's *Scope of Works and Technical Criteria*. These updates must be submitted to RMS and the Independent Verifier.

The Company may choose to accelerate its widening works, but if it does so RMS will not be obliged to assist it to complete the works, apart from minor defects. prior to the “date for construction completion” (currently 24 December 2014), and the times for RMS to carry out its own obligations will not be affected.

Similarly, an initial *Quality Plan, Design Management Plan, Project Management Plan, Construction Plan, Community Involvement Plan, Traffic Management and Safety Plan, Occupational Health, Safety and Rehabilitation Management Plan, Project Training Plan* and *Environmental Management Plan* are appended to the widening project's *Scope of Works and Technical Criteria*, and these “project plans” must be developed, amended and updated by the Company throughout the design and construction of the widening works, again in accordance with detailed requirements specified in *Annexure A* to the M5 West Widening Deed and the *Scope of Works and Technical Criteria*, and submitted to RMS and the Independent Verifier.

RMS may, but need not, review any of these D&C programs and project plans.

RMS may order amendments to or updating of a project plan if it reasonably believes it has not been adequately updated as required or if it otherwise does not comply with the M5 West Widening Deed.

The Company has warranted that each of its “project plans” will be fit for its intended purpose and has undertaken to comply with each updated plan for which RMS has not ordered amendments or further updating.

The Company's compliance with its *Quality Plan, Environmental Management Plans* and *Occupational Health, Safety and Rehabilitation Management Plan* must be independently audited, by auditors acceptable to RMS, at least every six months during the design and construction of the widening works.

To the extent the “project plans” are relevant to the operation, maintenance and repair of the widening works after they are completed and have become part of the motorway's “tollroad” and subject to the Project Deed, these “project plans” must be

incorporated into a *Maintenance Manual* prepared by the Company under the Project Deed (see sections 4.17 and 5.1.1).

The Company must give RMS an *M5 West Widening Industrial Relations Plan* before commencing any of its works, and must resubmit this plan on a monthly basis for RMS implementation reviews, making all relevant industrial relations management records held by the Company, including those of the D&C Contractor and its subcontractors, available to RMS on request.

RMS may, but need not, inspect, review and monitor the works being carried out by the Company, and monitoring and testing of any aspect of this work may be carried out by RMS or the Independent Verifier at any time.

If RMS notifies the Company that the works are not being constructed in accordance with the M5 West Widening Deed, the Company must correct this non-compliance unless it notifies RMS within five business days that it disagrees with RMS's notice, in which case RMS and the Company must attempt to resolve the matter. If they cannot do so within five business days, either may refer the matter for determination by the Independent Verifier within the following five business days, and the Independent Verifier may in turn refer the matter for determination under the M5 West Widening Deed's dispute resolution procedures, as described in section 7.12.

The Company must promptly give RMS any documentation or other information RMS requires concerning its administration and performance of the "M5 West widening" works, including but not limited to the "agency works" being paid for by RMS.

In addition, and more specifically, *Annexure A* to the M5 West Widening Deed sets arrangements for:

- Fortnightly site meetings between representatives of RMS, the Company and representatives of others, including the D&C Contractor and its subcontractors, as required by RMS
- Regular reporting by the Company to RMS, as specified in the documentation schedule appended to the *Scope of Works and Technical Criteria*
- At least monthly meetings of a Project Review Group, and monthly or otherwise agreed meetings of a smaller, higher-level Project Control Group, to review the progress of the widening works and, in the latter case, assist in resolving any special matters referred by any of the parties, and
- The Company to notify RMS of any claims against RMS and the bases for any such claims.

It also sets out obligations on the Company to obtain and pay for all the water, sewerage, drainage, power, communications and similar services required for the widening project, provide security measures to protect its sites and works, implement specified occupational health and safety measures and comply with its obligations under the M5 West Widening Deed of Engagement of Principal Contractor, give preference to Australian and New Zealand goods and services, comply with specified training guidelines and requirements, implement specified construction industry codes and other employee relations requirements, carry out specified community liaison

programs and activities, provide written reports on all accidents on or near their worksites, carry out its "property works" and obtain certification of these works, and erect only specified types of signs.

4.13 Quality assurance and verification

The Company has assumed all responsibility for the quality and durability of its widening designs and works.

It must implement a quality system for all of these design and construction activities and works as specified in the M5 West Widening Deed's *Scope of Works and Technical Criteria*, including the development and implementation of a *Quality Plan*, and must appoint a Quality Manager to independently certify and report on the integrity and effectiveness of this quality system. As already indicated, the Company's compliance with its *Quality Plan* must be independently audited, by an auditor acceptable to RMS, at least every six months during the design and construction of the widening works. Procedures for the correction of non-conformances are set out in the *Scope of Works and Technical Criteria* and must be included in the *Quality Plan*.

The Independent Verifier—which has been engaged under the Deed of Appointment of Independent Verifier at the Company's cost, but is obliged to act independently of RMS, the Company, the D&C Contractor and any other subcontractors—must:

- Verify that the widening works comply with the requirements of the M5 West Widening Deed
- Make a series of binding determinations, as set out in the M5 West Widening Deed and listed in a schedule to the Deed of Appointment of Independent Verifier, and
- Undertake other design and construction review, certification and reporting responsibilities as listed in the schedule to the Deed of Appointment of Independent Verifier.

The Independent Verifier has acknowledged that RMS and the Company will be relying on its skills and expertise, and warranted that it will 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 highway engineering works in particular.

Any failure by the Independent Verifier, RMS or anyone engaged by RMS to detect any defect in the works, including any failures resulting from negligence, will not relieve the Company of any of its obligations or liabilities under the M5 West Widening Deed.

4.14 Subcontracting

As already indicated, to assist it in satisfying its design and construction obligations under *Annexure A* to the M5 West Widening Deed the Company has appointed the D&C Contractor to carry out specified design and construction tasks under the M5 West Widening Design and Construction Contract dated 19 June 2012.

This engagement of the D&C Contractor does not limit or otherwise affect the obligations and liabilities of the Company to the Minister for Roads and RMS under the M5 West Widening Deed, and the Company is liable to RMS for the acts and omissions of the D&C Contractor, its subcontractors and their employees and agents as if these were acts or omissions by the Company.

The Company must:

- Notify RMS of any proposed or executed contract concerning its work on the widening project with a contract sum of more than \$500,000
- If requested, give RMS a copy of any such contract with a contract sum of more than \$20 million and access to any other such contract for a lesser sum, including all of the contract's plans, specifications and drawings but without having to include any commercially sensitive information
- Ensure the D&C Contractor's subcontractors for specified types of work are pre-qualified or registered with RMS, and
- Ensure that the D&C Contractor's subcontracts include provisions for the novation of these subcontracts to RMS or the termination of these subcontracts by the D&C Contractor if the M5 West Widening Deed is terminated for an extended delay resulting from "migratory contamination", the discovery of an artefact or a native title claim (see sections 4.7 and 4.8 above and section 10.7 below) or for an "event of default" as defined in the M5 West Widening Deed (see sections 10.2 to 10.7).

4.15 Payments between RMS and the Company

As already indicated, under the M5 West Widening Deed RMS must pay the Company:

- Up to \$34,290,459 in total (excluding GST) for the "agency works" described in section 4.1
- A specified (but "commercial in confidence") amount to cover Interlink's cost escalations between 1 April 2011 and 25 June 2012, and
- \$730,125 (excluding GST) for specified additional costs arising from the widening project's planning approval conditions.

If RMS fails to make any of these payments the Minister for Roads must make the payment.

Conversely, on 25 June 2012 the Company had to and did pay RMS \$5,236,912.65 (excluding GST) to cover payments previously made to the Company by the RTA following the cessation of earlier negotiations on the widening of the motorway.

4.16 Loss or damage to and insurance of the widening works

The Company bears the risk of loss or damage to the widening project's works at all times.

The Company has had to effect and must maintain (or cause to be effected and maintained) the following insurance policies:

- Contract works or construction risks insurance, covering the widening works (including the temporary works) and existing improvements on (and everything else brought onto) the construction sites and temporary work areas, plus materials stored elsewhere for incorporation into the widening works, for risks as reasonably required by RMS and as described in an annexure to the M5 West Widening Deed, until the "final completion" of the widening works (section 4.17), with the sum insured being at least the full reinstatement or replacement value of the insured property plus amounts to cover demolition and debris removal costs, fees for project managers and other consultants and the costs of expediting repairs
- Transit insurance, until the final completion of the widening works
- Public and products liability insurance, for at least \$100 million for each public liability occurrence and for at least \$100 million per occurrence and \$100 million per year in total for products liability, until the end of the last defects correction period (see section 4.18 below)
- Professional indemnity insurance for at least \$50 million per claim, until seven years after the end of the last defects correction period
- Workers' compensation insurance, until the end of the last defects correction period
- Motor vehicle third party property damage insurance, for at least \$20 million per claim and with no aggregate limit, until the end of the last defects correction period
- Advance consequential loss or delay-in-startup insurance, covering 24 months of losses of anticipated additional revenue from the widening project, until the final completion of the widening works, and
- Directors' and officers' liability insurance for at least \$10 million per occurrence and \$10 million per year in total, until the seven years after the completion of the works apart from minor defects.

All of these insurance policies had to and must be with insurers with a specified minimum claims paying ability rating and comply with terms set out in the M5 West Widening Deed or otherwise approved by RMS. Procedural requirements are also set out in the M5 West Widening Deed.

If the Company fails to effect or maintain any of the required policies or pay any premium, RMS may do so instead and recover its costs from the Company as a debt.

The Company must use its best endeavours to ensure the D&C Contractor and all subcontractors and agents of the Company and the D&C Contractor effect and maintain equivalent insurance policies, as appropriate to the nature of the services or work performed.

If there is any loss or damage to any part of the widening works the Company must promptly make good the loss or damage. In doing so it must:

- After a reasonable time for inspections by the insurers, immediately start clearing any debris and carrying out initial repairs
- Promptly consult with RMS and take all steps necessary to promptly repair or replace the loss or damage in order to minimise disruption to the widening project and, as much as possible, continue to comply with its obligations under the widening project's contracts
- Minimise the impacts of these activities on the widening works
- Coordinate the repair and reinstatement of the widening works with the repair and reinstatement of any damage to the motorway's existing "tollroad" (see section 5.5 below; there is no equivalent requirement for coordination with the Company's repair and reinstatement of any damage to the motorway's existing "M5 Western Link"), and
- Keep RMS fully informed of progress.

All of the insurance proceeds received under the widening project's insurance policies, if any, must be applied to the repair and reinstatement of the widening works.

If there has been an "uninsurable event",* as defined in the M5 West Widening Deed, in some circumstances the renegotiation provisions described in section 8.2 may apply.

* "Uninsurable events", as defined in the M5 West Widening Deed, include any war, invasion, act of a foreign enemy, hostility between nations, civil insurrection, military coup, radioactive contamination (from nuclear waste or the combustion of nuclear fuel) or confiscation, nationalisation, requisition or property damage under the order of any government or semi-government authority which is beyond the reasonable control of (and not caused by) the Company, the D&C Contractor and any of their subcontractors and which causes the Company to be unable to perform its obligations under the M5 West Widening Deed, *provided* this effect could not have been prevented or avoided by the Company, the D&C Contractor or their subcontractors by their taking the steps a prudent, experienced and competent concessionaire, designer or constructor would have taken.

"Uninsurable events" also include any other unanticipated physical event which:

- Is beyond the reasonable control of the Company or its contractors and which could not have been prevented or avoided by their taking the steps a prudent, experienced and competent concessionaire, designer or constructor of tollroads would have taken, including the exercise of reasonable care
- Is not an exercise by RMS of any of its statutory functions or powers, and
- Directly results in a loss connected with a physical loss of or damage to the "M5 West widening works" (see section 4.1)

and for which:

- Insurance is not available from insurers in the Australian and London insurance markets at that time with a claim paying ability rating of at least 'A-' by Standard & Poor's (Australia) Pty Ltd or an equivalent rating by another recognised insurance rating agency, *or*
- Insurance is available from such insurers, but only on terms which, in the opinion of an independent insurance broker acceptable to the Minister for Roads, RMS and the Company, mean prudent, experienced and competent concessionaires, designers and constructors of tollroads in the Australian and London insurance markets are generally not insuring against the event, and the Company has not insured against the event, *or*
- The loss suffered by the Company exceeds the amount recoverable (after deductibles) under any of the Company's insurance policies

provided:

- The event is not caused by a breach of the M5 West Widening Deed or any other contract by the Company or its contractors
- The event is not caused by any negligence by the Company, its contractors or their agents or employees, and
- If there *is* any insurance,
 - ♦ Any non-response of the insurance to the event did not arise because of an act or omission (including a breach of the insurance policy or negligence) by the Company or its contractors
 - ♦ The insurer has not failed to pay because it was insolvent, and
 - ♦ The Company did not under-insure (*regardless* of whether it complied with the insurance liability limit requirements of *Annexure A* to the M5 West Widening Deed).

4.17 Completion of the widening works

As already indicated, the Company must use its best endeavours to:

- Achieve "**construction completion**"—the certification of (among other things) its completion of all the widening works apart from minor defects—by 24 December 2014, and
- Achieve the certification of "**final completion**" of the widening works by 24 March 2015.

If the Company becomes aware of any matter which will or might delay "construction completion" or "final completion" beyond the relevant date, it must immediately notify RMS of this in writing, providing details and a proposed corrective action plan involving, for example, changes to construction sequencing or methodologies. The Company must also give RMS a proposed corrective action plan if RMS notifies it that RMS believes the Company will not meet these deadlines.

RMS then has five business days to notify the Company if it is not satisfied this plan will mitigate the effects of the delay. If it does so, an amended plan must be submitted. If it does not, the Company must implement the plan.

The Company must prepare and give RMS and the Independent Verifier "as constructed" documentation, construction completion reports and pavement reports as specified in the documentation schedule appended to the M5 West Widening Deed's *Scope of Works and Technical Criteria*.

The M5 West Widening Deed sets out procedures for the advance notification of estimated "construction completion" and "final completion" dates and the formal certification of

“construction completion” and “final completion” by the Independent Verifier.

Pre-conditions applying in each case, including the provision of copies of approvals, reports and other documents, are specified in a schedule to *Annexure A* to the M5 West Widening Deed. In addition, before “construction completion” may be certified:

- The Company must give RMS an unconditional \$1,555,000 bank guarantee in favour of RMS, in a form specified in another schedule to *Annexure A*, as a security for its performance of its obligations to correct defects in the completed widening works, as described below, and
- The Company must update the *Maintenance Manual* which applies for the operation, maintenance and repair of the “tollroad” component of the motorway under the Project Deed to incorporate the maintenance tasks associated with the “M5 West widening” component of the “M5 West widening works” (section 4.1).

(As already indicated, the “M5 West widening”, including the “agency works” funded by RMS, plus the widening project’s “property works” and its new surfaces on the existing pavements of the current “tollroad” and the “M5 Western Link”, will all become part of this defined “tollroad” on the date of “construction completion”.)

The “M5 West widening” may not be opened for public use prior to the date of “construction completion”, except as expressly contemplated in the widening project’s *Scope of Works and Technical Criteria*, but the Company must open it to the public for “the safe, efficient and continuous passage of vehicles” as soon as practicable after “construction completion”.

4.18 Correction of defects

The Company must correct all defects existing at the time of certification of “construction completion” of the widening works as soon as practicable.

In addition, during “defects correction periods” which are specified in the M5 West Widening Deed the Company must correct all defects in the “M5 West widening works” (section 4.1) notified by RMS, within reasonable times specified by RMS.

These “defects correction periods” are:

- For “M5 West widening” itself (i.e. the works widening the motorway) the period *from* the date of “construction completion” *until* 12 months after “final completion” (and also, for each new defect notified by RMS and corrected, the period ending 12 months after the completion of the correction)
- For each discrete part of the “local road works”, the period *from* the date on which the Independent Verifier notifies RMS and the Company that the work has been completed (provided the relevant local authority has also notified its satisfaction that the work has been completed, unless RMS waives this prerequisite) *until* two years after “construction completion” (and also, for each new defect notified by RMS

and corrected, the period ending two years after the completion of the correction)

- For each discrete part of the “service works”, the period *from* the date on which RMS and the Independent Verifier are given a copy of a notice by the relevant authority that the work has been completed *until* 12 months after “construction completion” (and also, for each new defect notified by RMS and corrected, the period ending 12 months after the completion of the correction), and
- For each discrete part of the “property works”, the period *from* the later of (a) the date on which this part of the works was completed and (b) the date on which the relevant certification is submitted to RMS and the Independent Verifier *until* 12 months after “final completion” (and also, for each new defect notified by RMS and corrected, the period ending 12 months after the completion of the correction).

If the Company disagrees with an RMS direction to carry out corrective works, it must notify RMS of this, in writing, within ten business days, and RMS and the Company must reasonably attempt to resolve their differences. If they cannot do so within ten business days of the notification, either may refer the matter for final, binding determination by the Independent Verifier, which must make its determination within ten business days of this referral.

If the Company fails to comply with an RMS direction to carry out corrective works, RMS may employ others to carry out these works and recover its costs and other losses from the Company as a debt.

The Company must not allow any use of any part of the widening works which it knows to be defective or unsafe, and must promptly notify RMS of this situation.

RMS may have recourse to the unconditional bank guarantee provided to RMS as a security for the Company’s performance of its defects correction obligations even if there is a dispute between RMS and the Company about the Company’s performance, but RMS may demand no more than \$777,500 during each 12-month period following its receipt of this security.

Subject to any such recourse to the guarantee, RMS must release this undertaking 20 business days after the later of:

- The date of expiry of the last of the defect correction periods, and
- The date on which RMS has received releases signed by the owners and occupiers of all “extra land” parcels used by the Company (section 4.6) and by others with an interest in this “extra land”, releasing RMS from all claims and demands against RMS (or, in the case of all failures or refusals by the owners, occupiers or others to sign such a release, written statements confirming this from the Company).

As described in section 5.1 below, the Company has ongoing obligations to repair defects throughout the operating term of the motorway.

5 Operation, maintenance and repair of the motorway

This section 5 summarises the principal contract provisions governing the operation, maintenance and repair of the M5 motorway's:

- “Tollroad”, which is currently confined to the section of the motorway between King Georges Road and just east of the westernmost Georges River crossing and currently is and will continue to be subject to the operation, maintenance and repair provisions of the Project Deed (see section 2.2.1 and *Figure 2.2*), and
- “M5 Western Link”, between the Hume Highway at Casula and the western end of the motorway in Prestons, which currently is and will continue to be subject to the separate operation, maintenance and repair provisions of the M5 Western Link Project Deed (see sections 2.2.2 and *Figure 2.2*).

As already indicated in section 4.17, from the date of “construction completion” of the 2012–15 motorway widening works—in other words, once these widening works have been certified as having been completed apart from minor defects—the Project Deed’s definition of the “tollroad” will be expanded to also encompass:

- The “M5 West widening” itself, as defined in the M5 West Widening Deed (i.e. the works which by then will have widened the motorway as broadly described in section 1.2.13 and *Figure 1.3*, including the new and augmented noise wall components and other “agency works” funded by RMS)
- The widening project’s “property works”, and
- The widening project’s new surfaces on the existing pavements of both the current “tollroad” and the “M5 Western Link”

but not the widening project’s “local road works”, “service works” or “temporary works” (section 4.1).

Accordingly, from that date these widening components of the motorway will become subject to the operation, maintenance and repair provisions of the Project Deed, while the existing “M5 Western Link” components of the motorway—often immediate adjacent to and physically integrated with the new “tollroad” elements along this section of the motorway—will continue to be governed by the M5 Western Link Project Deed (see *Figure 2.2*).

5.1 The Company’s general operation, maintenance and repair obligations

5.1.1 Overview of principal obligations

As already partly described in section 3.2, the Company’s principal obligations concerning the operation, maintenance and repair of the M5 motorway are:

- Under the Project Deed, to operate, maintain and repair the motorway components which fall within the Project Deed’s definition of “the tollroad” until the end of the Project Deed’s term—which is currently 22 August 2023 but which will be extended to 10 December 2026, or a later date in specified circumstances described in sections 4.2 and 4.3, once the “M5 West widening works” are completed, apart from minor defects—or any earlier termination of the Project Deed, in accordance with:
 - ♦ Detailed requirements set out in a *Scope of Works and Design Criteria* document exhibited to the Project Deed, which:
 - Has been updated and amended in other ways by the F–5 Tollroad Amendment Deed (Tolled Ramps and Wattle Grove Noise Barriers) of 3 November 1994, the F–5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997 and the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, in line with changes in relevant technical standards and the projects to develop the motorway described in sections 1.2.4, 1.2.6 and 1.2.10
 - Will be amended again when “M5 West widening works” are completed, apart from minor defects, so that it will extend to the operation, maintenance and repair of these additional M5 West widening components of the “tollroad” from that date, and also so as to add requirements for the resurfacing of the “tollroad” during the last three years of the term of the Project Deed, and
 - More generally, may be amended only with the consent of the debt financiers’ Security Trustee

- ♦ An operation, maintenance and repair manual (“**the Maintenance Manual**”), which:
 - Had to be prepared by the Company, prior to the opening of the original “tollroad”, in accordance with the Project Deed’s *Scope of Works and Design Criteria* and to the reasonable satisfaction of the RTA
 - Has had to be updated in line with the development of the motorway, and
 - As already indicated, must be amended again before “M5 West widening works” are completed, apart from minor defects, so as to address the maintenance of these new components of the “tollroad”
- ♦ Requirements in the Project Deed for compliance by the Company with conditions of the motorway’s original (1986 and 1991) planning approvals and associated environmental assessment reports (section 1.2.2), the 1997 planning approval for the M5 East and the M5 King Georges Road to Fairford Road widening works (section 1.2.6), the 1998 planning approval for the east-facing ramps at The River Road (section 1.2.6) and the 2002 planning approval for the Moorebank Avenue interchange works (section 1.2.10) that were identified in those approvals as being the Company’s responsibility
- ♦ From the completion of the “M5 West widening works”, apart from minor defects, requirements under the Project Deed and the M5 West Widening Deed for ongoing compliance by the Company with two conditions of the November 2011 planning approval for the widening project, concerning operational monitoring and performance audits (RMS has similar specific obligations to comply with seven of these planning approval conditions), and
- ♦ More generally, the lawful requirements of all relevant government, local government and statutory authorities.
- Under the M5 Western Link Project Deed, to operate, maintain and repair the motorway’s “M5 Western Link” until the end of the M5 Western Link Project Deed’s term—which is currently 22 August 2023 but which will be extended to 10 December 2026, or a later date in the specified circumstances described in sections 4.2 and 4.3, once the “M5 West widening” works are completed, apart from minor defects—or any earlier termination of the M5 Western Link Project Deed, in accordance with:
 - ♦ Requirements set out in an *M5 Western Link Scope of Works and Design Criteria* document exhibited to the M5 Western Link Project Deed, which:
 - Unlike the Project Deed’s *Scope of Works and Design Criteria*, has not been updated or otherwise amended since it became effective in 1993
 - Will, however, be amended when the “M5 West widening works” are completed, apart from minor defects, so as to add requirements for the resurfacing of the “M5 Western Link” during the last three years of the term of the M5 Western Link Project Deed, and
 - More generally, may be amended only with the consent of the debt financiers’ Security Trustee
 - ♦ An operation, maintenance and repair manual (“the *Western Link Maintenance Manual*”), which:
 - Had to be prepared by the Company, prior to the opening of the “M5 Western Link”, in accordance with the *Western Link Scope of Works and Design Criteria* and to the reasonable satisfaction of the RTA
 - Has not had to be updated or otherwise amended since then, and
 - Will not have to be amended before “M5 West widening works” are completed
 - ♦ Requirements in the M5 Western Link Project Deed for compliance by the Company with all the conditions of the M5 Western Link’s 1993 planning approval (section 1.2.3) that were identified in that approval as being the Company’s responsibility, and
 - ♦ More generally, the lawful requirements of all relevant government, local government and statutory authorities.
- To comply with its obligations under the Lease, the Moorebank Avenue Lease and the M5 Western Link Lease during the terms of these leases (see section 5.2)
- To accept the Bridge Works Lease once the “M5 West widening” works are completed, except for minor defects, and comply with the Company’s obligations under this lease during the term of this lease (see section 5.2)
- At the end of the terms of the Project Deed, the M5 Western Link Project Deed and the leases, or upon any earlier termination of these contracts, to surrender the “tollroad” (as defined in the Project Deed), the M5 Western Link’s fixtures and all plant, machinery, equipment, fixtures, fittings and other improvements on the “tollroad” and its land to RMS, in a condition consistent with the Company’s maintenance and repair obligations and without any RMS payment or compensation to the Company, and
- In specified circumstances, to share a portion of its toll revenues with RMS under arrangements set out in the Project Deed (see sections 6.2 and 6.3).

5.1.2 Traffic obligations

The Company must keep both the “tollroad” and the “M5 Western Link” open to traffic unless RMS otherwise agrees in

writing or unless it is necessary to close part or all of the “tollroad” and/or the “M5 Western Link”:

- Because of an emergency or the requirements of a relevant government authority, or
- Prior to the completion of the “M5 West widening” works, as permitted under the M5 West Widening Deed’s traffic management arrangements (see section 4.11).

However, the Company must not allow members of the public to access or use any part of the motorway which it knows to have become defective, unsafe, weakened, in need of repair or faulty in any way that threatens public health or safety.

If the Company believes it is reasonably necessary to interfere with traffic flows on any roadways for the purposes of maintaining or repairing the motorway, it must give RMS reasonable prior written notice, detailing the traffic modifications, diversions, controls and other arrangements proposed, and obtain the consent of all other relevant authorities to these arrangements. It may then make all of these arrangements and will be responsible for implementing them while the maintenance or repair work is being performed.

5.1.3 Other obligations

The Company’s operation, maintenance and repair obligations under the Project Deed and the M5 Western Link Project Deed also include:

- The maintenance of specified accounts with sufficient balances at all times for periodic maintenance expenditures and expenditures on capital works on the motorway (other than the design and construction of the “M5 West widening” works, which as already discussed are subject to separate arrangements)
- At least monthly inspections by the Company to determine the motorway’s state of repair
- The provision of detailed written reports to RMS if the Company becomes aware of any serious damage, defects or disrepair that is likely to cause a serious danger, risk or hazard to the motorway or any person on the motorway or its land, with detailed information on the remedial actions taken and/or proposed by the Company and the estimated time the remedy will require
- The provision of detailed written reports to RMS if the Company becomes aware of any accident involving personal injury, submitted promptly after the Company has implemented any appropriate actions at the accident site
- The prompt notification of relevant government authorities if the Company becomes aware of any “riotous, disorderly, offensive or improper” conduct or any unlawful act on the motorway or its land
- The obtaining of approvals from RMS and any other relevant authorities before erecting any signs on nearby roads indicating the availability and accessibility of the M5

motorway or erecting any advertising or display signs or other advertising materials on the motorway or its land

- Compliance, within a reasonable time, with any RMS directions to remedy any defect, damage or disrepair (*other than* any defect, damage or disrepair on the existing “tollroad” that is permitted or contemplated for the construction of the “M5 West widening” works under the M5 West Widening Deed), followed by a written report to RMS on the steps taken by the Company
- Six-monthly reports to RMS, for each of the “tollroad” and the “M5 Western Link”, on all of the Company’s maintenance and repair activities, with reasonable details on the materials and procedures used, and
- In accordance with amendments to the Project Deed’s *Scope of Works and Design Criteria* and the M5 Western Link Project Deed’s *Scope of Works and Design Criteria* introduced by the M5 West Widening Deed and taking effect once “construction completion” of the “M5 West widening” works has been achieved (section 4.17), resurfacing of the entire motorway during the last three years of the concession period unless RMS agrees otherwise, in response to a Company proposal setting out other options, including the application of new technologies, that would produce the same “performance outcome”. If the Company submits such a proposal RMS must consider it and negotiate in good faith, without seeking any commercial or financial advantage, provided the motorway’s performance standards would remain the same or be improved.

In addition to these arrangements under the Project Deed and the M5 Western Link Project Deed,

- The WSO/M5 Interface Agreement of 14 December 2002 and the M5/M7 Interface Deed of 19 June 2012 set out arrangements for managing the operation, maintenance and repair of the interfaces between the M5 motorway and the Westlink M7 motorway in Prestons, including reciprocal licences for the Company, WSO Co and Westlink to access the land the others are leasing from RMS and reciprocal arrangements for the maintenance and repair of any sections of these two motorways located on the land leased for the other motorway, and
- The Electronic Tolling MoU sets out detailed interoperability, privacy and administrative requirements for the M5 and other motorways’ electronic tolling systems.

The Electronic Tolling MoU is supported by a series of “roaming agreements” between the individual parties to the Electronic Tolling MoU and between these parties and the Company, as one of the four organisations issuing electronic transponder “tags” in Sydney (the others are RMS, Tollaustr and Roam Tolling).

The terms of the Electronic Tolling MoU and the roaming agreements are subject to contractual confidentiality provisions.

5.1.4 Interactions with RMS

RMS may access and inspect the motorway and its land at any time, provided it causes no unnecessary inconvenience to the Company or motorway users.

If RMS considers there is a threat to the safety of motorway users or other members of the public it may take any action it considers appropriate, after notifying the Company. In doing so RMS and its engineers, agents, contractors and workforce may enter onto and remain on any part or all of the motorway and its land. RMS may recover any expenses it incurs from the Company, and the Company must indemnify RMS against any damage, loss or liability it incurs in taking this action, apart from any caused by any negligence or wilful default by RMS.

The Company must give RMS copies of all proposed and executed contracts concerning the operation, maintenance and repair of the motorway, along with all related plans, drawings and specifications, and must ensure these contracts include provisions granting RMS and its agents the right to access the motorway to monitor the performance of the Company's obligations or to do something the Company has failed to do, in breach of its obligations under the Project Deed and/or the M5 Western Link Project Deed.

5.2 The leases

As already described in section 2.2.4, RMS and the Company have entered into:

- Two leases of the existing "tollroad's" land:
 - ♦ The Lease, dated 21 February 1995 and executed in accordance with leasing arrangements set out in the Project Deed, and
 - ♦ The Moorebank Avenue Lease, dated 4 April 2012 and executed in accordance with leasing arrangements set out in the Project Deed and the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works), and
- One lease over the "M5 Western Link's" land, the M5 Western Link Lease, executed on 14 June 2004 in accordance with leasing arrangements set out in the M5 Western Link Project Deed.

The terms of all three of these leases currently end on 22 August 2023, but under the M5 West Widening Deed these terms will be extended, upon the completion of the 2012–15 "M5 West widening" works except for minor defects, to end on 10 December 2026 or on a later date in specified circumstances as summarised in sections 4.2, 4.3, 5.3 and 8.

The rents payable by the Company to RMS are \$1,000 per year under each of the leases.

Again as already described in section 2.2.4, once the "M5 West widening" works have been completed, except for minor defects, RMS must grant the Company a further lease, the Bridge Works Lease, over specified land required for the widening of the motorway's bridges over Queen Street and

Nuwarra Road (*Figure 1.3*). The term of this lease, the form of which must be as set out in an attachment to a new Schedule added to the Project Deed by the M5 West Widening Deed, is to end on 10 December 2026 or on a later date in specified circumstances as summarised in sections 4.2, 4.3, 5.3 and 8.

The rent payable by the Company to RMS under this new lease will be \$100 per year.

The Project Deed sets out arrangements for the completion and registration of the Bridge Works Lease as soon as practicable. Until this lease is executed and delivered to RMS by the Company, RMS and the Company will be bound by the terms of the form of the lease attached to the schedule to the Project Deed as if this lease had been executed on the date the "M5 West widening" works have been certified as completed except for minor defects.

5.3 Tolls

The existing motorway is a "tollway" under section 52 of the Roads Act 1993 (NSW), as a result of:

- A declaration by the then Minister for Roads, Mr Wal Murray, on 22 February 1991, that specified works and proposed works between King Georges Road and Moorebank Avenue were "toll works" under section 46 of the Roads Act 1986 (any "toll work" automatically became a "tollway" under section 52 of the Roads Act 1993 when that Act commenced, in accordance with clause 18 of Schedule 2 to the Roads Act 1993)
- A further declaration by the then Minister for Roads, Mr Murray, on 6 August 1992, that specified works and proposed works between King Georges Road and Moorebank Avenue were "toll works" under section 46 of the Roads Act 1986
- A declaration by the then Minister for Roads, Ms Anne Cohen, on 28 June 1993, that specified proposed "M5 Western Link" works between the Main Southern Railway in Liverpool and Campbelltown Road in Glenfield were "toll works" under section 46 of the Roads Act 1986
- A declaration by the then Minister for Roads, Mr Eric Roozendaal, on 8 August 1998, that specified "Moorebank Avenue interchange" land was now a "tollway" under section 52 of the Roads Act 1993
- A declaration by the then Minister for Roads, Mr David Campbell, on 13 November 2009, that a specified part of the "tollway" in Moorebank, as declared in 1991 and 1992, was now a public road (and thus no longer a "tollway") and that specified additional land in Moorebank was now a "tollway" under section 52 of the Roads Act 1993, and
- A declaration by the then Minister for Roads, Mr David Borger, on 17 December 2010, that specified part of the M5 Western Link "tollway" in Casula, as declared in 1993, were now no longer a "tollway" and were instead a public road.

The Minister for Roads and RMS must ensure that the first declarations of the motorway's defined "tollroad" and the "M5

Western Link” as “tollways” under section 52 of the Roads Act 1993 remain in full force until the end of the motorway’s concession term.

The Company may levy tolls on users of the motorway’s “tollroad”, *apart from* the Moorebank Avenue interchange and the section of the “tollroad” between Heathcote Road and the western Georges River crossing, at rates specified in a *Calculation of Tolls* schedule to the Project Deed.

Under this *Calculation of Tolls* schedule, different tolls may be levied for “cars” and “trucks”. These terms are not defined in the Project Deed, but in practice the Company has taken “cars” to mean vehicles with two axles that are less than 2.8 metres high and vehicles with three axles that are less than 2 metres high and has taken “trucks” to mean all other vehicles.

The toll for “cars”—excluding GST, about which the Project Deed and its *Calculation of Tolls* schedule are currently silent*—may be no higher than an amount calculated by:

- Adjusting a specified “base toll” of \$2.50 for “cars” in line with quarterly movements since 31 March 1996 in the Consumer Price Index for Sydney, and rounding the result to the nearest two decimal places in order to calculate a so-called “theoretical toll” for each quarter for “cars”, and then
- Rounding this “theoretical toll” to the nearest 50 cents.

For example, after 31 March 1996 there could be no toll increase for “cars” until the “theoretical toll” for “cars” had reached \$2.75, at which time the maximum permissible toll for “cars” increased to \$3.00. The actual toll could then be no higher than this until the “theoretical toll” reached \$3.25, at which time the maximum permissible toll for “cars” increased to \$3.50, and so on.

The toll for “trucks”, again excluding GST,* may currently be no higher than an amount calculated by:

- Adjusting a specified “base toll” of \$5.00 for “trucks” in line with quarterly movements since 30 June 1994 in the Consumer Price Index for Sydney, and rounding the result to the nearest two decimal places in order to calculate a so-called “theoretical toll” for each quarter for “trucks”, and then
- Rounding this “theoretical toll” to the nearest 50 cents.

From the first quarter after the quarter in which “construction completion” of the “M5 west widening” works is achieved (i.e. these works are certified as having been completed, except for minor defects), the method of calculating the “theoretical toll” for each quarter for “trucks” will be changed over a two-year period, so that:

- For the first quarter during this period the “theoretical toll” for “trucks” will be calculated by multiplying the “theoretical toll” for “cars” for the same quarter (after rounding of that “theoretical toll” to the nearest two decimal places) by 2.269375 and then rounding the result to the nearest two decimal places
- For each of the following quarters this multiplication factor will be increased by 0.104375, so that during the second quarter of the two-year period (for example) it will be 2.37375 and during the eighth it will be exactly 3, and
- From then on, the “theoretical toll” for “trucks” will be calculated by multiplying the “theoretical toll” for “cars” for the same quarter by 3 and then rounding the result to the nearest two decimal places.

The maximum permitted toll for “trucks”, excluding GST, will then be the “theoretical toll” for the relevant quarter, calculated in this way, rounded to the nearest 50 cents.

If the Company wishes to increase the “car” and/or “truck” tolls it actually charges because they are below the permitted tolls, it must either give RMS at least four weeks’ notice of the possible change(s) and then formally notify RMS of the change(s), or give RMS only this formal notification and then wait four weeks, unless RMS agrees otherwise, before implementing the change(s).

The Company may levy tolls only at the main toll plaza in Hammondville, at toll plazas on east-facing ramps (*Figures 1.1 and 1.3*) or at other location(s) agreed between the Minister for Roads, RMS and the Company.

It may introduce full cashless tolling at any time, provided this is agreed in writing with RMS and amendments are made to the Project Deed’s *Scope of Works and Design Criteria*, with the consent of the debt financiers’ Security Trustee, to incorporate this cashless tolling. The Company has expressly accepted all

* The use of a private tollway constitutes a “taxable supply” under the terms of the Commonwealth legislation for the Goods and Services Tax (GST), which took effect from 1 July 2000. In contrast to the contractual arrangements for later motorways, there are currently no provisions in the *Calculation of Tolls* schedule, or elsewhere in the Project Deed, for the permissible tolls to be increased as a result of the introduction of a GST or equivalent tax. However, in a letter to the Company dated 26 May 2000, the RTA:

- “Noted” that the RTA had no role in determining or approving increases in the Company’s toll charges to account for GST
- “Noted” proposals which had been made by the Company to increase tolls as a result of the introduction of the GST
- Stressed the need for the Company to comply with the relevant provisions of the Trade Practices Act and guidelines issued by the Australian Competition and Consumer Commission, and
- Advised that if a toll increase as a result of the GST required amendments to the M5 motorway’s project documentation, or other written confirmation from the RTA, the RTA would be prepared to “review any terms that the Company issued”.

The Company has incorporated the GST in the M5 motorway tolls it has charged motorway users since 1 July 2000.

From the date of “construction completion” of the “M5 West widening” works (section 4.17) the Project Deed will be amended to make it clear that unless otherwise expressly indicated, any amount payable for any GST “taxable supply” provided by RMS, the Minister for Roads or the Company in connection with the Project Deed is exclusive of GST, so GST must be added to this amount. This new provision will apply directly to the tolls payable to the Company by users of the motorway.

the risks associated with introducing cashless tolling, including all implementation, cost and revenue risks.

If a court issues an injunction preventing the Company from levying, collecting or retaining tolls on the ground that this may be unlawful, either at all or without the consent of a government authority, the motorway's concession term must be extended by the period necessary to compensate the Company for the financial impact which it establishes, to RMS's reasonable satisfaction, is or will be imposed on the Company by the injunction.

Similarly, if a court makes a final determination, not subject to appeal, requiring the Company to obtain the consent of an authority for the levying, collection or retention of tolls, and the Company obtains this consent, the motorway's concession term must be extended by the period necessary to compensate the Company for the financial impact which it establishes, to RMS's reasonable satisfaction, is or will be imposed on the Company by the need to obtain the consent and comply with any conditions attached to the consent.

In some circumstances a court injunction or final determination of the types described above may also entitle the Company to terminate the Project Deed and the M5 Western Link Project Deed, and consequently also terminate the leases and the M5 West Widening Deed, under arrangements described in section 9.3 of this report.

5.4 Service centres

The Company may grant third parties the right to provide service centre(s), serving both eastbound and westbound motorway users, on the motorway land, other than the land to be leased under the Bridge Works Lease, provided it obtains RMS's prior written consent, which may not be unreasonably withheld or delayed, and provided it complies with the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease and the requirements of all relevant government and local government authorities.

In deciding whether to give its consent, RMS may consider, among other things,

- Relevant policies of the NSW Government, RMS and local government authorities in relation to service centres and the rights the Company proposes to grant, including the types and range of services the centre would offer and the extent to which the centre would be accessible to both eastbound and westbound motorway users
- The effects of the development on the Company's ability to comply with its contractual commitments to the Minister for Roads and RMS
- The nature of the proposed contractual arrangements, including the extent to which they are arms-length commercial transactions and the nature and value of the consideration involved

- The identity and nature of any proposed sub-lessees of the land and/or the operator of the service centre, including their financial and commercial standing, reputation and expertise
- The design and aesthetics of the proposed service centre
- The proposed construction of the centre, including its standards of workmanship and materials and any effects on the Project Deed's *Scope of Works and Design Criteria* or the M5 Western Link Project Deed's *Scope of Works and Design Criteria*, and
- Proposed reporting and accounting obligations.

Any fees, income or other consideration received by the Company from any such service centre will form part of the Company's revenue from the motorway, even though it will not be counted for the purposes of the Project Deed provisions described in sections 6.3 and 6.4 of this report.

5.5 Loss or damage and insurance requirements

In addition to providing the indemnities concerning loss and damage described in section 3.5, the Company has had to effect and must maintain the following insurance policies concerning the operation, maintenance and repair of the motorway:

- Insurance against any common law liabilities which might arise in connection with the motorway and its land
- Workers' compensation insurance
- Insurance of the "tollroad" and the "M5 Western Link" for the reinstatement costs of loss, damage or destruction from any insurable risk reasonably required by RMS, including fire, lightning and storm damage
- Insurance indemnifying RMS and the Company, during the motorway's concession term, against all of the actions, claims, demands, losses, damages, compensation, charges and costs subject to the Company's indemnities described in section 3.5, up to a limit of \$30 million per claim (for each of the "tollroad" and the "M5 Western Link) or any other reasonable sum notified by RMS from time to time, having regard to the frequency of the reinsurance program arranged by the Company's insurers, and
- Any other insurance, as required by RMS from time to time, which RMS reasonably believes to be commonly effected by owners, lessees or contractors, provided this insurance does not impose any requirements on the Company more onerous than those applied by a Fixed and Floating Charge entered into by the Company with the debt financiers' Security Trustee on 22 December 2009.

These insurance policies must be taken out in the names of RMS and the Company for their respective interests and must be with insurers approved by RMS. The insured amounts and the terms and conditions of the policies must be reasonably acceptable to RMS or as reasonably required by RMS, and any exclusions, endorsements or alterations may be made only with

RMS's prior written approval. The Company must make full and accurate disclosures to its insurers, punctually pay all the premiums, give RMS copies of all its policies, renewal certificates and endorsement slips and use its best endeavours to ensure the insurers will remain liable under the policies if there have been any non-disclosures or inaccurate disclosures in the Company's proposals for these policies.

If the Company's annual premium for its insurance for the "tollroad" (but not the "M5 Western Link") indemnifying RMS and the Company against the actions, claims, demands, losses, damages, compensation, charges and costs subject to the Company's indemnities described in section 3.5 increases beyond a specified (but "commercial in confidence") "adjusted base premium", in some circumstances the renegotiation provisions described in section 8.1 may apply.

If the motorway is partly or wholly destroyed or damaged and RMS reasonably believes its rebuilding or reinstatement is practicable and desirable, the Company must apply all the insurance proceeds available (under arrangements described below), plus the Company's own funds if the insurance proceeds are insufficient, to rebuilding or reinstating the motorway or repairing the damage so that the motorway once more complies (as relevant) with the requirements of the Project Deed's *Scope of Works and Design Criteria* and the M5 Western Link Project Deed's *Scope of Works and Design Criteria*.

In the case of any repairs to and reinstatement of the motorway's existing "tollroad", the Company must coordinate these works with any repairs to and reinstatement of damage to the "M5 West widening" works under the arrangements described in section 4.16. There is no equivalent contractual requirement for coordination in the case of repairs to and reinstatement of any damage to the motorway's "M5 Western Link".

The arrangements governing the application of insurance proceeds are different for the "tollroad" and the "M5 Western Link".

If there is loss or damage to the "tollroad",

- Any insurance proceeds received by the Company for loss or damage to the "tollroad" under any insurance policies maintained by the Company concerning property loss or damage—but *not* any proceeds received under any public or third party liability policies, any workers' compensation policies or any business interruption or other revenue-replacement policies—must be deposited into a special-purpose "**insurance proceeds account**" established in accordance with the RMS Consent Deed—2012.

Prior to repayment of the Company's "Tollroad" and "M5 Western Link" debts, this account must be established by the Company and the debt financiers' Security Trustee, with only the Security Trustee as a signatory. After that date, the account must be established by the Company and RMS and be with a financial institution notified by the Company and approved by RMS.

- Any other insurance proceeds received by the Company for loss or damage to the "tollroad" under any other insurance policies maintained by the Company in accordance with the Project Deed must be paid into an interest-bearing "**F-5 trust account**" established in accordance with the Project Deed. This account must be in RMS's name and be with a bank agreed to by RMS and the Company.
- If the Company and/or the Security Trustee receive insurance proceeds, of type(s) that must be deposited by the Company into the "insurance proceeds account", for loss or damage to the "tollroad" caused by an event or a series of related events, and these proceeds are in total less than or equal to:
 - \$125 million, if "construction completion" of the "M5 West widening" works has not yet been achieved (see section 4.17), or
 - \$175 million if "construction completion" of the "M5 West widening" works has been achieved,

indexed in both cases in line with increases in the Sydney Consumer Price Index from 19 June 2012, these proceeds must be applied to the repair and/or reinstatement of the "tollroad".

- If the Company and/or the Security Trustee receive insurance proceeds, of type(s) that must be deposited by the Company into the "insurance proceeds account", for loss or damage to the "tollroad" caused by an event or a series of related events, and these proceeds exceed:
 - \$125 million, indexed in line with increases in the Sydney CPI, if "construction completion" of the "M5 West widening" works has not yet been achieved, or
 - \$175 million, indexed in line with increases in the Sydney CPI, if "construction completion" of the "M5 West widening" works has been achieved,

the proceeds must again to be applied to the repair and/or reinstatement of the "tollroad", *provided*:

- The insurance proceeds and other sources of funds are sufficient to repair or reinstate the "tollroad" within a reasonable time
- The Company is able to meet its obligations to repay the debt financiers substantially in accordance with its debt financing arrangements and its ability to refinance its bank debts is not materially prejudiced, and
- It is economically viable to repair or reinstate the "tollroad".

However, if these three requirements have not been satisfied within three months of the event or series of related events which gave rise to the insurance proceeds, the debt financiers' Security Trustee may apply part or all of the insurance proceeds deposited into the "insurance proceeds account" to repay the debt financiers, with the balance, if any, still having to be paid by the Company into the "insurance proceeds account".

- Any other insurance proceeds for loss or damage to the "tollroad" received by the Company, of type(s) that must be deposited by the Company into the "F-5 trust account", plus the interest accrued by this account, must be paid by RMS to the Company for the repair and/or reinstatement of the "tollroad", in accordance with progress payment arrangements set out in the Project Deed, with the balance, if any, then being credited against any amounts the Company owes to RMS under the Project Deed, the Lease, the Moorebank Avenue Lease or the Bridge Works Lease.

If there is loss or damage to the "M5 Western Link",

- Any insurance proceeds received by the Company for loss or damage to the "M5 Western Link" under any insurance

policies maintained by the Company in accordance with the M5 Western Link Project Deed must be paid into the interest-bearing "F-5 trust account" established in accordance with the Project Deed, and

- These proceeds, plus the interest accrued by this account, must be paid by RMS to the Company for the repair and/or reinstatement of the "M5 Western Link", in accordance with progress payment arrangements set out in the M5 Western Link Project Deed, with the balance, if any, then being credited against any amounts the Company owes to RMS under the M5 Western Link Project Deed or the M5 Western Link Lease.

6 Revenue sharing, compensation and call option rights

6.1 Current arrangements for compensation if tolls were introduced on the M5 East

As already indicated in sections 1.2.6, 2.2.1 and 3.6, under the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, if RMS were to levy and collect tolls on the M5 East freeway at any time while the Company remains the operator of the M5 motorway, prior to the opening of any future duplication of the M5 East or more generally prior to the opening of any new arterial road or tunnel connected to the eastern end of the M5 motorway, RMS must compensate the Company for any resultant reduction in the toll revenue it receives from the M5 motorway, but not for any reductions in its other revenue (such as its revenue from any service centres on the motorway).

The annual compensation amount payable by RMS must be determined at the end of each relevant financial year and paid to the Company, along with interest, calculated at the BBSY bank bill rate, accrued from each month during the financial year. If toll revenue has increased the compensation amount will be zero. If RMS and the Company cannot agree on the compensation amount within ten business days of the end of the financial year, either may require the compensation amount to be determined by an expert agreed between them or, failing this, an expert appointed by the President (or equivalent) of the Australian Bankers' Association, using procedures set out in the Works Commitment and Novation Deed.

If the compensation amount is assessed at \$500,000 or less in any financial year the expert's determination for that year will be final and binding. If it is more and RMS and the Company still disagree about the quantum, or if they disagree about the expert's methodology, the Project Deed's dispute resolution mechanisms will then apply (see section 7.11).

These M5 East "toll compensation" arrangements will be scrapped if the NSW Government and/or RMS proceed with the duplication of the M5 East or more generally if they proceed with any new arterial road or tunnel, whether for all classes of vehicles or for only restricted classes of vehicles (e.g. only for heavy vehicles), connected to the eastern end of the M5 motorway (see section 6.3). From the date on which the M5 East duplication or the new arterial road or tunnel is opened to traffic, the Company will not be entitled to make any claim against the NSW Government or RMS concerning any levying of

tolls or other charges on any users of the M5 East and/or the new arterial road or tunnel.

6.2 Current arrangements for sharing profits

If the Company were to achieve an after-tax financial return equal to or higher than a specified (but commercial-in-confidence) "**expected financial return**", calculated on a quarterly basis, at any time after the Company's bank debts have been fully repaid, and the NSW Government and RMS have not yet duplicated the M5 East freeway or more generally connected a new arterial road or tunnel to the eastern end of the M5 motorway, the Company must pay RMS a specified (but again "commercial in confidence") proportion of the Company's after-tax profits during each of its accounting periods from (and including) the accounting period during which the "expected" or higher rate of return was first achieved until (and including) the last accounting period during the motorway's concession term.

This liability will arise only if RMS serves a notice on the Company, which it may do only if the Company's bank debts have been fully repaid and RMS considers the present value of the motorway's construction costs, which are specified in the Project Deed, and the Company's adjusted after-tax profits and losses, based on its annual profit and loss statements provided to RMS, to be positive when discounted at the "expected" rate of return.

The Company's payments must be made within 90 days of the end of each of the relevant accounting periods.

This profit-sharing arrangement will be scrapped, and replaced by the revenue sharing arrangements described in section 6.3, if the M5 East is duplicated or more generally if any new arterial road or tunnel, whether for all classes of vehicles or for only restricted classes of vehicles (e.g. only for heavy vehicles), is connected to the eastern end of the M5 motorway.

6.3 Revised arrangements for sharing toll revenue following any duplication of the M5 East

From the date on which any future duplication of the M5 East is opened to traffic, or more generally from the date on which any new arterial road or tunnel connected to the eastern end of the M5 motorway is opened to traffic, RMS will be entitled to a share of the Company's revenue, under arrangements set out in three schedules to the Project Deed, if the Company's actual toll

revenue during a financial year (excluding GST, and excluding any revenue from other sources) exceeds a specified (but “commercial in confidence”) percentage of “**modelled revenue (M5 ED)**” for that financial year, calculated using estimates by two expert traffic forecasters of what “car” and “truck” traffic for each quarter of the year would have been had the M5 East duplication never occurred.

The two expert traffic forecasters must be jointly appointed by RMS and the Company, within 30 days of the opening of the duplication or other road or tunnel, under an agreed brief which must be consistent with a set of principles listed in one of the schedules to the Project Deed. The terms of their appointment contracts must be as set out in another of these schedules or otherwise as the experts require. If RMS and the Company cannot agree on which two experts should be appointed, the experts are to be nominated, from lists of possible independent experts exchanged between RMS and the Company, by the President of the Institute of Engineers.

The traffic forecasts by the experts must be prepared in accordance with a code of conduct, procedural rules and other specifications set out in two of the schedules to the Project Deed. The experts must act independently of each other and without collusion.

The average of the two expert’s forecasts for each quarter will be used for the purposes of calculating the “modelled revenue (M5 ED)” for that quarter. Each of these “**expert-determined traffic forecasts (M5 ED)**” will be final and binding on RMS and the Company, except in the case of manifest error or fraud, and will apply without being amended even if there is a subsequent additional duplication of the M5 East and/or connection of a new arterial road or tunnel to the eastern end of the M5 motorway.

The “modelled revenue (M5 ED)” for each financial year following the opening of the initial M5 East duplication or connection of a new arterial road or tunnel is to be calculated by adding up the forecast “car” and “truck” toll revenues for each quarter during the year, based on the “expert-determined traffic forecasts (M5 ED)” for each quarter and the actual tolls applying during each quarter (see section 5.3), and if necessary adjusting the result on a *pro rata* basis for the period immediately after the opening of the duplication or other new road or tunnel and the period at the end of the motorway’s concession period.

Within 90 business days of the end of each financial year following the opening of the duplication or other new road or tunnel the Company must calculate and pay RMS its specified share of the amount, if any, by which the Company’s actual toll revenue for the financial year (or relevant part thereof) exceeded the specified percentage of the “modelled revenue (M5 ED)” for the financial year (or relevant part thereof). In doing so the Company must give RMS details of its calculations as specified in the Project Deed.

These payment obligations must be treated by the Company as an operating expense and must take priority over its servicing of its debts.

6.4 Compensation if the ‘Cashback’ scheme were changed or ended

As already indicated in section 3.6, the NSW Government and/or RMS may at any time, in their absolute discretion, phase out or end the “Cashback” scheme (section 1.2.5), reduce the rates of the “refunds” under this scheme and/or introduce different refund rates for peak and non-peak traffic.

If any of these so-called “**Cashback trigger events**” occurs after the date of “construction completion” of the “M5 West widening” works (section 4.17), RMS must make compensation payments to the Company, under arrangements set out in three schedules to the Project Deed, if the Company’s actual toll revenue during any financial year after the “Cashback trigger event” (excluding GST, and excluding any revenue from other sources) is less than “**modelled revenue (Cashback)**” for that financial year, calculated using forecasts of “car” and “truck” traffic prepared by two expert traffic forecasters for each quarter of the year on the assumption the “Cashback trigger event” never occurred.

The two expert traffic forecasters must be jointly appointed by RMS and the Company, within 30 days of the first of any “Cashback trigger events”, under an agreed brief which must be consistent with a set of principles listed in one of the schedules to the Project Deed. The terms of their appointment contracts must be as set out in another of these schedules or otherwise as the experts require. If RMS and the Company cannot agree on which two experts should be appointed, the experts are to be nominated, from lists of possible independent experts exchanged between RMS and the Company, by the President of the Institute of Engineers.

The traffic forecasts by the experts must be prepared in accordance with a code of conduct, procedural rules and other specifications set out in two of the schedules to the Project Deed. The experts must act independently of each other and without collusion.

The average of the two expert’s forecasts for each quarter will be used for the purposes of calculating the “modelled revenue (Cashback)” for that quarter. Each of these “**expert-determined traffic forecasts (Cashback)**” will be final and binding on RMS and the Company, except in the case of manifest error or fraud, and will apply without being amended even if there is a subsequent further “Cashback trigger event”.

The “modelled revenue (Cashback)” for each financial year following the “Cashback trigger event” is to be calculated by adding up the forecast “car” and “truck” toll revenues for each quarter during the year without the “Cashback” changes, based on the “expert-determined traffic forecasts (Cashback)” for each quarter and the actual tolls applying during each quarter (see section 5.3), and if necessary adjusting the result on a *pro rata* basis for the period immediately after the “Cashback trigger event”, the period at the end of the motorway’s concession period or, if the “Cashback trigger event” is reversed before then, the period immediately before the date of the reversal

(compensation is not payable for any revenue reductions past the date of such a reversal).

The Company must lodge its compensation claims with RMS, providing details as specified in the Project Deed, within 20 business days of the end of each financial year following the “Cashback trigger event”, or a longer period if this is reasonably required by the Company. RMS must then respond with a proposed payment schedule within 20 business days, providing reasons if its proposed compensation payment is less than the amount claimed. RMS may set off any compensation amounts payable to the Company against any amounts the Company owes to RMS under the Project Deed (see section 7.3), but if it does not fully do so it must pay the Company in accordance with the payment schedule within 30 business days of receiving the Company’s claim.

The compensation payable (or able to be set off) by RMS under these arrangements in any particular financial year (or relevant part thereof) is a specified (but “commercial in confidence”) percentage, as set out for each year in a schedule to the Project Deed, of the amount, if any, by which the Company’s actual toll revenue for the financial year (or relevant part thereof)—*not counting* any loss of toll revenue caused by (a) any Company breach of the Project Deed, the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works), the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works), the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works), the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed or the RMS Consent Deed—2012 or (b) any Company act or omission not expressly permitted under these documents—is less than the “modelled revenue (Cashback)” for the financial year (or relevant part thereof), *subject to* specified (but “commercial in confidence”) caps on the compensation payable for the relevant financial year (these caps are subject to *pro rata* reductions for any shorter periods during these years).

These Project Deed compensation arrangements constitute the Company’s sole entitlement to make any claim in connection with any “Cashback trigger event”.

6.5 RMS’s rights to buy shares in the Company or its business

As already indicated, the M5 Motorway Call Option Deed of 29 June 1993, as amended and novated (see section 2.2.7), has

granted RMS an option for RMS or its nominee to purchase shares in the Company, or the Company’s assets and undertakings, if the Company achieves an after-tax financial return equal to or higher than the specified (but “commercial in confidence”) “expected financial return” (see section 6.2), calculated on a quarterly basis, at any time after 26 June 2019 and after the Company’s bank debts have been fully repaid.

Unlike the profit-sharing arrangements described in section 6.2, these rights will continue even if the M5 East freeway is duplicated or a new arterial road or tunnel is connected to the eastern end of the M5 motorway.

RMS’s rights under the Call Option Deed to purchase shares in the Company or the Company’s assets and undertakings will arise only if:

- RMS serves a notice on the Company, after the Company’s bank debts have been fully repaid and under the same Project Deed arrangements as those described in section 6.2, indicating that the “expected” rate of return has been achieved, and
- RMS then serves a “call notice” on the Company, exercising its right to buy shares in the Company or its right to buy the Company’s business (but not both), on a date after 26 June 2019. RMS may issue only one such “call notice”.

The Call Option Deed sets out arrangements for:

- An independent valuation of the shares or the business, as applicable
- Negotiations in good faith on the price to be paid
- If the shareholders or the Company (as applicable) and RMS cannot agree on the price within seven business days of the delivery of the “call notice”, a final and binding determination of this price by an independent expert agreed between the shareholders or the Company (as applicable) and RMS or, if they cannot agree, an expert valuer selected by the President of the Australian Institute of Valuers and Land Administrators
- The completion of the purchase
- The conduct of the Company’s business pending completion of the sale, and
- Adjustments to the price if there is an event which materially affects the profitability or value of the Company’s business during this period prior to completion.

7 Miscellaneous general provisions of the contracts

7.1 Rates, levies and taxes

The Company must pay:

- All rates, taxes and charges levied by any government authority on the M5 motorway, its land or the services supplied to the M5 motorway and its land
- All stamp duties and similar taxes connected with the delivery, performance or enforcement of the M5 West Widening Deed, the M5 West Widening Side Deed and the other principal “M5 West widening” contracts
- All land-based rates, taxes and charges concerning the “M5 West widening” worksites and temporary works areas, and all other taxes and charges levied on the Company’s “M5 West widening” work, and
- All taxes connected with carrying out the transactions (including “stepping in” by RMS and/or the Security Trustee following a Company default) contemplated by the RMS Consent Deed—2012.

However, if the Company has to pay land tax, or if it has to pay water, sewerage and drainage rates or charges other than charges depending on usage, it may notify RMS of this and RMS must then pay or reimburse the Company for these payments.

As already indicated, many of the motorway’s contracts preceded and did not expressly contemplate the introduction of the Goods and Services Tax or any similar tax. Most of the more recent contracts include standard GST provisions, and from the date of “construction completion” of the “M5 West widening” works (section 4.17) the Project Deed will be amended to include the same standard provisions, which among other things will clarify the treatment of GST for the motorway’s tolls (see section 5.3). The M5 Western Link Project Deed and the other pre-2000 contracts still include no express references to the treatment of GST.

If:

- The Company’s liability to pay local government rates increases to more than \$50,000 per year, annually indexed in line with increases in the Sydney Consumer Price Index since 22 February 1991, or
- The NSW Government imposes any rate, tax, levy or charge on the Company, the motorway, the motorway’s land, the motorway’s tolls or any other amounts payable under the Project Deed, the Lease, the Moorebank Avenue Lease or the M5 Western Link Lease, and this discriminates against

the Company in its operation, maintenance or repair of the “tollroad” and/or the “M5 Western Link”, or more generally against the operators of tollroads, including the Company,

in some circumstances the renegotiation provisions described in section 8.1 may apply.

7.2 Interest on overdue payments

If the Minister for Roads, RMS or the Company are overdue by seven or more days in paying any amount due under the Project Deed or the M5 Western Link Project Deed, they must pay interest of 2% per annum plus the Commonwealth Bank of Australia’s reference rate for A\$ loans to prime commercial customers (or, if there is no such reference rate, the Commonwealth Bank’s rate for overdrafts of more than A\$100,000 to prime commercial customers).

Similarly, if the Minister for Roads, RMS or the Company fail to pay any amount due under the M5 West Widening Deed by the due date they must pay compound interest of 3% per annum plus the BBSY reference rate.

7.3 Setting off

In addition to RMS’s right to set off any compensation amounts otherwise payable to the Company following a “Cashback trigger event” against any amounts the Company owes to RMS under the Project Deed, as described in section 6.4,

- RMS may set off any amounts otherwise payable to the Company under the M5 West Widening Deed, or more generally otherwise payable in relation to the Company’s “M5 West widening” works, against any amounts the Company owes to RMS under the M5 West Widening Deed or otherwise in relation to the “M5 West widening” works, and
- If there has been an “event of default” as defined in the Project Deed or the M5 Western Link Project Deed (see section 9.1), RMS may set off any amounts it owes to the Company against any amounts the Company owes RMS under any of the motorway’s main contracts.

7.4 Miscellaneous reporting and accounting obligations

In addition to the Company’s “M5 West widening” reporting obligations described in sections 4.12 and its motorway

operation, maintenance and repair reporting obligations described in section 5.1.4,

- The Project Deed and the M5 Western Link Project Deed set out more general requirements for the Company to:
 - ♦ Keep its accounts and all its other records concerning the design, construction, operation, maintenance and repair of the “Tollroad” and the “M5 Western Link” at specified locations owned and controlled by the Company, and make them available to RMS, at all reasonable times, for inspection, examination, transcription, copying and auditing purposes
 - ♦ Give RMS quarterly Company-certified cashflow and profit and loss statements (at or prior to the end of each quarter), an independently audited annual profit and loss statement (as soon as practicable, and by no later than 28 October each year) and monthly traffic reports (by no later than the tenth business day of the following month, and also at any other times as reasonably required by RMS), and
 - ♦ Give RMS annual statements of anticipated periodic maintenance and capital works expenditures (other than expenditures on the “M5 West widening” works) at the start of each financial year and also at any other time as reasonably requested by RMS, and
- Under the RMS Consent Deed—2012 the Company must:
 - ♦ Give RMS copies of a series of specified documents, reports and notices concerned with the financing of the project, including updates on, amendments to and audit reports and tax opinions on the Company’s financial model for the motorway (see section 7.7), and
 - ♦ Promptly notify RMS if it becomes aware of any material error in this financial model, other than in its projections, which could have been known at the time the model was provided to RMS.

7.5 Confidentiality, privacy protection and publicity

The M5 West Widening Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the Deed of Engagement of Principal Contractor, the M5/M7 Interface Deed, the M5 West Widening Side Deed, the RMS General Security Deed and the RMS Consent Deed—2012 are subject to confidentiality restrictions imposed by the M5 West Widening Deed. These restrictions, which are supplemented by confidentiality requirements in the RMS General Security Deed, the Deed of Appointment of Independent Verifier and the Deed of Appointment of Environmental Representative themselves, also govern the release of information concerning the negotiations leading to the M5 West Widening Deed or disclosed to the participants in these negotiations.

Specified exemptions to these restrictions include the release of information as required by the law (including the Government Information (Public Access) Act 2009 (NSW)) or for legitimate government purposes, the release of information to aid investors, financiers and insurers and the publication of this *Summary of Contracts*, as tabled in Parliament, in accordance with the NSW Government’s *Working with Government Guidelines for Privately Financed Projects*.

Analogous restrictions and exemptions apply under the M5/M7 Interface Deed and the Subordination Deed.

The RMS General Security Deed also sets requirements for the Company to obtain RMS’s consent before it discloses or requests specified types of information subject to the Personal Property Securities Act 2009 (Cth), and the design and construction provisions of Annexure A to the M5 West Widening Deed include a series of specific obligations concerning the protection of personal privacy and the uses and disclosure of personal information.

The confidentiality restrictions and privacy protections described above do not diminish the NSW Auditor-General’s ability to carry out audit functions under the Public Finance and Audit Act 1983.

Under publicity restrictions in the M5 West Widening Deed and the M5/M7 Interface Deed:

- The Company, WSO Co and WestLink may issue information, documents or articles concerning the “M5 West widening” works to the media only with the prior written approval of RMS (and also, in the case of WSO Co and Westlink, the Company) and only in a manner approved by RMS
- WSO Co and WestLink may, however, provide timely information to the public about lane and ramp closures on the M7 and other traffic adjustments resulting from the “M5 West widening” works, in a manner they consider appropriate but again subject to RMS’s prior approval
- If the Company, the D&C Contractor, any of their subcontractors, WSO Co or WestLink receives a direct media request for comment on any aspect of the “M5 West widening” works they must promptly provide details about the request to RMS, and
- The Company must obtain RMS’s written approval before announcing, promoting, holding or permitting any event or party on the “M5 West widening” worksites, temporary work areas or “extra land”.

There are no equivalent or other confidentiality, privacy protection or publicity requirements in the Project Deed or the M5 Western Link Project Deed.

7.6 Restrictions on changes of ownership or control, assignments, encumbrances and refinancings

7.6.1 Changes of ownership or control of the Company

Any change in the ownership of or any other interest in 50% or more of the voting shares in the Company—ignoring any issues of shares as part of a portfolio investment by a reputable professional institutional investor, so long as the day-to-day management and control of the Company is retained by its existing directors and shareholders—may occur only with RMS's prior written consent.

In these circumstances RMS has a sole and unfettered discretion, except as described below, in deciding whether to grant its consent and the terms and conditions of any consent.

However, providing there has not been any continuing “event of default” not waived by RMS—these events are defined in the Project Deed and the M5 Western Link Project Deed and described in section 9.1 below—RMS may not unreasonably withhold its consent if:

- The Company has given RMS full particulars of the proposed transaction and drafts of any proposed agreements
- The Company has satisfied RMS that the proposed new shareholder is “a reputable corporation of financial and commercial standing”, and
- There are no subsisting breaches by the Company of the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease or the M5 Western Link Lease, other than any breaches waived by RMS.

As already indicated, the Company's shareholders when the original form of the Project Deed was executed in February 1991 were Leighton Contractors Pty Ltd and the Commonwealth Bank of Australia, each of which held 50% of the shares. Since then, RMS has consented to:

- The 1996 sale of all of Leighton Contractors' shares to M5 Holdings Pty Ltd in 1996, with RTA's (and now RMS's) consent being recorded in the Deed of Consent and Novation of 21 August 1996
- The 1998 sale of all of the Commonwealth Bank's shares to Utilities of Australia Pty Ltd and Development Australia Nominees Ltd (as the trustees of the Utilities Trust of Australia and the Development Australia Fund, respectively), which in total purchased approximately 34.6% of the Company's shares, and to AMP Investment Services Pty Ltd (as the trustee of the AMP Infrastructure Equity Fund), which purchased approximately 15.4% of Interlink's shares. RTA's (and now RMS's) consent to these transactions was recorded in the Deed of Consent and Novation: Sale of CBA Shares of 15 December 1998

- The sale in 1999 of some of AMP Investment Services Pty Ltd's shares to Retail Employees Superannuation Pty Ltd (as the trustee of the Retail Employees Superannuation Trust) and Sunsuper Pty Ltd (as the trustee of the Sunsuper Superannuation Fund) and any associated transfers of these shares between nominated related parties
- The May 2007 purchase by Transurban Holdings Ltd of all of the shares in M5 Holdings Pty Ltd, which continues to hold 50% of the shares in the Company.

Other transfers of shares or other interests in the Company have not required RTA/RMS consent, as each of these transactions has involved fewer than 50% of the Company's shares or has involved public share issues.

7.6.2 Assignments etc of the Company's rights and interests

7.6.2.1 Project Deed, M5 Western Link Project Deed, Lease, Moorebank Avenue Lease, Bridge Works Lease and M5 Western Link Lease restrictions

Under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and the M5 Western Link Lease the Company may not:

- Assign, otherwise transfer, sublet, license or otherwise deal with any or all of its rights under and interests in the Project Deed, the M5 Western Link Project Deed or the leases, or

- Permit or procure any such dealing without RMS's prior written consent.

In these circumstances RMS has a sole and unfettered discretion, except as described below, in deciding whether to grant its consent and the terms and conditions of any consent.

However, providing:

- There has not been any continuing Project Deed or M5 Western Link Project Deed “event of default” not waived by RMS (see section 9.1), and
- The Company is proposing to deal with its interests in both the Project Deed and the M5 Western Link Project Deed, and both the Lease and the M5 Western Link Lease, to the same party at the same time and on the same terms and conditions,

RMS may not withhold or delay its consent if, as required under the Project Deed, the M5 Western Link Project Deed and the leases,

- The Company has given RMS full particulars of the proposed transaction and drafts of any proposed agreements
- There are no subsisting breaches by the Company of the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease or the M5 Western Link Lease, other than any breaches waived by RMS
- The Company has satisfied RMS that the proposed assignee, transferee or sub-lessee (etc) is a reputable corporation

whose expertise, ability and financial and commercial standing are sufficient for RMS to be satisfied that it is capable of properly carrying out the Company's obligations under the Project Deed and the M5 Western Link Project Deed (this requirement is deemed to have been satisfied if the proposed assignee etc is a wholly owned subsidiary of the Company)

- The proposed assignee etc has entered into deeds of assignment with the Company and RMS, the forms of which must be as set out in a schedule to the Project Deed and a schedule to the M5 Western Link Project Deed, and
- The proposed assignee etc has given RMS any guarantees and indemnities RMS requires concerning the assignee's performance of its obligations under the Project Deed and the M5 Western Link Project Deed.

The Company must ensure certified copies of every agreement by which it assigns or otherwise parts with its interests in the Project Deed and the M5 Western Link Project Deed are forwarded to RMS. Once the assignment etc has occurred and the requirements listed above have been satisfied, RMS must release the Company from all its further obligations under the Project Deed, the M5 Western Link Project Deed, the leases, the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed.

7.6.2.2 M5 West Widening Deed restrictions

Under the M5 West Widening Deed the Company may sell, assign, dispose of, otherwise transfer or otherwise deal with its interests in the "M5 West widening works" and the associated temporary works (section 4.1) or any "**M5 West widening project document**" as defined in that deed—*meaning* the M5 West Widening Deed, the M5/M7 Interface Deed, the M5 West Widening Design and Construction Contract, the Deed of Engagement of Principal Contractor, the M5 West Widening Side Deed, the Interim Design and Independent Verification Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the RMS General Security Deed and the RMS Consent Deed—2012—only with RMS's prior written consent.

RMS may not unreasonably withhold this consent.

7.6.2.3 RMS General Security Deed restrictions

Under the RMS General Security Deed the Company may assign or otherwise deal with its rights under any "**transaction document**" as defined in that deed—*meaning* the Project Deed, the M5 Western Link Project Deed, the Lease, the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Amendment Deed of 29 June 1993, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the M5 West

Widening Deed, the M5 West Widening Side Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee), the M5 West Widening Design and Construction Consent Deed, the Subordination Deed, specified contracts between private sector parties governing subordinated loans by the Company's shareholders, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed, the RMS Consent Deed—2012, a specified private sector collateral security under the motorway's 2012 debt financing arrangements, any other agreement or other document recording or providing evidence of terms under which the Company must make any payments to RMS or the terms of any other obligations to RMS, any other agreement or document which RMS and the Company agree in writing is a "transaction document", any letter between RMS and the Company concerning any of the above documents or which is otherwise material to the "tollroad" and "M5 Western Link" projects, any agreement or document amending, supplementing, novating or replacing any of the above documents, or any written or unwritten undertaking by or to RMS or the Company that is given under or otherwise related to any of the above documents—only with RMS's prior written consent.

Unless otherwise indicated by the relevant "transaction document", such as the Project Deed, M5 Western Link Project Deed, lease and M5 West Widening Deed provisions discussed above, RMS may grant or withhold its consent in its absolute discretion and impose conditions on any consent.

7.6.2.4 Call Option Deed restrictions

The Company and the Company shareholder parties to the M5 Motorway Call Option Deed may assign or otherwise transfer any or all of their rights and obligations under that deed only with the written consent of RMS and all the other parties.

7.6.3 Encumbrances over the Company's rights and interests

7.6.3.1 Project Deed, M5 Western Link Project Deed, Lease, Moorebank Avenue Lease, Bridge Works Lease and M5 Western Link Lease restrictions

Under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and the M5 Western Link Lease the Company may not:

- Mortgage, charge, declare a trust over or otherwise encumber any or all of its rights under and interests in the Project Deed and the M5 Western Link Project Deed, or
- Permit or procure any such encumbrance

without RMS's prior written consent, unless it is doing so to secure its finance obligations and in accordance with the RMS Consent Deed—2012.

The Project Deed, the M5 Western Link Project Deed and the leases expressly permit the Company to encumber its rights and

interests under these deeds and leases, to secure its obligations to the motorway's debt financiers, provided:

- In the case of encumbrances over its rights under the Project Deed, the Lease and the Moorebank Avenue Lease, that this is in accordance with the RMS Consent Deed—2012, which imposes obligations on the Company and RMS concerning any refinancing of the project and/or other amendments to the debt financing documents as described in section 7.6.5 below, and
- The Company and the entity or entities taking the security interest have entered into a deed, in a form reasonably required by RMS, under which the entity or entities taking the security interest must:
 - ♦ Notify RMS if the Company breaches the terms of the document or arrangement creating the security interest, and
 - ♦ If they exercise any right to take possession of the motorway, its land or any of the Company's rights under and interests in the Project Deed, the M5 Western Link Project Deed and/or any of the leases, they must perform the Company's obligations under these contracts.

The Minister for Roads and RMS have expressly consented to the Company's granting of any such security interests to the debt financiers' Security Trustee.

7.6.3.2 M5 West Widening Deed restrictions

Under the M5 West Widening Deed the Company may mortgage, charge or otherwise encumber its interests in the "M5 West widening works" and the associated temporary works (section 4.1) or any "M5 West widening project document" (section 7.6.2) only with RMS's prior written consent.

RMS may not unreasonably withhold this consent.

7.6.3.3 RMS General Security Deed restrictions

Under the RMS General Security Deed the Company may declare a trust over or otherwise encumber its rights under any "transaction document" (section 7.6.2) only with RMS's prior written consent.

Again, unless otherwise indicated by the relevant "transaction document", such as the Project Deed, M5 Western Link Project Deed, lease and M5 West Widening provisions discussed above, RMS may grant or withhold its consent in its absolute discretion and impose conditions on any consent.

7.6.4 Assignments etc of RMS's rights and interests

RMS may sell, assign, otherwise transfer or otherwise deal with its interests in the "M5 West widening project documents" (section 7.6.2) without the prior written consent of the Company.

However, RMS may assign or otherwise transfer any or all of its rights and obligations under to the M5 Motorway Call Option Deed only with the written consent of the other parties to that deed (see section 2.2.7).

7.6.5 Refinancing

With the exception of an already approved further ("second") refinancing and another particular debt financing arrangement expressly permitted under the motorway's current (2012) debt financing contracts, the Company may refinance or restructure its bank debts, increase the limit on the debts it can incur under its current debt financing arrangements or incur any other new financing debts only with RMS's prior written consent, for the purposes of protecting and maintaining RMS's position under the motorway's contracts.

In seeking this consent the Company must give RMS reasonable notice and fully disclose all material information about the proposed refinancing of relevance to RMS's decision and/or RMS's rights and obligations under the RMS Consent Deed—2012.

RMS may not unreasonably withhold or delay its consent, and in deciding whether to grant its consent RMS must recognise the Company's commercial constraints. In particular, RMS has acknowledged that, subject to the requirements of specified debt financing documents, the Company may pay dividends or distributions to its shareholders as and when it elects, and that it would be unreasonable for RMS to withhold its consent if the proposed refinancing is on market terms, provided the refinancing will not worsen RMS's actual or contingent financial position, apart from any effects on interest rates and margins that reflect current market conditions during the refinancing period.

The Company may amend specified debt financing documents without the prior consent of the Minister for Roads or RMS, provided it has given RMS prior notice of the proposed amendment(s) and the amendment(s) will not worsen RMS's actual or contingent financial position.

The Company may not pay (or enter into an agreement to pay) any fees to the debt financiers' Security Trustee or Agent, or any other participant in the debt financing agreements, beyond those specified in the current debt financing agreements, without first obtaining RMS's written consent, for the purposes of protecting and maintaining RMS's position under the motorway's contracts.

The Security Trustee and Agent must give RMS prior notice if they intend to amend any of a specified list of debt financing documents or consent to the amendment of any such document, and they must obtain RMS's prior written consent if the proposed amendment or any other agreement will cause additional money to be owing under any of these documents to which they are parties.

If the Security Trustee or the Agent assigns its rights under any of the specified debt financing documents and notifies RMS of this assignment, it must also assign its rights under the RMS Consent Deed—2012.

7.7 Updating of the Company's 'base case' financial model

The Company's so-called "base case" financial model for the motorway may be amended or replaced only as agreed between RMS and the Company and only in accordance with procedures and other requirements specified in the Project Deed, including arrangements for:

- The Company to update its "base case" financial model to reflect the "M5 West widening" project, and gain RMS's acceptance of this updated model, within 14 days of the M5 West Widening Deed's becoming fully effective on 25 June 2012, following protocols set out in a schedule to the Project Deed, and
- Future revisions to the "base case" financial model, for the purposes of a future refinancing or for any other reason agreed in writing between RMS and the Company.

Although RMS has rights under these arrangements to review, comment on and make directions concerning proposed revisions to the "base case" model, if it does so it will assume no duty of care or responsibility for ascertaining the model's accuracy, completeness or compliance.

7.8 Amendments and waivers

Most of the motorway contracts include general provisions governing amendments to these contracts and/or waivers of the parties' obligations under these contracts. For example,

- The Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and the M5 Western Link Lease may be amended or waived only in writing, and a delay or failure in exercising any right or remedy under these deeds or any other course of dealing between the parties cannot operate as a waiver of any breach of the deeds, and
- Similarly, the M5 West Widening Deed, the M5/M7 Interface Deed and the M5 West Widening Side Deed may be amended only by a document signed by their parties, a delay or failure in exercising any right or remedy under these deeds will not operate as a waiver of this right or remedy, and a waiver will be effective and binding only if it is given or confirmed in writing and will not operate as a waiver of any future breach of the deeds.

In addition,

- The Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and the M5 Western Link Lease may not be amended, and no obligations of the Minister for Roads or RMS under these contracts may be waived, without the written consent of any holder of a mortgage, charge or other security interest that has notified RMS of this interest, and
- More specifically, under the RMS Consent Deed—2012 the Minister for Roads and RMS may not consent to any amendment of the Project Deed, the M5 Western Link

Project Deed, the Lease, the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Moorebank Avenue Lease, the M5 Western Link Lease, the F-5 Tollroad Amendment Deed of 29 June 1993, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the M5 West Widening Deed, the M5 West Widening Side Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee), the M5 West Widening Design and Construction Consent Deed, the F-5 Tollroad Project Deed of Charge or the RMS General Security Deed without the prior written consent of the debt financiers' Security Trustee.

7.9 Cumulative rights

The rights and remedies of the Minister for Roads, RMS and the Company set out in the Project Deed, the M5 Western Link Project Deed and the leases are cumulative and do not exclude any other legal or equitable rights or remedies.

7.10 Force majeure under the M5 West Widening Deed

The Project Deed and the M5 Western Link Project Deed have no express *force majeure* provisions. However, under the Project Deed some circumstances potentially preventing or limiting the Company's performance of its obligations under the motorway's contracts may trigger the Project Deed's renegotiation provisions, which for convenience are summarised later in this report, in section 8.1 below.

The M5 West Widening Deed treats some but not all types of *force majeure* events, as expressly defined in that deed, as potential triggers for its own renegotiation provisions, which are described in section 8.2 below, but it also sets out a series of other requirements in response to any *force majeure*.

In the M5 West Widening Deed, a "**force majeure event**" is defined as any earthquake, lightning, cyclone, fire, explosion, flood, landslide, mudslide, malicious damage, sabotage, act of a public enemy, terrorism, civil unrest, war, invasion, act of a foreign enemy, hostility between nations, civil insurrection, military coup, ionising radiation or radioactive contamination from nuclear waste or the combustion of nuclear fuel, or

confiscation, nationalisation, requisition or property damage under the order of any government authority which:

- Is beyond the reasonable control of, and is not caused by, the Company, the D&C Contractor and any of their subcontractors
- Causes the Company to be unable to perform an obligation under the M5 West Widening Deed, and
- Could not have been prevented or avoided by the Company, the D&C Contractor or their subcontractors by their taking the steps a prudent, experienced and competent concessionaire, designer or constructor would have taken.

If the Company alleges a “*force majeure* event” has occurred, it must promptly notify RMS in writing, providing details of the event, its effects on its obligations, the actions it has taken or proposes to take to remedy the situation, the time it is likely to be unable to carry out its affected obligations, the estimated cost of remediation and the insurance proceeds on which it expects to be able to rely.

The Minister for Roads, RMS and the Company must then meet within five business days to determine how long the *force majeure* is likely to continue.

The Company must remedy the effects of the “*force majeure* event” promptly, in accordance with the arrangements for reinstating damaged “M5 West widening” works described in section 4.16 and including any reasonable expenditures which may mitigate or avoid the effects of the “*force majeure* event”.

The Company’s M5 West Widening Deed obligations affected by the “*force majeure* event” will be suspended, but only to the extent and for so long as the event continues to affect these obligations.

7.11 Dispute resolution under the Project Deed and the M5 Western Link Project Deed

Any disputes between RMS and the Company concerning their rights and obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and/or the M5 Western Link Lease must be dealt with under dispute resolution procedures set out in the Project Deed and the M5 Western Link Project Deed.

If the dispute is:

- A dispute about whether there has been an event of a type potentially triggering the Project Deed’s renegotiation provisions (see section 8.1), and the Minister for Roads and/or RMS and the Company have not reached agreement about this within 14 days of entering into negotiations as required under those provisions, or
- A dispute about the action to be taken in response to an event that has triggered the Project Deed’s renegotiation provision, and the Minister for Roads and/or RMS and the Company have not reached agreement about this within 14

days of entering into negotiations as required under those provisions,

any of these parties may require the dispute to be determined by an independent expert agreed between the parties or, if they cannot agree within 21 days of having entered their negotiations, an expert appointed by the President of the Australian Bankers Association or his or her nominee.

The Company must notify the debt financiers’ Agent and Security Trustee if it intends to refer such a dispute for expert determination under these provisions, and RMS must do likewise if it intends to refer such a dispute for expert determination at any time prior to “construction completion” of the “M5 West widening” works (section 4.17).

In these cases the expert must take account of the same considerations as those stipulated in the Project Deed for the negotiations (section 8.1). He or she may reach his or her determination in any manner he or she chooses, and his or her determination, including any decision about the costs of the determination, will be final and binding on the Minister for Roads, RMS and the Company.

All other disputes under the Project Deed, the M5 Western Link Project Deed and/or the leases, other than disputes about the compensation payable to the Company following a termination of the Project Deed and/or the M5 Western Link Project Deed by the Company (see section 9.3 below), must first be referred for mediation by the Australian Commercial Disputes Centre Ltd in Sydney, with the mediation rules of that centre being modified if this is agreed between the Minister for Roads, RMS and the Company.

If this mediation is unsuccessful, or if it concerns the compensation amount described above, the dispute must be determined by arbitration. Any of the parties may formally notify the dispute and then refer it to arbitration by an arbitrator agreed between the parties or, if they cannot agree within 30 days of the formal notification of the dispute, an arbitrator appointed by the President of the Institute of Arbitrators Australia or his or her nominee. The arbitration must be conducted in accordance with that Institute’s *Rules for the Conduct of Commercial Arbitrations*, with the parties being entitled to legal representation. The arbitrator may not order the parties to attend any conference conducted by the arbitrator or order them to take any other steps to settle the dispute.

Disputes under the M5 West Widening Deed are subject to separate dispute resolution procedures, as described in section 7.12 below.

7.12 Dispute resolution under the M5 West Widening Deed

Any disputes between RMS and the Company related to the M5 West Widening Deed or the Company’s “M5 West widening” design and construction work must be addressed in accordance with dispute resolution procedures set out in the M5 West Widening Deed.

These M5 West Widening Deed dispute resolution procedures follow the following sequence:

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

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

- (ii) If these negotiations fail to resolve the dispute within ten business days, or a later time agreed between the parties, *and* the dispute is about:

- Whether there is an obvious error in a determination by the Independent Verifier, *or*
- An RMS notice to the Company that the “M5 West widening” works are not being constructed in accordance with the M5 West Widening Deed (section 4.12), *or*
- The costing estimates and/or other advice provided by the Company to RMS in response to an RMS “change order” for a change in the M5 West Widening Deed’s *Scope of Works and Technical Criteria* (section 4.2), *or*
- The manner and timing of a Company payment to RMS, related to the operation, maintenance and repair of the “tollroad”, the “M5 Western Link” or the “M5 West widening works”, of some or all of a cost saving that has resulted or is expected to result from an RMS-directed change in the “M5 West widening” scope of works (section 4.2), *or*
- If RMS has “stepped in” following an “event of default” under the M5 West Widening Deed provisions described in section 9.1 below, the costing estimates and/or other advice provided by the Company to RMS in response to an RMS “additional works proposal” for a change in the M5 West Widening Deed’s *Scope of Works and Technical Criteria*, *or*
- Whether a “change in law” or court injunction of a type potentially triggering the M5 West Widening Deed’s renegotiation provisions, as described in section 8.2 below, has had or has started to have a material adverse effect on the Company’s ability to pay its debt financiers or the Company’s “base case” financial return calculated in accordance with the Company’s “base case” financial model,

the dispute may be referred by the Minister for Roads, RMS or the Company, within a further ten business days,

for determination by an independent expert, selected as specified in the M5 West Widening Deed, in accordance with rules set out in the M5 West Widening Deed.

The Company must notify the debt financiers’ Agent and Security Trustee if it intends to refer an “M5 West widening” works dispute for expert determination under these provisions, and RMS must do likewise if it intends to refer an “M5 West widening” works dispute for expert determination at any time prior to “construction completion” of these works (section 4.17).

RMS and the Company must equally share the costs of the expert, and each must bear its own costs.

The determination of the expert will be final and binding, unless one of the parties involved notifies the other(s), within ten business days of the determination—or within five business days of a decision by the expert in response to a request by any of the parties to amend the determination—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 ten business days or by a later time agreed between the parties, *or*
- The dispute has been referred to expert determination but a determination has not been made within 60 days of the expert’s acceptance of his or her appointment or by a later time agreed between the parties, *or*
- The dispute has been referred to expert determination but the determination has not resolved the dispute to the satisfaction of all the parties,

the Minister for Roads, RMS and/or the Company may refer the matter for final and binding arbitration, again in accordance with procedures and rules set out in the M5 West Widening Deed. For disputes already considered by an expert, expedited arbitration rules will apply.

Notwithstanding the existence of any dispute, the Minister for Roads, RMS and the Company must continue to perform their obligations under the M5 West Widening Deed.

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

8 Renegotiation provisions

The Project Deed and the M5 West Widening Deed both expressly envisage circumstances under which aspects of the motorway project and/or the “M5 West widening” project, potentially including their contracts, might need to be renegotiated.

In some circumstances, even following the completion of the widening works, the renegotiation provisions of *both* the Project Deed and the M5 West Widening Deed might apply.

8.1 ‘Material adverse effect’ renegotiations under the Project Deed

Under the Project Deed, if:

- The NSW Government and/or RMS fail to take any action reasonably available to them to remove or overcome the effects of any road blockade or other form of civil disobedience that is hindering access to the motorway’s “tollroad”, *or*
- The NSW Government imposes any rate, tax, levy or charge on the Company, the motorway, the motorway’s land, the motorway’s tolls or any other amounts payable under the Project Deed, the Lease, the Moorebank Avenue Lease or the M5 Western Link Lease, and this discriminates against the Company in its operation, maintenance or repair of the “tollroad” and/or the “M5 Western Link”, or more generally against the operators of tollroads, including the Company, *or*
- The Company’s annual premium for its insurance for the “tollroad” (but not the “M5 Western Link”) indemnifying RMS and the Company against the actions, claims, demands, losses, damages, compensation, charges and costs subject to the Company’s indemnities described in section 3.5 (see section 5.5) increases beyond an “adjusted base premium” of a specified (but “commercial in confidence”) amount, *and* this increases the cost of the Company’s performance of its obligations under the Project Deed, the Lease and the Moorebank Avenue Lease, *or*
- An eastbound off-ramp from the motorway to the Hume Highway in Casula is constructed and opened to traffic, *or*
- The Company’s liability to pay local government rates increases to more than \$50,000 per year, annually indexed in line with increases in the Sydney Consumer Price Index since 22 February 1991, *and* this increases the cost of the Company’s performance of its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the

Moorebank Avenue Lease, the Bridge Works Lease and/or the M5 Western Link Lease, *or*

- More generally, there is a change in the lawful requirements of any government authority, a change in the application of the lawful requirements of a government authority or a final court decision (not subject to appeal) which changes the interpretation of existing NSW legislation, *and* this increases the cost of the Company’s performance of its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and/or the M5 Western Link Lease beyond the cost reasonably anticipated at the time of execution of (as relevant) the Project Deed, the M5 Western Link Project Deed or, in the case of the Company’s obligations under these documents concerning the “M5 West widening works” (section 4.1), the M5 West Widening Deed,

and

- These event(s) and effect(s) are not associated with any future duplication of the M5 East freeway or other connection of a new arterial road or tunnel to the eastern end of the M5 motorway, or with any subsequent imposition of tolls on the M5 East, *and*
- The Company notifies the Minister for Roads and RMS, with the prior written consent of the debt financiers’ Security Trustee, that the Company considers, in good faith, that the financial viability of the “tollroad” project is adversely and materially affected because of one or more of these events and effects, having regard to all relevant factors, expressly including the Company’s ability to fully repay its bank debts within three months of the due date (this prerequisite for believing there is an adverse material effect is not required in the case of any new eastbound off ramp at the Hume Highway), *and*
- The Company’s notification provides full details on the effects on the financial viability of the “tollroad” project, *and*
- The debt financiers’ Security Trustee has consented, in writing, to RMS’s and the Company’s entering into negotiations as described below,

the Minister for Roads and RMS must then, as soon as practicable and in any event within 14 days of receiving the Company’s notice, enter into good faith negotiations with the Company so as to enable the Company to have the same ability to fully repay its bank debt financiers by the due date that it would have had had the event(s) not occurred.

The Company must notify the debt financiers' Agent and Security Trustee of these negotiations, and RMS must do likewise if the negotiations are to occur at any time prior to "construction completion" of the "M5 West widening" works (section 4.17).

The Minister for Roads, RMS and the Company have agreed that in any such negotiations they should take a cooperative approach and have the maximum flexibility in determining any actions which may need to be taken for this purpose, and that if the Security Trustee has granted its prior written consent these actions may include:

- Amendments to the Project Deed (expressly including its *Calculation of Tolls Schedule*), the M5 Western Link Project Deed, the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works), the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works), the F5 Tollroad Project—M5 Deed of Term Amendment (Construction of Moorebank Avenue Interchange and Associated Works), the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed, the RMS Consent Deed—2012 and/or any other document contemplated by the M5 Western Link Project Deed and/or the M5 Western Link Lease
- Amendments to the risk allocations between the parties established by these contracts
- The waiver or releasing of existing rights under these contracts, including rights to receive payments
- Changing the motorway's concession term
- Changing the parties' financial contributions to the "tollroad" project
- In the case of negotiations resulting from the opening of an eastbound off ramp at the Hume Highway, a requirement for a further RMS financial contribution, and
- Any other action(s) agreed by the parties.

More generally, the Minister for Roads and RMS must exercise their rights and discretions under the Project Deed, the M5 Western Link Project Deed and the other contracts listed above in a manner promoting the mutual interests of the parties, having regard to the Project Deed's renegotiation arrangements.

Any extension of the operating term of the Project Deed must be matched by an extension of the term of the M5 Western Link Project Deed, so that both terms still expire on the same date.

If an event potentially triggering renegotiations under the Project Deed provisions described above is also a potential trigger for "material adverse effect" renegotiations under the M5 West Widening Deed's renegotiation provisions described in section 8.2 below, both sets of renegotiation provisions must be applied

so as to avoid any double counting in determining the relief provided to the Company.

As already indicated, if there is a dispute about whether there has been an event of a type potentially triggering the Project Deed's renegotiation provisions, or a dispute about the action to be taken in response to such an event, and the Minister for Roads and/or RMS and the Company have not reached agreement about this within 14 days of entering into their negotiations, any of the parties may require the dispute to be determined by an independent expert under the Project Deed's dispute resolution procedures described in section 7.11.

The Company must notify the debt financiers' Agent and Security Trustee if it intends to refer such a dispute for expert determination, and RMS must do likewise if it intends to refer such a dispute for expert determination at any time prior to "construction completion" of the "M5 West widening" works (section 4.17).

8.2 'Material adverse effect' renegotiations under the M5 West Widening Deed

Under the M5 West Widening Deed, if:

- The "M5 West widening" project's planning approval is modified, a new planning approval is issued or any such new approval is modified—other than as a result of a breach of the planning approval or any of the "M5 West widening" contracts by the Company or the D&C Contractor or in response to an application by the Company and/or the D&C Contractor or a change to the widening project's *Scope of Works and Technical Criteria* proposed by the Company and approved by RMS under the arrangements described in section 4.2—and this necessitates a change to the "M5 West widening works" (other than the widening project's "temporary works" or its design and construction processes), regardless of whether the Company has received any "change costs" under the arrangements described in section 4.3, *or*
- An "uninsurable event", as defined in the M5 West Widening Deed, occurs (see section 4.16), *or*
- The cost of performing the Company's obligations under the M5 West Widening Deed increases beyond the cost reasonably anticipated when that deed was executed on 19 June 2012 because of—
 - A change in NSW or local government legislation (including regulations or by-laws), NSW public authority requirements or legally binding NSW Government, local government or NSW public authority guidelines, *or*
 - A change in the application of existing NSW public authority requirements, *or*
 - A change in the courts' interpretation of existing NSW legislation, not subject to appeal, *or*

- The cost of performing the Company’s obligations under the M5 West Widening Deed increases beyond the cost reasonably anticipated on 19 June 2012 because of —

- ♦ A change in Commonwealth Government legislation (including regulations or by-laws), Commonwealth authority requirements or legally binding Commonwealth Government or Commonwealth authority guidelines, or
- ♦ A change in the application of existing Commonwealth authority requirements, or
- ♦ A change in the courts’ interpretation of existing Commonwealth legislation, not subject to appeal,

except in relation to any tax, the Clean Energy Act 2011 (Cth), any associated legislation or instruments or any other law or instrument concerning greenhouse gas emissions, *or*

- A court issues an injunction or makes a final determination, not subject to appeal, preventing the Company from undertaking the “M5 West widening” project substantially in accordance with the M5 West Widening Deed, *and* this injunction or final determination is not made as a result of a default by the Company, the D&C Contractor or any of their subcontractors under the M5 West Widening Deed, the M5/M7 Interface Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Deed of Engagement of Principal Contractor, the Interim Design and Independent Verification Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the RMS General Security Deed or the RMS Consent Deed—2012, or as a result of any other wrongful act or omission by the Company, the D&C Contractor or any of their subcontractors,

and this has had or has started to have a material adverse effect on:

- The ability of the Company to pay its bank debt financiers the amounts due under, and substantially in accordance with, the requirements of debt financing documents related to a specified tranche of the Company’s debts used by the Company to meet the costs of the “M5 West widening” project’s works, *or*
- The Company’s financial returns from the “M5 West widening” project, as calculated using the incremental cashflows from the “M5 West widening” project forecast by the Company’s “base case” financial model,

the Company must use all reasonable endeavours to mitigate the adverse consequences, and may notify RMS of the situation, providing full details.

If the Company does notify RMS, the Minister for Roads, RMS and the Company must then enter into negotiations in good faith, as soon as practicable but in any event by no later than 20 business days after RMS is notified, with the aims of:

- Enabling the Company to repay the “M5 West widening” project’s debt financiers the interest, amortisation and interest rate management agreement amounts that are or

would have been payable but for the “material adverse effect” circumstances, on the dates these repayments are or would have been due, but with the amortisation payments being no more than those calculated by the Company’s “base case” financial model, *or*

- If the Company has been unable to meet these repayments before the “material adverse effect” circumstances occurred, giving it an ability to make repayments similar to the ability it had before these circumstances arose,

and:

- Enabling the Company to achieve a financial return from the “M5 West widening” project equal to that calculated without the “material adverse effect” circumstances using the Company’s “base case” financial model, *or*
- If the Company had been unable to achieve this return before the “material adverse effect” circumstances occurred, giving it an ability to achieve a return similar to the ability it had before these circumstances arose.

The Company must notify the debt financiers’ Agent and Security Trustee of these negotiations, and RMS must do likewise if the negotiations are to occur at any time prior to “construction completion” of the “M5 West widening” works (section 4.17).

The Minister for Roads, RMS and the Company have agreed that they should take a flexible approach in the negotiations and consider, among other things,

- Amendments to the Project Deed, the M5 Western Link Project Deed, the M5 West Widening Deed, the M5/M7 Interface Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Deed of Engagement of Principal Contractor, the Interim Design and Independent Verification Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the RMS General Security Deed and/or the RMS Consent Deed—2012
- Changes to the motorway’s concession term
- Changes to their financial and other contributions, and
- Any other action that might be appropriate,

having regard to any payments RMS has already made under the M5 West Widening Deed (section 4.15).

The Company must use all reasonable endeavours to ensure the negotiated responses are efficiently applied and structured, so as to (among other things) minimise tax liabilities.

As already indicated,

- If an event potentially triggering renegotiations under the M5 West Widening Deed provisions described above is also a potential trigger for “material adverse effect” renegotiations under the Project Deed’s renegotiation provisions described in section 8.1, both sets of renegotiation provisions must be applied so as to avoid any double counting in determining the relief provided to the Company

- The Minister for Roads and RMS may not agree to amend any of the contracts listed above without the Security Trustee's prior written consent (see section 7.8), and
- If there is a dispute about whether a change in the law or a court injunction or order of a type potentially triggering the M5 West Widening Deed's renegotiation provisions, as described above, has had or has started to have a material adverse effect as described above, the dispute may be referred by the Minister for Roads, RMS or the Company for determination by an independent expert under the M5 West

Widening Deed's dispute resolution procedures described in section 7.12.

The Company must notify the debt financiers' Agent and Security Trustee if it intends to refer an "M5 West widening" works dispute of this type for expert determination under these provisions, and RMS must do likewise if it intends to refer an "M5 West widening" works dispute for expert determination at any time prior to "construction completion" of these works (section 4.17).

9 Defaults under and termination of the Project Deed and the M5 Western Link Project Deed

There are quite separate, and different, default and contract termination provisions in the Project Deed and the M5 Western Link Project Deed, on the one hand, and the M5 West Widening Deed on the other.

The former, which do not apply to 2012–15 “M5 West widening” design and construction defaults, are summarised in this section 9, and the latter, applying almost entirely to the widening project, are summarised in section 10.

The notes below summarise, in turn,

- Arrangements under the Project Deed, the M5 Western Link Project Deed, the leases and the RMS Consent Deed—2012 for the Company, RMS and the debt financiers’ Security Trustee to remedy:
 - ♦ Any unremedied breaches by the Company of the Project Deed, the M5 Western Link Project Deed and other specified project contracts, and
 - ♦ Specified other “events of default” defined in the Project Deed and the M5 Western Link Project Deed (section 9.1)
- The circumstances in which RMS may terminate the Project Deed and/or the M5 Western Link Project Deed for the specified “events of default”, and the procedures and timeframes to be followed (sections 9.2), and
- The grounds on which the Company may terminate the Project Deed and/or the M5 Western Link Project Deed, the procedures and timeframes to be followed, and the payments to be made to the Company by the Minister for Roads or RMS following a termination in these circumstances (section 9.3).

The rights and remedies of the Minister for Roads, RMS and the Company set out in the Project Deed, the M5 Western Link Project Deed and the leases, as described below, are cumulative and do not exclude any other legal or equitable rights or remedies.

9.1 Actions to remedy Company breaches and ‘events of default’

9.1.1 RMS’s general powers to ‘step in’ to remedy a Company breach

9.1.1.1 RMS’s powers under the Project Deed, the M5 Western Link Project Deed, the leases and the RMS Consent Deed—2012

If the Company breaches any of its obligations to make a payment or do or effect anything else under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease or the M5 Western Link Lease, and:

- This breach has continued for 21 days or more, and
- RMS has notified the debt financiers’ Security Trustee of the breach, in writing, and
 - ♦ In the case of a non-payment, the breach has not been remedied within 21 days of this notification, or
 - ♦ In the case of any other breach which is capable of being remedied, the breach has not been remedied within a period after the notification equivalent to that available to the Company to remedy the breach if this is specified in the relevant contract,

RMS may (but need not) “step in”, after notifying the Company of its intention to do so, and remedy the breach by paying the money or taking the required action itself, or through its engineers, agents, contractors and workforce, as if RMS were the Company.

If RMS does “step in” in this way,

- RMS’s other rights and powers arising from the Company’s breach, including its right to damages, will not be prejudiced
- RMS and its engineers, agents, contractors and workforce may enter any part or all of the motorway and its land and remain there for the purposes of remedying the breach
- The Company must indemnify RMS against any damage, loss or liability it incurs in exercising these rights, other than as a result of any RMS negligence or wilful default

- RMS may recover any expenses it incurs in remedying the breach, and
- More specifically, in the case of a payment default by the Company, the Company must reimburse RMS, upon demand, for any amount paid by RMS, even if any legislation, order or moratorium imposes the liability for the payment on RMS.

9.1.1.2 RMS's powers under the RMS General Security Deed, the F-5 Tollroad Project Deed of Charge and the RMS Consent Deed—2012

Under the RMS General Security Deed of 19 June 2012 and the RMS Consent Deed—2012, if:

- The Company breaches the RMS General Security Deed, including any breach of provisions in that deed requiring the Company to fully and punctually perform all its obligations under (among other contracts) the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and the M5 Western Link Lease, and
- RMS has notified the Security Trustee of this breach, in writing, and
 - ♦ In the case of a non-payment, the breach has not been remedied within 21 days of this notification, or
 - ♦ In the case of any other breach which is capable of being remedied, the breach has not been remedied within a further reasonable period of time,

RMS may (but need not) do everything RMS believes necessary or desirable to remedy the breach to its own satisfaction, and any liabilities or expenses incurred by RMS in doing so must be reimbursed by the Company on demand.

These RMS General Security Deed provisions do not limit RMS's other rights under the Project Deed, the M5 Western Link Project Deed and the leases, described above, or its other rights at law.

Similarly, under the F-5 Tollroad Project Deed of Charge of 22 February 1991 and the RMS Consent Deed—2012, if:

- The Company does not fully and punctually perform any of its express or implied obligations under the Project Deed or the Lease, and
- RMS has notified the Security Trustee of this breach, in writing, and
 - ♦ In the case of a non-payment, the breach has not been remedied within 21 days of this notification, or
 - ♦ In the case of any other breach which is capable of being remedied, the breach has not been remedied within a further reasonable period of time,

RMS may, without prejudicing its other legal rights and remedies, do all things RMS believes necessary or desirable to make good the default to RMS's satisfaction.

9.1.2 Procedures for the Company to remedy a Project Deed or M5 Western Link Project Deed 'event of default'

The Project Deed and the M5 Western Link Project Deed define two very similar series of "events of default", including but not limited to Company breaches of these and other contracts, which may give RMS the right to terminate the Project Deed, the M5 Western Link Project Deed and the other main motorway contracts.

It should be noted that these "events of default" are different to the "events of default" defined in the M5 West Widening Deed for the purposes of the default and termination provisions of that deed (see section 10).

Under the Project Deed and the M5 Western Link Project Deed there is an "event of default" if:

- (1) The Company breaches the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed or the RMS Consent Deed—2012 and this breach has not been waived or excused by RMS in writing
- (2) The debt financiers' Security Trustee or Agent or any of the debt financiers exercises a right under the motorway's debt financing documents to accelerate the date for repayment of part or all of the Company's bank debts or enforces any of the private sector securities over these debts
- (3) Any representation or warranty by the Company or report or statement delivered by or on behalf of the Company under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed or the RMS Consent Deed—2012 proves to have been untrue in any material respect at the time it was made
- (4) The Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed or the RMS Consent Deed—2012 is or becomes wholly or partly void, voidable or unenforceable against the Company, other than as a result of any event entitling the Company to terminate the Project Deed, the M5 Western Link Project Deed and other motorway contracts under the arrangements summarised in section 9.3 below
- (5) The F-5 Tollroad Project Deed of Charge or the RMS General Security Deed loses its priority as a second-ranking charge (see section 11.3) or is or becomes wholly or partly void, voidable or unenforceable, or a claim to either effect is made by the Company and the Company fails to give RMS a replacement security,

reasonably satisfactory to RMS, within seven days of a demand by RMS, or an order is made or a resolution is passed for the winding up of the Company, except for a reconstruction or amalgamation consented to by RMS (RMS may not unreasonably withhold or delay such consent)

- (6) The Company is liquidated, or an application is made to a court for a liquidator or provisional liquidator to be appointed and the Company does not satisfy RMS within 14 days that this application is frivolous or vexatious
- (7) The Company makes an assignment for the benefit of its creditors or enters into an arrangement or composition with its creditors, or a receiver or receiver/manager is appointed to the Company or any of its assets, except for a reconstruction or amalgamation consented to by RMS (again, RMS may not unreasonably withhold or delay such consent)
- (8) The Company is or becomes unable to pay its debts when they are due or within the meaning of the Corporations Act 2001 (Cth)
- (9) A distress, execution or other process for more than \$100,000 is levied against the Company and not discharged within 30 days, unless the Company has initiated proceedings in good faith to set aside this execution and it is discharged within a further 30 days, or
- (10) An order or application is made to place the Company under official management, and in the case of an application the Company does not satisfy RMS within 14 days that this application is frivolous or vexatious.

If any of these “events of default” occurs and RMS has notified the debt financiers’ Security Trustee of this in writing, *and*

- In the case of an “event of default” arising from a non-payment, this default has not been fully remedied within 21 days of the notification of the Security Trustee, *or*
- In the case of any other “event of default” which is capable of being remedied, the “event of default” has not been remedied within a period after the notification equivalent to that available to the Company to remedy the “event of default”, if this is specified in the relevant contract, *or*
- In the case of an “event of default” which is not capable of being remedied,
 - ♦ The Security Trustee has not “stepped in” to exercise the Company’s rights and obligations under the relevant contract, under arrangements described in section 9.1.4 below, *and*
 - ♦ Any receiver, receiver/manager or administrator appointed by the Security Trustee has not “stepped in” in this way, *and*

- ♦ The Security Trustee has not assigned the Company’s interests in the “RMS Consent Deed project documents” within 12 months of RMS’s notification,

RMS may:

- If the “event of default” is a contract breach as described in (1) in the list of “events of default” above and is capable of being remedied, *or* if it is one of the “events of default” described in (2), (6), (7), (8), (9) or (10), give the Company a formal written notice of the “event of default”, after which:
 - ♦ In the case of an “event of default” that has arisen from a non-payment, the Company has 21 business days to remedy the non-payment before RMS becomes entitled to give the Company 14 days’ notice that RMS is terminating the Project Deed and/or the M5 Western Link Project Deed, as applicable (other prerequisites also apply for some types of “events of default”, as described in section 9.2), and
 - ♦ In the case of any other “event of default” which is capable of being remedied, the Company has 14 business days to notify RMS that it will remedy the “event of default”, after which the Company must:
 - Commence and diligently pursue the remedy within 28 business days, and
 - Complete the remedy within a reasonable time, having regard to the nature and extent of the default*or* RMS will again become entitled to give the Company 14 days’ notice that RMS is terminating the Project Deed and/or the M5 Western Link Project Deed, as applicable (once more, other prerequisites also apply for some types of “events of default”, as described in section 9.2), *or*
- If the “event of default” is a contract breach as described in (1) in the list of “events of default” above but is *not* capable of being remedied, *or* if it is one of the “events of default” described in (2), (3), (4) or (5), immediately give the Company 14 days’ notice that RMS is terminating the Project Deed and/or the M5 Western Link Project Deed, as applicable (although, again, other prerequisites also apply for some of these types of “events of default”, as described in section 9.2).

9.1.3 More general limits on RMS’s rights to respond to a Company breach

In addition to the requirements for RMS to notify the Security Trustee and defer taking action before “stepping in” to remedy a Company breach as described in section 9.1.1 above or responding to an “event of default” as described in sections 9.1.2 and 9.2, the RMS Consent Deed—2012 imposes more general limits on RMS’s ability to exercise its rights following any Company breach under, and following any Company breach of, the Project Deed, the M5 Western Link Project Deed, the Lease, the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Moorebank Avenue Lease, the M5

Western Link Lease, the F-5 Tollroad Amendment Deed of 29 June 1993, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F5 Tollroad Project—Works Commitment Deed (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the F5 Tollroad Project—Deed of Amendment (Construction of Moorebank Avenue Interchange and Associated Works) of 24 June 2002, the F-5 Tollroad Project Deed of Charge or the RMS General Security Deed (and also on RMS’s ability to exercise its rights under, and following any Company breach of, the M5 West Widening Deed, the M5 West Widening Side Deed, the M5 West Widening Design and Construction Contract, the M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee) and the M5 West Widening Design and Construction Consent Deed, as described in section 10 below).

(The contracts listed above are termed “project documents” in the RMS Consent Deed—2012. Other contracts such as the Project Deed have different definitions of “project documents”, so in this report the contracts listed above are referred to as “**the RMS Consent Deed project documents**”).

Under the RMS Consent Deed—2012, RMS may exercise any of its rights in relation to a Company breach of any of these “RMS Consent Deed project documents” only if RMS has notified the Security Trustee of the breach, in writing, and:

- In the case of a non-payment, the breach has not been remedied within 21 days of this notification
- In the case of any other breach which is capable of being remedied, the breach has not been remedied within a period after the notification equivalent to that available to the Company to remedy the breach, if this is specified in the relevant contract, or
- In the case of a breach or “event of default” which is not capable of being remedied,
 - ♦ The Security Trustee has not “stepped in” to exercise the Company’s rights and obligations under the relevant contract, under arrangements described in section 9.1.4 below
 - ♦ Any receiver, receiver/manager or administrator appointed by the Security Trustee has not “stepped in” in this way, and
 - ♦ The Security Trustee has not assigned the Company’s interests in the “RMS Consent Deed project documents” within 12 months of RMS’s notification.

9.1.4 The Security Trustee’s powers to ‘step in’ and take other actions to remedy a Company breach or a Project Deed or M5 Western Link Project Deed ‘event of default’

In addition to the Company’s obligations to remedy its breaches and RMS’s rights to remedy a Company breach as described in section 9.1.1 above, under the RMS Consent Deed—2012 the Security Trustee may, in exercising its rights under the debt financiers’ securities and after notifying RMS in writing,

- “Step in” to remedy a Company breach of any “RMS Consent Deed project document” (section 9.1.3), or a Project Deed or M5 Western Link Project Deed “event of default” (section 9.1.2), by exercising the Company’s rights and performing the Company’s obligations under the relevant contract(s), or
- Appoint a receiver, receiver/manager or administrator which may “step in” in this way.

The Security Trustee or a receiver, receiver/manager or administrator appointed by the Security Trustee may also assign, otherwise transfer or sublet the Company’s rights under and interests in any “RMS Consent Deed project document”, in accordance with the relevant provisions of these contract(s). Notwithstanding the “normal” requirements for such transfers described in section 7.6.2, RMS may not withhold its consent to the transfer on the grounds that the Security Trustee or the receiver has not itself issued the relevant guarantees and indemnities required under the Project Deed, the Western Link Project Deed, the Lease, the Moorebank Avenue Lease and the M5 Western Link Lease.

9.2 Termination by RMS for a Project Deed or M5 Western Link Project Deed ‘event of default’

RMS may give the Company 14 days’ written notice that it is terminating the Project Deed and/or the M5 Western Link Project Deed, as applicable, for a Project Deed or M5 Western Link Project Deed “event of default” if:

- (a) The “event of default” is:
- ♦ A contract breach as described in (1) in the list of “events of default” in section 9.1.2 and is capable of being remedied, or
 - ♦ One of the “events of default” described in (2), (6), (7) and (8) in section 9.1.2,
- and
- ♦ RMS has notified the Security Trustee as described in section 9.1.2, and the relevant associated times for remedying the default before RMS may act have elapsed, and
 - ♦ RMS has then given the Company a formal written notice of the “event of default”, as described in section 9.1.2, but the default has not been

remedied by the Company within the applicable times before RMS may terminate the relevant contract(s), as described in section 9.1.2.

(b) The “event of default” is one of the “events of default” described in (9) and (10) in section 9.1.2, *and*

- ◆ RMS has notified the Security Trustee as described in section 9.1.2, and the relevant associated times for remedying the default before RMS may act have elapsed, and
- ◆ RMS has then given the Company a formal written notice of the “event of default”, as described in section 9.1.2, but the default has not been remedied by the Company within the applicable times before RMS may terminate the relevant contract(s), as described in section 9.1.2, and
- ◆ RMS reasonably believes the “event of default” will adversely and materially affect the Company’s ability to perform its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease and/or the M5 Western Link Lease.

(c) The “event of default” is:

- ◆ A contract breach as described in (1) in the list of “events of default” in section 9.1.2 but is *not* capable of being remedied, *or*
- ◆ One of the “events of default” described in (3) and (4),

and

- ◆ RMS has notified the Security Trustee as described in section 9.1.2, and the relevant associated times for remedying the default before RMS may act have elapsed, and
- ◆ RMS reasonably believes the “event of default” will adversely and materially affect the Company’s ability to perform its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease and/or the M5 Western Link Lease.

(d) The “event of default” is one of the “events of default” described in (2) and (5) in the list of “events of default” in section 9.1.2, and RMS has notified the Security Trustee as described in section 9.1.2, and the relevant associated times for remedying the default before RMS may act have elapsed.

In addition, in *any* of these “event of default” circumstances, once RMS becomes entitled to terminate the Project Deed and/or the M5 Western Link Project Deed RMS may either:

- Repossess the relevant part(s) of the motorway and its land, in which case there will be an immediate automatic termination of the Lease, the Moorebank Avenue Lease, the Bridge Works Lease and/or the M5 Western Link Lease, as applicable, or

- Call on the Company to immediately surrender its interests under the relevant lease(s), without prejudice to any other remedies available to RMS.

If a termination notice is issued by RMS under (a) or (b), but not if the termination notice is issued by RMS under (c) or (d), the Company may suspend the operation of the termination notice by notifying RMS, within 14 days, that the Company wishes to assign all its rights and interests in the Project Deed, the Lease, the Moorebank Avenue Lease and the Bridge Works Lease, and/or all its rights and interests in the M5 Western Link Project Deed and the M5 Western Link Lease, as applicable.

If the Company suspends the operation of the termination notice on this basis, and if it then complies with its obligations under the Project Deed, the Lease, the Moorebank Avenue Lease and the Bridge Works Lease, and/or the M5 Western Link Project Deed and the M5 Western Link Lease, as applicable—including, in particular, their restrictions on ownership changes, assignments and encumbrances as described in sections 7.6.1 to 7.6.3 of this report—during the following 12 months, the Company will be entitled to assign its rights and interests in these contracts without being subject to their restrictions on such assignments (section 7.6.2).

The proceeds of any such assignment must be applied:

- First, as required by law
- Second, to pay and discharge the private sector financiers’ and RMS’s charges and other security interests over the Company’s rights and interests, in the order of their priority (see section 11.3), with a cap on the total of these payments equal to the amount owing under the motorway’s main debt financing agreement, and
- Third, to pay RMS any amounts owing to it under the Project Deed, the Lease, the Moorebank Avenue Lease and the Bridge Works Lease, and/or the M5 Western Link Project Deed and the M5 Western Link Lease, as applicable,

with the Company retaining the balance, if any, for its own use and benefit.

An RMS termination of the Project Deed and its three associated leases, the Lease, the Moorebank Avenue Lease and the Bridge Works Lease, will automatically terminate the M5 Western Link Project Deed and the M5 Western Link Lease, and *vice versa*, and either will also automatically terminate the M5 West Widening Deed.

The M5 West Widening Deed’s provisions governing the consequences of its termination in these circumstances are described in section 10.7.1 below.

Under the Project Deed and the M5 Western Link Project Deed, upon the termination of these deeds:

- The Company must immediately surrender the motorway and its land to RMS in the operating condition and state of repair and maintenance required by the Project Deed and the M5 Western Link Project Deed.

- The “tollroad”, the “M5 Western Link” and all the Company’s plant, equipment, fixtures, fittings and other improvements will automatically become RMS’s absolute property, without any RMS compensation payments to the Company or any further RMS action.
- The Company must remove all its advertising and display signs and other media from the motorway and the motorway’s land, and make good any damage or disfigurement caused by these signs or their removal.
- The Company must give RMS all of its manuals relevant to the motorway’s plant, equipment, fixtures, fittings and other improvements.
- All the Company’s accounts and other records concerning the motorway must immediately be turned over to RMS, so as to ensure an orderly continuance of the operation, maintenance and repair of the motorway. For the following seven years these records must be made available to the Company for inspections, audits and transcriptions at any reasonable times.
- The indemnities provided by the Company in favour of RMS under the Project Deed and the M5 Western Link Project Deed will continue to bind the Company.

9.3 Termination by the Company

The Company may terminate the Project Deed and/or the M5 Western Link Project Deed, by giving RMS 14 days’ written notice, if:

(1) A court decides:

- RMS’s execution of the Project Deed, the M5 Western Link Project Deed and/or the leases, and/or RMS’s performance of its obligations under these contracts, are beyond RMS’s powers or otherwise unlawful
- RMS’s obligations under the Project Deed, the M5 Western Link Project Deed and/or the leases are not enforceable
- The Company is not entitled to levy, collect or (subject to the debt financiers’ securities) retain tolls as envisaged by the Project Deed, or
- The “M5 Western Link” planning approval is invalid or otherwise inadequate for the operation, maintenance and repair of the “M5Western Link”,

and this means the Company cannot maintain the “tollroad” and/or the “M5 Western Link” or levy, collect and retain tolls from “tollroad” users as contemplated by the Project Deed, the M5 Western Link Project Deed and the leases, as applicable

(2) New NSW legislation prohibits the Company from maintaining the motorway or levying, collecting and retaining tolls as contemplated by the Project Deed, the M5 Western Link Project Deed and/or the leases

- (3)** A court makes a final determination, not subject to appeal, requiring the Company to obtain the consent of a government authority for the levying, collection or retention of tolls (see section 5.3), but this consent is not obtained within the following six months, despite the Company’s best endeavours
- (4)** Any part or all of the motorway or its land is resumed by a relevant authority and this materially prejudices the Company’s ability to maintain the motorway or levy, collect and retain tolls as contemplated by the Project Deed, the M5 Western Link Project Deed and/or the leases
- (5)** The Minister for Roads or RMS breaches any of their obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease and/or the M5 Western Link Lease, and this breach prevents the Company from maintaining the motorway or levying, collecting and retaining tolls as contemplated by the Project Deed, the M5 Western Link Project Deed and/or the leases, or
- (6)** A court:
 - Issues an injunction preventing the Company from levying, collecting or retaining tolls on the ground that this may be unlawful, either at all or without the consent of a government authority, or
 - Makes a final determination, not subject to appeal, requiring the Company to obtain the consent of an authority for the levying, collection or retention of tolls, and the Company obtains this consent,

and this means it will not be possible, on the basis of financial projections reasonably acceptable to RMS, for the Company to fully repay its debt financiers within three months after the due date.

If the Company notifies RMS that it intends to terminate the Project Deed and/or the M5 Western Link Project Deed in 14 days, RMS may suspend its right to do so:

- For 12 months in the case of an event or circumstance described in (1) above
- For four months in the case of an event or circumstance described in (2)
- For three months in the case of an event or circumstance described in (3), (4) or (5), or
- For two months in the case of an event or circumstance described in (6),

or for any longer period agreed between the Minister for Roads, RMS and the Company, by giving the Company a notice to this effect within 14 days of receiving the Company’s termination notice.

During this suspension period,

- The Company must continue to perform its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Moorebank Avenue Lease, the Bridge Works

Lease, the M5 Western Link Lease, the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed, if this is lawful and it is practicable for it to do so

- In the case of a 12-month or longer suspension of a termination notice following an event or circumstance described in (1) above, RMS must pay the Company, monthly in arrears, the amount the Company reasonably satisfies RMS it would have received from toll collections during the suspension period, but without double counting if the Company is also entitled to a separate remedy for delayed or lost toll revenue under the M5 West Widening Deed provisions summarised in section 10.8 below), and
- In the case of a two-month or longer suspension of a termination notice following an event or circumstance described in (6) above, RMS and the Company must negotiate in good faith, starting with an initial meeting that must be specified in RMS's suspension notice, on how to make it possible, on the basis of financial projections reasonably acceptable to RMS, for the Company to fully repay its debt financiers within three months after the due date. The Project Deed and the M5 Western Link Project Deed expressly indicate the possibilities may include an extension of the motorway's concession term.

If the event or circumstance leading to the Company's termination notice is remedied or overcome or ceases to exist within the suspension period, in ways specified in the Project Deed and the M5 Western Link Project Deed, the Project Deed and the M5 Western Link Project Deed will remain in full force.

Otherwise, the Project Deed will automatically terminate when the suspension period expires or upon any earlier ending of the suspension period because of:

- An election by RMS to end the suspension early, which it may do at any time simply by giving the Company five business days' written notice, or
- In the case of a suspension of a termination notice following an event or circumstance described in (1) above, a final court decision, not subject to appeal, that it is unlawful for the Company to maintain the "tollroad" and/or the "M5 Western Link", and/or levy, collect and retain tolls from "tollroad" users, as contemplated by the Project Deed, the M5 Western Link Project Deed and the leases, as applicable.

If the Project Deed and/or the M5 Western Link Project Deed are terminated by the Company on any of the bases summarised above,

- The Minister for Roads must pay the Company, within 30 days of the termination, an "**early termination amount**" equal to the sum of —
 - ♦ Its debts to the motorway's debt financiers on the termination date, excluding any penalty interest on as-yet-unpaid debt payment liabilities, and
 - ♦ The Company's monetary obligations under any contracts it has entered into with contractors, consultants or suppliers for the purposes of the

"tollroad" and "M5 Western Link" projects, to the extent that the Company's main debt financing agreement has not provided funding intended to meet these obligations

less:

- ♦ The liquidated damages (not counting interest) paid by RMS under the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997 for late opening of the M5 East freeway (section 1.2.6), to the extent that these liquidated damages payments (of almost \$5.9 million in total) have not been used by the Company to reduce its debts or meet the monetary obligations described above, and
 - ♦ In order to avoid double counting or double relief, any amount that is also payable or has been paid to the Company as a separate "early termination amount", as (differently) defined in the M5 West Widening Deed, under the M5 West Widening Deed provisions summarised in section 10.7.1 below.
- More generally, the Minister for Roads and RMS must also compensate the Company for any damage, expense or loss it incurs because of the termination, and the Company must take all reasonable steps to mitigate any such damage, expense or loss.

The amount able to be claimed by the Company under these Project Deed and M5 Western Link Project Deed compensation provisions is capped at:

- ♦ An amount sufficient to allow them to give the Company an after-tax financial return equal to the "expected financial return" (section 6.2), as calculated in a specified manner using the Company's "base case" financial model and after taking account of the financial returns already achieved from the motorway
- ♦ *less* the Project Deed/M5 Western Link Project Deed "early termination amount".

Any dispute about the compensation payable to the Company must be determined by an arbitrator in accordance with the relevant provisions of the dispute resolution procedures of the Project Deed and M5 Western Link Project Deed (section 7.11), having regard to:

- ♦ Any losses during the suspension period (if any)
- ♦ The payment of the "early termination amount"
- ♦ The motorway's concession term, and
- ♦ Any amounts payable to the Company by a resuming government authority, if the Project Deed has been terminated because of a land resumption (i.e. event (4) in the list above), *less* any reasonable fees and expenses incurred by the Company in connection with the resumption.

- If the Project Deed has been terminated by the Company the M5 Western Link Project Deed will automatically terminate, and *vice versa*, and the Lease, the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease and the M5 West Widening Deed will also automatically terminate.
- Under the Project Deed and the M5 Western Link Project Deed, upon the termination of these deeds:
 - ♦ The Company must immediately surrender the motorway and its land to RMS in the operating condition and state of repair and maintenance required by the Project Deed and the M5 Western Link Project Deed.
 - ♦ The “tollroad”, the “M5 Western Link” and all the Company’s plant, equipment, fixtures, fittings and other improvements will automatically become RMS’s absolute property, without any RMS compensation payments to the Company or any further RMS action.
 - ♦ The Company must remove all its advertising and display signs and other media from the motorway and

the motorway’s land, and make good any damage or disfigurement caused by these signs or their removal.

- ♦ The Company must give RMS all of its manuals relevant to the motorway’s plant, equipment, fixtures, fittings and other improvements.
- ♦ All the Company’s accounts and other records concerning the motorway must immediately be turned over to RMS, so as to ensure an orderly continuance of the operation, maintenance and repair of the motorway. For the following seven years these records must be made available to the Company for inspections, audits and transcriptions at any reasonable times.
- ♦ The indemnities provided by the Company in favour of RMS under the Project Deed and the M5 Western Link Project Deed will continue to bind the Company.

The M5 West Widening Deed’s provisions governing the consequences of its termination in these circumstances are described in section 10.7.1 below.

10 Defaults under and termination of the M5 West Widening Deed

As already indicated, there are quite separate, and different, default and contract termination provisions in the Project Deed and the M5 Western Link Project Deed, on the one hand, and the M5 West Widening Deed on the other.

The former have been summarised in section 9. The latter are summarised below.

The notes below address, in turn,

- RMS's general right to remedy unremedied failures by the Company to perform any of its obligations under the M5 West Widening Deed (section 10.1)
- Arrangements under the M5 West Widening Deed and the RMS Consent Deed—2012 for the Company to remedy “events of default” of types specified in the M5 West Widening Deed or overcome their effects (section 10.2)
- Arrangements under the RMS Consent Deed—2012 for the project debt financiers’ Security Trustee to remedy any such “events of default” or overcome their effects (section 10.3)
- Arrangements under the M5 West Widening Deed for RMS to “step in” to remedy any such “events of default” or overcome their effects and to be paid part or all of the costs it incurs in doing so (sections 10.4 and 10.5)
- Other arrangements under the M5 West Widening Deed for reinstatement of the motorway following an “event of default” (section 10.6)
- The grounds on which RMS may terminate the M5 West Widening Deed, and the procedures and timeframes to be followed (section 10.7), and
- The grounds on which the Company may terminate the M5 West Widening Deed, the procedures and timeframes to be followed, and the payments to be made to the Company by the Minister for Roads or RMS following a termination in these circumstances (section 10.8).

RMS must notify the debt financiers’ Security Trustee, in writing, of any breach of the M5 West Widening Deed, the M5 West Widening Design and Construction Contract or the M5 West Widening Side Deed before RMS may exercise its rights concerning this breach or other “event of default” under these contracts, and it must give the Security Trustee and the Agent copies of all correspondence and other documents it issues to the Company concerning any breach or other “event of default” under these contracts

10.1 RMS’s general powers to remedy any unremedied Company failure to perform its M5 West Widening Deed obligations

10.1.1 Powers under the M5 West Widening Deed and the RMS Consent Deed—2012

Under the M5 West Widening Deed and the RMS Consent Deed—2012, if:

- The Company fails to perform any of its obligations to the Minister for Roads and RMS under the M5 West Widening Deed
- The Company does not remedy this failure within a reasonable period of time after receiving a written notice from RMS requiring it to do so, and
- RMS has notified the Security Trustee of this breach of the M5 West Widening Deed, in writing, and
 - ♦ In the case of a non-payment, the breach has not been remedied within 21 days of this notification, or
 - ♦ In the case of any other breach which is capable of being remedied, the breach has not been remedied within a further reasonable period of time,

RMS or a nominee of RMS may (but need not) take any action necessary to remedy the default and may, for this purpose, enter the “M5 West widening” project’s worksites, temporary works areas, “extra land” and any other land on which the Company is carrying out its widening tasks.

This general RMS power is in addition to RMS’s more specific rights to “step in” under the M5 West Widening Deed “event of default” provisions summarised in sections 10.2 to 10.7 below.

If it does take remedial action, RMS or its nominee must cease taking this action as soon as the failure has been remedied, giving the Company reasonable notice of the intended cessation.

The Company must give all reasonable assistance to RMS or its nominee to remedy the Company’s failure, including the provision of staff, giving RMS access to the works, plant, equipment, consumables and documents and doing anything else reasonably required by RMS, and must ensure the D&C Contractor and all other subcontractors do likewise.

The Company will not be entitled to any relief from its obligations or any compensation from RMS concerning any actions taken by RMS or its nominee, and it has released RMS from any claim or liability for any costs, damage or loss the Company incurs as a result of RMS's actions, apart from any costs etc resulting from any RMS negligence or wilful default.

Any costs, damage or losses reasonably incurred by RMS in taking action under this general remedial power—*other than* any costs etc incurred because of any RMS or RMS agent's negligence or wilful default, and also excluding any costs etc incurred to the extent that the Company's failure to perform also entitles RMS to "step in" and take remedial action under the more specific "event of default" provisions described in sections 10.2 to 10.7 below, even if RMS has chosen to exercise its general remedial power rather than its "event of default" step-in powers—will be a debt due and payable by the Company to RMS. (If RMS chooses to exercise its "event of default" remedial powers, its rights to be paid for the costs it incurs will be governed by the arrangements described in section 10.5.4.)

10.1.2 Powers under the RMS General Security Deed and the RMS Consent Deed—2012

Under the RMS General Security Deed and the RMS Consent Deed—2012, if:

- The Company breaches the RMS General Security Deed, including any breach of provisions in that deed requiring the Company to fully and punctually perform all its obligations under (among other contracts) the M5 West Widening Deed and the M5 West Widening Side Deed, and
- RMS has notified the Security Trustee of this breach, in writing, and
 - ♦ In the case of a non-payment, the breach has not been remedied within 21 days of this notification, or
 - ♦ In the case of any other breach which is capable of being remedied, the breach has not been remedied within a further reasonable period of time,

RMS may (but need not) do everything RMS believes necessary or desirable to remedy the breach to its own satisfaction, and any liabilities or expenses incurred by RMS in doing so must be reimbursed by the Company on demand.

These RMS General Security Deed provisions do not limit RMS's other rights under the M5 West Widening Deed, described above, or its other rights at law.

10.2 Remediation of M5 West Widening Deed 'events of default' by the Company

"Events of default" are defined in the M5 West Widening Deed as:

- Any failure by the Company to commence or expeditiously and diligently progress the design, construction, completion and commissioning of the widening works (see section 4)

- Any display by the Company of an intention to permanently abandon the widening project
- Any material failure by the Company to insure the widening works as required under the M5 West Widening Deed and the Project Deed (sections 4.16 and 5.5)
- Any other material breach by the Company of its obligations under any "**M5 West widening project document**" as defined in the M5 West Widening Deed, *meaning* the M5 West Widening Deed, the M5/M7 Interface Deed, the M5 West Widening Design and Construction Contract, the Deed of Engagement of Principal Contractor, the M5 West Widening Side Deed, the Interim Design and Independent Verification Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the RMS General Security Deed, the RMS Consent Deed—2012 or any other document the Minister for Roads, RMS and the Company agree is an "M5 West widening project document"
- Any failure by the Company's shareholders to pay an "RMS step-in required shareholder contribution", as defined in the M5 West widening Deed, following a demand by RMS for such a payment under arrangements summarised in section 10.5.4 below, even if the Company is not in breach of the M5 West Widening Deed
- Any of a defined series of "insolvency events" concerning the Company, even if it is not in breach of the M5 West Widening Deed, and
- Any material breach of a representation or warranty given by the Company under the M5 West Widening Deed.

If any of these "events of default" occurs and RMS has notified the debt financiers' Security Trustee of this in writing, *and*

- In the case of an "event of default" arising from a non-payment, this default has not been fully remedied within 21 days of the notification of the Security Trustee, *or*
- In the case of any other "event of default" which is capable of being remedied, the "event of default" has not been remedied within a period after the notification equivalent to that available to the Company to remedy the "event of default", if this is specified in the relevant contract(s), *or*
- In the case of an "event of default" which is not capable of being remedied,
 - ♦ The Security Trustee has not "stepped in" to exercise the Company's rights and obligations under the relevant contract, under arrangements described in section 10.3 below, *and*
 - ♦ Any receiver, receiver/manager or administrator appointed by the Security Trustee has not "stepped in" in this way, *and*
 - ♦ The Security Trustee has not assigned the Company's interests in the "RMS Consent Deed project

documents” (section 9.1) within 12 months of RMS’s notification,

RMS may give the Company a written notice, copied to the Security Trustee and Agent, requiring the Company to remedy the “event of default”, or overcome its effects, within a time period of not more than 40 business days that is regarded by RMS as reasonable and specified in the notice.

The Minister for Roads, RMS and the Company have agreed that if the “event of default” is a failure to pay money, the “reasonable time” to remedy the default will be 10 business days.

If the “event of default” is not a failure to pay money, the Company must give RMS a program to remedy the “event of default” or overcome its effects in accordance with RMS’s notice, and RMS must consult with the Company in good faith to develop and settle this program. If the “event of default” is either of the first two types listed above, the proposed program must be given to RMS within ten business days of RMS’s notice.

The Company must comply with both RMS’s notice and the settled program.

If the Company considers, in good faith, that the time specified in RMS’s notice is not reasonable, it must immediately notify RMS, giving details of its reasons, and RMS must then, as soon as practicable, review the time allowed for the “event of default” to be remedied or its effects overcome.

RMS is obliged to grant a reasonable extension of time if the Company is diligently pursuing the agreed remedial program and the motorway is open to the public to the extent that it is safe to do so (subject to the Company’s traffic management rights and obligations under the M5 West Widening Deed, as described in section 4.11, and the relevant Project Deed and M5 Western Link Project Deed requirements described in section 5.1). If the Company still consider that the time allowed, as varied, is not reasonable, it may either repeat this process or refer the matter for expert determination, and if necessary arbitration, under the M5 West Widening Deed’s dispute resolution procedures (section 7.12).

Under the M5 West Widening Deed itself the total extension of time granted by RMS and/or an expert or arbitrator under the original and all subsequent applications may not exceed 21 months or, if the “event of default” is either of the first two types listed above, six months.

RMS must give the Security Trustee and Agent copies of all material correspondence and documents RMS issues to the Company concerning the default while it is attempting to remedy the default.

If the Company fails to promptly remedy an “event of default” or the consequences of any negligence or wilful misconduct on its part, and RMS believes urgent action is required to minimise any resultant health, safety, environmental or property risks or risks to the widening works, RMS may immediately take any steps it

considers necessary to minimise these risks or, if they materialise, their effects.

10.3 Remediation of Company breaches and M5 West Widening Deed ‘events of default’ by the Security Trustee

In addition to the Company’s obligations to remedy any M5 West Widening Deed “event of default” (section 10.2) and RMS’s rights to remedy a Company breach (section 10.1), under the RMS Consent Deed—2012 the Security Trustee may, in exercising its rights under the debt financiers’ securities and after notifying RMS in writing,

- “Step in” to remedy a Company breach of any “RMS Consent Deed project document” (see section 9.1.3), including the M5 West Widening Deed, the M5 West Widening Design and Construction Contract and the M5 West Widening Side Deed, or an M5 West Widening Deed “event of default”, by exercising the Company’s rights and performing the Company’s obligations under the relevant contract(s), or
- Appoint a receiver, receiver/manager or administrator which may “step in” in this way.

The Security Trustee or a receiver, receiver/manager or administrator appointed by the Security Trustee may also assign, otherwise transfer or sublet the Company’s rights under and interests in any “RMS Consent Deed project document”, in accordance with the relevant provisions of these contract(s).

If the Security Trustee or a receiver, trustee, administrator, controller, agent or attorney appointed by the Security Trustee “steps in” but fails to promptly remedy an “event of default” or the consequences of any negligence or wilful misconduct on their part, and RMS believes urgent action is required to minimise any resultant health, safety, environmental or property risks or risks to the widening works, RMS may immediately take any steps it considers necessary to minimise these risks or, if they materialise, their effects.

10.4 Notifications of ‘stepping in’ by RMS or termination of the M5 West Widening Deed for an unremedied ‘event of default’

If:

- The Company (or the Security Trustee in its shoes) fails to remedy the “event of default” or overcome its effects within the period specified by RMS, as extended, under the arrangements described in section 10.2, or
- At any time during this period, the Company (or the Security Trustee in its shoes) is not diligently pursuing a program to remedy the “event of default” or overcome its effects, or the motorway is not open to the public to the extent that it is safe to do so (again subject to the M5 West Widening Deed’s

traffic management provisions described in section 4.11 and the relevant Project Deed requirements described in section 5.1),

RMS may, but need not, give the Company:

- A “**default step-in notice**”, giving the Company 20 business days” notice that RMS intends to exercise “default step-in rights” to remedy the “event of default” or overcome its effects itself, as specified in the M5 West Widening Deed and described in section 10.5 below, or
- A “**termination notice**”, giving the Company 20 business days” notice that RMS intends to initiate procedures to terminate the M5 West Widening Deed, as described in section 10.7.

RMS must give the Security Trustee and Agent a copy of any such “default step-in notice” or “termination notice”. In either circumstance the Company (or the Security Trustee in its shoes) may continue to remedy the “event of default” or overcome its effects during the 20-day notice period.

If RMS is entitled to issue a “default step-in notice” or a “termination notice” but has not done so within 60 business days of the date on which it became entitled, and:

- The Company cannot comply with all its obligations under the Project Deed and/or the M5 Western Link Project Deed, or
- RMS and the Company, acting reasonably, agree that the motorway should be reinstated so as to minimise any material adverse effects the “event of default” will have on its capacity or patronage,

any of the Minister for Roads, RMS and the Company may proposed a “*Reinstatement Plan*” for the motorway, in which case the arrangements described in section 10.6 below will apply.

10.5 ‘Stepping in’ by RMS to remedy an M5 West Widening Deed ‘event of default’

10.5.1 General ‘step in’ and ‘step out’ arrangements

If RMS issues a “default step-in notice” as described above, but the “event of default” has not been remedied or its effects overcome by the end of the 20-day notice period, RMS may, but again need not, in its absolute discretion,

- Assume either total or partial possession, management and control of the widening project and works in connection with the remedying of the “event of default” or overcoming its effects, or
- Take any other steps which RMS considers necessary or desirable to continue the design and construction of the widening works and which are connected with the remedying of the “event of default” or overcoming its effects, expressly including any steps to minimise risks to health and safety, the

environment, the widening works, any property or the safe and secure performance of work on the widening of the motorway.

Whichever of these “default step-in” approaches is adopted, RMS must:

- Give the Company a written notice, copied to the Security Trustee and Agent, of the date it intends to “step in” and the widening works and design and construction tasks for which it will be “stepping in”
- Promptly consult with the Company on the actions it proposes to take and the time period RMS believes might be necessary for these actions
- In performing the widening design and construction obligations of the Company, comply with the M5 West Widening Deed’s *Scope of Works and Technical Criteria* and obtain the same verifications and certifications from the Independent Verifier as the Company was obliged to obtain
- Keep the Company informed about all of its relevant communications with the Independent Verifier and the Environmental Representative, and
- More generally, diligently pursue the tasks for which it has “stepped in” if any failure to do so would adversely affect the use, patronage or capacity of the motorway or the Company’s ability to levy tolls and so as to permit the Company to resume the performance of all its obligations under the Project Deed and the M5 Western Link Project Deed as soon as reasonably practicable.

When RMS “steps in” the Company’s M5 West Widening Deed obligations concerning the widening works and design and construction tasks for which RMS has “stepped in” will be suspended and the Company must promptly comply with any reasonable directions RMS may make to them to:

- Immediately suspend all or any other part of its work on the widening of the motorway
- Co-operate on the “step in” with RMS, or its nominees, as and when required by RMS in its absolute discretion, and
- Take any other steps RMS considers reasonably necessary or desirable in order to permit the Company to perform all its obligations under the Project Deed and the M5 Western Link Project Deed as soon as reasonably practicable, minimise health, safety, environmental and property risks and achieve efficiency in its “step in” tasks.

The Company must give RMS and its nominees all reasonable assistance required by RMS in exercising its “step in” rights, and must also, as much as reasonably practicable, procure that the D&C Contracts and all of its other subcontractors, suppliers and consultants do likewise.

More specifically, the Company must:

- Make all relevant widening design documentation and other widening documentation available to RMS and/or its nominees

- Give RMS and/or its nominees access to the relevant widening worksites, temporary works areas and “extra land” (section 4.6)
- As much as practicable, having regard to its other M5 motorway obligations, give RMS and/or its nominees possession of all relevant plant, equipment and materials
- Make all relevant Company staff available to RMS and/or its nominees
- If RMS has assumed only partial possession, management and control of the widening project and works, in what is termed a “**partial step-in**”,
 - ♦ Make all relevant staff of the D&C Contractor and other Company subcontractors, suppliers and consultants available to RMS and/or its nominees,
 - ♦ Permit RMS to “step in” under any relevant Company widening project subcontracts, including its M5 West Widening Design and Construction Contract with the D&C Contractor, and
 - ♦ Cooperate openly and constructively with RMS, subject to reasonable protection of its commercial and legal positions, in managing the respective rights of RMS and the Company under the subcontracts during the “step-in” period, so as to minimise, as much as reasonably practicable, any adverse effects on the ability of the Company to carry out its other widening project tasks and continue to meet its Project Deed and M5 Western Link Project Deed obligations
- If RMS has assumed possession, management and control of *all* of the widening project and works following an “event of default”, in what is termed a “**total step-in**”, procure the novation to RMS and/or its nominees of any relevant Company and/or D&C Contractor subcontracts connected with widening works which have not yet been completed, if these procurement(s) of novation(s) are required by RMS
- Facilitate a smooth transfer of its work to RMS and/or its nominees, and do nothing that is intended, directly or indirectly, to prejudice or frustrate this transfer or make it difficult, and
- Do everything else reasonably required by RMS to enable RMS and/or its nominees to remedy the “event of default” or overcome its effects,

and must also, as much as reasonably practicable, procure that the D&C Contractor and all of its other subcontractors, suppliers and consultants do likewise.

The Minister for Roads, RMS and the Company must cooperate openly and constructively, subject to reasonable protection of their commercial and legal positions, in investigating, managing and responding to any incidents on the motorway during RMS’s “step in” which have or might have resulted in serious injury or death to any person, and the Company must immediately inform RMS, in writing, about any motorway safety actions it is taking, or proposes, in response to such an incident.

Throughout its “step in” RMS will, if necessary, have an irrevocable power of attorney to execute any documents which are reasonably necessary for the “step in” on the Company’s behalf, should the Company fail to do this within five business days of a written request by RMS.

RMS must give the Security Trustee and Agent copies of any notices it issues during the “step in”.

If RMS engages a contractor to perform any works or services connected with its “default step-in” rights, RMS must reasonably endeavour to obtain the rights and warranties that a “reasonable and prudent principal” would obtain—including specified warranties and indemnities similar to those provided by the Company in the M5 West Widening Deed and a defects liability period of 12 months (plus 12 months more for any rectification of defects)—plus a collateral warranty by the contractor indemnifying the Company against any losses it suffers as a result of any damage to the motorway arising from the contractor’s works or services.

The M5 West Widening Deed makes it clear that while RMS is exercising its “default step-in” rights, the rights and obligations of the Minister for Roads, RMS and the Company under the M5 West Widening Deed will be affected only in the way expressly set out in the M5 West Widening Deed and summarised above and below.

The D&C Contractor has expressly acknowledged RMS’s “default step-in” rights under the M5 West Widening Deed.

RMS will not have to pay the Company any compensation for exercising its “default step-in” rights, and will not be liable for any costs, damage, losses or claims the Company suffers as a result of its “stepping in”, apart from:

- A requirement to reimburse the Company for any contract sums it must pay during the “step-in” period under any subcontract subjected to “stepping in” by RMS and/or its nominees under the arrangements described above
- Any losses or claims resulting from RMS negligence or a wilful RMS default in exercising its “step-in” rights, and
- A requirement to pay the Company for any increase in the motorway’s operating and maintenance costs caused by any “additional works” undertaken by RMS, under arrangements described in section 10.5.2 below.

If RMS achieves “construction completion” of the widening works (section 4.17) in the course of exercising its “step-in” rights, the Company will be deemed to have remedied the “event of default”, the completed widening works will become part of the “tollroad” as if they had been completed by the Company, and the Company must comply with all its relevant obligations under the M5 West Widening Deed (including the defects correction obligations summarised in section 4.18) and the Project Deed and M5 Western Link Project Deed (section 5) as if it had completed the widening works. In these circumstances RMS must assign to the Company the benefits of any of the warranties and indemnities it was obliged to

reasonably endeavour to obtain from any contractors it engaged to perform “step in” works or services.

RMS may, at any time, issue a “**step-out notice**” to the Company, copied to the debt financiers’ Security Trustee and Agent, notifying them that it intends to cease exercising its “step in” rights on a specified reasonable date no later than 60 business days after the date of the notice.

If it does so, RMS must “step out” and the Company must recommence its performance of the relevant widening tasks on the notified date. Again, in these circumstances RMS must assign to the Company the benefits of any of the warranties and indemnities it was obliged to reasonably endeavour to obtain from any contractors it engaged to perform “step in” works or services.

If RMS “steps out” and an “event of default” of the same type or a substantially similar “event of default” subsequently occurs, the notification processes described in sections 10.2 and (if applicable) 10.4 may be repeated, and if RMS chooses to “step in” again the provisions summarised in this section 10.5 will once again apply. However, in these circumstances the total period available to the Company (or the Security Trustee in its shoes) to remedy the repeated “event of default”, under the M5 West Widening Deed provisions described in sections 10.2 and 10.3, may not exceed three months.

If RMS has “stepped out” before “construction completion” of the widening works has been achieved, and:

- The Company cannot comply with all its obligations under the Project Deed and the M5 Western Link Project Deed, or
- RMS and the Company, acting reasonably, agree that the motorway should be reinstated so as to minimise any material adverse effects the “event of default” will have on its capacity or patronage,

any of the Minister for Roads, RMS and the Company may propose a “*Reinstatement Plan*” for the motorway, in which case the arrangements described in section 10.6 below will apply.

10.5.2 Changes to the widening works during a ‘default step-in’ by RMS

At any time during an RMS “default step-in” RMS may propose changes to the widening works by issuing an “additional works proposal”, a copy of which must also be sent to the debt financiers’ Security Trustee and Agent.

If RMS does so, the Company must, within 15 business days, give RMS detailed estimates by the Company of the motorway operating and maintenance costs or savings the Company would incur if the proposed changes were made, details on any adverse effects on the functional integrity of the widening works, performance standards, quality standards, any other M5 West Widening Deed obligations, the motorway’s patronage or capacity, the Company’s ability to levy or collect tolls or the ability of the Company to comply with its Project Deed and M5 Western Link Project Deed obligations, plus any other information requested in the “additional works proposal”.

RMS will then have 15 business days to advise the Company whether it wishes to proceed with the proposed changes.

If it decides to proceed, and RMS agrees with the costings and advice provided by the Company, RMS may notify the Company of this within this period, again providing a copy of its notice to the Security Trustee and Agent, in which case:

- The changes will take effect in accordance with the costings and advice the Company has provided (i.e. with the notified amended standards etc), and
- The “additional works” may be carried out by RMS, *provided* (unless the Minister for Roads, RMS and the Company otherwise agree) these “additional works”:
 - Will not reduce the motorway’s capacity or patronage prior to “final completion” of the widening works (section 4.17) by more than the reductions forecast for this period, as a result of the Company’s widening works, in the Company’s “base case” financial model for the widening project as at 19 June 2012, and
 - Will not adversely affect the use, patronage and capacity of the widening works or the motorway after “final completion”, or the Company’s ability to levy and collect tolls.

If RMS wishes to proceed but disagrees with the costings and/or advice provided by the Company and/or the Trustee, RMS may refer the matter for determination under the M5 West Widening Deed’s dispute resolution procedures (section 7.12), in which case:

- RMS may carry out the “additional works” before the dispute is determined if the above criteria are satisfied (even though RMS has not yet agreed with the Company’s costings and advice) or if the Minister for Roads, RMS and the Company have otherwise agreed the “additional works” may be carried out, and
- The obligations of the Company under the M5 West Widening Deed, the Project Deed and the M5 Western Link Project Deed will be amended in accordance with the costings and advice the Company has provided or, in the case of those aspects with which RMS disagrees, the determination made under the dispute resolution procedures.

RMS must pay the Company for any increase in the motorway’s operating and maintenance costs caused by the “additional works” undertaken by RMS, either as agreed between RMS and the Company under the processes described above or as determined under the dispute resolution procedures. Unless otherwise agreed, this payment must be made through a set-off against any amounts then due and payable to RMS under quarterly “step in” cost payment arrangements which will apply (subject to a number of provisos) after “construction completion” of the widening works, as summarised in section 10.5.4 below, or otherwise within ten business days of RMS’s completion of the “additional works”.

Changes to the widening works may also be made if RMS, while exercising its “step in” rights, discovers any latent defect in the

condition of a structure on, above, under or adjacent to any widening worksite, temporary works area or “extra land”.

If RMS makes such a discovery it must promptly notify the Company, and within the next 20 business days the Company may (but need not) propose alternative design solutions for the widening works.

If the Company does propose alternative design solutions, and RMS reasonably believes, taking account of any additional capital and operating cost consequences of the latent defect, that it would not have been feasible for the Company to carry out the widening works in accordance with the M5 West Widening Deed’s existing *Scope of Works and Technical Criteria*, RMS must consider the proposed changes and any supporting information and documentation, consult with the Company in assessing the changes and the resultant total capital and operating costs, and either approve or reject the proposed changes in good faith but otherwise in its absolute discretion.

All disputes concerning any latent defect detected by RMS and any alternative design solutions or other changes proposed in response by the Company must be addressed through the M5 West Widening Deed dispute resolution procedures described in section 7.12.

10.5.3 M5 West Widening Side Deed provisions concerning ‘stepping in’ by RMS

As already indicated in section 10.5.1,

- If RMS assumes only partial possession, management and control of the widening project and works following an “event of default”, in a “partial step-in”, the Company must make all relevant staff of the D&C Contractor and other Company widening subcontractors, suppliers and consultants available to RMS and/or its nominees, permit RMS to “step in” under any relevant Company widening subcontracts, including its M5 West Widening Design and Construction Contract with the D&C Contractor, and cooperate openly and constructively with RMS, subject to reasonable protection of its commercial and legal positions, in managing the respective rights of RMS and the Company under the subcontracts during the step-in period, so as to minimise, as much as reasonably practicable, any adverse effects on the ability of the Company to carry out its other widening project tasks and continue to meet its Project Deed and M5 Western Link Project Deed obligations, and
- If RMS assumes possession, management and control of *all* of the widening project and works following an “event of default”, in a “total step-in”, the Company must procure the novation to RMS and/or its nominees of any relevant Company and/or D&C Contractor subcontracts connected with widening works which have not yet been completed, including the M5 West Widening Design and Construction Contract, if these procurement(s) of novation(s) are required by RMS.

Under the M5 West Widening Side Deed between RMS, the D&C Contractor, the Company and the D&C Contractor Guarantor, if RMS elects to “step in” to the M5 West Widening Design and Construction Contract but not to require its novation,

- During its “step in” RMS will be entitled to exercise the rights of the Company under this contract
- The D&C Contractor must promptly provide all the assistance required by RMS and, as much as reasonably practicable, procure that its own subcontractors do likewise
- The D&C Contractor must deal with RMS throughout the “step in”
- The M5 West Widening Design and Construction Contract must remain in full force, and the D&C Contractor must continue to diligently perform all of its obligations, including the completion of the construction of the widening works, and
- Without double counting, RMS must pay the D&C Contractor any portion of the contract sum payable to it by the Company under this contract during the “step in” period.

If RMS elects *not* to “step in” to the M5 West Widening Design and Construction Contract and not to require its novation, the D&C Contractor must nonetheless cooperate with and provide all reasonable assistance to RMS and the Company as required by them, so as to enable them to exercise their rights and fulfill their obligations following RMS’s “partial step in”, as summarised in section 10.5.1.

If there is a “total step in” by RMS and RMS gives the D&C Contractor and the D&C Contractor Guarantor a notice that it requires the novation of the M5 West Widening Design and Construction Contract (with a copy of this “**novation notice**” also being sent to the Security Trustee and Agent),

- The M5 West Widening Design and Construction Contract will end and will be deemed to have been replaced by a new contract, on the same terms apart from:
 - ♦ Having RMS as a party in the place of the Company, and
 - ♦ Any amendments that are required to reflect the fact that RMS’s “step in” has occurred and to permit the new contract between RMS and the D&C Contractor to act independently of the M5 West Widening Deed, on the basis that:
 - The rights and obligations of RMS and the D&C Contractor must be equivalent to those the Company and the D&C Contractor would have had had the “step in” not occurred, and
 - The rights and obligations which were previously conditional on the Company’s having an entitlement against RMS or an obligation to RMS must now apply regardless of any such right or obligation,

provided RMS's liability may be no greater than it would have been under the M5 West Widening Deed had it not exercised its "default step-in" rights.

If there is a dispute between RMS and the D&C Contractor about these deemed amendments, either party may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (see section 7.12).

- The M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee), under which the D&C Contractor Guarantor has provided a guarantee to the Company of the D&C Contractor's performance under the M5 West Widening Design and Construction Contract, will similarly end and be deemed to have been replaced by a new guarantee, on the same terms apart from:
 - ♦ Having RMS as the beneficiary of the D&C Contractor Guarantor's guarantee, in the place of the Company, and
 - ♦ Any amendments that are required to reflect the fact that RMS's "step in" has occurred and the M5 West Widening Design and Construction Contract has been replaced as described above, *provided* the D&C Contractor Guarantor's liability under the new guarantee may be no greater than it would have been under the original guarantee had RMS not issued its novation notice.

Again, if there is a dispute between RMS and the D&C Contractor Guarantor about these deemed amendments, either party may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (section 7.12).

Nothing in these arrangements may require RMS to assume any of the obligations of the Company under the M5 West Widening Design and Construction Contract relating to the period before the date RMS issued its novation notice, or otherwise have any liability to the D&C Contractor or the D&C Contractor Guarantor arising from any circumstances before that date.

If RMS subsequently issues a "step-out notice" to the Company, under the "stepping out" arrangements described in section 10.5.1, and the Company issue a "further novation notice" to the D&C Contractor and the D&C Contractor Guarantor as described in the M5 West Widening Side Deed, from the date on which RMS "steps out":

- Any novated and amended contract between RMS and the D&C Contractor which replaced the M5 West Widening Design and Construction Contract during RMS's "step in" will end and will be deemed to be replaced by another new contract, on the same terms apart from:
 - ♦ Having the Company as a party in the place of RMS, and

- ♦ Any amendments that are required under an application of specified "pass through" provisions originally set out in the original M5 West Widening Design and Construction Contract (as at 19 June 2012), on the basis that the rights and obligations of the Company and the D&C Contractor must otherwise be equivalent to those RMS and the D&C Contractor would have had under the previous contract had the further novation not occurred.

If there is a dispute between RMS and the Company about these deemed amendments, any of these parties may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (section 7.12).

- Any novated and amended guarantee of the D&C Contractor's performance provided to RMS by the D&C Contractor Guarantor will similarly end and be deemed to have been replaced by a new guarantee, on the same terms apart from:
 - ♦ Having the Company as the beneficiary of the D&C Contractor Guarantor's guarantee, in the place of RMS, and
 - ♦ Any amendments that are required to reflect the fact that the contract that replaced the original M5 West Widening Design and Construction Contract has itself been replaced as described above, *provided* the D&C Contractor Guarantor's liability under the new guarantee may be no greater than it would have been under the guarantee it had provided to RMS had the "step out" not occurred.

Once more, if there is a dispute between RMS and the D&C Contractor Guarantor about these deemed amendments, either party may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (section 7.12).

Nothing in these arrangements may:

- Require the Company to assume any of RMS's obligations, under the contract which replaced the M5 West Widening Design and Construction Contract during the "step in", relating to the period before the "step out" date
- Affect the rights of RMS or the D&C Contractor under that contract prior to the "step out" date, or
- Affect the rights of RMS and the D&C Contractor Guarantor under the guarantee provided to RMS by the D&C Contractor Guarantor prior to the "step out" date.

The Company has expressly acknowledged RMS's rights under all of these M5 West Widening Side Deed provisions and has undertaken to cooperate with RMS in its exercising of these rights.

10.5.4 Payments to RMS for its ‘step-in’ costs

The M5 West Widening Deed specifies two potential sources of payments to RMS for part or all of the costs it incurs in exercising its “default step-in” rights: the Company’s shareholders and the Company.

Under the arrangements concerning shareholder payments, RMS may issue a formal “demand notice” to the Company, accompanied by specified supporting information, at any time after “stepping in”, provided the Company’s shareholders have not yet subscribed to specified subordinated debt notes for an amount of \$63 million or more. If RMS does so, the Company must irrevocably direct each of its shareholders to pay a specified share of the so-called “**RMS step-in required shareholder contribution**” requested in RMS’s demand notice, which in total may not exceed \$63 million less the aggregate principal of all the debt notes issued to the shareholders prior to or on the contribution date. The Company has irrevocably appointed RMS as its attorney for the purposes of these arrangements.

Under the arrangements concerning Company payments, from the date of “construction completion” of the widening works (section 4.17)—if it occurs, and subject to several other provisos discussed below—the reasonable costs incurred by RMS in any exercising of its “default step-in” rights will become a debt due to be paid by the Company to RMS in quarterly instalments, subject to upper limits on these quarterly payments specified in a *Cost Payment Schedule* set out in an annexure to the M5 West Widening Deed.

For the purposes of these arrangements, the reasonable costs incurred by RMS for which reimbursements may be made expressly include:

- RMS’s reasonable contracting, procurement and financing costs and its costs under any novated subcontract in connection with the remedying of “event(s) of default” or overcoming their effects
- Its reasonable costs in obtaining rights and warranties (as discussed in section 10.5.1) from any contractors it engages to perform any works or services connected with its “default step-in” rights
- Its reasonable costs in connection with health, safety, environmental and other required responses to any latent defects detected during its “step in” (section 10.5.2), and
- Without any double counting, interest on these costs and RMS’s other reasonable “step in” costs, from the dates on which they are incurred, at a rate specified in another annexure to the M5 West Widening Deed,

but do *not* include any costs incurred by RMS in carrying out any “additional works” (section 10.5.2) or any unpaid costs that are payable by RMS to the Company for the “agency works” (sections 4.1 and 4.15). RMS must give the Company all the documentation relied upon by RMS, plus any other information the Company reasonably requires, to substantiate its costs.

If RMS has not yet paid the Company for any increase in the motorway’s operating and maintenance costs caused by any “additional works” undertaken by RMS under the arrangements for this described in section 10.5.2, this payment must be set off against any amounts then due and payable to RMS under the quarterly “step in” cost payment arrangements.

Subject to RMS’s rights concerning an “event of default”, its rights under the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed and the RMS Consent Deed—2012 and its common law and equity rights concerning any breach of the Company’s payment obligations under this M5 West Widening Deed payment regime, this regime provides RMS’s sole remedy for recovering any of its reasonable “default step-in” costs from the Company.

If RMS receives any “RMS step-in required shareholder contribution” this amount must be applied to reduce the amount payable to RMS by the Company for RMS’s “default step-in” costs.

If “construction completion” of the widening works (section 4.17) is never achieved, the Company will have no obligations to repay any of RMS’s “default step-in” costs. However, if RMS has “stepped in” it will be *deemed* to have achieved “construction completion” if the Independent Verifier issues a notice, in accordance with the M5 West Widening Deed’s construction completion arrangements described in section 4.17, stating that the only work remaining to be completed is:

- Work which is to be performed by the Company itself, not the D&C Contractor
- Updating of the *Maintenance Manual* (section 4.17), and/or
- Any work RMS has been prevented from performing because:
 - It has been complying with its obligations to permit the Company to resume all its obligations under the Project Deed and the M5 Western Link Project Deed as soon as reasonably practicable
 - The Company has failed to give RMS access to the relevant widening worksites, temporary works areas, “extra land” or the motorway beyond RMS’s rights of access under the M5 West widening contracts, the Project Deed, the M5 Western Link Project Deed and the leases, and/or
 - The Company has breached any of its other obligations.

Notwithstanding the provisions described above, the M5 West Widening Deed’s arrangements for reimbursing RMS for its reasonable “default step-in” costs:

- Are subject to a cap on the aggregate reimbursement payment, calculated using the Company’s “base case” financial model, which under the current “base case” model (as at 25 June 2012) is \$308.7 million, and
- Require the quarterly payments to be made only to the extent that the Company has sufficient “available funds”, *meaning*

sufficient funds sourced from the additional revenues generated by the widening which it is entitled to distribute for the relevant quarter in accordance with the motorway's debt financing documents.

Any shortfall will accrue capitalised interest at 2.68% per quarter until it is ultimately paid to RMS, through future quarterly payment(s) if (but only if) sufficient funds are available, under arrangements set out in the M5 West Widening Deed.

The M5 West Widening Deed and RMS Consent Deed—2012 specify requirements and consents for the establishment and operation by the Company of a “**step-in costs reserve account**” for the purpose of funding their reimbursements to RMS for its “step in” costs.

Under the Subordination Deed of 19 June 2012, between RMS, the Company and the Company's shareholders, if RMS has “stepped in”, under either a “total step-in” or a “partial step-in” (section 10.5.1), and has not yet “stepped out”, there may be no payments by the Company to its shareholders under their subordinated debt note financing arrangements with the Company if:

- An “RMS step-in required shareholder contribution” has not been paid as demanded by RMS, *or*
- Immediately before the proposed repayment, the Company is not complying with the M5 West Widening Deed's requirements concerning the “step-in costs reserve account”, *or*
- If the repayment were made, the Company would not be complying with the M5 West Widening Deed's requirements concerning the “step-in costs reserve account”.

The Company and the shareholders may not amend, replace, transfer or waive any of their rights and obligations under the Subordination Deed if this would:

- Materially prejudice the subordination contemplated by the restrictions on Company payments to the shareholders described above, *or*
- More generally, have a material adverse effect on RMS's interests

unless RMS grants its consent.

10.6 Other motorway reinstatement arrangements

As already indicated in section 10.4, if there is an “event of default” and:

- RMS is entitled to issue a “default step-in notice” or a “termination notice” as described in section 10.4 but has not done so within 60 business days of the date on which it became entitled, *or*
- RMS has “stepped in” but has then “stepped out”, as described in section 10.5.1, before “construction completion” of the widening works has been achieved

and:

- The Company cannot comply with all its obligations under the Project Deed and the M5 Western Link Project Deed, *or*
- RMS and the Company, acting reasonably, agree that the motorway should be reinstated so as to minimise any material adverse effects the “event of default” will have on its capacity or patronage,

the Minister for Roads, RMS and the Company may propose a “*Reinstatement Plan*” for the motorway.

This *Reinstatement Plan* must include detailed descriptions of the works that are necessary for prompt repair or replacement of the motorway so that the Company may comply with its Project Deed and M5 Western Link Project Deed obligations, the material adverse effects of the “event of default” on the motorway's capacity and patronage will be minimised and, as much as reasonably practicable, the flexibility of the parties to the M5 West Widening Deed in carrying out the widening project will be preserved.

If the Company proposes a *Reinstatement Plan*, RMS must, within 20 business days, direct the Company to implement either this plan or an alternative plan proposed by RMS.

If RMS proposes such an alternative, the Company must, again within 20 business days, either accept this plan or, if it believes in good faith that the RMS plan will not achieve the desired objectives, refer the matter for determination under the M5 West Widening Deed's dispute resolution procedures, as described in section 7.12.

The Company must then diligently implement the ultimately accepted or determined *Reinstatement Plan* as soon as reasonably practicable.

10.7 Termination of the M5 West Widening Deed by RMS

RMS may terminate the M5 West Widening Deed by:

- Terminating the Project Deed and/or the M5 Western Link Project Deed for a Company default, if it is entitled to do so on any of the bases described in section 9.2, under the arrangements described in that section, including restrictions imposed by the RMS Consent Deed—2012, in which case the M5 West Widening Deed will automatically terminate and the consequences described in section 10.7.1 below will apply
- Issuing a notice to the Company, in RMS's absolute discretion, if the Company is prevented from carrying out its widening works for more than six months as a result of “migratory contamination” (see section 4.7) or an RMS, court or tribunal order or other legal requirement responding to the discovery of an artefact or a native title claim (see section 4.8), in which case the consequences described in section 10.7.2 below will apply, *or*
- Issuing a notice to the Company, copied to the Security Trustee and Agent, if the Company (or the Security Trustee in

its shoes) has failed to remedy an M5 West Widening Deed “event of default” or overcome its effects within 20 business days of a “termination notice” having been issued by RMS under the arrangements described in section 10.4, in which case the consequences described in section 10.7.3 below will apply.

10.7.1 Consequences of an automatic termination of the M5 West Widening Deed upon a termination of the Project Deed and/or the M5 Western Link Project Deed for a Company default

Upon the automatic termination of the M5 West Widening Deed resulting from any termination of the Project Deed and/or the M5 West Widening Deed for an “event of default” as defined in those deeds (section 9.2),

- RMS will be entitled to damages for any expenses, losses or liabilities it incurs which are connected in any way with the termination of the M5 West Widening Deed, *other than* any “special, indirect or consequential” losses of income, revenue, profits, financial opportunities, business, business opportunities, contracts, goodwill, use, production or value of the M5 motorway, or failures to realise anticipated savings, cost reductions or other benefits
 - Any unpaid RMS “default step-in” costs owing to RMS will become immediately due and payable
 - The Minister for Roads, RMS and the Company will retain their rights to claim damages for any breaches of contract and any other accrued entitlements
 - RMS will not otherwise be liable to pay any compensation to the Company as a result of the termination
 - The Company must immediately give RMS all of its original design documentation for the widening project and all copies of this documentation
 - The Company must carry out any rectification or remediation work reasonably required by RMS in order to minimise any adverse effects on the motorway’s capacity or patronage and allow the motorway to be operated in accordance with the relevant criteria and specifications of the Project Deed and the M5 Western Link Project Deed
 - If it fails to do so to RMS’s reasonable satisfaction and within a period specified by RMS, RMS may carry out the rectification or remediation work itself, or procure others to carry it out, and any costs or other losses incurred by RMS in taking this action, other than losses arising from any negligence or wilful default by RMS or its contractors, will be a debt due and payable by the Company to RMS
 - To the extent necessary for RMS to be able to take this action,
 - ◊ RMS may (but need not) require the novation of any subcontract or other contract entered into by the Company concerning the widening project, including
 - the M5 West Widening Design and Construction Contract (see sections 4.14 and 10.7.4)
- The Company must execute documents to transfer its interests in the widening project’s physical, contractual, intellectual property and residual insurance assets to RMS (and has irrevocably appointed RMS as its attorney for this purpose)
 - The Company must give RMS or its nominee the originals or copies of all its accounts, records and proprietary documentation concerning the widening project and all other documentation relating to the widening project which is in its custody or control or the custody or control of its subcontractors, and
 - The Company must procure the assignment of the Company’s rights under its widening project insurance policies
- The widening project’s worksites, temporary works areas and any other land on which the Company’s work on the widening project was being carried out will revert to RMS
 - Even if RMS is not undertaking rectification or remediation work as described above, RMS may (but need not) require the novation of the M5 West Widening Design and Construction Contract (see section 10.7.4)
 - RMS must release any widening project security bond held by RMS (section 4.17):
 - ◊ Three months after the termination of the M5 West Widening Deed, if the Project Deed and/or the M5 West Widening Deed were terminated by RMS under the arrangements described in section 9.2, or
 - ◊ Within 30 days of the termination of the M5 West Widening Deed, if the Project Deed and/or the M5 West Widening Deed were terminated by the Company under the arrangements described in section 9.3
 - If the Project Deed and/or the M5 West Widening Deed were terminated by the Company under the arrangements described in section 9.3, but *not* if they were terminated by RMS under the arrangements described in section 9.2, the Minister for Roads must, within 30 days of the termination of the M5 West Widening Deed, pay the Company an “**M5 West widening early termination amount**” as specified by the M5 West Widening Deed, equal to the sum of –
 - ◊ Its widening-related debts to its financiers on the payment date, excluding any penalty rates of interest, and
 - ◊ An additional amount so that the total is sufficient to enable the Company to achieve a specified “base case” financial return from the widening project, calculated using the Company’s “base case” financial model, after taking account of incremental cashflows generated by the widening project to date, the amounts already paid and received by the Company and the amounts the Company must pay as a result of the termination, including payments it must make to its

contractors (subject to the “novation to RMS” provisions which the Company was required to ensure were present in all of the D&C Contractor’s subcontracts, as described in section 4.14) but ignoring any amounts payable to the D&C Contractor that are related to any amounts it must pay to a related corporate entity that has not been engaged by it on an arms-length basis and on commercial terms,

less, in order to avoid double counting or double relief, any amount that is also payable or has been paid to the Company as a separate “early termination amount”, as (differently) defined in the Project Deed and/or the M5 Western Link Project Deed, under the provisions summarised in section 9.3, and

- The Company must give RMS access to its accounts and all other records relating to the performance of its M5 West Widening Deed obligations for the next seven years.

10.7.2 Consequences of a termination of the M5 West Widening Deed for an extended ‘migratory contamination’, artefact or native title delay

If the M5 West Widening Deed is terminated by RMS because the Company has been prevented from carrying out its widening works for more than six months as a result of “migratory contamination” or an order or other legal requirement responding to the discovery of an artefact or a native title claim,

- The Company must continue to operate, maintain and repair the motorway in accordance with the Project Deed and the M5 Western Link Project Deed
- Within 30 days of the termination of the M5 West Widening Deed RMS must release any widening project security bond held by RMS (section 4.17) and the Minister for Roads must pay the Company the “M5 West widening early termination amount” (section 10.7.1) as specified in the M5 West Widening Deed
- Any unpaid RMS “default step-in” costs owing to RMS will become immediately due and payable
- The Minister for Roads, RMS and the Company will retain their rights to claim damages for any breaches of contract and any other accrued entitlements
- The Company must immediately give RMS all of its original design documentation for the widening project and all copies of this documentation
- RMS may (but need not) require the novation of the M5 West Widening Design and Construction Contract (see section 10.7.4), and
- The Company must give RMS access to its accounts and all other records relating to the performance of its M5 West Widening Deed obligations for the next seven years.

10.7.3 Consequences of a termination of the M5 West Widening Deed for an unremedied ‘event of default’

Upon the termination of the M5 West Widening Deed for a failure by the Company (or the Security Trustee in its shoes) to remedy an M5 West Widening Deed “event of default” or overcome its effects,

- The Company must continue to operate, maintain and repair the motorway in accordance with the Project Deed and the M5 Western Link Project Deed
- RMS will be entitled to damages for any expenses, losses or liabilities it incurs which are connected in any way with the termination of the M5 West Widening Deed, *other than* any “special, indirect or consequential” losses of income, revenue, profits, financial opportunities, business, business opportunities, contracts, goodwill, use, production or value of the M5 motorway, or failures to realise anticipated savings, cost reductions or other benefits
- Any unpaid RMS “default step-in” costs owing to RMS will become immediately due and payable
- The Minister for Roads, RMS and the Company will retain their rights to claim damages for any breaches of contract and any other accrued entitlements
- RMS will not otherwise be liable to pay any compensation to the Company as a result of the termination
- The Company must immediately give RMS all of its original design documentation for the widening project and all copies of this documentation
- The Company must carry out any rectification or remediation work reasonably required by RMS in order to minimise any adverse effects on the motorway’s capacity or patronage and allow the motorway to be operated in accordance with the relevant criteria and specifications of the Project Deed and the M5 Western Link Project Deed
- If it fails to do so to RMS’s reasonable satisfaction and within a period specified by RMS, RMS may carry out the rectification or remediation work itself, or procure others to carry it out, and any costs or other losses incurred by RMS in taking this action, other than losses arising from any negligence or wilful default by RMS or its contractors, will be a debt due and payable by the Company to RMS
- To the extent necessary for RMS to be able to take this action,
 - ♦ RMS may (but need not) require the novation of any subcontract or other contract entered into by the Company concerning the widening project, including the M5 West Widening Design and Construction Contract (see sections 4.14 and 10.7.4)
 - ♦ The Company must execute documents to transfer its interests in the widening project’s physical, contractual, intellectual property and residual insurance assets to

RMS (and has irrevocably appointed RMS as its attorney for this purpose)

- ♦ The Company must give RMS or its nominee the originals or copies of all its accounts, records and proprietary documentation concerning the widening project and all other documentation relating to the widening project which is in its custody or control or the custody or control of its subcontractors, and
- ♦ The Company must procure the assignment of the Company's rights under its widening project insurance policies
- The widening project's worksites, temporary works areas and any other land on which the Company's work on the widening project was being carried out will revert to RMS
- Even if RMS is not undertaking rectification or remediation work as described above, RMS may (but need not) require the novation of the M5 West Widening Design and Construction Contract (see section 10.7.4)
- RMS must release any widening project security bond held by RMS (section 4.17) three months after the termination of the M5 West Widening Deed, and
- The Company must give RMS access to its accounts and all other records relating to the performance of its M5 West Widening Deed obligations for the next seven years.

10.7.4 Novation of the M5 West Widening Design and Construction Contract to RMS

Under the M5 West Widening Side Deed, if the M5 West Widening Deed is terminated and RMS gives the D&C Contractor and the D&C Contractor Guarantor a notice that it requires the novation of the M5 West Widening Design and Construction Contract,

- The M5 West Widening Design and Construction Contract will end and will be deemed to have been replaced by a new contract, on the same terms apart from:
 - ♦ Having RMS as a party in the place of the Company, and
 - ♦ Any amendments that are required to reflect the fact that the M5 West Widening Deed has been terminated and to permit the new contract between RMS and the D&C Contractor to act independently of the M5 West Widening Deed, on the basis that:
 - The rights and obligations of RMS and the D&C Contractor must be equivalent to those the Company and the D&C Contractor would have had had the termination not occurred, and
 - The rights and obligations which were previously conditional on the Company's having an entitlement

against RMS or an obligation to RMS must now apply regardless of any such right or obligation,

provided RMS's liability may be no greater than it would have been under the M5 West Widening Deed had it not been terminated.

If there is a dispute between RMS and the D&C Contractor about these deemed amendments, either party may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (section 7.12).

- The M5 West Widening Design and Construction Parent Company Guarantee (Performance Guarantee), under which the D&C Contractor Guarantor has provided a guarantee to the company of the D&C Contractor's performance under the M5 West Widening Design and Construction Contract, will similarly end and be deemed to have been replaced by a new guarantee, on the same terms apart from:
 - ♦ Having RMS as the beneficiary of the D&C Contractor Guarantor's guarantee, in the place of the Company, and
 - ♦ Any amendments that are required to reflect the fact that the M5 West Widening Deed has been terminated and the M5 West Widening Design and Construction Contract has been replaced as described above, *provided* the D&C Contractor Guarantor's liability under the new guarantee may be no greater than it would have been under the original guarantee had the M5 West Widening Deed not been terminated.

Again, if there is a dispute between RMS and the D&C Contractor Guarantor about these deemed amendments, either party may serve a written notice to this effect and the dispute must then be determined under dispute resolution procedures directly equivalent to those under the M5 West Widening Deed (section 7.12).

Nothing in these arrangements may require RMS to assume any of the obligations of the Company under the M5 West Widening Design and Construction Contract relating to the period before the date RMS issued its novation notice, or otherwise have any liability to the D&C Contractor or the D&C Contractor Guarantor arising from any circumstances before that date.

10.8 Termination of the M5 West Widening Deed by the Company

The Company may terminate the M5 West Widening Deed by:

- Terminating the Project Deed and/or the M5 Western Link Project Deed, if it entitled to do so on any of the bases described in section 9.3, under the arrangements described in that section, in which case the M5 West Widening Deed will automatically terminate and the consequences described in section 10.8.1 below will apply, or

- Giving RMS 30 business days” notice that it intends to terminate the M5 West Widening Deed directly, which it may do if:
 - ♦ RMS fails to provide construction access as required for the widening project under the M5 West Widening Deed (see section 4.6), *and* this prevents the Company from undertaking its widening works substantially in accordance with the M5 West Widening Deed and this breach is not remedied (or its effects overcome) within 12 months of RMS’s being notified by the Company
 - ♦ A court makes a final determination, not subject to appeal, which prevents the Company from undertaking the widening project substantially in accordance with the M5 West Widening Deed, *and* this court determination did not result from a default by the Company or its contractors under the M5 West Widening Deed, the M5/M7 Interface Deed, the Interim Design and Independent Verification Deed, the Deed of Appointment of Independent Verifier, the Deed of Appointment of Environmental Representative, the M5 West Widening Design and Construction Contract, the Deed of Engagement of Principal Contractor, the M5 West Widening Side Deed, the RMS General Security Deed or the RMS Consent Deed—2012 or from any other wrongful act or omission by the Company or its contractors, *and* RMS fails to overcome the effect of the court order within 12 months of being notified of the court order by the Company
 - ♦ New NSW legislation (including rules, regulations and by-laws) prohibits or effectively prohibits the Company from undertaking its widening works substantially in accordance with the M5 West Widening Deed
 - ♦ A government authority resumes any part of the land on which widening works are to be carried out *and* this prevents the Company from undertaking its widening works substantially in accordance with the M5 West Widening Deed, or
 - ♦ RMS fails to pay the Company the amounts described in section 4.15 concerning the widening project’s cost escalations between 1 April 2011 and 25 June 2012 and specified additional costs arising from the widening project’s planning approval conditions, *and*:
 - This breach of the M5 West Widening Deed has not been remedied within six months of RMS’s being notified by RMS of the breach, or
 - If RMS has disputed the breach and a court has made a final determination, not subject to appeal, that the money is due and payable by RMS to the Company, the payment(s) have not been made within six months of the court decision.

If this course is followed the processes and consequences described in section 10.8.2 below will apply.

If an event referred to in either of the first two of these five bases on which the Company may directly terminate the M5 West Widening Deed arises, RMS must, during the 12-month periods referred to in these provisions and regardless of whether the Company subsequently notifies RMS that it intends to terminate the M5 West Widening Deed, pay the Company, monthly in arrears, amounts sufficient to place the Company in the same net after-tax position they would have been in had the event not occurred.

10.8.1 Consequences of an automatic termination of the M5 West Widening Deed upon a termination of the Project Deed and/or the M5 West Widening Deed by the Company

Upon the automatic termination of the M5 West Widening Deed resulting from any termination of the Project Deed and/or the M5 Western Link Project Deed by the Company under the arrangements described in section 9.3, in addition to the consequences under the Project Deed and the M5 Western Link Project Deed described in section 9.3:

- Within 30 days of the termination of the M5 West Widening Deed RMS must release any widening project security bond held by RMS (section 4.17) and the Minister for Roads must pay the Company the “M5 West widening early termination amount” (section 10.7.1) as specified in the M5 West Widening Deed
- The Minister for Roads, RMS and the Company will retain their rights to claim damages for any breaches of contract and any other accrued entitlements
- RMS will not otherwise be liable to pay any compensation to the Company as a result of the termination
- Any unpaid RMS “default step-in” costs owing to RMS will become immediately due and payable
- The Company must immediately give RMS all of its original design documentation for the widening project and all copies of this documentation
- The Company must, at its own cost, carry out any rectification or remediation work reasonably required by RMS in order to minimise any adverse effects on the motorway’s capacity or patronage and allow the motorway to be operated in accordance with the relevant criteria and specifications of the Project Deed and the M5 Western Link Project Deed
- If it fails to do so to RMS’s reasonable satisfaction and within a period specified by RMS, RMS may carry out the rectification or remediation work itself, or procure others to carry it out, and any costs or other losses incurred by RMS in taking this action, other than losses arising from any negligence or wilful default by RMS or its contractors, will be a debt due and payable by the Company to RMS

- To the extent necessary for RMS to be able to take this action,
 - ♦ RMS may (but need not) require the novation of any subcontract or other contract entered into by the Company concerning the widening project, including the M5 West Widening Design and Construction Contract (see sections 4.14 and 10.7.4)
 - ♦ The Company must execute documents to transfer its interests in the widening project’s physical, contractual, intellectual property and residual insurance assets to RMS (and has irrevocably appointed RMS as its attorney for this purpose)
 - ♦ The Company must give RMS or its nominee the originals or copies of all its accounts, records and proprietary documentation concerning the widening project and all other documentation relating to the widening project which is in its custody or control or the custody or control of its subcontractors, and
 - ♦ The Company must procure the assignment of the Company’s rights under its widening project insurance policies
- The widening project’s worksites, temporary works areas and any other land on which the Company’s work on the widening project was being carried out will revert to RMS
- Even if RMS is not undertaking rectification or remediation work as described above, RMS may (but need not) require the novation of the M5 West Widening Design and Construction Contract (see section 10.7.4), and
- The Company must give RMS access to its accounts and all other records relating to the performance of its M5 West Widening Deed obligations for the next seven years.

10.8.2 Processes and consequences of a direct termination of the M5 West Widening Deed by the Company

If the Company issue a notice to RMS that it intends to terminate the M5 West Widening Deed in 30 days, RMS may suspend its rights to terminate the M5 West Widening Deed for 12 months, from the date the Company issued its termination notice, by giving the Company a notice to this effect within 30 business days of receiving the termination notice.

During this suspension period, RMS must pay the Company, monthly in arrears, amounts sufficient to place the Company in the same net after-tax position it would have been in had the event giving rise to the Company’s termination notice not occurred.

RMS may end the suspension at any time by giving the Company a notice to this effect.

If the relevant event is remedied by RMS within the 12 months, or if it ceases to exist, the M5 West Widening Deed will remain in force. Otherwise, the M5 West Widening Deed will automatically terminate 12 months after the date of the

Company’s termination notice or upon any earlier ending of the suspension period by RMS.

If the M5 West Widening Deed is terminated by the Company on any of the bases summarised above,

- Within 30 days of the termination of the M5 West Widening Deed RMS must release any widening project security bond held by RMS (section 4.17) and the Minister for Roads must pay the Company the “M5 West widening early termination amount” (section 10.7.1) as specified in the M5 West Widening Deed
- The Minister for Roads, RMS and the Company will retain their rights to claim damages for any breaches of contract and any other accrued entitlements
- RMS will not otherwise be liable to pay any compensation to the Company as a result of the termination
- Any unpaid RMS “default step-in” costs owing to RMS will become immediately due and payable
- The Company must immediately give RMS all of its original design documentation for the widening project and all copies of this documentation
- Provided both the Project Deed and the M5 Western Link Project Deed remain on foot, the Company must, at RMS’s cost, carry out any rectification or remediation work reasonably required by RMS in order to minimise any adverse effects on the motorway’s capacity or patronage and allow the motorway to be operated in accordance with the relevant criteria and specifications of the Project Deed and the M5 Western Link Project Deed
- If it fails to do so to RMS’s reasonable satisfaction and within a period specified by RMS, RMS may carry out the rectification or remediation work itself, or procure others to carry it out, at RMS’s own cost
- To the extent necessary for RMS to be able to take this action,
 - ♦ RMS may (but need not) require the novation of any subcontract or other contract entered into by the Company concerning the widening project, including the M5 West Widening Design and Construction Contract (see sections 4.14 and 10.7.4)
 - ♦ The Company must execute documents to transfer its interests in the widening project’s physical, contractual, intellectual property and residual insurance assets to RMS (and has irrevocably appointed RMS as its attorney for this purpose)
 - ♦ The Company must give RMS or its nominee the originals or copies of all its accounts, records and proprietary documentation concerning the widening project and all other documentation relating to the widening project which is in its custody or control or the custody or control of its subcontractors, and

- ♦ The Company must procure the assignment of the Company's rights under its widening project insurance policies,
with RMS being liable for all the associated costs
- Again provided both the Project Deed and the M5 Western Link Project Deed remain on foot, the widening project's worksites, temporary works areas and any other land on which the Company's work on the widening project was being carried out will revert to RMS
- Even if RMS is not undertaking rectification or remediation work as described above, RMS may (but need not) require the novation of the M5 West Widening Design and Construction Contract (see section 10.7.4), and
- The Company must give RMS access to its accounts and all other records relating to the performance of its M5 West Widening Deed obligations for the next seven years.

11 RMS's securities and related provisions of the RMS Consent Deed—2012

As already indicated, in addition to the bank guarantee to be provided by the Company for the completion of the widening project under the M5 West Widening Deed (section 4.17) there are currently two contracts under which the Company has granted more general securities to RMS for the performance of the Company's obligations under the motorway's contracts.

Under the first, the **F-5 Tollroad Project Deed of Charge** of 21 February 1991, the Company has granted RMS fixed and floating charges over the Company's undertakings, assets and rights to secure its obligations to RMS under the Project Deed, the Lease, the F-5 Tollroad Project Deed of Charge and (since 19 June 2012) the RMS General Security Deed.

The second, the **RMS General Security Deed** of 19 June 2012, has updated this by:

- Extending RMS's securities to cover all the Company's obligations to RMS, including its obligations under the M5 Western Link Project Deed, the M5 West Widening Deed, the leases and other specified contracts and other documents, and
- Making amendments reflecting requirements introduced by the Personal Property Security Act 2009 (Cth), which came into full operation on 30 January 2012.

Under the Project Deed RMS must discharge the F-5 Tollroad Deed of Charge, at the Company's cost, as soon as reasonably practicable after 19 December 2012, if the Company asks it to do so, provided RMS is satisfied that the discharge will not adversely affect RMS's security position concerning the M5 motorway project and provided other specified conditions have been met.

Both the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed are subject to provisions in the RMS Consent Deed—2012 governing the relative priorities of the securities held by RMS and the Company's private sector debt financiers, as described below.

Aspects of the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed concerning RMS's powers to remedy defaults by the Company have been summarised earlier in this report, in sections 9.1.1.2 and 10.1.2.

11.1 RMS's securities under the F-5 Tollroad Project Deed of Charge

Under the F-5 Tollroad Project Deed of Charge the Company has granted RMS a fixed and floating charge over all its present

and future undertakings, assets and rights as security for the due and punctual performance of all its obligations to RMS under the Project Deed, the Lease, the F-5 Tollroad Project Deed of Charge and (since 19 June 2012) the RMS General Security Deed.

The Company has warranted that there are no encumbrances over its charged property other than the encumbrances created or permitted by these contracts and other specified encumbrances arising in the course of its carrying out its obligations under these contracts.

The Company has also pledged not to deal with, sell or part with possession of its charged property, or create any interest or encumbrance over its property, other than:

- To its debt financiers
- In the case of its property that is subject only to the floating charge, in the ordinary course of the Company's business, or
- Otherwise as permitted by RMS,

and has pledged that its subsidiary companies will do likewise.

The relative priorities of the charges created by the F-5 Tollroad Project Deed of Charge and the debt financiers' securities are governed by the RMS Consent Deed—2012, as discussed in section 11.3 below. Once all the debt financiers have been fully repaid, the F-5 Tollroad Project Deed of Charge will rank ahead of all other securities affecting the property of the Company.

Otherwise, and *solely* for the purpose of fixing priorities between RMS's charges and any subsequently registered charges, RMS's charges are to be treated as securing a prospective liability of up to \$300 million. (The RMS charge may in fact secure larger prospective liabilities.)

The charges created by the F-5 Tollroad Project Deed of Charge may be immediately enforced by RMS, without the need for any demand or notice, if:

- There is a Project Deed "event of default" that is continuing and has not been waived by RMS (see section 9.1.2), *and*
- RMS has notified the Security Trustee of the Project Deed "event of default", in writing, *and*:
 - ♦ In the case of a non-payment, the "event of default" has not been remedied within 21 days of this notification, *or*
 - ♦ In the case of any other Project Deed "event of default" which is capable of being remedied, the "event of default" has not been remedied within a period after

the notification equivalent to that available to the Company to remedy the default, if this is specified in the relevant contract, *or*

- ♦ In the case of a Project Deed “event of default” which is not capable of being remedied,
 - The Security Trustee has not “stepped in” to exercise the Company’s rights and obligations under the relevant contract, under arrangements described in section 9.1.4, *and*
 - Any receiver, receiver/manager or administrator appointed by the Security Trustee has not “stepped in” in this way, *and*
 - The Security Trustee has not assigned the Company’s interests in the “RMS Consent Deed project documents” within 12 months of RMS’s notification.

In these circumstances, RMS may appoint a receiver or a receiver and manager of the charged property, exercising powers set out in the F-5 Tollroad Project Deed of Charge, and this receiver and any RMS officer may exercise specified powers of attorney.

11.2 RMS’s securities under the RMS General Security Deed

Under the RMS General Security Deed the Company has granted RMS:

- A security interest, as defined in the Personal Property Securities Act 2009 (Cth), over all of the present and future personal property for which the Company may grant such a security interest under that Act, and
- A fixed charge over all of the Company’s other present and future property

to secure the due and punctual performance of all its obligations to RMS, expressly including its obligations under the Project Deed, the M5 Western Link Project Deed, the Lease, the Licence (Construction of Moorebank Avenue Interchange and Associated Works), the Moorebank Avenue Lease, the Bridge Works Lease, the M5 Western Link Lease, the F-5 Tollroad Project Amendment Deed of 29 June 1993, the F-5 Tollroad Project Documentation Deed of Amendment (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the F-5 Tollroad Project Works Commitment and Novation Deed (Construction, Land Acquisition and Variation Loans and King Georges Road to Fairford Road Duplication) of 30 June 1997, the M5 West Widening Deed, the M5 West Widening Side Deed, the Subordination Deed, the F-5 Tollroad Project Deed of Charge, the RMS General Security Deed, the RMS Consent Deed—2012, any agreement amending, supplementing, replacing or novating any of these agreements, any letters or undertakings relating to any of these agreements and any documents or agreements concerning the terms of payments to

be made by the Company to RMS or the terms on which any of the Company’s obligations are to be performed.

The Company has warranted that there are no encumbrances over the secured property other than the encumbrances created or permitted by these contracts and other specified encumbrances arising in the course of its carrying out its obligations under these contracts.

The Company has also pledged not to dispose of, create any interest in or encumbrance over or part with possession of the secured property, apart from:

- Encumbrances of specified permitted types, including the debt financiers’ securities
- Disposals of assets in exchange for other assets of comparable value
- “Arm’s length” disposals of assets in the ordinary course of ordinary business, subject to a cap of \$2 million per year in total
- Disposals of surplus, obsolete or redundant assets
- Specified permitted uses of cash or cash equivalents, or
- Otherwise as permitted by RMS.

The relative priorities of the charges created by the RMS General Security Deed and the debt financiers’ securities are governed by the RMS Consent Deed—2012, as discussed in section 11.3 below. Once all the debt financiers have been fully repaid, the RMS General Security Deed will rank ahead of all other securities affecting the property secured under the RMS General Security Deed.

The securities created by the RMS General Security Deed may be immediately enforced by RMS, without the need for any notice or consent, if:

- There is a Project Deed or M5 Western Link Project Deed “event of default” (see section 9.1.2), and
- RMS has notified the Security Trustee of the Project Deed or M5 Western Link Project Deed “event of default”, in writing, *and*:
 - ♦ In the case of a non-payment, the “event of default” has not been remedied within 21 days of this notification, *or*
 - ♦ In the case of any other Project Deed or M5 Western Link Project Deed “event of default” which is capable of being remedied, the “event of default” has not been remedied within a period after the notification equivalent to that available to the Company to remedy the default, if this is specified in the relevant contract, *or*
 - ♦ In the case of a Project Deed or M5 Western Link Project Deed “event of default” which is not capable of being remedied,
 - The Security Trustee has not “stepped in” to exercise the Company’s rights and obligations under the

relevant contract, under arrangements described in section 9.1.4, *and*

- Any receiver, receiver/manager or administrator appointed by the Security Trustee has not “stepped in” in this way, *and*
- The Security Trustee has not assigned the Company’s interests in the “RMS Consent Deed project documents” within 12 months of RMS’s notification.

In these circumstances, RMS may appoint a receiver or a receiver and manager of the secured property, exercising powers set out in the RMS General Security Deed, and this receiver, RMS and any RMS officer may exercise specified powers of attorney.

11.3 Ranking of RMS and private sector debt financiers’ securities in the RMS Consent Deed—2012

The provisions of the RMS Consent Deed—2012 regulating the enforcement of RMS’s securities under the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed are described in sections 11.1 and 11.2 above, and the provisions of the RMS Consent Deed—2012 governing the application of certain insurance proceeds, assignments and novations, refinancings of the project, other amendments to the project’s contracts, dispute resolution, renegotiations and defaults by the Company (including actions by RMS to remedy any such defaults) have been summarised earlier in this report.

The RMS Consent Deed—2012 also:

- Records the consents of the Minister for Roads and RMS to the 2012 refinancing of the motorway and the securities held by the Security Trustee on behalf of the private sector debt financiers
- Records the consent of the Security Trustee to the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed, and

- Sets out the relative priorities of the debt financiers’ and RMS securities, as described below.

With the exception of what are termed “**RMS priority moneys**”, each of the debt financiers’ securities has priority over any RMS security over the same property, including the RMS’s securities under the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed.

“RMS priority moneys” are:

- Any credit balances in the “step-in costs reserve account” that must be established and operated by the Company for the purposes of reimbursing RMS for its costs if RMS “steps in” following an M5 West Widening Deed “event of default”, under the arrangements described in sections 10.4 and 10.5 (see section 10.5.4)
- Any additional amounts owed by the Company to its debt financiers under specified debt financing contracts as a result of any variation of or amendment or addition to these contracts without RMS’s prior written consent, contrary to requirements described in section 7.6.5, and
- Any amounts received by the Company or paid directly to RMS as a result of subscriptions by the Company’s shareholders for up to \$63 million of specified subordinated debt notes (see section 10.5.4).

Accordingly, any money received by the Security Trustee, the agent, RMS or any receiver, receiver and manager or attorney on enforcement of a debt financiers’ security, the F-5 Tollroad Project Deed of Charge or the RMS General Security Deed, as the case may be, is to be applied:

- First, to pay any “RMS priority moneys”
- Second, to pay all sums of money secured from time to time by the debt financiers’ securities, and
- Third, to pay all other sums of money secured from time to time by the F-5 Tollroad Project Deed of Charge and the RMS General Security Deed.



This *Summary of Contracts* was written, edited, designed and produced for NSW Roads and Maritime Services by Catalyst Communications, 38 Gladstone Street, Lilyfield NSW 2040 (phone (02) 9571 4001, www.catalyst.com.au). The assistance of RMS, Transport for NSW and Ashurst Australia is gratefully acknowledged.

In accordance with the public disclosure requirements of the NSW Government's December 2006 *Working with Government: Guidelines for Privately Financed Projects* and August 2012 *NSW Public Private Partnership Guidelines*, this report presents only summaries of, and *not* complete reports on, the M5 motorway contracts currently of greatest relevance to the public sector, and does not cover any matters which are expressly confidential under the contracts or any contract provisions revealing the contractors' financing arrangements, cost structures, profit margins, "base case" financial model(s), intellectual property or "any matter whose disclosure would place the contractors at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future".

This report is based on the M5 motorway's contracts as they stood on 25 June 2012. Amendments of or additions to the contracts taking effect after 25 June 2012, other than future amendments and additions specified in the contracts already in effect on 25 June 2012, are not reflected in this report.

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