



Westlink M7 motorway: Summary of contracts

For public information

AUGUST 2003



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I Introduction

This report summarises the main contracts, from a public sector perspective, for the Westlink M7 motorway, previously known as the Western Sydney Orbital, in western Sydney.

It has been prepared by the Roads and Traffic Authority of New South Wales (RTA) in accordance with the public disclosure requirements of sections 3.7 and 7.1 of the NSW Government's November 2001 guidelines *Working with Government: Guidelines for Privately Financed Projects*, and its compliance with these requirements has been assessed by the Auditor-General prior to its tabling in Parliament.

Accordingly, this report:

- Focuses on those contracts to which the Minister for Roads, the RTA, other NSW Government authorities and/or State-owned corporations are parties, or which otherwise have a potentially substantive impact on public sector risks or

benefits. Other contracts solely between private sector organisations are referred to only to the extent necessary to explain the public sector's exposure.

- Does not disclose the private sector parties' cost structures, profit margins, intellectual property or any other matters which might place them at a disadvantage with their competitors.

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

I.1 The project

The Westlink M7 project involves:

- The financing, design, construction, operation and maintenance of a 40 km long, four-lane, dual carriageway motor-



Looking southeast over the M7–Old Windsor Road interchange in West Baulkham Hills

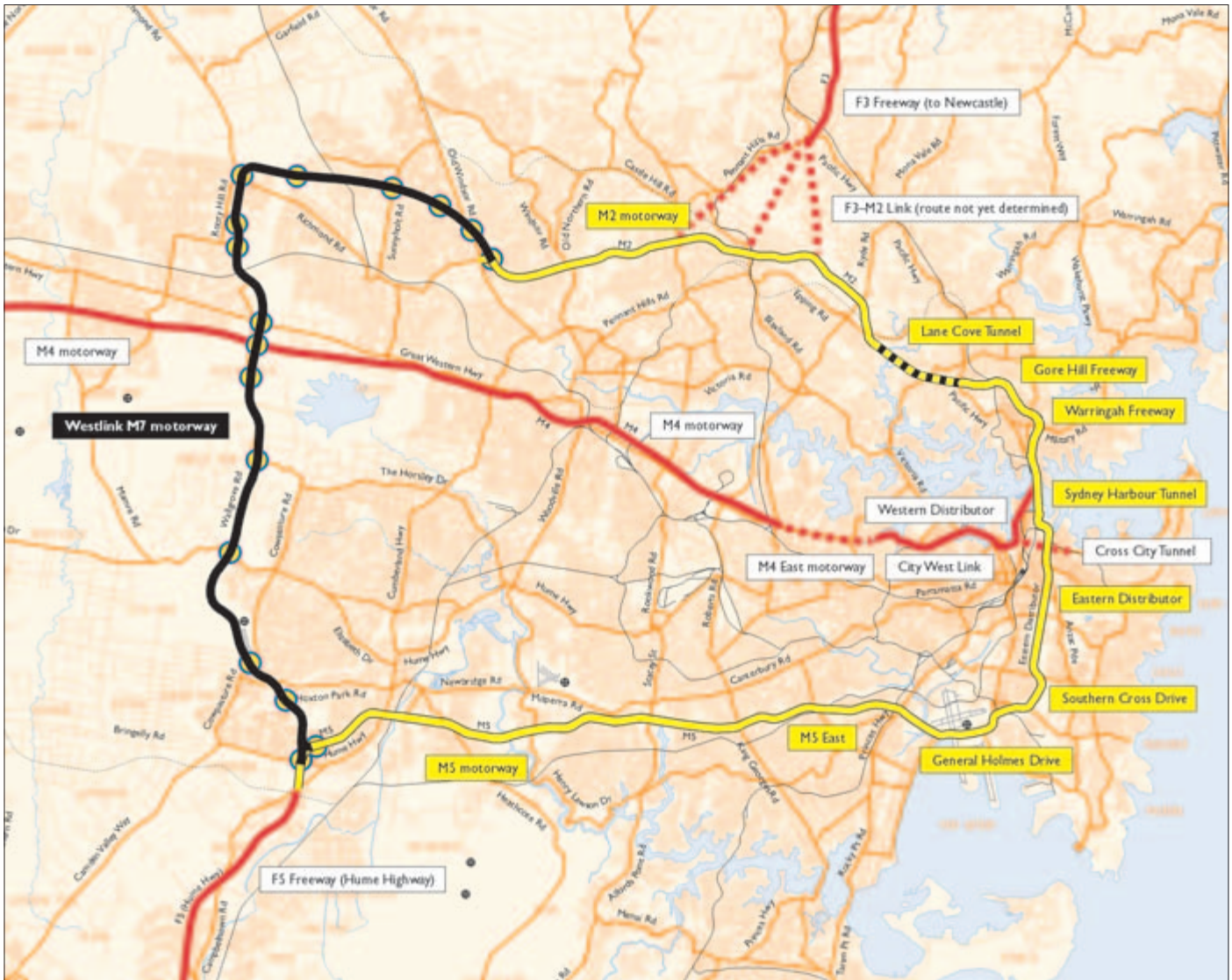


Figure 1. The Westlink M7 motorway, previously known as the Western Sydney Orbital, will form a critical part of the Sydney Orbital freeway and motorway system.

way between the F5 freeway and the M5 motorway in Prestons and the M2 motorway in West Baulkham Hills, as part of the Sydney Orbital freeway and motorway circuit (Figures 1 and 2), and

- The financing, design and construction of associated improvements to surface roads and intersections.

The project is being funded, designed and built and will be operated and maintained by a private sector group, the WestLink Motorway consortium. The estimated design and construction cost for the motorway itself is \$1.54 billion, and the total cost of the project, including the costs of connecting roadworks and financing costs, is \$2.23 billion.

The project will replace the Cumberland Highway as part of the National Highway network, and about \$360 million of funding support has been provided by the Commonwealth Government.

Under the contracts summarised in this report all of the motorway must be completed by 13 August 2006 and all the associated works must be completed within 26 weeks of the

completion of the motorway. The motorway will be operated, maintained and repaired by the consortium until 14 February 2037 or any earlier termination of the project contracts. The project's surface road and property works and some of its services works will also be maintained and repaired by the consortium during this period.

The principal benefits of the project identified by the RTA are:

- Safer and more efficient road transport for both passenger vehicles and freight in western Sydney
- Better access to employment opportunities for the people of western Sydney, through the provision of links between existing and future industrial and residential areas
- Stronger economic growth within western Sydney, with further investment in the area being encouraged by potential savings in transport costs
- 1,200 jobs during the project's construction phase
- The encouragement of further employment opportunities in western Sydney

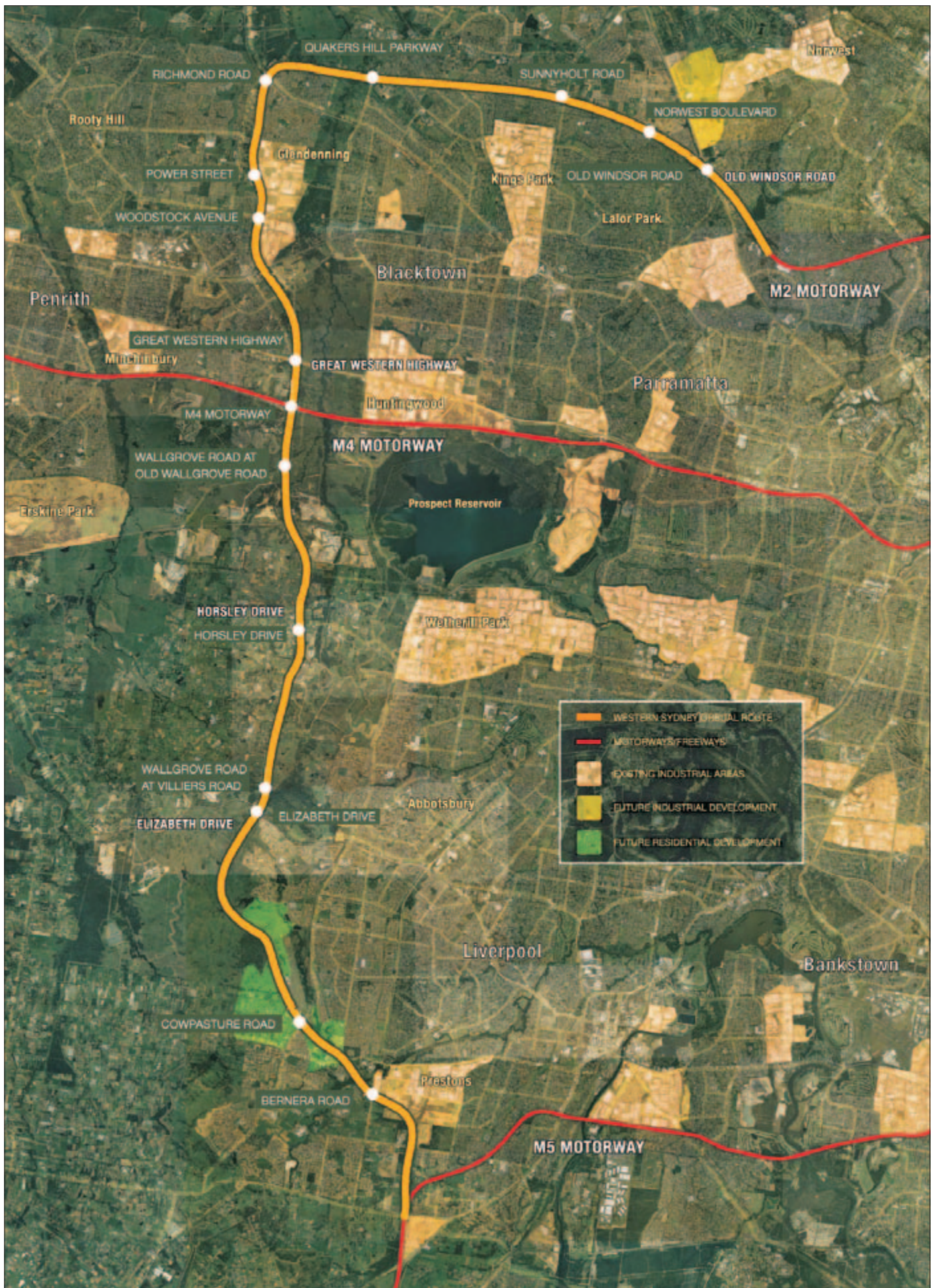


Figure 2. Westlink M7 (Western Sydney Orbital) motorway route and interchanges.



Looking southeast over the M7–M4 interchange in Eastern Creek.



Looking north, along the southernmost portion of the new M7 motorway, at the M7–M5–F5 interchange in Prestons.



The M7–Elizabeth Drive interchange in Cecil Park.

- Reductions in the numbers of heavy vehicles using local roads
- Better air quality and less noise in key residential areas
- Improved access to other growing cities and regions, including the Central Coast, Newcastle, Canberra and the Illawarra, and
- Faster travel times between key western Sydney suburbs.

The results of RTA evaluations of the likely economic performance of the project are summarised in *Table 1*.

The M7 will bypass up to 56 sets of traffic lights, cutting travel times across western Sydney by up to an hour. It will have 17 interchanges, as shown in *Figure 2*, and there will be 38 overpasses and underpasses to maintain local access for pedestrians, cyclists and motorists.

A high-quality off-road cycleway, the longest in Australia, will stretch the length of the route, and provisions will be made for future dedicated busways and other public transport infrastructure.

The motorway will be electronically tolled. The initial toll charges will be 25 cents per kilometre, up to a cap of \$5.00 (1 July 2000 prices, including GST). Tolls will be allowed to increase in line with inflation. There will be no tolls for cyclists or for buses providing public transport services, but additional charges, currently estimated at between 20c and \$1.75 per trip, will apply for vehicles without electronic tolling transponders.

Local road upgrades as part of the project will include:

- Upgrading of Beech Road at Casula from a two lane undivided road to a four and five lane divided road for 500

Table 1. RTA estimates of the likely economic performance of the Westlink M7 project

taking account of initial and recurring capital costs, operation and maintenance costs, road user benefits (savings in vehicle operating costs, travel time savings and savings in accident costs), pedestrian benefits and environmental externalities

Discount rate	Present value of costs (land acquisitions, initial and recurring capital costs and operating and maintenance costs)	Present value of benefits (road user, pedestrian and environmental benefits)	Net present value	Benefit:cost ratio		Net present value/initial capital cost
				$\frac{\text{Benefits} - O\&M}{D\&C}$	$\frac{\text{Benefits}}{D\&C + O\&M}$	
4%	\$2,014 m	\$10,450 m	\$8,437 m	5.7	5.1	4.7
7%	\$1,750 m	\$6,374 m	\$4,625 m	3.6	3.4	2.7
10%	\$1,607 m	\$4,332 m	\$2,725 m	2.8	2.7	1.8



Shared pedestrian and cycleway bridge over the M7 west of Eastern Road in Quakers Hill.



Typical shared cycleway and pedestrian underpass under the M7.

metres between Camden Valley Way and Hoxton Park Road

- Upgrading of Bernera Road at Prestons from a two lane undivided road to a four lane road for 260 metres south of an off ramp from the motorway
- Upgrading of Jedda Road at Prestons from a two lane undivided road to a four and five lane road for 450 metres near its interchange with the motorway
- Upgrading of Cowpasture Road at West Hoxton from a two lane undivided road to a four lane divided road between the motorway and Hoxton Park Road
- Upgrading of McIver Avenue at West Hoxton from a two lane unformed road to a sealed road for 500 metres between the motorway and the sealed section of McIver Avenue
- Upgrading of Elizabeth Drive at Cecil Hills from a two lane undivided road to a four lane divided road between the motorway and Windsor Road
- Upgrading of The Horsley Drive at Horsley Park from a three lane undivided road to a four lane undivided road between the motorway and Ferrers Road
- Upgrading of Power Street at Glendenning from a two lane sealed road to a four lane road for approximately 250 metres between the motorway and Rooty Hill Road North
- Upgrading of Rooty Hill Road North at Hassall Grove from just south of Luxford Road to Richmond Road
- Upgrading of Richmond Road at Marsden Park from a two lane undivided road to a four lane divided road for approximately 600 metres between the motorway and Bells Creek, and
- Upgrading of Sunnyholt Road at Glenwood from a two lane undivided road to a six lane divided road between James Cook Drive and Malvern Road.

1.2 History of the project's development

1.2.1 Concept development and planning approvals

The concept of a north–south freeway-standard link in western Sydney was first mooted by the NSW Department of Main Roads, one of the RTA's predecessors, in the 1960s, and was revived in the mid 1980s, as part of a possible route for a 'Sydney Orbital Motorway'.

At that time the western portion of the Sydney Orbital route, linking the F5 (Hume Highway) with the then-proposed Castle-reagh Freeway (which later became the M2), was envisaged as passing along a corridor reserved for a 'Prospect Arterial' and the Prospect Highway, through the developing suburbs of Busby,

Bonnyrigg, St Johns Park and Prairiewood and the quarry land to the east of Prospect Reservoir.

In the early 1990s a *Liverpool to Hornsby Highway Strategy Study* of options for a new National Highway connection between Liverpool and Hornsby favoured a different route, further to the west, along Wallgrove Road. This study, whose findings were released early in 1994, also recommended a new expressway between Elizabeth Drive and the F5, the use of a section of the M4 between Wallgrove Road and the Prospect Highway and upgrading of the Prospect Highway to the M2. It was expected that eventually Wallgrove Road would be replaced by an expressway and a new northern link would be developed from the M4, either to a westward extension of the M2 along a long-reserved corridor or to the Sydney–Newcastle Freeway.

Route concepts for the new 'Western Sydney Orbital' National Highway were further developed in 1994 and 1995. Late in 1994 the Commonwealth Minister for Transport announced the start of an *Environmental Impact Study* into three route options between Prestons and Cecil Park. An *Overview Report* on the results of this study, released in late 1995, depicted a route for the Western Sydney Orbital broadly similar to the route now adopted.

In November 1996 the Commonwealth Minister for Transport announced funding of \$109 million over the following five years for pre-construction activities and the preparation of two *Environmental Impact Statements*, one for a southern section between M5 at Prestons and Cecil Park and the other for a northern section from Cecil Park to the M2 at West Baulkham Hills.

In 1998 there were extensive community consultations in Liverpool, Fairfield, Blacktown and Baulkham Hills on the Western Sydney Orbital's preliminary designs and features. A new, shorter *Overview Report* was released, together with an *Initial Design Proposal* and a brochure. A major change in the proposals at this stage, compared with earlier concepts, was a preference for a more easterly route option through Cecil Hills.

Further changes to the route were made in the light of feedback from the community. Although the easterly route at Cecil Hills was confirmed, the alignment at Prestons was moved to the east and northeast, substantially reducing the impact of the project on endangered ecological communities between Camden Valley Way and Bernera Road and eliminating its impact on Sule College north of Kurrajong Road.

The possibility that the Western Sydney Orbital might be a toll road was first raised by the Commonwealth Minister for Transport and Regional Services in 1999. With the Commonwealth advising that it could not provide the \$1 billion required to build the road in the short to medium term, the RTA commenced an investigation of tolling options and the likely effects of tolls on traffic on the Western Sydney Orbital and alternative toll-free roads.

An *Environmental Impact Statement* for the Western Sydney Orbital, incorporating a *Species Impact Statement*, was publicly exhibited by the RTA from 8 January 2001 to 5 March 2001. 267 submissions in response to this *EIS* were received by the RTA.

After considering these submissions, the RTA made a series of 23 modifications to the proposal, including, in particular;

- A realignment of the route 400 metres further to the west at Cecil Hills, to reduce noise and visual impacts in this residential area
- Revisions to the Western Sydney Orbital/M4 interchange, designed to improve the performance and safety of this interchange, and
- A realignment of the Western Sydney Orbital over Woodstock Avenue in Rooty Hill and associated changes to ramps to and from the motorway at this location, reducing impacts on nearby private properties.

These modifications were presented in a *Preferred Activity Report* within a *Western Sydney Orbital Representations Report* submitted by the RTA to the Department of Urban Affairs and Planning—later known as the Department of Planning or ‘Planning NSW’, and now part of the Department of Infrastructure, Planning and Natural Resources—on 17 September 2001.

These modifications were publicly announced by the Minister for Roads, Mr Carl Scully, on 14 November 2001, along with an announcement of a high-standard off-motorway cycleway along the Western Sydney Orbital route.

The RTA’s *Preferred Activity Report* was publicly released on 21 December 2001.

In accordance with section 115C of the Environmental Planning and Assessment Act, a report by the Director-General of the Department of Planning on the modified project proposal, *Proposed Western Sydney Orbital: Director General’s Report*, was completed in February 2002. Among other things, this report concluded that the modifications proposed by the RTA would not necessitate the preparation of another *Environmental Impact Statement*.

On 28 February 2002 the Minister for Planning, Dr Andrew Refshauge, granted planning approval for the project, as described in the *EIS* and as modified by the *Representations Report*, under section 115B(2) of the Environmental Planning and Assessment Act. This approval was subject to 223 conditions.

In July 2002 the Commonwealth Department of the Environment and Heritage (‘Environment Australia’) advised the RTA that the requirements of the Environment Protection (Impact of Proposals) Act 1974 (Cth) had been met.

The change of the project’s official name from the ‘Western Sydney Orbital’ to ‘Westlink M7’ was announced by the Premier, Mr Bob Carr, and the Deputy Prime Minister and Common-

wealth Minister for Transport, Mr John Anderson, on 7 July 2003.

1.2.2 The inviting of private sector proposals and selection of a preferred proponent

On 25 July 2001 the RTA invited *Registrations of Interest* from private sector parties for the financing, design, construction, operation and maintenance of the Western Sydney Orbital.

Registrations of Interest were received from three consortia by the closing date of 29 August 2001:

- The **WestLink Motorway** consortium, sponsored by Leighton Contractors, Abigroup, Transurban and Macquarie Bank
- The **Orbital Park Alliance** consortium, sponsored by Thiess, Baulderstone Hornibrook, CKI and Deutsche Bank, and
- The **Western Link Joint Venture** consortium, sponsored by Transfield and Bouygues Travaux.

After evaluating these *Registrations of Interest*, the RTA issued a formal *Request for Proposals* to all three consortia on 1 November 2001, asking them to submit detailed proposals. Before receiving this *Request for Proposals* these proponents warranted, in Deeds of Disclaimer, that they would rely on their own investigations in preparing their proposals, and also executed Process (Probity) Deeds setting out procedures to address any conflicts of interests arising from the common ownership of some of the participants in the different consortia.

The RTA’s *Request for Proposals* included drafts of a Project Deed, *Scope of Works and Technical Criteria* documentation, an RTA Consent Deed and a *Site Access Schedule*.

All three consortia submitted detailed proposals on the closing date, 19 March 2002.

The proposals were evaluated by an evaluation panel comprising Mr Les Wielinga, the RTA’s General Manager; Private Infrastructure, Mr Garry Humphrey, the RTA’s General Manager; Motorway Services, Mr Kevin Pugh, Senior Manager; Corporate Finance, NSW Treasury Corporation, and Mr Peter Gemell, a principal of Evans and Peck Pty Limited.

The evaluation panel was assisted by Clayton Utz (legal advice), Evans and Peck (commercial and technical advice), Arthur Andersen and Ernst and Young (financial advice), Mr Frank Perry, the Acting General Manager of the RTA’s Economic Services and Support Branch, and other specialist advisers on specific issues, including other RTA staff.

Its activities were overseen by a review panel, comprising Mr Mike Hannon, Director of the RTA’s Road Network Infrastructure Directorate, Mr Brett Skinner, the RTA’s Director; Finance, Mr Graham Read, the RTA’s Corporate Counsel, Mr Danny Graham, Principal Adviser; Infrastructure with the NSW Treasury, Mr Alan Griffin, chairperson of the State Contracts Control

Board, and Ms Trudi Meakins from the Commonwealth Department of Transport and Regional Services, and by a probity auditor, Mr Rory O'Connor of Deloitte Touche Tohmatsu.

The RTA's assessment of the proposals involved:

- A 'comparative value' assessment against a 'public sector comparator'—a hypothetical, risk-adjusted estimate of the net present cost of delivering the project, to the same level and standard of service, using the most efficient likely form of delivery able to be financed by the public sector—in accordance with the requirements of the NSW Government guidelines *Working with Government: Guidelines for Privately Financed Projects*.

This 'public sector comparator' was initially prepared by the RTA, before it received the proposals, with the assistance of Arthur Andersen, Ernst and Young, Evans and Peck, NSW Treasury and NSW Treasury Corporation. It was subsequently amended, prior to its use in assessing the proposals, to take account of the likely design and construction cost impacts of the planning approval conditions of 28 February 2002, and other adjustments were made to (for example) the timings of project costings and the setting of nominal interest rates so that the 'public sector comparator' could be directly compared with each proposal.

The 'comparative value' of each proposal was expressed in terms of the net present value to the RTA of the proposed financial transaction between the proponent and the RTA, adjusted for (among other things) differences in each proposal's risk allocations and whole-of-life costs.*

- A 'non-price assessment', against other pre-determined criteria, weighted as follows:
 - Project structure, participants and organisation: 25%.
 - Design and construction (architectural and landscape design, geometric, drainage, structural, pavement, geo-technical, tunnel, environmental, services, toll collection system and operational management and control system concept designs, design specifications, construction phase traffic arrangements, design and construction program, quality plan requirements, project strategies, quality management, independent verifier and sign-age): 35%.
 - Initial traffic management and safety plan: 10%.
 - Initial project plans for quality assurance, project management, environmental management, design, construct-

ion, operation and maintenance, community involvement, incident responses, occupational health, safety and rehabilitation management and project training: 20%

- Operation and maintenance (indicative replacement and refurbishment schedule, routine maintenance schedule, specified design lives of asset items and sub-items, maintenance standards and quality manager): 10%.

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

In combining the two types of assessments, the 'non-price assessment' results of all three proponents were expressed as fractions of the best of the three non-price assessment results, the difference between 1.0 and this fraction was then multiplied by a 'nominal value of the non-price assessment in \$ terms' of \$33 million—a figure set by the RTA before the proposals had been received—and the result for each proponent was subtracted from its proposal's 'comparative value' to produce an 'adjusted comparative value'. This meant that for the proponent with the best 'non-price assessment' result, the 'adjusted comparative value' was the same as its 'comparative value', while for the other two proponents it was reduced.

On 27 June 2002, following an interim report by the RTA Evaluation Committee and a report by the Probity Auditor on the selection processes carried out to that stage, the RTA advised the Western Link Joint Venture that its proposal had been unsuccessful. This narrowing of the shortlist to two proponents was publicly announced on 28 June 2002.

Following further, more detailed evaluations, involving a series of additional requests to the remaining proponents and evaluations of their responses, the RTA's assessments concluded that:

- The proposal submitted by the WestLink Motorway consortium would represent better value for money than the 'public sector comparator' and proposals submitted by the Orbital Parkway Alliance
- The WestLink Motorway consortium should therefore be selected as the preferred proponent
- The RTA should enter into detailed negotiations with this consortium, and

* For a 'public sector comparator' based on the most efficient likely form of delivery of the Western Sydney Orbital (M7) project able to be financed by the public sector; the estimated net present value of the risk-adjusted financial cost of the project to the RTA was \$153.6 million.

In contrast, the delivery of the project by the private sector, in accordance with the rights, obligations and risk allocations described in this report, is expected to result in a significant net financial benefit to the RTA, with the financial costs of the project to the RTA being outweighed by a substantive transfer of risks to the private sector (see section 3.1) and by an up-front payment to the RTA that had to be (and was) made by the private sector participants on 14 February 2003 (see section 2.3).

- The Orbital Parkway Alliance should be appointed as a 'reserve proponent', and that the preferred proponent should be advised that the RTA reserved the right to negotiate with this reserve proponent if there were a 'material change to the expected financial transaction, risk profile, technical requirements and/or ranking of proposals'.

On 28 October 2002 the NSW Minister for Roads, Mr Carl Scully, and the Acting Prime Minister and Federal Minister for Transport and Regional Services, Mr John Anderson, announced the selection of the WestLink Motorway consortium as the preferred proponent and the commencement of contract negotiations with this consortium.

These negotiations were satisfactorily concluded with the execution of the principal contracts for the project on 13 February

2003, the satisfaction of all their remaining conditions precedent on 14 February 2003 and the announcement of this on 17 February 2003.

1.3 The structure of this report

Section 2 of this report summarises the structuring of the Westlink M7/Western Sydney Orbital project and explains the inter-relationships of the various agreements between the public and private sector parties.

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

2 Overview of the project's contracts

2.1 The participants in the project

2.1.1 Public sector parties to the contracts

The principal public sector parties to the Westlink M7/Western Sydney Orbital contracts are:

- The **Minister for Roads**, on behalf of the State of New South Wales
- The **Roads and Traffic Authority of NSW** (ABN 64 480 155 255) ('**RTA**')¹
- The **NSW Rail Infrastructure Corporation** (ABN 21 298 300 693) ('**RIC**')²
- The **State Rail Authority of NSW** (ABN 73 997 983 198) ('**SRA**'), and
- The **Office of the Co-ordinator General of Rail** (ABN 54 770 756 513) ('**OCGR**')³

The RTA is constituted under Part 6 of the Transport Administration Act 1988. Its powers in relation to the Westlink M7 project arise from the Transport Administration Act, which empowers the RTA to enter into contracts or arrangements for the carrying out of works and the performance of services, and the Roads Act 1993.

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

2.1.2 Private sector parties to the contracts

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

- **WestLink Motorway Limited** (ABN 63 096 512 300) ('**WestLink**'), both in its own capacity and as the agent of its shareholders, which have formed a partnership trading as the **WestLink Motorway Partnership** ('**the Partnership**').

These shareholders ('**the Partners**') are currently:

- **Macquarie Infrastructure Investment Management Limited** (ABN 67 072 609 271) (40%), as trustee for the **Western Sydney Orbital Holding Trust**, which is ultimately wholly owned, through another trust, by Macquarie Infrastructure Trust (I) (ABN 35 662 603 186)
- **Transurban Nominees Pty Limited** (ABN 78 103 029 269) (40%), as trustee of the **Transurban WSO Trust** (ABN 56 360 773 461), which is ultimately wholly owned, through another trust, by the Transurban Holding Trust (ABN 30 169 362 255)
- Four Abigroup special purpose vehicles—**Abigroup WestLink Partner No 1 Pty Limited** (ABN 26 103 141 135) (2.5%), **Abigroup WestLink Partner No 2 Pty Limited** (ABN 30 103 141 153) (2.5%), **Abigroup WestLink Partner No 3 Pty Limited** (ABN 32 103 141 162) (2.5%) and **Abigroup WestLink Partner No 4 Pty Limited** (ABN 36 103 141 180) (2.5%)—which are ultimately wholly owned, through holding companies and trusts, by Abigroup Limited (ABN 63 000 358 467), Macquarie Infrastructure Trust (I) and the Transurban Holding Trust,* and
- Four Leighton special purpose vehicles—**LMI WSO No 1 Pty Limited** (ABN 28 102 790 063) (2.5%),

* Abigroup Limited is currently, through a series of holding companies and bare trusts, the ultimate beneficial owner of these four special purpose vehicles. The shares in two holding companies which wholly own Abigroup WestLink Partner No 1 and Abigroup WestLink Partner No 3, and all rights and interests in these shares, are held on trust for Abigroup WestLink Motorway Partner Holding Company Pty Limited (ABN 97 102 920 383)—a wholly owned subsidiary of Abigroup Limited—by a trust which is ultimately wholly owned, through another trust, by Macquarie Infrastructure Trust (I). Similarly, the shares in another two holding companies which wholly own Abigroup WestLink Partner No 2 and Abigroup WestLink Partner No 4, and all rights and interests in these shares, are held on trust for Abigroup WestLink Motorway Partner Holding Company by a trust which is ultimately wholly owned, through another trust, by the Transurban Holding Trust. These intermediate Macquarie and Transurban trusts have the right to acquire full ownership of the holding companies which own Abigroup WestLink Partner No 3 and Abigroup WestLink Partner No 4, respectively, upon the completion of construction of the M7 motorway and other specified 'Stage 1' works (see section 3.1 below), and Abigroup WestLink Motorway Partner Holding Company has the right to require them to do so.

LMI WestLink Partner No 2 Pty Limited (ABN 32 103 147 717) (2.5%), **LMI WestLink Partner No 3 Pty Limited** (ABN 59 103 147 833) (2.5%) and **LMI WestLink Partner No 4 Pty Limited** (ABN 57 103 147 888) (2.5%)—which are ultimately wholly owned, through holding companies, Leighton Contractors Pty Limited (ABN 98 000 893 667) and/or trusts, by Leighton Holdings Limited (ABN 57 004 482 982), Macquarie Infrastructure Trust (I) and the Transurban Holding Trust.*

WSO Holding No 4 Pty Limited (ABN 59 103 141 779) (2.5%)—which are ultimately wholly owned, through a holding company and Leighton Contractors, by Leighton Holdings Limited.†

- **The Partners** themselves, primarily to confirm the role of WestLink as their agent under several of the project contracts.
- **WSO Co Pty Limited** (ABN 73 102 757 924) ('**WSO Co**'), which is wholly owned by:
 - MIG – Western Sydney Orbital Holding Company Pty Limited (ABN 67 103 026 731) (40%), which is wholly owned by Macquarie Infrastructure Trust (II) (ABN 18 548 399 854)
 - Transurban (WSO) Pty Limited (ABN 82 103 029 223) (40%), which is wholly owned by Transurban Holdings Limited (ABN 86 098 143 429)
 - Four Abigroup special purpose vehicles—Abigroup WSO Holding No 1 Pty Limited (ABN 54 103 137 211) (2.5%), Abigroup WSO Holding No 2 Pty Limited (ABN 46 103 137 239) (2.5%), Abigroup WSO Holding No 3 Pty Limited (ABN 50 103 137 257) (2.5%) and Abigroup WSO Holding No 4 Pty Limited (ABN 58 103 137 293) (2.5%)—which are ultimately wholly owned, through a holding company, by Abigroup Limited,‡ and
 - Four Leighton special purpose vehicles—LMI WSO Holding No 1 Pty Limited (ABN 40 103 141 699) (2.5%), LMI WSO Holding No 2 Pty Limited (ABN 63 103 141 733) (2.5%), LMI WSO Holding No 3 Pty Limited (ABN 65 103 141 742) (2.5%) and LMI
- **Abigroup Contractors Pty Limited** (ABN 40 000 201 516) and **Leighton Contractors Pty Limited** (ABN 98 000 893 667) ('**the Contractors**'), which have formed a partnership trading as the 'Abigroup Leighton Joint Venture' (ABN 62 685 421 175), with each party having joint and several obligations to design, construct and commission the project for WestLink and WSO Co, thereby enabling WestLink and WSO Co to meet their design, construction and commissioning obligations to the RTA, the SRA, RIC and OCGR.
- **Abigroup Limited** (ABN 63 000 358 467) and **Leighton Holdings Limited** (ABN 57 004 482 982) ('**the Contractor Guarantors**'), which wholly own Abigroup Contractors and Leighton Contractors, respectively, and have given WestLink and WSO Co parent company guarantees of the completion of the Contractors' design and construction obligations to WestLink and WSO Co.
- **WestLink (Services) Pty Limited** (ABN 21 096 511 376) ('**the Operator**'), which will operate, maintain and repair the motorway component of the project and maintain and repair its associated works for WSO Co from the opening of the M7 motorway in 2006 until it is handed over to the RTA in 2037, thereby assisting WSO Co to meet its operational and maintenance obligations to the RTA.
- **Transurban Infrastructure Developments (WSO) Pty Limited** (ACN 103 186 670) ('**the TCM Operator**'), which will provide tolling and customer management services to WSO Co, thereby assisting WSO Co to meet its operational obligations to the RTA.
- **Sinclair Knight Merz Pty Limited** (ABN 37 001 024 095) ('**the Independent Verifier**'), which will independently verify and certify the performance by WestLink and WSO Co of specified design, construction, commissioning and defect recti-

* LMI WSO No 1 and LMI WestLink Partner No 2 are wholly owned, through a series of holding companies and Leighton Contractors, by Leighton Holdings Limited, which is also the ultimate beneficial owner; through a series of holding companies and bare trusts, of LMI WestLink Partner No 3 and LMI WestLink Partner No 4. The shares in a holding company which wholly owns LMI WestLink Partner No 3, and all rights and interests in these shares, are held on trust for Leighton Motorway Investments No 2 Pty Limited (ABN 73 103 136 545)—a wholly owned subsidiary of Leighton Contractors Pty Limited, which is itself wholly owned by Leighton Holdings—by the trustee of a trust which is ultimately wholly owned, through another trust, by the Macquarie Infrastructure Trust (I). Similarly, the shares in another holding company which wholly owns LMI WestLink Partner No 4, and all rights and interests in these shares, are held on trust for Leighton Motorway Investments No 2 by the trustee of a trust which is ultimately wholly owned, through another trust, by the Transurban Holding Trust. These intermediate Macquarie and Transurban trusts have the right to acquire full ownership of the holding companies which own LMI WestLink Partner No 3 and LMI WestLink Partner No 4, respectively, upon the completion of construction of the motorway and other 'Stage 1' works, and Leighton Motorway Investments No 2 has the right to require them to do so.

† MIG – Western Sydney Orbital Holding Company and Transurban (WSO) have the right to acquire full ownership of Abigroup WSO Holding No 3 and Abigroup WSO Holding No 4, respectively, from their current owner, Abigroup WestLink Motorway Partner Holding Company, upon the completion of construction of the motorway and other 'Stage 1' works, and Abigroup WestLink Motorway Partner Holding Company has the right to require them to do so.

‡ MIG – Western Sydney Orbital Holding Company and Transurban (WSO) have the right to acquire full ownership of LMI WSO Holding No 3 and LMI WSO Holding No 4, respectively, from their current owner, Leighton Motorway Investments No 2, upon the completion of construction of the motorway and other 'Stage 1' works, and Leighton Motorway Investments No 2 has the right to require them to do so.

fication obligations to the RTA and review and monitor the project's initial operation, maintenance and repair.

- **Interlink Roads Pty Limited** (ABN 53 003 845 430) ('**Interlink**'), the operator and leasee of the M5 motorway, concerning arrangements for the connection of the M7 motorway to the M5 motorway in Prestons.
- **The Hills Motorway Limited** (ABN 28 062 329 828), the operator of the M2 motorway, and **Hills Motorway Management Limited** (ABN 89 064 687 645) and **Perpetual Trustees Australia Limited** (ACN 000 431 827), the responsible entity and custodian of the Hills Motorway Trust (ABN 51 058 183 515), concerning arrangements for the connection of the M7 motorway to the M2 motorway in West Baulkham Hills.
- WSO Co, Interlink, The Hills Motorway Limited and other tollroad operators—**SWR Operations Pty Limited** (ABN 33 002 359 864), **Airport Motorway Limited** (ABN 26 057 283 093), **Queensland Motorways Limited** (ABN 50 067 242 513) and **CrossCity Motorway Pty Limited** (ABN 45 098 445 839)—concerning arrangements for the interoperability of tolling systems on the M7 motorway and other Sydney and Brisbane tollroads.
- **WSO Finance Pty Limited** (ABN 60 102 757 871) ('**the Borrower**'), which is wholly owned by the Partners (with the same proportional shareholdings as for WestLink). The Borrower will be receiving approximately \$1,250 million in debt finance for the project from the project's senior debt financiers, National Australia Bank Limited (ABN 12 004 044 937), Bank of America, National Association (ABN 51 064 874 531), RBS (Australia) Pty Limited (ABN 36 088 574 270) and WestLB Aktiengesellschaft (ABN 70 076 170 039).
- **National Australia Bank Limited** (ABN 12 004 044 937) ('**the Security Trustee**'), in its role as the security trustee for securities granted by WestLink, WSO Co, the Borrower and the Partners to the project's senior debt financiers to secure their obligations under the project's debt financing documents.

2.2 Contractual structure

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

The core contract is the **Western Sydney Orbital Project Deed** ('the **Project Deed**') of 13 February 2003 between the RTA, WestLink and WSO Co. This agreement sets out the terms under which:

- (a) WestLink and WSO Co must finance, plan, design, construct and commission the M7 motorway and associated

surface road, property and services works, with 'Stage 1'—the motorway and other specified works—to be completed by 13 August 2006 and with all other works ('Stage 2') to be completed within 26 weeks of the completion of Stage 1.

Under the Project Deed construction site access must be granted by the RTA as set out in the **Motorway Stratum Deed of Agreement to Lease (Western Sydney Orbital)** (the '**Motorway Stratum Agreement to Lease**') of 13 February 2003 between the RTA and WestLink and the **Gantry Land Deed of Agreement to Lease (Western Sydney Orbital)** (the '**Gantry Land Agreement to Lease**') of 13 February 2003 between the RTA and WSO Co.

The design, construction and commissioning tasks imposed on WestLink and WSO Co under the Project Deed include railway-related obligations specified in (and also required under) the **Western Sydney Orbital Rail Agreement** (the '**Rail Agreement**') of 13 February 2003 between RIC, the SRA, OCGR, WestLink and WSO Co. The terms of the Rail Agreement are supplemented by the **Western Sydney Orbital Intragovernmental Agreement** (the '**Intragovernmental Rail Agreement**') of 12 February 2003 between the RTA, RIC, the SRA and OCGR.

For its part, the RTA has an obligation to WestLink and WSO Co to comply with commitments it has made to:

- Interlink, in the **WSO/M5 Interface Agreement** of 14 December 2002, concerning M7–M5 interface works and operational interfaces, and
- The Hills Motorway Limited, Hills Motorway Management Limited and Perpetual Trustees Australia Limited, in the **WSO/M2 Interface Agreement** of 2 August 2002, concerning M7–M2 interface works and operational interfaces.

The performance by WestLink and WSO Co of their design, construction and commissioning obligations to the RTA under the Project Deed will be independently verified by the Independent Verifier. The terms on which the Independent Verifier's duties must be carried out are set out in the Project Deed, the **Deed of Appointment of Independent Verifier (Western Sydney Orbital)** of 13 February 2003, between the RTA, WestLink, WSO Co, the Security Trustee and the Independent Verifier, and a deed poll made by the Independent Verifier on 12 February 2003 in favour of RIC, the SRA and OCGR (the '**IV Deed Poll**').

WestLink and WSO Co will satisfy their design and construction obligations under the Project Deed through

the performance by the Contractors of their obligations to WestLink and WSO Co under the **Western Sydney Orbital Design and Construction Deed** (the 'D&C Contract') of 13 February 2003.

The Contractors' performance of these obligations has been guaranteed to WestLink and WSO Co by the Contractor Guarantors under the **D&C Consent Deed** of 13 February 2003, between WestLink, WSO Co, the Contractors, the Contractor Guarantors and National Australia Bank (both as the Security Trustee and as the debt financiers' agent).

The Independent Verifier will independently verify the Contractors' performance under the D&C Contract in accordance with terms set out in the **Deed of Appointment of Independent Certifier** of 13 February 2003 between WestLink, WSO Co, the Contractors, National Australia Bank (both as the Security Trustee and as the debt financiers' agent) and the Independent Verifier.

Should the Project Deed be terminated by the RTA during the project's design and construction, under the **Contractors' Side Deed** of 13 February 2003, between the RTA, WestLink, WSO Co, the Contractors, the Contractor Guarantors and the Independent Verifier, the RTA will be able effectively to step into the shoes of:

- WestLink and WSO Co under the D&C Contract
- The beneficiaries of the private sector debt financing securities, WestLink, WSO Co and the Security Trustee under the parent company completion guarantee provisions of the D&C Consent Deed, and
- WestLink, WSO Co, the debt financiers' agent and the Security Trustee under the Deed of Appointment of Independent Certifier;

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of their parent companies' completion guarantees.

- (b) WSO Co must operate, maintain and repair the M7 motorway and maintain and repair the associated surface road and property works and specified services from the date of completion of the 'Stage 1' works until 14 February 2037 or any earlier termination of the Project Deed.

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

The performance by WSO Co of its operational, maintenance and repair obligations to the RTA will again be

independently verified by the Independent Verifier during the first two years of operations, under terms set out in the Project Deed, the Deed of Appointment of Independent Verifier and the IV Deed Poll.

WSO Co will satisfy most of its operational, maintenance and repair obligations through the performance by the Operator of its obligations to WSO Co under the **Western Sydney Orbital Operation and Maintenance Deed** (the 'O&M Agreement') of 13 February 2003 and the performance by the TCM Operator of its obligations to WSO Co under the **Tolling and Customer Management Agreement** (the 'TCM Agreement') of 13 February 2003. Under the Project Deed WSO Co may also make additional arrangements for the operation, maintenance and repair of the project, subject to requirements in the Project Deed.

Should the Project Deed be terminated by the RTA during the project's operational phase, under the **Operator's Side Deed** of 13 February 2003, between the RTA, WSO Co and the Operator, and the **TCM Operator's Side Deed** of 13 February 2003, between the RTA, WSO Co and the TCM Operator, the RTA will be able effectively to step into the shoes of WSO Co under the O&M Agreement and/or the TCM Agreement so that the operational phase work of the Operator and/or the TCM Operator may continue directly for the RTA.

- (c) WSO Co may collect and keep tolls and impose other charges on motorway users.

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

- (d) WestLink and WSO Co must hand over the M7 motorway to the RTA on 14 February 2037 or upon any earlier termination of the Project Deed.

At the time of execution of the Project Deed on 13 February 2003, the RTA, WestLink and WSO Co entered into a **Deed of Disclaimer** concerning information supplied to WestLink and WSO Co by the RTA and the reliance of WestLink and WSO

Co on their own investigations, rather than this information, in entering into the project contracts.

The **Partners' Undertaking (Western Sydney Orbital)** of 13 February 2003, between the RTA, WestLink and the Partners (the '**Partners' Undertaking**'), confirms the role of WestLink as the Partner's agent under all the project contracts to which the RTA is a party and spells out the joint and several liability of the Partners if WestLink fails to perform any of its obligations to the RTA under these contracts.

Some of the rights and obligations of the RTA, WestLink and WSO Co under the Project Deed are subject to restrictions or additional process requirements under the **RTA Consent Deed (Western Sydney Orbital)** of 13 February 2003 between the RTA, WestLink, WSO Co, the Partners, the Borrower and the Security Trustee (the '**RTA Consent Deed**').

Following the completion of the Stage 1 works the RTA must:

- Lease the motorway land, other than that required for the motorway's tolling gantries, to WestLink, under the **Motorway Stratum Lease**, until 14 February 2037 or any earlier termination of the Project Deed. This lease must take the form of a draft lease annexed to the Motorway Stratum Agreement to Lease. In turn, WestLink must sublease this land to WSO Co under a **Motorway Stratum Sublease**, which must take the form of a draft sublease annexed to an **Agreement to Sublease** between WestLink and WSO Co.
- Lease the land required for the motorway's tolling gantries to WSO Co, under the **Gantry Land Lease**, until 14 February 2037 or any earlier termination of the Project Deed. This lease must take the form of a draft lease annexed to the **Gantry Land Agreement to Lease**.

Under the **Western Sydney Orbital RTA Security** of 13 February 2003 between the RTA, WestLink, WSO Co, the Partners and the Borrower (the '**RTA Security**'), the obligations of WestLink and WSO Co to the RTA under the Project Deed, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease, the Gantry Land Lease, the Partners' Undertaking, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the TCM Operator's Side Deed, the RTA Security, the RTA Consent Deed and all other project contracts are secured by fixed and floating charges over their assets, undertakings and rights.

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

The **Public Authorities (Financial Arrangements) Act Deed of Guarantee** of 13 February 2003 (the '**PAFA Act Guarantee**'), between the Minister for Roads (on behalf of the State of NSW), the RTA, WestLink, WSO Co and the Security Trustee, provides a guarantee by the State of NSW of the RTA's performance of its obligations under the Project Deed, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease, the Gantry Land Lease, the Partners' Undertaking, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the RTA Security, the RTA Consent Deed and any other documents approved by the NSW Treasurer in the future.

2.3 Conditions precedent

Under their terms, the Project Deed, the RTA Consent Deed the Rail Agreement, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Deed of Appointment of Independent Verifier and the IV Deed Poll, along with several other project contracts to which the RTA is not a party, did not become binding until:

- The PAFA Act Guarantee had been executed. This condition precedent was satisfied on 13 February 2003.
- All the other major project contracts, other than the Motorway Stratum Lease, the Gantry Land Lease, had been executed in a form satisfactory to the RTA and all of their conditions precedent—other than those relating to the satisfaction of the Project Deed's own conditions precedent—had been satisfied or waived. This condition precedent was satisfied on 14 February 2003.
- The Minister for Roads had declared specified parts of the M7 motorway as a tollway, in accordance with section 52 of the Roads Act, and had directed the RTA to act as the roads authority for this tollway, in accordance with section 63 of the Roads Act. This condition precedent was satisfied on 17 January 2003, with the gazettal of a tollway declaration by the Minister for Roads for most (but not all) of the proposed M7 motorway's roadway corridor.
- All other necessary Ministerial consents and approvals, including the Treasurer's consent under section 20 of the Public Authorities (Financial Arrangements) Act, had been obtained. This condition precedent was satisfied on 23 January 2003.
- The RTA had received two of several security bonds to be provided to it by WestLink and WSO Co under the Project Deed. This condition precedent was satisfied on 13 February 2003.
- WestLink and WSO Co had effected insurance policies covering the design, construction and commissioning works to be undertaken by WestLink and WSO Co, as specified in the Project Deed, and had provided certified copies of

these policies to the RTA. This condition precedent was satisfied on 13 February 2003.

- The RTA had received certified copies of ruling(s) on the project from the Australian Taxation Office, in a form acceptable to the RTA, concerning the applicability of sections 51AD and Division 16D of Part III of the Income Tax Assessment Act (Cth). These rulings were issued on 23 January 2003, and the condition precedent was satisfied when the RTA received copies on 30 January 2003.
- The RTA had received the private sector parties' 'base case financial model' for the project, an associated statement by WestLink and an audit of this 'base case financial model', to the satisfaction of the RTA, by an auditor acceptable to the RTA. This condition precedent was satisfied on 14 February 2003.
- The RTA had received an 'output schedule' in a form satisfactory to the RTA. This condition precedent was satisfied on 14 February 2003.

In addition, under the terms of the RTA Consent Deed some of its provisions did not become binding until 'financial close', as defined in the project's debt financing documents. This condition precedent was satisfied on 14 February 2003.

Accordingly, all of the contracts to which the RTA or RIC, the SRA and OCGR are parties and which were subject to conditions precedent became binding on 14 February 2003.

On the same date, in accordance with the Project Deed, WSO Co paid the RTA \$193,481,433 plus GST, a sum described in the Project Deed as an 'agreed amount in respect of costs incurred and to be incurred by RTA in connection with the project' that was to be paid 'in consideration for RTA granting to WSO Co the right to levy tolls on the motorway in accordance with [the Project Deed] and retain those tolls for its own benefit'.

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

2.4 Limits on the liabilities of Partners which are trustees

The contracts to which the Partners are parties all contain standard provisions limiting the scope of the liabilities of two of these Partners, Macquarie Infrastructure Investment Management Limited (as trustee for the Western Sydney Orbital Holding Trust) and Transurban Nominees Pty Limited (as trustee of the Transurban WSO Trust).

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

3 The Project Deed, the interface agreements and verification, lease and novation arrangements

3.1 General obligations on and acceptance of risks by WestLink and WSO Co

The main obligations of **WestLink** to the RTA under the Project Deed are to:

- **Finance, plan, design, construct and commission** all the project's motorway, local road, property, services and temporary works, except for specified plant and equipment works which are to be carried out by WSO Co.

WestLink's '**Stage 1**' works, as defined in detailed *Scope of Works and Technical Criteria* documentation exhibited to the Project Deed and including specified motorway works, must be completed by 13 August 2006. All the other works for which WestLink is responsible (the '**Stage 2**' works) must be completed within 26 weeks of the completion of Stage 1.

- Yield possession of the motorway to the RTA on 14 February 2037 or upon any earlier termination of the Project Deed.

In carrying out these obligations and exercising its rights under the Project Deed WestLink will be acting as the agent of the Partners at the time, including any substitute Partners appointed in accordance with the project's equity participants' documentation. The Partners will be jointly and severally liable if WestLink fails to perform any of its obligations to the RTA under the Project Deed or any of the other project contracts to which the RTA is a party.

The main obligations of **WSO Co** to the RTA under the Project Deed are to:

- **Finance, plan, design, construct and commission** specified 'Stage 1' plant and equipment works
- **Operate, maintain and repair** the motorway from the completion of the 'Stage 1' works until 14 February 2037 or any earlier termination of the Project Deed

- **Maintain and repair** the project's local road and property works within a specified geographic area, plus any of the project's services works not handed over to or maintained by organisations other than the RTA, throughout this period.
- **Yield possession** of the motorway's tolling gantry land and plant and equipment to the RTA on 14 February 2037 or upon any earlier termination of the Project Deed.

Subject to specific terms in the Project Deed discussed in sections 3.2 to 3.5 below, WestLink and WSO Co have accepted all the risks associated with the project, including:

- The risks associated with the costs of the project
- The risks that traffic volumes or project revenues may be less than expected
- Tax risks, and
- The risks that their works or operational and maintenance activities might be disrupted by the lawful actions of other government and local government authorities.

The Project Deed expressly acknowledges that the RTA has made no representations or promises concerning M7/Western Sydney Orbital traffic levels. More generally, in the Deed of Disclaimer of 13 February 2003, WestLink and WSO Co have expressly warranted that they have not relied on the RTA's *Request for Proposals* of 1 November 2001 or specified information documents subsequently provided by the RTA, and that the RTA has made no representations or promises about the accuracy, adequacy, suitability or completeness of these documents, the designs in the *Scope of Works and Technical Criteria* or any other specifications or drawings in the Project Deed.

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

3.2 Design and construction

3.2.1 Scope of the WestLink and WSO Co works

The works to be designed, constructed and commissioned by WestLink and WSO Co comprise:

- The M7 motorway itself, as specified in the *Scope of Works and Technical Criteria* exhibited to the Project Deed
- 'Property works', including adjustments to property access arrangements, as specified in the *Scope of Works and Technical Criteria*
- 'Local road works', including adjustments to existing local roads, footpaths, cycleways, open space and street landscaping and the construction of new pedestrian, cyclist, vehicle access, signage, lighting, street furniture, safety barrier and noise mitigation facilities, as specified in the *Scope of Works and Technical Criteria*
- 'Service works', to protect, adjust or enhance services infrastructure affected by the project, as specified in the *Scope of Works and Technical Criteria*
- Temporary works required only during the construction of the project
- M5 and M2 motorway interface works, as specified—in accordance with RTA commitments to Interlink in the WSO/M5 Interface Agreement and RTA commitments to The Hills Motorway Limited, Hills Motorway Management Limited and Perpetual Trustees Australia Limited in the WSO/M2 Interface Agreement—in two schedules to the Project Deed and in the Project Deed's *Scope of Works and Technical Criteria*, and
- Railway-related works as specified—in accordance with RTA commitments to RIC, the SRA and OCGR in the Intra-governmental Rail Agreement—in the Rail Agreement and the Project Deed's *Scope of Works and Technical Criteria*.

The Project Deed's *Scope of Works and Technical Criteria* documents set out detailed site investigation and surveying requirements, quality assurance and project verification requirements, performance and fitness for purpose requirements, design standards, construction method requirements, safety requirements and community involvement requirements for WestLink and WSO Co.

The Project Deed also imposes more general obligations that their works must be designed and constructed so that they are and will remain fit for their intended purposes and constructed with good workmanship and materials.

In addition, under the Rail Agreement WestLink and WSO Co have a general obligation to ensure their works do not reduce rail safety or damage rail infrastructure or other RIC, SRA or

OCGR property, and must comply with several more specific obligations aimed primarily at protecting rail safety.

3.2.2 Changes to the scope of the WestLink and WSO Co works

The RTA may change the works to be designed and constructed by WestLink and/or WSO Co under the Project Deed, provided the change will not adversely affect the use, patronage or capacity of the M7 motorway or WSO Co's ability to levy or collect tolls.

Within 15 business days of receiving a 'change order' from the RTA, WestLink or WSO Co (as relevant) must give the RTA detailed estimates of the likely costs, details on the implications of the proposed change for the functional integrity of the works, performance standards, quality standards, the date of completion of the works and any other obligations affected by the change, and any other information requested in the 'change order'. The deadline for providing this information may be extended if the change is a complex or major change which cannot reasonably be finalised and costed within 15 business days.

The RTA will then have 15 business days—or a reasonably extended period, in the case of complex or major changes—to advise WestLink or WSO Co whether it wishes to proceed with the proposed change. If it decides to proceed, and the RTA agrees with the costings and advice of WestLink or WSO Co, the RTA may notify WestLink or WSO Co within this period and the change will take effect in accordance with WestLink/WSO Co costings and advice (i.e. with the notified amended standards etc). If the RTA disagrees with the WestLink/WSO Co costings and/or advice, it may refer the matter for determination under dispute resolution procedures set out in the Project Deed, discussed in section 3.4.8 below; in the meantime, it may require WestLink or WSO Co to implement the change, with the RTA paying WestLink or WSO Co on the basis of their cost estimates during this period.

Changes to the scope of works may also be proposed by WestLink and/or WSO Co, which may be required by the RTA to certify that their proposed changes will not adversely affect the functional integrity of the works, performance standards, quality standards, the date of completion of the works or any of their other obligations to the RTA.

The RTA has an absolute discretion whether to approve or reject any proposal by WestLink and/or WSO Co for a change in the scope of works. If the RTA approves the proposed change, WestLink and WSO Co must pay all the costs associated with the change, including those incurred by the RTA, unless the RTA agrees otherwise in writing.

If a change directed by the RTA increases the scope of work or the cost of the works, the RTA must pay WestLink or WSO Co,

as applicable, the costs to WestLink or WSO Co reasonably arising from the change, including financing and delay costs and reasonable amounts associated with the Contractors' overheads and profits.

Similarly, if a change to the scope of works directed by the RTA increases the scope or costs of WSO Co's operation, maintenance and repair obligations (see section 3.3.1), the RTA must pay WSO Co the additional operational-phase costs reasonably arising from the change, including financing and delay costs, losses of revenue and reasonable amounts associated with the Operator's and/or TCM Operator's overheads and profits.

If a change directed by the RTA decreases the scope of works or reduces the costs of the works, or if it decreases the scope or costs of WSO Co's operation, maintenance and repair obligations, the RTA is entitled to receive 75% of the cost savings reasonably arising from the change, including any acceleration savings and reductions in financing costs.

If a change in the scope of work suggested by WestLink or WSO Co and agreed to by the RTA results in construction-phase and/or operational-phase cost savings, the RTA is entitled to receive 50% of the cost savings, as estimated by WestLink or WSO Co when it proposed the change.

Unless otherwise agreed, any payments by the RTA to WestLink and/or WSO Co under these arrangements must be made progressively, within ten business days of the end of each month during which the relevant work has been undertaken.

Any payments to the RTA of a portion of any design and construction cost savings 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 the RTA.

Any payments to the RTA of a portion of the operational-phase cost savings must be made in a manner and at a time to be agreed between the RTA and WSO Co. If they cannot agree, the manner and timing of these payments must be determined by an expert, who must ensure that the timing will not adversely affect:

- The ability the Borrower had, prior to the change, to make payments under the project's debt financing agreements, or
- The ability the Partners and WSO Co had, collectively and prior to the change, to give the project's equity investors—treated as if they were all among the project's initial equity investors—after-tax returns equal to the lower of the returns they would have received but for the change and the returns predicted in the private sector participants' 'base case financial model' for the project, submitted to the RTA on 14 February 2003.

3.2.3 Amendments and challenges to the project's planning approval

The respective responsibilities of the RTA, WestLink and WSO Co for ensuring the project complies with the conditions of the Minister for Planning's approval of 28 February 2002 are detailed in a schedule to the Project Deed.

WestLink and WSO Co have warranted to the RTA that the *Scope of Works and Technical Criteria* exhibited to the Project Deed complies with this planning approval, except in the case of two design changes made (and incorporated into the *Scope of Works and Technical Criteria*) after the approval was granted.

Under these changes,

- The M7–M4 interchange will be a four-level, above-ground interchange, instead of the *Representations Report's* design with some ramps in tunnels under the M4. The overall height and 'footprint' of the amended interchange design is similar to that of the *Representations Report* design.
- The vertical alignment of the M7 has been lowered in the vicinity of The Horsley Drive, Saxony Road and Villiers Road, and these three roads will pass over rather than under the M7.

In the case of these particular post-approval design changes, WestLink and WSO Co will warrant the compliance of the *Scope of Works and Technical Criteria* designs with the planning approval only if:

- The RTA decides that modifications of the planning approval are not required, or
- The RTA requests modifications of the planning approval and the planning approval is modified by the Minister for Planning.

WestLink and WSO Co must bear all the costs associated with environmental assessments of these two design changes and any changes to the works required as a result of the environmental assessments, as if these changes were changes to the scope of works proposed by WestLink and WSO Co under the arrangements described in section 3.2.2.

If the project's planning approval is modified in this or any other way or a new planning approval is issued—other than as a result of a breach of the planning approval by WestLink, WSO Co or the Contractors or a change to the project proposed by WestLink or WSO Co and agreed to by the RTA—and this necessitates a change to the works,

- The change must be addressed as if the RTA had directed the change by issuing a 'change order' under the arrangements described in section 3.2.2
- WestLink and WSO Co must take all reasonable steps to mitigate the costs of the change, comply with all reasonable

RTA directions aimed at reducing these costs and ensure the Contractors do likewise, and

- In some circumstances the renegotiation provisions described in section 3.5 may apply.

If there is a legal challenge to the project's environmental assessment or planning approval, WestLink and WSO Co must continue to perform their obligations to the RTA under the project contracts unless they are ordered not to by a court. If a court does issue such an order,

- WestLink and WSO Co must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RTA directions concerning the legal challenge and its consequences, and ensure the Contractors do likewise.
- The RTA must pay WestLink and WSO Co for any reasonable costs directly incurred by:
 - WestLink or WSO Co (other than any amounts payable to the Contractors), or
 - The Contractors (other than any amounts payable to a related corporate entity not engaged on an arm's-length, commercial basis),

but *not* for:

- Any delay costs if the court order does not prevent the completion of the 'Stage 1' works by 13 August 2006, or
 - Any costs resulting from a failure by WestLink or WSO Co to mitigate the costs or comply with RTA directions, or a legal challenge initiated or upheld because of a breach of the Project Deed by WestLink or WSO Co.
- In some circumstances the renegotiation provisions described in section 3.5 may apply.

In addition, if a court ruling overturns any RTA decision that a modification of the planning approval of 28 February 2002 is not required for the design change at the M7–M4 interchange and/or for the design change in the vicinity of The Horsley Drive, Saxony Road and Villiers Road, WestLink and WSO Co will not be in breach of their warranties that the changed designs, as incorporated in the *Scope of Works and Technical Criteria*, comply with the original planning approval.

3.2.4 Design obligations and intellectual property

The principal design obligations of WestLink and WSO Co are to satisfy the requirements of the *Scope of Works and Technical Criteria* and ensure the works will be, and will remain, fit for their intended purposes. Additional requirements, intended to protect railway infrastructure, operations and safety, are set out in the Rail Agreement.

WestLink and WSO Co must give the RTA, RIC, the SRA, OCGR and the Independent Verifier the opportunity to comment on and monitor their design development and documentation, which must comply with timeframes set out in a documentation schedule appended to the *Scope of Works and Technical Criteria* and *Rail Parties' Requirements* exhibited to the Rail Agreement.

The design documentation for each discrete design element must be certified by WestLink or WSO Co, as relevant, and verified by the Independent Verifier as being suitable for construction and in compliance with the *Scope of Works and Technical Criteria*, including, in particular, its durability and design life requirements.

WestLink and WSO Co have warranted to the RTA that at the time the Project Deed took effect on 14 February 2003 they owned or were otherwise entitled to use all the project's existing design documentation. On that date, ownership of and copyright in the existing design documentation owned by WestLink and WSO Co passed to the RTA, and the RTA will also automatically own and have copyright in all future design documentation created by them for the project. In the case of design documentation owned by others, WestLink and WSO Co must grant the RTA an irrevocable, perpetual, royalty-free licence to use the documentation for the purposes of the project.

3.2.5 Construction access

The RTA must give WestLink, WSO Co, the Contractors and their contractors, agents and employees access to construction sites and temporary works areas defined in two appendices to the *Scope of Works and Technical Criteria*, under arrangements set out in the Project Deed, a *Site Access Schedule* exhibited to the Project Deed, the Motorway Stratum Agreement to Lease and the Gantry Land Agreement to Lease. The RTA will bear the costs of any land acquisitions needed for these defined construction sites and temporary works areas.

If the RTA fails to give WestLink or WSO Co access to a construction site whose boundaries have been defined only by references to coordinates and not in deposited plans, and this means the relevant works cannot be constructed, the RTA must *either* acquire any necessary rights over the site and give WestLink or WSO Co access as soon as practicable *or* direct a change to the works under the arrangements described in section 3.2.2.

If WestLink or WSO Co are prevented from completing the 'Stage 1' works by 13 August 2006 because site access was delayed or because of delays arising from an RTA 'change order' in these circumstances,

- The RTA must pay WestLink and WSO Co for any reasonable costs directly incurred by:
 - WestLink or WSO Co (other than any amounts payable to the Contractors), or

- The Contractors (other than any amounts payable to a related corporate entity not engaged on an arms-length, commercial basis),

because of the delays, to the extent that these costs do not already have to be paid by the RTA under the arrangements described in section 3.2.2, and

- WestLink and WSO Co must take all reasonable steps to mitigate these costs, comply with all reasonable RTA directions aimed at reducing the costs and ensure the Contractors do likewise.

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

Until the completion of all construction the RTA may access the construction sites and all other areas relevant to the works during business hours or on reasonable notice (except in emergencies), subject to normal safety and security constraints, in order to observe the progress of the works, monitor WestLink's and WSO Co's compliance with the Project Deed and exercise its other rights and obligations under the contracts.

3.2.6 Latent conditions and contamination

WestLink and WSO Co have accepted all the risks of losses or delay associated with the physical conditions and characteristics of the land used for the project, its surroundings and structures on the land, including water and sub-surface conditions and any hazardous contamination.

They have also warranted that they have not relied on any RTA information about this land.

WestLink and WSO Co must remove and/or treat any contamination and remediate the land at their own expense.

3.2.7 Native title claims

If there is a native title claim over any part of any construction site or temporary works area, WestLink and WSO Co must continue to perform their design and construction obligations unless they are ordered not to by the RTA, a court or tribunal or any other legal requirement, in which case:

- WestLink and WSO Co must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RTA directions concerning the native title claim and its consequences, and ensure the Contractors do likewise.
- The RTA must pay WestLink and WSO Co for any reasonable costs directly incurred by:
 - WestLink or WSO Co (other than any amounts payable to the Contractors), or

- The Contractors (other than any amounts payable to a related corporate entity not engaged on an arms-length, commercial basis),

because of the direction or order; but *not* for:

- Any delay costs if the direction or order does not prevent the completion of the 'Stage 1' works by 13 August 2006, or
- Any costs resulting from a failure by WestLink or WSO Co to mitigate the costs or comply with RTA directions.

- In some circumstances the renegotiation provisions described in section 3.5 may apply.
- If WestLink or WSO Co is prevented from carrying out its works for more than six months, the RTA may terminate the Project Deed, in its absolute discretion, by giving WestLink and WSO a notice to this effect (see section 3.6.5).

3.2.8 Heritage protection

WestLink and WSO Co must give the RTA a detailed, location-specific *Heritage Report*, prepared by the Australian Museum, Robyane Mills Archaeological and Heritage Services or another heritage consultant agreed by the RTA, WestLink and WSO Co, before commencing construction work at any construction site or temporary works area location.

They must then comply with these *Heritage Reports*, take precautions to prevent the removal of or damage to any archaeological or other artefacts on the sites, notify the RTA immediately if they discover any such artefacts and comply with any resultant directions by any government authority at their own expense.

Within 30 business days of receiving each *Heritage Report* WestLink and WSO Co must advise the RTA whether any artefacts identified in the report will necessitate a change in the design or construction of the works or the subsequent operation of the motorway, providing details of the change required, its estimated costs, the estimated construction delays, if any, and proposed action to mitigate the costs and delays.

If an artefact is discovered, WestLink and WSO Co must continue to perform their design and construction obligations unless they are ordered not to by the RTA, a court or tribunal or any other legal requirement, in which case:

- WestLink and WSO Co must take all reasonable steps to mitigate the resultant costs, comply with all reasonable RTA directions concerning the artefact and its consequences, and ensure the Contractors do likewise.

- The RTA must pay WestLink and WSO Co for any reasonable costs directly incurred by:
 - WestLink or WSO Co (other than any amounts payable to the Contractors), or
 - The Contractors (other than any amounts payable to a related corporate entity not engaged on an arms-length, commercial basis),

because of the direction or order; but *not* for:

- Any delay costs if the direction or order does not prevent the completion of the 'Stage 1' works by 13 August 2006, or
 - Any costs resulting from a failure by WestLink or WSO Co to mitigate the costs or comply with RTA directions.
- In some circumstances the renegotiation provisions described in section 3.5 may apply.

3.2.9 Environmental requirements and complaints

As already indicated, WestLink and WSO Co must comply with the conditions of the Minister for Planning's approval of 28 February 2002—many of which are intended to reduce construction-phase environmental impacts—in accordance with an allocation of responsibilities detailed in a schedule to the Project Deed.

They must also:

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

3.2.10 Third party claims

Under the Project Deed WestLink and WSO Co must indemnify the RTA from and against any claim or loss arising from

damage or injury to others, including any liability for pure economic losses by third parties as well as any liability for physical damage and/or injury and consequential economic losses.

Under the Rail Agreement WestLink and WSO Co must provide a similar indemnity to RIC, the SRA and OCGR, but this does not extend to losses caused by negligence by RIC, the SRA or OCGR or their contractors, agents or employees.

WestLink and WSO Co must, at their own cost, promptly repair any third party property damage caused by a breach of their obligations under the Project Deed or for which they are otherwise legally liable. If they fail to do so, the RTA may carry out these repairs and recover its costs from WestLink or WSO Co as a debt.

3.2.11 Traffic management during construction

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

Specific arrangements for the closure of M5 and M2 motorway lanes at different stages of construction are detailed in two schedules attached to the Project Deed. These schedules also sets out payments to be made by WestLink and WSO Co to the RTA when these closures occur; so that the RTA may, in turn, make compensation payments to Interlink and The Hills Motorway Limited in accordance with the WSO/M5 Interface Agreement and the WSO/M2 Interface Agreement.

3.2.12 Project construction programs, plans, reports, reviews, inspections and rail safety procedures

An initial design and construction works program is exhibited to the Project Deed. This works program must be progressively updated and detailed by WestLink and WSO Co as set out in a 'Company documentation schedule' appended to the Project Deed's *Scope of Works and Technical Criteria*.

In addition, under the Rail Agreement WestLink and WSO Co must submit a construction program to RIC, the SRA and OCGR at least four months before commencing any works affecting rail infrastructure.

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

requirements specified in the *Scope of Works and Technical Criteria*, and submitted to the RTA.

The RTA may, but need not, review any of these project plans. WestLink and WSO Co must promptly submit an amended project plan if the RTA notifies it within 15 business days that any of these plans does not comply with the Project Deed.

Similarly, under the Rail Agreement WestLink and WSO Co must:

- Prepare a *Safe Work Method Statement*, a *Risk Management Plan*, an *Environmental Management Plan*, an *Emergency Event Plan* and details on their designs and construction methodologies, have them verified as 'appropriate' by the Independent Verifier and submit these documents to RIC, the SRA and OCGR at least four months before commencing any works affecting rail infrastructure
- Comply with RIC, SRA and OCGR safety requirements, as set out in a *Safety Protocol* reproduced as a schedule to the Rail Agreement and in the *Emergency Event Plan* and otherwise as notified by RIC, the SRA and/or OCGR
- Pay the costs of RIC, the SRA and OCGR in administering the *Rail Safety Protocol*, and
- Regularly update RIC, the SRA and OCGR on the progress of works affecting rail infrastructure, and notify them immediately of anything which threatens or is likely to threaten rail safety or rail operational capacity and efficiency.

WestLink and WSO Co must give the RTA an *Industrial Relations Plan*, as detailed in the Project Deed's *Scope of Works and Technical Criteria*, before commencing any construction works, and must then resubmit this plan on a monthly basis for RTA implementation reviews, making all relevant records, including those of its Contractors, available to the RTA.

The RTA and persons authorised by the Commonwealth Minister for Transport and Regional Services may, but need not, inspect, review and monitor the works being carried out by WestLink, WSO Co and the Contractors. If the RTA notifies WestLink or WSO Co of a defect, WestLink or WSO Co (as relevant) must correct this defect unless it notifies the RTA within five business days that it disagrees with the RTA's notice, in which case the RTA and WestLink or WSO Co (as relevant) must attempt to resolve the matter. If they cannot do so within five business days, either of them may refer the matter for determination by the Independent Verifier within the following five business days.

Similarly, under the Rail Agreement RIC, the SRA and OCGR may at any time inspect any of the works affecting rail infrastructure, provided they do not cause unnecessary inconvenience to WestLink or WSO Co.

3.2.13 Quality assurance and verification

WestLink and WSO Co have assumed all responsibility for the quality and durability of their designs and works.

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

The Independent Verifier, which is obliged to act independently of WestLink, WSO Co, the RTA, the Contractors, the Operator, the TCM Operator, their subcontractors and the private sector financiers, must:

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

The Independent Verifier has acknowledged in the Deed of Appointment of Independent Verifier and the IV Deed Poll that the RTA, RIC, the SRA, OCGR, WestLink, WSO Co and the Security Trustee will be relying on its skills and expertise, and has 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 engineering works in particular.

3.2.14 Completion of the works and opening of the motorway

As already indicated, WestLink's and WSO Co's 'Stage 1' works, as defined in the Project Deed's *Scope of Works and Technical Criteria* and including the motorway, must be completed by 13 August 2006 and 'Stage 2'—all the other works for which WestLink is responsible—must be completed within 26 weeks of the completion of Stage 1.

If WestLink or WSO Co become aware of any matter which will or might delay them in achieving completion by the due dates, they must immediately notify the RTA of this in writing, providing details and a proposed corrective action plan involving, for example, changes to construction sequencing or methodol-

ogies. They must also give the RTA a proposed corrective action plan if the RTA notifies them that the RTA believes they will not achieve completion by the due dates.

The RTA then has five business days to notify WestLink and WSO Co 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, WestLink and WSO Co must implement the plan.

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

- The provision of road safety audits, quality reports, non-conformance documents, drainage design approvals, a series of certificates on specific works, copies of operation and maintenance manuals and plans, copies of all approvals for the operation of the motorway, evidence of operational phase insurance policies, notification of traffic opening dates, notices from relevant authorities that the services and local road works have been completed, bridge inventory details, copies of specified site investigation reports and property condition surveys, and details of the locations of services
- NSW Fire Brigade approval of the motorway's fire fighting systems and tunnel structures and materials
- RTA approval of WestLink's and WSO Co's asset management system, and
- In addition, in the case of Stage 2 completion, the correction of all known Stage 1 defects (see section 3.2.15 below), the provision of 'as built' drawings, copies of all property and land surveys and releases concerning 'extra land' used for construction of the project (see section 3.2.5), RTA receipt and approval of durability assessment reports, and the removal of all construction phase signage.

WSO Co must open all lanes of the M7 motorway for traffic as soon as practicable after the completion of Stage 1.

Unless the RTA decides otherwise, the motorway may not be opened to traffic before all of the Stage 1 works have been completed.

The RTA may, however, give WSO a written notice, at any time, stating that in the RTA's reasonable opinion a traffic lane or a section of the motorway is able to be used by the public for the safe, efficient, continuous and tolled passage of vehicles. If the RTA does so, WSO must take out a series of operational phase insurance policies specified in the Project Deed (see section 3.4.2), and once it has done so it must open the relevant lane(s) or section(s) to the public.*

The RTA must ensure that before any part of the motorway is opened for traffic the Minister for Roads:

- Supplements the tollway declaration of 17 January 2003 by declaring any undeclared parts of the motorway as a tollway, in accordance with section 52 of the Roads Act, and
- Directs the RTA to act as the roads authority for these additional sections of the tollway in accordance with section 63 of the Roads Act.

The RTA must ensure all the motorway's tollway declarations and directions remain effective until 14 February 2037 or any earlier termination of the Project Deed.

3.2.15 Correction of defects

WestLink and WSO Co must correct all defects existing at the time of certification of completion as soon as practicable.

In particular, all Stage 1 defects existing at the time of completion of Stage 1 must be corrected as a pre-condition for the completion of Stage 2.

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

If WestLink disagrees with an RTA direction to carry out corrective works, it must notify the RTA of this, in writing, within five business days, and the RTA and WestLink must 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.

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

In addition to these Project Deed obligations, under the Rail Agreement WestLink and WSO Co—or, after the completion of Stage 1, WSO Co alone—must pay any costs incurred by RIC, the SRA or OCGR in correcting any defects in rail infrastructure or railway land caused by any of the WestLink or WSO Co works, either during their works affecting rail infrastructure or during the following 12 months. Before the end of this period WestLink and/or WSO Co (as applicable) must also give RIC, the SRA and OCGR 'as constructed' drawings of all the works affecting rail infrastructure.

* Any staged opening of the motorway under these provisions could occur only after an RTA-proposed modification of the project's 28 February 2002 planning approval, which requires the whole of the motorway to be opened as a complete project, as described in the RTA's *Representations Report* of 17 September 2001.

As described in section 3.3.1 below, WSO Co has ongoing obligations throughout the operating term of the M7 motorway to correct all defects as soon as possible.

3.2.16 Design and construction security bonds

In addition to the security granted to the RTA under the RTA Security (see section 4.1), WestLink and WSO Co have given the RTA two unconditional bank guarantees in favour of the RTA, one for \$50 million and the other for \$20 million, to secure their performance of their design and construction obligations to the RTA under the Project Deed.

If they are not drawn upon,

- The \$50 million bank guarantee is to be released within 20 business days of the completion of the Stage 2 works, and
- The \$20 million bank guarantee is to be released within 20 business days of the end of the defects correction periods for local road works, services works and property works (i.e. within one year and 20 business days of the completion of Stage 2 or, if any directions to correct defects are issued by the RTA under the arrangements described in section 3.2.15, within 20 business days of the end of the last of the new 12-month defects correction period(s)).

3.3 Operation and maintenance

3.3.1 Scope of WSO Co's operation, maintenance and repair obligations

WSO Co must:

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

from the completion of Stage 1—or any earlier opening of lane(s) or section(s) of the motorway at the RTA's direction, as described in section 3.2.14—until 14 February 2037 or until any earlier termination of the Project Deed, so that:

- All the motorway's lanes are opened for traffic as soon as practicable after the completion of Stage 1 (or, in the case of any 'early opening' lanes, as soon as the required insurance policies have been effected by WSO Co)
- All the motorway's lanes are then kept open at all times, regardless of whether tolling systems are operational, unless:
 - The RTA grants a 'road occupancy licence' authorising it to close the motorway or a traffic lane, in accordance with arrangements set out in an appendix

to the Project Deed's *Scope of Works and Technical Criteria*

- The RTA otherwise consents, in writing, or
- It is necessary to close the motorway or a lane because of:
 - The legal requirements of a relevant government or local government authority
 - The occurrence of a *force majeure* event (see section 3.4.9)
 - A material threat to public health or safety, or
 - Emergency maintenance or repairs
- The motorway and the local road, property and services works meet and maintain performance standards, design life standards and handover conditions specified in the Project Deed's *Scope of Works and Technical Criteria*, and otherwise remain fit for their intended purposes at all times
- All defects are corrected as soon as possible, and
- The conditions of the project's planning approval of 28 February 2002 and other environmental requirements set out in an appendix to the *Scope of Works and Technical Criteria* are met at all times (as already indicated in section 3.2.3, RTA and WSO Co responsibilities for meeting the planning approval's conditions have been allocated in a schedule to the Project Deed).

Minimum standards, tasks and obligations for WSO Co to fulfil these general obligations are detailed in the *Scope of Works and Technical Criteria*. If further measures are needed, WSO Co must implement them at its own cost. WSO Co must also develop an *Operation and Maintenance Plan* and *Operation and Maintenance Manuals*, as detailed in the *Scope of Works and Technical Criteria*, prior to the completion of Stage 1, and maintain and implement them throughout the project's operating term.

WSO Co has warranted that its operation, maintenance and repair works will use workmanship and materials of the highest standard and fit for their intended purposes, that any replacement parts will be of equal quality and fit for their intended purposes and that its *Operation and Maintenance Manuals* will also be fit for their intended purposes.

Quality assurance and verification requirements, including monitoring, auditing, testing and reviews by the Independent Verifier, will be analogous to those described in section 3.2.13 above for the design and construction phase. Independent quality audits, by auditors acceptable to the RTA, must be conducted at least once every 12 months.

WSO Co's operation, maintenance and repair obligations extend to upgrading of the motorway by incorporating advances in technology or operation and maintenance practices.

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

WSO Co must obtain the consent of RIC, the SRA and OCGR before it may enter any area within 50 metres of any rail facility for any purpose, including maintenance of the motorway. RIC, the SRA and OCGR may grant or withhold this consent in their discretion, and may impose any conditions they wish. All WSO Co maintenance work within 50 metres of any rail infrastructure must comply with the *Safety Protocol* reproduced as a schedule to the Rail Agreement.

Advertising and other promotional signage will not be permitted.

All the motorway's fixtures, fittings and equipment must be either owned by WSO Co or, if leased or on hire purchase, able to be transferred to the RTA if necessary (see sections 3.6.4 and 3.6.5).

WSO Co must ensure that any entity carrying out substantial operation, maintenance and/or repair obligations for it on the motorway is reputable and has sufficient experience, expertise, skills and resources, including financial resources and commercial standing, and must give the RTA prior written details of any such appointments and any changes in the terms of these appointments.

The RTA has expressly consented to WSO Co's engagement of the Operator and the TCM Operator.

WSO Co must obtain the RTA's prior written consent before appointing any replacement for the Operator, the TCM Operator or any other motorway operator. The RTA may not withhold its consent if the replacement operator meets the criteria described above, the terms and conditions of the appointment or novation are reasonably acceptable to the RTA, the proposed operator has agreed to be bound by the terms of the relevant project contracts and all the RTA's costs associated with the proposed appointment or novation have been met by others.

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

WSO Co must promptly give the RTA detailed written reports on:

- Any material damage or disrepair to the motorway or the local road, services and property works it is maintaining and repairing
- The corrective action it proposes to take, and

- Any incidents or other accidents causing injuries or material damage to the motorway or the local road, services and property works it is maintaining and repairing.

WSO Co may not make or permit any structural changes to the motorway, or any other changes outside the *Scope of Works and Technical Criteria*, without the RTA's prior written approval, which must be granted if the changes are required to comply with the law. It must also notify the RTA of any other changes to the motorway or the project's local road, property or services works.

The RTA has expressly acknowledged that WestLink and WSO may seek planning, environmental and other approvals in the future for west-facing ramps at Quakers Hill Parkway, a merging lane between Sunnyholt Road and Norwest Boulevard and a merging lane between Sunnyholt Road and Quakers Hill Parkway, and has agreed to take all reasonable steps, consistent with the RTA's statutory functions, to facilitate their applications for these approvals.

More specific obligations leading up to the handover of the M7 to the RTA are discussed in section 3.3.9 below.

3.3.2 Changes to WSO Co's operation, maintenance and repair obligations

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

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

3.3.3 Compliance with planning and environmental approvals and plans and handling of complaints

In fulfilling its operation, maintenance and repair obligations WSO Co must comply with the conditions of the Minister for Planning's approval of 28 February 2002 in accordance with an allocation of responsibilities detailed in a schedule to the Project Deed.

It must also:

- Comply with other environmental requirements detailed in an appendix to the Project Deed's *Scope of Works and Technical Criteria*
- Prepare and comply with *Environmental Management Plans*, again as detailed in the Project Deed's *Scope of Works and Technical Criteria*

- Indemnify the RTA from and against any claim or loss if they fail to meet these obligations
- Obtain all other State and local government approvals required for the operation, maintenance and repair of the motorway and the other works
- Notify the RTA immediately of any complaints or threatened or actual legal proceedings concerning land contamination, any non-compliance by WSO Co with the planning approval or other environmental requirements, its use or occupation of the motorway land maintenance areas or any damage by WSO to third parties' property, and
- Resolve any such matters as soon as possible and keep detailed records of all complaints etc and its responses.

If the project's planning approval is modified or a new planning approval is issued—other than as a result of a breach of the planning approval by WestLink, WSO Co, or their contractors or a change to the project proposed by WestLink or WSO Co and agreed to by the RTA—and this necessitates a change to the works,

- The change must be addressed as if the RTA had directed the change by issuing a 'change order' under the arrangements described in section 3.2.2 and 3.3.2
- WSO Co must take all reasonable steps to mitigate the costs of the change, comply with all reasonable RTA directions aimed at reducing these costs and ensure the Operator and the TCM Operator do likewise, and
- In some circumstances the renegotiation provisions described in section 3.5 may also apply.

3.3.4 Operation, maintenance and repair security bonds

In addition to the security granted to the RTA under the RTA Security (see section 4.1), if WSO Co fails to comply with its operation, maintenance and repair obligations under the Project Deed, the RTA may at any time issue a notice requiring it to rectify specified non-conformances within 12 months.

If:

- WSO Co then fails to do so, *and*
- In the case of a failure to comply with a rectification notice issued before 14 February 2032, the RTA reasonably determines that this failure is materially affecting the operation of the motorway,

the RTA may require WSO Co to provide an unconditional bank guarantee of up to \$20 million, indexed to the CPI from 13 February 2003, to secure its operation, maintenance and repair obligations to the RTA.

If this guarantee is not drawn upon, it is to be released within 20 business days of the final handing over of the motorway to the RTA on 14 February 2037.

3.3.5 Preparations for and granting of the Motorway Stratum Lease and Gantry Land Lease

The Motorway Stratum Agreement to Lease and the Gantry Land Agreement to Lease set out procedures for:

- WestLink and WSO Co to conduct 'as built' engineering surveys within 12 months of the completion of Stage 1 and deliver specified drawings and a three-dimensional computer model to the RTA, certified as being adequate for the RTA to determine all the boundaries of the land to be leased to WestLink and WSO Co
- The RTA to use its best endeavours to create specified easements and register plans of consolidation or subdivision within the following 18 months
- The RTA to grant and WestLink to accept the Motorway Stratum Lease, which must be on the terms set out in a draft of this lease annexed to the Motorway Stratum Agreement to Lease
- The RTA to grant and WSO Co to accept the Gantry Land Lease, which must be on the terms set out in a draft of this lease annexed to the Gantry Land Agreement to Lease
- The RTA to give WestLink and WSO Co registrable forms of these leases following the registration of the necessary plans of consolidation or subdivision
- WestLink, WSO Co and the RTA to execute and register the leases, and
- The RTA to create other specified easements, including, where possible, easements requested by WestLink or WSO Co.

The land to be leased to WestLink under the Motorway Stratum Lease, and subleased by it to WSO Co under the Motorway Stratum Sublease, will comprise strata extending 5.3 metres above and 2 metres below the motorway carriageways and ramps (and 2 metres to the outside of the main carriageways and 2 metres to either side of the ramps), plus other agreed motorway areas, specified tunnel areas (if applicable), the motorway's control centre and specified approaches to and exits from the motorway, but will not include the land between the motorway carriageways, which has been reserved for possible future public transport uses. The land to be leased to WSO Co under the Gantry Land Lease will comprise strata extending 1 metre around each of the tolling gantries, plus other agreed motorway areas. The RTA will bear the costs of any land acquisitions which might be required.

The land to be leased to WestLink under the Motorway Stratum Lease includes some M5 motorway land, in Prestons, which the RTA has promised to lease to Interlink in accordance with the M5 Western Link Project Deed of 15 June 1993. In the WSO/M5 Interface Agreement, the RTA and Interlink have agreed to remove these areas from the M5 Western Link lease area from the date of completion of Stage 1 of the M7 and do everything necessary to have the amended M5 Western Link Lease completed and registered as expeditiously as possible.

The land to be leased to WestLink under the Motorway Stratum Lease also includes some M2 motorway land, in West Baulkham Hills, which the RTA has promised to lease to Perpetual Trustees Australia Limited, the custodian of The Hills Motorway Trust, under an M2 Trust Lease in accordance with the M2 Project Deed of 26 August 1994. In the WSO/M2 Interface Agreement, the RTA, Perpetual Trustees Australia Limited, Hills Motorway Management Limited (the responsible entity of the Hills Motorway Trust) and The Hills Motorway Limited (the operator of the M2 and the proposed sublessee of the land to be leased to the Hills Motorway Trust) have agreed to remove these areas from the land to be leased under the M2 Trust Lease and do everything necessary to have the variation to the M2 Trust Lease and the associated sublease completed and registered as expeditiously as possible.

The Motorway Stratum Lease and Gantry Land Lease must commence on the date of completion of Stage 1 and continue until 14 February 2037, unless they are terminated earlier—and automatically—upon any early termination of the Project Deed. Pending their execution and registration, the RTA, WestLink and WSO Co will be bound by the draft forms of the leases annexed to the Motorway Stratum Agreement to Lease and the Gantry Land Agreement to Lease.

3.3.6 Tolls and administrative charges

WSO Co may levy and retain tolls on motor vehicles using the motorway, or any part of it, in accordance with a toll calculation schedule to the Project Deed.

The details of the tolling system which must be used to collect these tolls electronically and systems to identify vehicles not fitted with electronic tolling transponders are specified in the Project Deed's *Scope of Works and Technical Criteria*. In addition, under the Electronic Tolling MoU—to which WSO Co has become a party as a result of the execution of the Electronic Tolling Admission Deed—the M7 motorway's electronic tolling system and associated operational, data transfer, security and privacy policies must be interoperable and compatible with those of other tollroads in NSW and Brisbane.

For vehicles without electronic tolling transponders or with temporary transponders, WSO Co may levy not only the tolls applying for all vehicles but an additional administration fee,

under arrangements which are also set out in the Project Deed's toll calculation schedule.

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

For other vehicles the toll which may be charged for any trip on the motorway may not exceed a 'theoretical toll' for that particular trip or a 'theoretical toll cap' applying for all trips, in both cases as specified in the toll calculation schedule and rounded to the nearest whole cent.

For the purposes of calculating 'theoretical tolls' the motorway has been divided into 16 sections, each of between 0.95 km and 5.36 km in length, between the motorway's entry and exit points, as shown in *Figure 2*. These tolling sections may be amended if additional connections to the motorway are opened in the future.

The 'theoretical toll' for any particular trip along part or all of the motorway will be equal to the total length of the sections traversed during this trip (in kilometres) multiplied by a 'theoretical rate' (in cents per kilometre). This 'theoretical rate' will start at 25 cents per kilometre (including GST) as at 1 July 2000 and will be escalated, at the end of each quarter starting from the July quarter of 2000, by the percentage increase in the Consumer Price Index (CPI) during the quarter before the quarter which has just finished.

The 'theoretical toll cap' will start at \$5.00 (including GST) as at 1 July 2000 and will similarly increase in line with the CPI.

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

If the rate of GST changes in the future, the theoretical tolls and the theoretical toll cap will automatically increase or decrease to match this change. More generally, if a new Commonwealth or State tax is imposed on the tolls collected by WSO Co, or if an existing Commonwealth or State tax on the tolls is increased, WSO Co will be entitled to increase its tolls in order to (at most) match the net effect of the change on its position, provided the increase is not higher than any maximum permitted under the applicable law.

The administration fees levied on 'casual users' (vehicles without transponders) and the issuing of temporary transponders, in addition to the tolls described above, must be determined by WSO Co for each quarter, in consultation with the RTA, so as to recover the actual direct and indirect costs of processing, administering and collecting revenue from these users.

In determining these fees, WSO Co must take account of the 'casual user' products it wishes to implement, actual and anticipated numbers of casual users and toll and fee recovery rates and the objective of encouraging the fitting of transponders.

Table 2. The RTA's share of any unexpectedly high revenues—generally over 12-month periods—from tolls and administration fees (additional charges for 'casual' motorway users and users requesting additional account services).

Actual revenue, as a percentage of forecast revenue	RTA's share of this portion of the actual revenue (to be paid by WestLink as part of its rent under the Motorway Stratum Lease)
up to 105%	0%
105%–110%	10%
110%–120%	15%
120%–130%	20%
more than 130%	25%

Subject to the uncertainties currently associated with these criteria, the RTA and WSO Co anticipate that the initial administration fee, upon the opening of the motorway in 2006, will be between 20 cents and \$1.75 for each 'casual' trip, on top of the tolls described above.

WSO Co may review the administration fee once each quarter. If it wishes to change it, it must give the RTA at least 20 business days' notice and provide reasonable details of its calculations.

WSO Co may also levy another administration fee on motorway users requesting additional account services, as specified in the Project Deed's toll calculation schedule, beyond those available with the standard pre-paid, automatically 'topped up' account. Again, this fee must be determined by WSO Co for each quarter, in consultation with the RTA, so as to recover the actual direct and indirect costs of processing, administering and collecting revenue from these 'additional account' users.

3.3.7 Rent payments to the RTA

Under the Motorway Stratum Lease, WestLink must make the following rent payments to the RTA for the period between the completion of Stage 1 and the following 30 June, for each successive financial year during the lease and then for the final period of the lease, in each case within 20 business days of the end of the relevant period:

- \$1, *plus*
- A share of the gross revenue of WestLink and WSO Co from any non-toll business uses of the motorway or the land leased to WestLink, as agreed to by the RTA as part of the RTA approval which is required before any such non-toll businesses may be conducted, *plus*
- For periods commencing six years or more after the completion of Stage 1, if WestLink's actual toll and administration fee revenue (see section 3.3.6) has been more than

5% higher than that forecast by the private sector participants' 'base case financial model' for the project at the time the Project Deed took effect on 14 February 2003, a progressively increasing share of this extra revenue, as set out in Table 2.

Under Gantry Land Lease, WSO Co must pay the RTA rent of \$1 per year, within 20 business days of the end of each of the periods described above.

3.3.8 RTA and Government road network, public transport and utility service development rights and restrictions

The Project Deed and the other Westlink M7 project contracts do not limit or restrict the powers of the RTA or the NSW Government to develop the NSW road network in any way.

The RTA, WestLink and WSO Co have expressly acknowledged, however, that the private sector participants' 'base case financial model' of 14 February 2003 assumes that 50 traffic connections to the M7 motorway, as specified in a schedule to the Project Deed, will not be closed or materially reduced during the motorway's operating term from the completion of Stage 1 to 14 February 2037, except during special events, emergencies or road maintenance or repair works or if there is a material threat to public health or safety.

Accordingly, the renegotiation provisions described in section 3.5 below may apply if any of the specified connections to the motorway are not maintained, except under the circumstances listed above.

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

- A 'competing road project' is completed and opened to traffic during the motorway's operating term, or
- The motorway ceases to be signposted as a National Highway connection between the M5, the M4 and the M2.

'Competing road projects' are defined in a schedule to the Project Deed as being any new road or widening and upgrading of an existing road:

- Between two roads which connect with the M7 motorway, and
- Within the 'exclusion zone' shown in Figure 4

other than:

- Any widening and enhancement of Richmond Road, the Great Western Highway, the M4 motorway, The Horsley Drive, Elizabeth Drive, Cowpasture Road, Hoxton Park Road or the Cumberland Highway
- Any bus-only transitways
- Any road projects aiming primarily to improve road safety

- Any road projects aiming primarily to achieve a specified minimum 'level of service' at intersections and/or specified minimum average travel speeds during peak periods
- Any road project for which the RTA is not the road authority, or
- Any road works which WestLink must carry out as part of the Westlink M7 project itself.

The RTA and the NSW Government are expressly entitled to:

- Make road and pedestrian access connections to the motorway
- Construct, operate and maintain public transport services, utility services or other infrastructure or improvements in the public transport corridor between the motorway's carriageways and/or in the leased motorway stratum, and

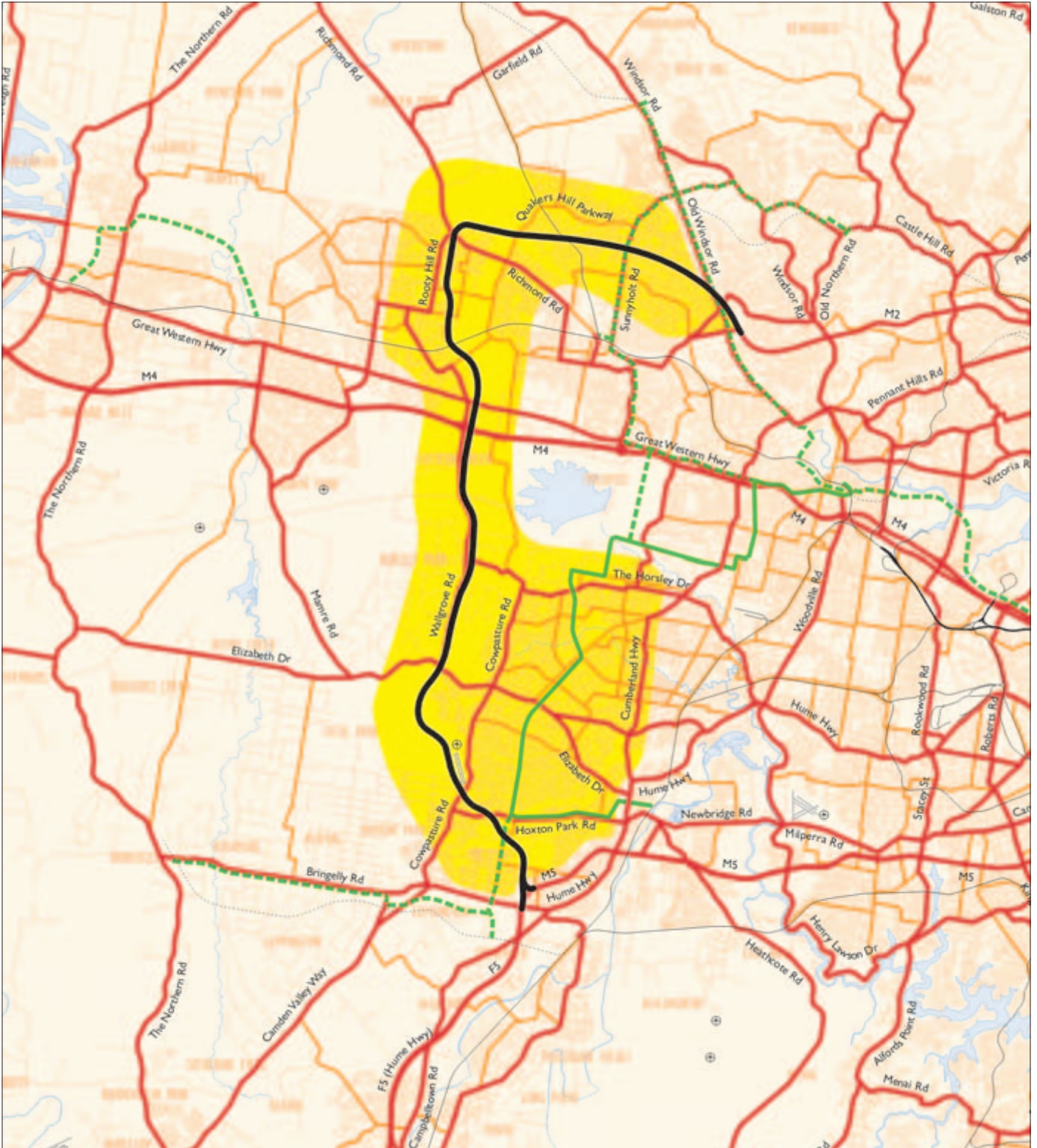


Figure 4. The yellow area in this map is the 'exclusion zone' for 'competing road projects' near the M7 motorway. Existing State Roads, for which the RTA is the relevant road authority, are shown in red, and existing and proposed bus-only transitways are shown in green.

- Connect any public transport or utility services or other infrastructure or improvements to the motorway itself or to other structures in the public transport corridor and/or the leased motorway stratum,

provided this:

- Is not done prior to the completion of Stage 2 construction without the consent of WestLink and WSO Co
- Does not permit any untolled use of the motorway or any un-metered use of utility services by the RTA or its nominees, and
- Does not prevent WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed or impede the safe and free flow of traffic onto, along and off the motorway at its design speed and volume *except* as a consequence of non-peak hour work or occasional short-term work (the RTA and its contractors must liaise with the Operator and the TCM Operator and use reasonable efforts to schedule any such work so as to minimise its impacts on traffic flows).

If the RTA or the Government proposes to carry out any of these permitted activities, it must give WestLink and WSO Co reasonable notice and WestLink and WSO Co must cooperate with the RTA or the Government, as applicable, to enable the activity to occur.

If the RTA or the Government decides to proceed with the permitted activity,

- WestLink and WSO Co must give the RTA and its nominees adequate access, facilitate the permitted activity through reasonable lane closures etc and mitigate any losses they might suffer by (for example) opening the motorway's shoulders to traffic and installing any equipment needed to prevent untolled use of the motorway
- The RTA must coordinate all activities associated with the permitted activity and minimise any interference with the operation and use of the motorway, but will not be under any obligation to install or pay for equipment to prevent untolled use of the motorway
- The RTA will not be liable for any WestLink or WSO Co losses connected with the permitted activity, including any changes in WSO Co's toll revenue (*except* potentially under the renegotiation provisions described in section 3.5 in the case of new public transport services along the public transport corridor or leased motorway stratum or the connection of public transport services to the motorway or to other structures in the public transport corridor or the leased motorway stratum), and
- Upon the completion of the works, WSO Co must maintain and repair any new road or pedestrian access connec-

tion to the motorway, any new utility services along the public transport corridor or the leased motorway stratum and any new connection of public transport or utility services or other infrastructure or improvements to the motorway or to other structures in the public transport corridor or the leased motorway stratum—but *not* any of the other types of expressly permitted works, such as public transport services along the public transport corridor—at its own cost, as if they formed part of the motorway.

3.3.9 Expiration of the operating term and final handover to the RTA

During the final three months of the operating term of the motorway under the Project Deed—that is, during the three months leading up to 14 February 2037—WSO Co must train RTA personnel, or others nominated by the RTA, in all aspects of the operation, maintenance and repair of the motorway and the local road, property and service works being maintained by WSO Co.

At the end of the operating term, or upon any earlier termination of the Project Deed, WestLink and WSO Co must:

- Surrender the motorway, the land leased under the Motorway Stratum Lease and the Gantry Land Lease and all rights and interests in them to the RTA in a fully functional condition, complying with the Project Deed's *Scope of Works and Technical Criteria* and the *Operation and Maintenance Manuals*
- Deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant and equipment required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- Pay the RTA any unexpended insurance proceeds and assign WestLink's and WSO Co's insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2 below, and
- Do everything reasonably necessary for the RTA to operate the motorway at least to the same level as that achieved just before the end of the operating term.

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

and the cost of rectifying this shortfall. WSO Co may then either:

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

Before a final handover to the RTA may occur,

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

Once WestLink and WSO Co believe they have satisfied these conditions, they must notify the RTA. The RTA will then have five business days to advise them of its agreement or otherwise, providing reasons if it considers the conditions have not yet been met.

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

3.4 Miscellaneous general provisions of the Project Deed, the Rail Agreement and the RTA Consent Deed

3.4.1 Rates, levies and taxes

WestLink and WSO Co must pay all land-based rates, taxes and charges associated with the land WestLink will lease under the Motorway Stratum Lease from the completion of Stage 1, but:

- If WestLink's or WSO Co's water, sewerage and drainage rates (excluding water use charges) exceed \$50,000 per year, indexed to the CPI from 13 February 2003, the RTA must reimburse the excess to the relevant company on demand, and

- The RTA must reimburse WestLink, on demand, for any land tax payable for the motorway stratum it will lease under the Motorway Stratum Lease.

WestLink and WSO Co must also pay all other taxes levied on the project, subject to GST input tax credits and other GST-specific arrangements.

3.4.2 Loss or damage and insurance

WestLink and WSO Co bear the risk of loss or damage to their construction works and then, until the termination of the Project Deed, the completed M7 motorway.

Before WestLink or WSO Co commenced design and construction of the project they had to effect the following insurance policies:

- Contract works or construction risks insurance, for risks described in an exhibit to the Project Deed, with at least \$200 million of cover for each occurrence plus additional cover for specified purposes, continuing until the completion of Stage 2
- Transit insurance, until the completion of Stage 2
- Third party liability insurance for at least \$250 million for each occurrence, with no aggregate limit, *plus* an additional \$250 million per occurrence and one full reinstatement of \$250 million for product liability, until the end of the last defects liability period
- Professional indemnity insurance for at least \$50 million per claim and \$50 million per year in total, until six years after the end of the last defects liability period
- Employer's liability and workers' compensation insurance, until the completion of Stage 2
- Motor vehicle third party property damage insurance, for at least \$100 million per claim and with no aggregate limit, until the completion of Stage 2
- Advance business interruption insurance covering all debt serving obligations, other standing charges and losses of anticipated net revenue for 24 months, and
- Directors' and officers' liability insurance for at least \$10 million per occurrence and \$10 million per year in total, until the end of the project's operating term.

From the completion of Stage 1—or prior to any earlier RTA-directed opening of lane(s) or section(s) of the motorway to traffic, as described in section 3.2.14—and throughout the project's operating term WSO Co must effect and maintain the following insurance policies for the motorway:

- Industrial special risks insurance, for at least \$200 million for each occurrence, for physical loss or damage and other risks as reasonably required by the RTA from time to time

- Third party liability insurance for at least \$250 million for each occurrence and with no aggregate limit, other than an aggregate limit of \$250 million per year for product liability claims
- Employer's liability and workers' compensation insurance
- Motor vehicle third party property damage insurance, for at least \$100 million per claim and with no aggregate limit
- Business interruption insurance covering all debt serving obligations, other standing charges and losses of anticipated net revenue for 24 months
- Directors' and officers' liability insurance for at least \$10 million per occurrence and \$10 million per year in total, and
- Any other insurance policies which are reasonably required by the RTA, which a prudent and competent motorway operator would normally maintain and which are reasonably able to be obtained by WSO Co on reasonable commercial terms.

All these insurance policies must be with insurers approved by the RTA and, in several cases, RIC, the SRA and OCGR. They must comply with terms set out in the Project Deed or otherwise approved by the RTA. In several cases, their terms must also be approved by RIC, the SRA and OCGR. Procedural requirements are set out in both the Project Deed and the Rail Agreement.

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

The contract works/construction risks, transit, industrial special risks, third party liability, motor vehicle and business interruption policies must be in the joint names of the RTA, WestLink, WSO Co and others with insurable interests under the project's contracts, including RIC, the SRA, OCGR, the Security Trustee, The Hills Motorway Limited, Hills Motorway Management Limited, Tollust Pty Limited (which is operating and maintaining the M2 motorway for The Hills Motorway Limited) and their financiers.

The Project Deed sets out procedures for the RTA and WSO Co to review the project's operational phase insurance requirements every five years.

WestLink and WSO Co must deposit any insurance proceeds they receive for any loss or damage to the construction works or the completed motorway in a special purpose account for which the only signatory, prior to the repayment of all the project debt, will be the private sector debt financiers' Security Trustee or its agent.

If there is any loss or damage to the construction works or the completed motorway, WestLink and/or WSO Co, as applicable,

must promptly make good the loss or damage unless it has resulted from an 'uninsurable event', as defined in the Project Deed.* (In these circumstances, the renegotiation provisions described in section 3.5 may apply.)

In making good any loss or damage WestLink and/or WSO Co, as applicable, must:

- Immediately start clearing any debris and carrying out initial repairs
- Promptly consult with the RTA and take all steps necessary to promptly repair or replace the loss or damage and continue to comply with their obligations under the project's contracts
- Minimise the impacts of these activities on the works or the motorway's operations, and
- Keep the RTA fully informed of progress,

If the insurance proceeds received by WestLink, WSO Co and/or the Security Trustee are less than or equal to \$200 million, indexed to the CPI from 13 February 2003, they must be applied to the repair and reinstatement of the works or motorway. If the insurance proceeds exceed this amount, they must

* 'Uninsurable events' include, at any time, 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 which is beyond the reasonable control of WestLink and/or WSO Co and their contractors, causes WestLink and/or WSO Co to be unable to perform their obligations under the Project Deed, and could not have been prevented or avoided by WestLink and/or WSO Co and their contractors by their taking the steps a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator would have taken.

After the completion of Stage 1, 'uninsurable events' also include any other unanticipated physical event which:

- Is beyond the reasonable control of WestLink or WSO Co and its contractors and which could not have been prevented or avoided by their taking the steps a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator would have taken
- Is not an exercise by the RTA of any of its statutory functions or powers, and
- Directly damages the motorway or nearby land or otherwise prevents the motorway from being open to the public for the safe, continuous and efficient passage of traffic

and for which:

- Insurance is not available in the Australian or London insurance markets
- Insurance is available, but only on terms which, in the opinion of an independent insurance broker acceptable to the RTA, WestLink and WSO Co, mean prudent, experienced and competent concessionaires, designers, constructors and tollroad operators are generally not insuring against the event, or
- The loss suffered by WestLink or WSO Co exceeds the amount recoverable (after deductibles) under any of its insurance policies

provided the event was not caused by a breach of contract or negligence by WestLink, WSO Co or its contractors or employees, and provided the insurance proceeds (if any) were not reduced or not paid because of an act or omission by WestLink, WSO Co or its contractors, by any negligence on their part, by any insolvency of the insurer or by any under-insurance.

again to be applied to the repair and reinstatement of the works or motorway, *provided*:

- The insurance proceeds and other sources of funds are sufficient to repair or reinstate the works or motorway within a reasonable time
- The Borrower is able to meet its obligations to repay the debt financiers substantially in accordance with its debt financing arrangements, and
- It is economically viable to repair or reinstate the works or motorway.

If these three requirements have not been satisfied within three months of the event(s) causing the loss or damage, or any longer period agreed to by the Security Trustee, the Security Trustee may, if it wishes, apply part or all of the insurance proceeds to repay the debt financiers, with the balance, if any, being paid by WestLink or WSO Co to an account established by it with the RTA. This balance, if any, must then be applied to the repair and reinstatement of the works or motorway.

3.4.3 Accounting and financial reporting

The Project Deed sets out requirements for WestLink and WSO Co to:

- Maintain accounts and other records, have them audited annually, make them available for RTA inspections and audits at any reasonable time
- Provide financial statements to the RTA on each six months' and year's performance of WestLink, each of the Partners, WSO Co and the Borrower
- Give the RTA copies of all ASIC and ASX documents they receive and any other information reasonably required by the RTA
- Immediately notify the RTA when the project's debt financiers have been fully repaid
- Immediately notify the RTA when WestLink or WSO Co receives any non-toll revenue or when their actual revenue during any financial year exceeds 105% of that forecast in the private sector participants' 'base case financial model' of 14 February 2003, triggering the need to make rent payments of more than \$1 to the RTA under the Motorway Stratum Lease (see section 3.3.7 above), and
- Give the RTA specified daily, monthly and annual reports on traffic volumes, toll levels, toll revenues, maintenance spending and their performance against specified performance indicators.

3.4.4 Restrictions on assignments, encumbrances and refinancing

Except as provided in the private sector debt financing agreements and in the RTA Consent Deed provisions described below, WestLink, the Partners and WSO Co may not:

- Sell, transfer, assign, novate or otherwise deal with their interests in the M7 motorway or any of the main project contracts
- Encumber these interests, or
- Add or replace a Partner or change the control of WestLink, WSO Co, any Partner or any of their holding companies and holding trusts, other than under a stock exchange listing or transfer of shares or units, an intra-group shareholding change or transfer within managed trusts (including those permitted under the project's equity investment arrangements) or a transfer to be made under these arrangements upon the completion of Stage 1 (see section 2.1.2)

without the RTA's prior written consent, which may not be unreasonably withheld. The RTA has already consented, in the RTA Consent Deed, to a series of financiers' securities (see sections 3.6.3, 3.8 and 4.2) and, in the Project Deed, to any assignments WestLink, the Partners or WSO Co may be required to make for these securities under the project's debt financing arrangements.

In the case of a proposed assignment of any of the project's private sector debt financing documents,

- The proposed transferee must satisfy specified minimum S&P or Moody's ratings, or be a subsidiary of a bank or financial institution satisfying these requirements, or be one of an agreed list of 'permitted transferees', and
- The Security Trustee and the debt financiers must also obtain the RTA's prior written consent, which may not be unreasonably withheld.

The RTA has already consented, in the Project Deed, to future refinancing by the Borrower of any or all of the project debt, provided this is substantially in accordance with the private sector participants' 'base case financial model' of 14 February 2003.

The Borrower may also refinance the debt in other ways, provided it obtains the RTA's prior written consent. The RTA may not unreasonably withhold its consent, either generally or (more specifically) if:

- The refinancing is an arm's-length commercial arrangement
- Specified detailed information is provided to the RTA a reasonable time before its consent is requested, and

- The refinancing does not weaken the RTA's position under the project contracts.

WestLink must pay the RTA's reasonable costs in reviewing any refinancing proposal.

The RTA and the incoming private sector financiers or their agents must execute a deed substantially the same as the RTA Consent Deed. The new financiers may not receive any greater security than that held by the project's initial financiers.

For its part, the RTA:

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

3.4.5 Restrictions on amendment of the contracts

WestLink and WSO Co may not at any time materially amend, terminate or surrender any of the project contracts to which they are parties without first obtaining the RTA's consent, in accordance with procedures set out in the Project Deed.

In addition, the Security Trustee, the Borrower, WestLink and WSO Co may not amend or replace any of the project's private sector debt financing documents—other than under the debt refinancing arrangements just described in section 3.4.4—in a way which would:

- Increase the principal of the project debt
- Bring forward repayments of this principal
- Materially increase the interest, fees and margins payable on the project debt, or
- Adversely affect the amount of rent payable to the RTA under the Motorway Stratum Lease or the RTA's right to receive rent under this lease and the Gantry Land Lease

without the RTA's prior written consent, which may not be unreasonably withheld or delayed and which must be granted if the amendment is reasonably necessary to cure an actual or threatened 'default event' by WestLink and/or WSO Co (see section 3.6.2 to 3.6.4). Any such amendment or replacement of any debt financing document without the RTA's consent will not affect the RTA's liabilities under any of the project contracts.

Notwithstanding the general requirement for WestLink and WSO Co to obtain the RTA's consent before amending any of

the project contracts, the RTA's consent is not required for any amendments of the debt financing documents which do not have any of the effects listed above.

For its part, the RTA:

- Has acknowledged that WestLink and WSO Co may amend, replace, terminate or waive their rights under their contracts with the RTA only in accordance with the debt financing documents, and has agreed that any amendments etc not complying with these requirements will be ineffective, and
- May not amend any of the project contracts to which it is a party—other than to make minor technical amendments or variations which could not reasonably affect the interests of the project's debt financiers—without the Security Trustee's prior written consent, which may not be unreasonably withheld or delayed.

3.4.6 Confidentiality and publicity

The project contracts and specified associated documents are subject to confidentiality restrictions. Specified exemptions to these restrictions include the release of information as required by the law or for legitimate government purposes, the release of information to aid investors, financiers and insurers and the publication of this *Summary of Contracts*.

Apart from announcements after the opening of the motorway which do not mention or relate to the RTA or management of the Sydney road network, WestLink and WSO Co may make statements about the project to the media only with the RTA's prior written consent, which may not be unreasonably withheld or delayed.

3.4.7 Changes in law

The renegotiation provisions described in section 3.5 below may apply:

- If there is a change to State law—as a result of a court decision or a statute, regulation or by-law—or a change to the application or interpretation of any such State law, and this change specifically and only affects the Westlink M7 project, either on its own or together with other privately owned and operated NSW tollroads, and
- More specifically, if a change in State law relating to the identification of motor vehicles means WSO's electronic tolling system is unable to identify vehicles as contemplated when the Project Deed was executed on 13 February 2003, notwithstanding all reasonable efforts and adjustments by WSO Co and its contractors.

Except for the possibility of renegotiation if such a 'discriminatory change in State law' occurs, WestLink and WSO Co have accepted all the risks associated with any changes in law.

3.4.8 Dispute resolution under the Project Deed

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

The Project Deed's dispute resolution procedures follow the following sequence:

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

The Security Trustee must be notified of and may attend and participate in these negotiations.

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

- (ii) If these negotiations fail to resolve the dispute within five business days, *and* the dispute concerns:

- A determination by the Independent Verifier, *or*
- A failure by the parties to agree within 90 business days on whether an event potentially triggering the renegotiation provisions described in section 3.5 has had or is starting to have a 'material adverse effect' on the project, *or*
- A failure by the parties to agree within 90 business days on the outcomes of any such renegotiations, *or*
- A failure by the RTA and WSO Co to agree on insurance liability limits or deductibles during a five-yearly review of operational phase insurance requirements (see section 3.4.2), *or*
- A disagreement about whether an RTA notice extending the time available for WestLink and/or WSO Co to remedy a 'default event' provides a reasonable extension period (see section 3.6.2), *or*
- A failure by the RTA and WSO Co to agree on the lengths of any proposed new tolling sections (see section 3.3.6),

the dispute may be referred by any of the relevant parties, within ten business days, for determination by an independent expert, selected as specified in the Project

Deed, in accordance with rules set out in the Project Deed.

The Security Trustee may attend, participate in and make submissions to the hearings.

The RTA must meet 50% of the costs of the expert, WestLink and/or WSO Co must meet the other 50%, and each party must bear its own costs.

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

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

The Security Trustee may attend, participate in and make submissions to the arbitration.

Notwithstanding the existence of any dispute, the RTA, WestLink and WSO Co must continue to perform their obligations under the Project Deed.

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

3.4.9 Force majeure under the Project Deed

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

- (a) Earthquake, cyclone, fire, explosion, flood (other than flooding of land outside the motorway stratum which would not have occurred without the works or the motorway), malicious damage, sabotage, act of a public or foreign enemy, terrorism, civil unrest, war, invasion, hostility between nations, civil insurrection, military coup or radioactive contamination from nuclear waste or the combustion of nuclear fuel
- (b) Confiscation, nationalisation, requisition or property damage under the order of any government, *or*
- (c) Other event after the opening of the motorway which is not itself, or does not arise from, a breach of the Project Deed by WestLink or WSO Co and which is not otherwise subject to a specific risk allocation under the Project Deed

which:

- Is beyond the reasonable control of WestLink and/or WSO Co and their contractors
- Causes WestLink and/or WSO Co to be unable to perform their obligations under the Project Deed, and
- Could not have been prevented or avoided by WestLink and/or WSO Co and their contractors by taking the steps of a prudent, experienced and competent concessionaire, designer, constructor or tollroad operator.

If WestLink or WSO Co alleges *force majeure* has occurred, it must promptly notify the RTA in writing, providing details of the event, its effects on its obligations, the actions it has taken or proposes to remedy the situation, the time it is unlikely to be able to carry out its affected obligations, the estimated costs of remediation and the insurance proceeds upon which it expects to be able to rely.

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

WestLink and/or WSO Co, as relevant, must remedy the effects of the *force majeure* promptly, in accordance with the reinstatement provisions described in section 3.4.2 above.

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

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

3.5 Renegotiation provisions

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

If:

- The project's planning approval is modified or a new planning approval is issued—other than as a result of a breach of the planning approval by WestLink, WSO Co or their contractors or a change to the project proposed by WestLink or WSO Co and agreed to by the RTA—and this necessitates a change to the works (see sections 3.2.3 and 3.3.3),
or

- Any of a specified series of traffic connections to the motorway are closed or materially reduced, except during special events, emergencies or road maintenance or repair works or if there is a material threat to public health or safety (see section 3.3.8), or
- A 'competing road project' is completed and opened to traffic during the motorway's operating term (see section 3.3.8), or
- The motorway ceases to be signposted as a National Highway connection between the M5, the M4 and the M2 (see section 3.3.8), or
- The RTA or the NSW Government introduces new public transport services along the public transport corridor or leased motorway stratum or connects public transport services to the motorway or to other structures in the public transport corridor or the leased motorway stratum (see section 3.3.8), or
- A 'discriminatory change in State law' occurs (see section 3.4.7), or
- An 'uninsurable event' occurs (see sections 3.4.2 and 3.4.9), or
- The NSW Government and its authorities fail to enforce the offence of failing or refusing to pay a motorway toll or pursue recovery procedures in a manner substantially the same as those applied by them for other private tollroads at the time the Project Deed was executed, or
- A legal challenge to the project's environmental assessment or planning approval—other than any legal challenge resulting from a breach of the project contracts or any other wrongful act or omission by WestLink, WSO Co or their contractors—prevents WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed at any time between the completion of Stage 1 and a final court decision which is not subject to appeal or is no longer able to be appealed (see section 3.2.3), or
- A native title claim or the discovery of an archaeological or other artefact on a construction site or temporary works area prevents WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed at any time between the completion of Stage 1 and a final court decision which is not subject to appeal or is no longer able to be appealed (see sections 3.2.7 and 3.2.8), or
- A new or increased Commonwealth or State tax increases WestLink's and WSO Co's costs of carrying out the project, not counting the direct and indirect effects on the new or increased tax on their costs of carrying out the works and operational phase tasks required under the Project Deed

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

- The ability of the Borrower to repay its debt financiers substantially in accordance with the project's debt financing arrangements, or
- The nominal after-tax returns of notional initial equity investors (i.e. the equity investors as at 14 February 2003),*

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

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

- Enabling the Borrower to repay the project's debt financiers in accordance with the project's debt financing arrangements, with principal payment levels not exceeding those envisaged in the private sector participants' 'base case financial model' of 14 February 2003, and
- Enabling the Partners and WSO Co, collectively, to give the project's equity investors—treated as if they were all among the project's initial equity investors—the lower of:
 - The after-tax equity return they would have received had the event or circumstance not occurred, and
 - The after-tax equity return they were originally predicted to receive, in the 'base case financial model' of 14 February 2003.

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

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

In the case of renegotiations following an 'uninsurable event', however, a change in the RTA's financial contribution to the

* In determining whether such a material adverse effect has occurred or started to occur following any introduction of new public transport services or new public transport service connections, other than heavy rail services or connections, the effect of the public transport services on motorway traffic must be ignored.

project may not be considered unless other approaches negotiated in good faith between the RTA, WestLink and WSO Co will not achieve the prescribed objectives.

WestLink and WSO Co must use all reasonable endeavours to ensure the negotiation processes and results are efficiently applied and structured (for example, by not increasing taxation liabilities).

The debt financiers' Security Trustee must be given copies of all relevant communications and may attend and participate in the negotiations, but the Security Trustee and the debt financiers are not obliged to agree to any amendment of the project's debt financing agreements.

3.6 Defaults under and termination of the Project Deed

3.6.1 General RTA power to 'step in' following any unremedied WestLink or WSO Co Project Deed default

If WestLink or WSO Co fails to perform any obligation to the RTA under the Project Deed, and does not remedy this failure within a reasonable period of time after receiving a written notice from the RTA requiring it to do so, the RTA may take any action necessary to remedy the default.

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

Any losses reasonably incurred by the RTA in taking this action will be recoverable from WestLink and WSO Co as a debt.

The debt financiers' Security Trustee has expressly acknowledged the RTA's right to 'step in' in these circumstances. The RTA must promptly give the Security Trustee a copy of any 'step in' notice it issues to WestLink or WSO Co.

The RTA must cease its 'step in' action and entry as soon as the failure by WestLink or WSO Co has been remedied.

This general right of the RTA to 'step in' is in addition to more specific rights for the RTA to 'step in', as described in section 3.6.2 below, following more narrowly defined 'default events'.

3.6.2 RTA notification and WestLink/WSO Co remediation of WestLink/WSO Co 'default events'

'Default events' are defined in the Project Deed as:

- Any failure by WestLink and/or WSO Co to commence or expeditiously and diligently progress construction of the project, or any display by either of them of an intention to permanently abandon the project

- After the opening of the motorway, any failure by WSO Co to keep all the motorway's traffic lanes open, except in expressly permitted circumstances (see section 3.3.1)
- Any material failure by WSO Co to operate, maintain, repair or insure the motorway in accordance with the Project Deed
- Any other material default by WestLink, a Partner or WSO Co under the Project Deed or any of their other contracts with the RTA
- Any of a defined series of 'events of insolvency' concerning WestLink, a Partner, WSO Co or the Borrower, even if WestLink and WSO Co are not in breach of the Project Deed
- Any 'event of insolvency' concerning a Contractor, a Contractor Guarantor, the Operator or the TCM Operator, if the relevant contractor or guarantor is not replaced within 60 days by a reputable, solvent entity with the resources and experience to perform its obligations under the D&C Contract, the O&M Agreement or the TCM Agreement (as applicable), and
- Any material breach by WestLink or WSO Co of a warranty or representation made by it under the Project Deed.

If any of these 'default events' occurs, the RTA may give WestLink or WSO Co a written notice requiring it—or, in the case of a material default or insolvency event involving another organisation, *either* of WestLink and WSO Co—to remedy the default or overcome its effects within:

- Two days if any of the motorway's lanes are closed, or
- For all other defaults, a reasonable period of time, as judged by the RTA and specified in the notice, but not more than 40 business days (if the default is a failure to pay money, the parties have already agreed a reasonable time will be ten business days).

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

WestLink or WSO Co (as applicable) must then comply with this notice. Unless the default is a failure to pay money, WestLink or WSO Co must give the RTA a program to remedy the default, the RTA must consult with WestLink or WSO Co on this program in good faith, and WestLink or WSO Co must then comply with the settled remedial program.

WestLink and WSO Co must keep the Security Trustee informed on all the measures they are taking or intend to take to remedy the default. If it is requested to do so, the RTA must give the Security Trustee copies of all notices and other documents it issues to WestLink or WSO Co concerning the default.

If WestLink or WSO Co believes, in good faith, that the time for remedying the default specified by the RTA's notice is not reasonable, it must immediately notify the RTA of this in writing, providing reasons, and the RTA must then review the specified time as soon as practicable.

If WestLink or WSO Co (as applicable) is diligently carrying out a program to remedy the default, and the motorway is open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed, the time specified in the RTA's notice must be extended by the time reasonably required to remedy the default, but not by more than six months, and this revised time to remedy the default must be notified in writing.

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

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

While the 'default event' remains unremedied WestLink or WSO Co must obtain the RTA's consent before replacing the Contractors, the Operator or the TCM Operator (by novating the D&C Contract, the O&M Agreement or the TCM Agreement), in accordance with procedures and criteria set out in the RTA Consent Deed. In the case of any replacement of the Operator or the TCM Operator, these procedures and criteria are the same as those applying at *all* times under the Project Deed, as already described in section 3.3.1.

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

- WestLink or WSO Co (as applicable) is not diligently carrying out a program to remedy the default, or
- The motorway is not open to the public, to the extent that it would be safe for this to occur, except in the circumstances described in section 3.3.1,

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

3.6.3 Security Trustee remediation of WestLink/WSO Co 'default events' and other potential triggers for termination

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

- The 'default events' listed in section 3.6.2, and
- Any other event or circumstance potentially entitling the RTA to terminate any or all of the contracts to which the RTA is a party*

by 'stepping in' and:

- Exercising the rights of WestLink and/or WSO Co under the project contracts
- Appointing a receiver, manager, administrator, controller, agent or attorney to perform some or all of WestLink's and/or WSO Co's obligations under these agreements
- Engaging (or permitting such a receiver etc to engage) other persons or organisations, reasonably acceptable to the RTA, to perform some or all of WestLink's and/or WSO Co's obligations under the agreements, or
- Assigning, novating or otherwise disposing of any or all of the rights and obligations of WestLink, the Partners, WSO Co and/or the Borrower under the agreements, or permitting a receiver etc to do so.

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

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

- Give the Security Trustee etc and its agents, consultants and contractors all necessary access to the relevant sites or land if the Security Trustee notifies the RTA of their intention to access these areas, subject to the provisions of the Project Deed, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease and the Gantry Land Lease, and

* This includes any event or circumstance that might become a 'default event' if it were not remedied. The Security Trustee 'step in' provisions described in this section 3.6.3 do not apply, however, if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim is preventing WestLink and/or WSO Co from carrying out construction work, even though, as already indicated in section 3.2.7 and as discussed further in section 3.6.5 below, the RTA may terminate the Project Deed, in its absolute discretion if this situation continues for more than six months.

- In response to reasonable requests, give the Security Trustee all relevant information in the RTA's possession.

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

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

- Replacing a Contractor; a Contractor Guarantor; the Operator or the TCM Operator (by novating the D&C Contract, the O&M Agreement or the TCM Agreement), or
- Disposing of WestLink's and/or WSO Co's rights and obligations under the project contracts

in accordance with procedures and criteria set out in the RTA Consent Deed. The RTA Consent Deed also sets out requirements for the RTA and the other relevant parties to execute agreements giving effect to any such replacement or disposal.

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

- During the remedy period notified by the RTA to WestLink and WSO Co, as extended under the Project Deed provisions described in section 3.6.2, *provided* WestLink or WSO Co (as applicable) is diligently carrying out a program to remedy the default, or
- During any additional period, of up to 18 months, which is reasonable to effect a remedy, *provided*
 - The Security Trustee or a receiver, manager, administrator, controller, agent or attorney appointed by the Security Trustee is diligently trying to remedy the 'default event', and
 - If the motorway has been opened, the Security Trustee or receiver etc is continuing to operate the motorway and keep it open to the public, to the extent that it is safe for this to occur, in compliance with the Project Deed (see section 3.3.1).

These RTA Consent Deed provisions do not affect the RTA's rights under the Project Deed to terminate the Project Deed if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim has prevented WestLink and/or WSO Co from carrying out construction work for more than six months (see sections 3.2.7 and 3.6.5).

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

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

- WestLink or WSO Co (as applicable) is not diligently carrying out a program to remedy the default, or
- The motorway is not open to the public, to the extent that it would be safe for this to occur; except in the circumstances described in section 3.3.1,

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

If the 'default event' is not remedied or the Security Trustee has not 'stepped in' within this 20 business day period, the RTA may then immediately terminate the Project Deed.

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

- The Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease and the Gantry Land Lease will automatically be terminated
- The RTA will be entitled to recover any losses it may suffer as a result of the termination, plus any other damages arising from breaches of contract by WestLink or WSO Co
- The RTA will not be liable to pay any compensation or other money to WestLink or WSO Co, except for any damages payable because of any breach of contract by the RTA
- The RTA may require the novation of the D&C Contract in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - WestLink and WSO Co under the D&C Contract
 - The beneficiaries of the private sector debt financing securities, WestLink, WSO Co and the Security Trustee under the parent company completion guarantee provisions of the D&C Consent Deed, and
 - WestLink, WSO Co, the debt financiers' agent and the Security Trustee under the Deed of Appointment of Independent Certifier;so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of their parent companies' completion guarantees

- The RTA may require the novation of the O&M Agreement in accordance with the Operator's Side Deed, and/or the novation of the TCM Agreement under the TCM Operator's Side Deed, with the RTA effectively stepping into the shoes of WSO Co under the O&M Agreement and/or the TCM Agreement so that the operational phase work of the Operator and/or the TCM Operator may continue directly for the RTA
- WestLink and WSO Co must execute documents transferring all their interests in the project and its assets to the RTA
- WestLink and WSO Co must surrender the motorway and the land leased under the Motorway Stratum Lease and the Gantry Land Lease to the RTA
- WSO Co must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- WestLink and WSO Co must pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2
- WestLink and WSO Co must hand over their accounts and all other records relating to the project, and
- WestLink and WSO Co must do everything else they can to enable the RTA to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a toll-road.

3.6.5 Termination of the Project Deed by the RTA following a native title claim

As already indicated in section 3.2.7, if a direction by the RTA, a court or tribunal or any other legal requirement following a native title claim has prevented WestLink and/or WSO Co from carrying out construction work for more than six months, the RTA may terminate the Project Deed, in its absolute discretion, simply by giving WestLink or WSO Co a notice to this effect.

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

- The Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease and the Gantry Land Lease will automatically be terminated
- The RTA must pay WestLink, within 30 days,
 - An amount equal to the project's total private sector debt on the date of termination, and

- An amount that will permit the Partners and WSO Co to give the project's equity investors—treated as if they were all among the project's initial equity investors—the after-tax equity return they would otherwise have been expected to receive to that date, taking account of previous payments and the obligations of WestLink and WSO Co to make termination payments to their contractors (other than any amount related to an amount payable by a Contractor to a 'related entity' not engaged by it on an arm's-length commercial basis)
- The RTA must release any security bonds provided to it by WestLink or WSO Co
- The RTA, WestLink and WSO Co will continue to be liable for any damages payable because of a breach of contract
- The RTA may require the novation of the D&C Contract in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - WestLink and WSO Co under the D&C Contract
 - The beneficiaries of the private sector debt financing securities, WestLink, WSO Co and the Security Trustee under the parent company completion guarantee provisions of the D&C Consent Deed, and
 - WestLink, WSO Co, the debt financiers' agent and the Security Trustee under the Deed of Appointment of Independent Certifier,

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of their parent companies' completion guarantees
- The RTA may require the novation of the O&M Agreement in accordance with the Operator's Side Deed, and/or the novation of the TCM Agreement under the TCM Operator's Side Deed, with the RTA effectively stepping into the shoes of WSO Co under the O&M Agreement and/or the TCM Agreement so that the operational phase work of the Operator and/or the TCM Operator may continue directly for the RTA
- WestLink and WSO Co must surrender the motorway and the land leased under the Motorway Stratum Lease and the Gantry Land Lease to the RTA
- WSO Co must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- WestLink and WSO Co must pay the RTA any unexpended insurance proceeds and assign their insurance rights

to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2

- WestLink and WSO Co must hand over their accounts and all other records relating to the project, and
- WestLink and WSO Co must do everything else they can to enable the RTA to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a toll-road.

3.6.6 Termination of the Project Deed by WestLink and WSO Co

WestLink and WSO Co may terminate the Project Deed, by giving the RTA 30 business days' notice in writing, if:

- A court makes a final determination, not subject to appeal or no longer able to be appealed, which:
 - Prevents WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed, and
 - Does *not* arise from any contractual breach or other wrongful act or omission by WestLink, WSO Co or their contractors,

and the RTA fails to overcome the effect of the determination within 12 months of being notified about it by WestLink or WSO Co,* or

- The NSW Government enacts legislation which has the effect of prohibiting WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed, or
- Any government or local government authority resumes any part of the motorway stratum, and this prevents WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed, or
- The RTA breaches its Project Deed obligations to provide construction access (see section 3.2.5), and this prevents WestLink or WSO Co from undertaking the project substantially in accordance with the Project Deed and is not remedied by the RTA within 12 months of the RTA's being notified of the breach,[†] or
- The RTA fails to ensure the Minister for Roads' 17 January 2003 declaration of the Western Sydney Orbital (as the M7 was then known) as a tollway (under section 52 of the

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

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

Roads Act), his associated direction to the RTA to act as the roads authority for this tollway (under section 63 of the Roads Act) and any other tollway declarations and directions prior to the opening of the motorway (see section 3.2.14) are effective and will remain effective until 14 February 2037.

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

During this period of suspension,

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

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

- The Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease and the Gantry Land Lease will automatically be terminated
- The RTA must pay WestLink, within 30 days,
 - An amount equal to the project's total private sector debt on the date of termination, and
 - An amount that will permit the Partners and WSO Co to give the project's equity investors—treated as if they were all among the project's initial equity investors—the after-tax equity return they would otherwise have been expected to receive to that date, taking account of previous payments and the obligations of WestLink and WSO Co to make termination payments to their contractors (other than any amount related to an amount payable by a Contractor to a 'related entity' not engaged by it on an arm's-length commercial basis)
- The RTA must release any security bonds provided to it by WestLink or WSO Co
- The RTA, WestLink and WSO Co will continue to be liable for any damages payable because of a breach of contract
- The RTA may require the novation of the D&C Contract in accordance with the Contractors' Side Deed, with the RTA effectively stepping into the shoes of:
 - WestLink and WSO Co under the D&C Contract

- The beneficiaries of the private sector debt financing securities, WestLink, WSO Co and the Security Trustee under the parent company completion guarantee provisions of the D&C Consent Deed, and
- WestLink, WSO Co, the debt financiers' agent and the Security Trustee under the Deed of Appointment of Independent Certifier,

so that independently verified design and construction work by the Contractors may continue directly for the RTA, with the backing of their parent companies' completion guarantees

- The RTA may require the novation of the O&M Agreement in accordance with the Operator's Side Deed, and/or the novation of the TCM Agreement under the TCM Operator's Side Deed, with the RTA effectively stepping into the shoes of WSO Co under the O&M Agreement and/or the TCM Agreement so that the operational phase work of the Operator and/or the TCM Operator may continue directly for the RTA
- WestLink and WSO Co must surrender the motorway and the land leased under the Motorway Stratum Lease and the Gantry Land Lease to the RTA
- WSO Co must deliver the *Operation and Maintenance Manuals* and all furniture, fittings, plant, equipment, machinery and spare parts required to operate, maintain and repair the motorway and maintain and repair the local road, property and services works
- WestLink and WSO Co must pay the RTA any unexpended insurance proceeds and assign their insurance rights to the RTA, unless this is contrary to the arrangements for insurance proceeds described in section 3.4.2
- WestLink and WSO Co must hand over their accounts and all other records relating to the project, and
- WestLink and WSO Co must do everything else they can to enable the RTA to operate the motorway at at least the same level as immediately before the termination of the Project Deed, with minimal disruption to its use as a toll-road.

3.7 Defaults under and termination of the Rail Agreement

Under the Rail Agreement, RIC, the SRA and OCGR may, at any time and at WestLink's and WSO Co's cost, 'step in' to rectify any damage to rail infrastructure caused by WestLink, WSO Co or the Westlink M7 project, and/or to do anything necessary or desirable to protect rail infrastructure facilities.

If WestLink or WSO Co defaults on any of its obligations under the Rail Agreement, RIC the SRA and OCGR may issue a notice

requiring it to rectify the default within a specified time. If WestLink or WSO Co fails to do so, or if urgent action is necessary, RIC the SRA and OCGR may take any action they consider appropriate to rectify the default or take the urgent action, with WestLink or WSO Co (as applicable) being liable to pay them for their costs.

The parties to the Rail Agreement may terminate the Rail Agreement at common law. In addition, and without limiting this, the Rail Agreement expressly gives RIC, the SRA and OCGR the right to terminate the Rail Agreement if WestLink or WSO Co does not comply with any notice by them to rectify any default.

3.8 Finance defaults

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

- Must immediately give the RTA copies of any notices it issues to WestLink, WSO Co or a debt financier concerning any default under the project's debt financing agreements
- If requested to do so by the RTA, must give the RTA copies of all the documents it issues to the Borrower, WestLink or WSO Co concerning such a finance default, and
- Must give the RTA at least ten days' written notice before it declares any debts due and payable or takes any action to enforce the debt financiers' securities or recover any of the money secured (see section 4.2), *unless* the Security Trustee reasonably believes any delay would materially harm the debt financiers, in which case only 'reasonable' notice need be given (of at least three hours in the case of an appointment of a receiver etc or any entry into possession).

In enforcing the debt financiers' securities, under the RTA Consent Deed the Security Trustee may, among other things,

- Exercise the rights of WestLink and/or WSO Co under the project contracts
- Appoint a receiver, manager, administrator, controller, agent or attorney to perform some or all of WestLink's and/or WSO Co's obligations under these agreements
- Engage (or permit such a receiver etc to engage) other persons or organisations, reasonably acceptable to the RTA, to perform some or all of WestLink's and/or WSO Co's obligations under the agreements, or
- Assign, novate or otherwise dispose of any or all of WestLink's and/or WSO Co's rights and obligations under the agreements, or permit a receiver etc to do so.

The RTA has expressly acknowledged and agreed that the Security Trustee and any receiver etc appointed by the Security Trustee under the debt financiers' securities may exercise the rights of WestLink, the Partners, WSO Co and/or the Borrower under the project contracts.

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

- Replacing a Contractor, a Contractor Guarantor, the Operator or the TCM Operator (by novating the D&C Contract, the O&M Agreement or the TCM Agreement), or
- Disposing of WestLink's and/or WSO Co's rights and obligations under the project contracts

in accordance with procedures and criteria set out in the RTA Consent Deed. The RTA Consent Deed also sets out requirements for the RTA and the other relevant parties to execute agreements giving effect to any such replacement or disposal.

4 The RTA Security and interactions between RTA and private sector securities

4.1 The RTA Security

Under the RTA Security of 13 February 2003, WestLink, WSO Co, each Partner and the Borrower have granted the RTA a fixed and floating charge* over all its present and future assets, undertakings and rights—in Macquarie Infrastructure Investment Management Limited's case as trustee for the Western Sydney Orbital Holding Trust, and in Transurban Nominees Pty Limited's case as trustee of the Transurban WSO Trust, as discussed in section 2.4—as security for the satisfaction of all its obligations to the RTA under the Project Deed, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease, the Gantry Land Lease, the Partners' Undertaking, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the TCM Operator's Side Deed, the RTA Security, the RTA Consent Deed and all other project contracts.

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

WestLink, the Partners, WSO Co and the Borrower have warranted in the RTA Security that there are and will be no encumbrances over their charged property other than encumbrances specified in and permitted under the private sector debt financing arrangements and encumbrances in favour of the RTA.

They have also undertaken not to create any other encumbrances or sell, transfer or otherwise deal with any of their property subject to the fixed charges in favour of the RTA, other than charges and mortgages listed in a schedule to the Project Deed or the encumbrances specified in and permitted under the private sector debt financing arrangements.

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

Subject to the priorities between securities under the RTA Consent Deed, the restrictions on enforcement also imposed under that deed (section 4.2) and any law requiring a period of notice or a lapse of time, the charges created by the RTA Security may be immediately enforced by the RTA if:

- A 'default event' is not remedied within the notified or determined period, as extended, under the arrangements described in section 3.6.2, or
- WestLink or WSO Co fails to comply with its Project Deed obligations to the RTA, at the end of the operating term or upon any earlier termination of the Project Deed, to surrender the motorway and the leased land to the RTA and fulfil other obligations listed in section 3.3.9.

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

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

WestLink, the Partners, WSO Co and the Borrower have irrevocably appointed the RTA as their attorney, able to do all the acts required of them under the RTA Security and take whatever additional action the RTA thinks necessary or desirable to better secure the payment of any money owing under the contracts.

* WestLink, WSO Co, the Partners and the Borrower may deal with the parts of their property subject only to a floating charge in the ordinary course of their businesses, but may not deal with the parts of their property subject to a fixed charge, except as described below.

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

The RTA Consent Deed formally records the RTA's consent to the debt financiers' securities under the project's private sector debt financing documents and the Security Trustee's consent to the RTA's securities under the RTA Security.

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

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

- First, to pay any 'RTA priority moneys'

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

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

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

- Enforce the RTA charges or exercise any of its other rights under the RTA Security, including any action to crystallise a floating charge or appoint a receiver or receiver/ manager, or
- Sell, take possession of or appoint a controller to any property subject to the RTA charges.

In addition, the RTA may not take any action that initiates, supports or is otherwise connected with any insolvency, winding up, liquidation, reorganisation, administration or dissolution proceedings or voluntary arrangements concerning WestLink, a Partner, WSO Co or the Borrower.

5 NSW Government guarantee of the RTA's performance

Under the Public Authorities (Financial Arrangements) Act Deed of Guarantee of 13 February 2003, between the Minister for Roads (on behalf of the State of NSW), the RTA, WestLink, WSO Co and the Security Trustee, the State of NSW has unconditionally and irrevocably guaranteed the RTA's performance of all its obligations under the Project Deed, the Motorway Stratum Agreement to Lease, the Gantry Land Agreement to Lease, the Motorway Stratum Lease, the Gantry Land Lease, the Partners' Undertaking, the Deed of Appointment of Independent Verifier, the Contractors' Side Deed, the Operator's Side Deed, the RTA Security, the RTA Consent Deed and any other documents approved by the NSW Treasurer in the future.

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

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

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

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



This *Summary of Contracts* was written, edited, designed and produced for the New South Wales Roads and Traffic Authority (RTA) by Catalyst Communications, Suite 101A, 75 Archer Street, Chatswood, NSW 2067 (phone (02) 9413 1497, fax (02) 9415 1027, www.catalyst.com.au). The assistance of Clayton Utz, WestLink and the RTA is gratefully acknowledged.

Catalyst Communications makes no representations or warranties, express or implied, as to the accuracy or completeness of sections 1.1 and 1.2 of this report, for which original source documentation has generally not been sighted.

In addition, in accordance with the NSW Government *Working with Government: Guidelines for Privately Financed Projects*, sections 2 to 5 of this report:

- Present only summaries of, and *not* complete reports on, the Westlink M7 contracts of greatest relevance to the public sector; and
- Do not cover matters which might disclose the private sector parties' cost structures, profit margins or intellectual property or otherwise place them at a disadvantage with their competitors.

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