

Dated

2004

**DEED RELATING TO THE AUCKLAND
ARRANGEMENTS**

between

**HER MAJESTY THE QUEEN IN RIGHT OF NEW
ZEALAND acting by and through her Minister of
Finance
(Crown)**

and

**TOLL NZ CONSOLIDATED LIMITED
(Toll Rail)**

and

**TRANZ METRO AUCKLAND LIMITED
(Tranz Metro)**

DATED

2004

PARTIES

- (1) **HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND** acting by and through her Minister of Finance (“**Crown**”)
- (2) **TOLL NZ CONSOLIDATED LIMITED** (“**Toll Rail**”)
- (3) **TRANZ METRO AUCKLAND LIMITED** (“**Tranz Metro**”)

BACKGROUND

- A. On or around the date of this Deed, the Crown has purchased the Rail Network from Toll Rail and Toll NZ Limited.
- B. The Crown and Toll Rail have agreed to vary the Auckland Rail Arrangements so that they are consistent with the transaction contemplated by the National Agreement for Sale and Purchase.
- C. The Crown, Tranz Metro and Toll Rail agree to vary the Auckland Rail Arrangements in accordance with this Deed.

TERMS OF THIS DEED

1. INTERPRETATION

1.1 Definitions: In this Deed, unless the context otherwise requires:

“**Auckland Agreement for Sale and Purchase**” means the Agreement for Sale and Purchase of the Auckland Network between the Crown, Toll Rail (named as Tranz Rail Limited), and Tranz Metro dated 24 December 2001.

“**Auckland Rail Arrangements**” means:

- (a) the Auckland Agreement for Sale and Purchase;
- (b) the CLEAR Deed;
- (c) the Tranz Rail Access Agreement;
- (d) the Common Access Terms;
- (e) the Maintenance and Network Control Agreement; and
- (f) the Designation Deed.

“**Best Endeavours**” means, in relation to any party agreeing to achieve an outcome, prompt and diligent use of all reasonable resources available to that party to effect that outcome as soon as possible, except that the best endeavours of the Crown does not include the exercise by it or the use of any regulatory or legislative powers in order to influence or effect an outcome.

“**CLEAR Deed**” means the Deed relating to the CLEAR Arrangements between the Crown, Toll Rail (named as Tranz Rail Limited), and NZRC dated 13 May 2002.

“**Common Access Terms**” mean the standard terms and conditions which apply to parties who have access to the Auckland Network for the purposes of operating a rail service, dated 13 May 2002 and annexed to the Tranz Rail Access Agreement.

“**Crown Transferee**” means NZRC, or any other entity owned by the Crown that is responsible for the long term operation and maintenance of the Rail Network (as that term is defined in the National Agreement for Sale and Purchase).

“**Designation Deed**” means the Designation Deed between the Crown, Toll Rail (named as Tranz Rail Limited), and NZRC dated 13 May 2002 and includes the Agreement in relation to the Transfer of Designations for the Auckland Rail Corridor which is attached as a Schedule to that Deed.

“**Effective Date**” means 1 July 2004.

“**End of the Transition Period**” means the end of the Transition Period under the National Agreement for Sale and Purchase.

“**Maintenance and Network Control Agreement**” means the Maintenance and Network Control Agreement between the Crown and Toll Rail (named as Tranz Rail Limited) dated 13 May 2002.

“**National Agreement for Sale and Purchase**” means the Agreement for Sale and Purchase of Rail Network and Associated Assets between the Crown, Toll New Zealand Limited and Toll Rail entered into on or around the date of this Deed.

“**National Rail Common Access Terms**” means the common access terms attached as Schedule 3 to the National Rail Access Agreement between the Crown and Toll Rail entered into on or around the date of this Deed.

“**National Rail System Standards**” has the meaning given in the National Rail Common Access Terms.

“**NZRC**” means New Zealand Railways Corporation or its successors or permitted assigns.

“**Project Boston Agreements**” mean the Tranz Rail Construction Contract and the Tranz Rail Subcontracts.

“**Toll Rail**” means Toll NZ Consolidated Limited or its successors or permitted assigns.

“**Tranz Rail Access Agreement**” means the Amended and Restated Tranz Rail Access Agreement between the Crown and Toll Rail (named as Tranz Rail Limited) dated 13 May 2002.

“**Tranz Rail Construction Contract**” means the Tranz Rail Construction Contract between the Auckland Regional Council and Toll Rail (named as Tranz Rail Limited) dated 8 April 2004 or amendment thereto.

“**Tranz Rail Subcontracts**” means all subcontracts (whether for consultancy, works, or other services) entered into under and in accordance with the Tranz Rail Construction Contract between Toll Rail (in some cases named as Tranz Rail Limited) and a subcontractor or consultant.

1.2 **Further Interpretation:** In this Deed, “including” and similar words do not imply any limitation.

2. VARIATIONS AND TERMINATIONS

2.1 **Variations and terminations:** The parties agree to vary and/or terminate certain of the documents comprising the Auckland Rail Arrangements in accordance with this Deed.

3. TRANZ RAIL ACCESS AGREEMENT

3.1 **Variations to Tranz Rail Access Agreement:** From the Effective Date:

(a) the following definition is inserted into clause 1.1 of the Tranz Rail Access Agreement after the definition of “Timetable”:

*“**Tranz Rail Group**’ means Toll NZ Limited, Tranz Rail, and all of the subsidiaries (as that term is defined in the Companies Act 1993) of those companies, and includes any related company (as that term is defined in section 2(3) of the Companies Act 1993) of Tranz Rail.”*

(b) clause 2.2 of the Tranz Rail Access Agreement is deleted, and the following clause is inserted in its place:

“2.2 Exclusive rights:

(a) *Tranz Rail shall retain its rights to exclusive access to the Auckland Network granted under clause 2.1 for the carrying out of freight operations, unless the level of freight operations on a particular part of the Auckland Network falls below those levels set out in Schedule 3 other than for the reasons set out in clause 2.2(c) of this Agreement, in which case the Access Provider shall have the right to introduce another freight operator on that part of the Auckland Network.*

(b) *Tranz Rail acknowledges that, if the Access Provider introduces a new freight operator to part of the Auckland Network under clause 2.2(a), in order for that new operator to make reasonable use of their Access Rights, they may need access to Tranz Rail’s (or Tranz Rail Group’s) facilities and services. If requested, Tranz Rail must, and must procure other companies in the Tranz Rail Group to, provide that new operator with:*

(i) *reasonable access to its facilities in any of its adjacent terminals and infrastructure (including all facilities and stations on the land subject to the Core Lease); and*

(ii) *services (other than IT services) and interchange (including reasonable running rights to and use of the nearest interchange, marshalling yards and other facilities),*

on fair and reasonable terms, to the extent such access and services are reasonably necessary to enable the new operator to effectively and efficiently

exercise its rights. Such rights will be reasonable having regard to the scale of Tranz Rail's operation on that part of the Auckland Network in comparison to the scale of the new operator's operation on that part of the Auckland Network, and such rights will be subject to periodic review on the same basis as set out in this clause.

(c) *For the purposes of clause 2.2(a), the reasons are:*

- (i) *the level of rail traffic has declined on account of interruption due to natural or accidental causes, or where such decline is a consequence of the repair, reinstatement or realignment of the Infrastructure, or repairs or reinstatement of rolling stock or other facilities necessary for the carrying on of railway operations over the Auckland Network; and*
- (ii) *in the case of repairs or reinstatement of rolling stock or other facilities owned by Tranz Rail, on the request of the Access Provider, Tranz Rail certifies in writing to the Access Provider that the railway operations will recommence within a reasonable period, making due allowance for such repairs and reinstatement but not any delays caused for economic or other operational reasons."*

(c) clause 6.4 of the Tranz Rail Access Agreement is deleted, and the following clause is inserted in its place:

"6.4 Effect of Termination Notice:

- (a) *On the date specified in the Termination Notice by the Access Provider, Tranz Rail's (in its capacity as an Operator) Access Rights and all other rights of Tranz Rail as an Operator under the Common Access Terms and this Agreement with respect to the Auckland Network cease to the extent specified. All other Operators will be provided with a copy of any Termination Notice relating to Tranz Rail.*
- (b) *Notwithstanding anything to the contrary in the Core Lease, if the Access Provider serves on Termination Notice on Toll Rail, the Access Provider (on behalf of the Lessor under the Core Lease) may give no less than 3 months notice in writing of the termination of the Core Lease in respect of any land the subject of the Core Lease that adjoins or relates to that part of the Auckland Network to which the Termination Notice relates and, on the expiry of that notice period, the Core Lease terminates in respect of such land. The Crown must procure New Zealand Railways Corporation's (as a party to the Core Lease) agreement to this clause 6.4(b)."*

(d) the parties' rights and obligations under clause 7A of the Tranz Rail Access Agreement terminate; and

(e) that clause 7A is deleted.

3.2 Payment of access fee:

- (a) From the End of the Transition Period (as a result of the termination of the Maintenance and Network Control Agreement under clause 5.1 of this Deed), Toll Rail must pay the Access Provider the access fee for use of the Auckland Network in accordance with clause 2.5(a) of the Tranz Rail Access Agreement.
- (b) The first monthly instalment of the access fee is due on the first 4th of the month following the End of the Transition Period following receipt of a valid tax invoice by Toll Rail and, after that, monthly instalments are due on the 4th of each month.

3.3 **Definitions in this clause:** In this clause 3, the terms “**Access Provider**”, “**Access Rights**”, and “**Auckland Network**” have the meaning given in the Tranz Rail Access Agreement.

4. COMMON ACCESS TERMS

4.1 **Variation to the Common Access Terms:** From the Effective Date, clause 11.5 of the Common Access Terms is deleted, and the following clause is inserted in its place:

*“11.5 **CLEAR Agreement:** Each Operator (excluding the Access Provider if it is an Operator) shall indemnify the Crown and the Access Provider (if a different person from the Crown) (“**Indemnified Parties**”) for and against all claims, costs, damages, environmental damage, expense, losses, liabilities (including environmental liabilities) which may be incurred by the Indemnified Parties under the CLEAR Agreement as a result of or in connection with the acts or omissions of that Operator or its agents, contractors, sub-licensees or customers upon or within the Auckland Network”.*

4.2 **Alignment:** The parties must use their Best Endeavours, working together in good faith, to amend the Common Access Terms before the end of the Transition Period to align them in all material respects to the terms of the National Rail System Standards. The parties:

- (a) record their expectation that such alignment will be implemented in the Common Access Terms in a similar fashion to its implementation in the National Rail Common Access Terms; and
- (b) acknowledge that changes to the Common Access Terms may require the approval of the Auckland Regional Council and/or Connex Auckland Limited, and the parties will consult in good faith with those organisations in order to obtain such approval.

4.3 **National Rail System Standards:** Until such time as the Common Access Terms are amended in accordance with clause 4.2 and where the National Rail System Standards form the basis of the Network Controller’s Approved Safety System, as between the parties to the Auckland Access Agreement, the National Rail System Standards prevail over the Common Access Terms to the extent of any inconsistency.

4.4 **Definitions in this clause:** In this clause 4, the terms “**Network Controller**” and “**Approved Safety System**” have the meaning given in the Common Access Terms.

5. MAINTENANCE AND NETWORK CONTROL AGREEMENT

5.1 **Termination of Maintenance and Network Control Agreement:** From the End of the Transition Period, the Maintenance and Network Control Agreement is terminated. Termination of the Maintenance and Network Control Agreement under this Deed is deemed to be a termination in accordance with that agreement's terms.

5.2 **Termination transition:**

- (a) The parties acknowledge that the Maintenance and Network Control Agreement contains a number of clauses that deal with termination transition or actions that must be undertaken by a party on or around the Termination Date ("**Termination Clauses**"). The Termination Clauses include clauses 5.7 (transfer of records), 5.11(b) (maps and plans), 5.13(b) (rates and outgoings – termination date), 8.3 (transfer of intellectual property and data), and 14 (exit).
- (b) To the extent that that the Termination Clauses are inconsistent with, or concern matters otherwise dealt with by, the National Agreement for Sale and Purchase, the Termination Clauses shall not apply.

5.3 **Definitions in this clause:** In this clause 5, "**Termination Date**" has the meaning given in the Maintenance and Network Control Agreement.

6. AUCKLAND AGREEMENT FOR SALE AND PURCHASE

6.1 **Termination of advertising arrangements:** From the Effective Date:

- (a) the rights of Toll Rail under the Auckland Agreement for Sale and Purchase in respect of the Advertising Arrangements (including the right to receive revenue and to use the Surrender Land outside the station environs for the purpose of advertising, together with the rights of Toll Rail to assign those rights for the benefit of third parties) are terminated.
- (b) The following are deleted from the Auckland Agreement for Sale and Purchase:
 - (i) in clause 1.1:
 - (1) the definition of "Advertising Arrangements";
 - (2) the reference to "and the Advertising Arrangements" in paragraph (c) of the definition of "Network Entitlements"; and
 - (3) the reference to "Advertising Arrangements and the" in the definition of "Retained Arrangements";
 - (ii) the references to "the Advertising Arrangements" in clauses 6.1 and 6.2;
 - (iii) clauses 10.2, 11.1 and 11.2;
 - (iv) the reference to "ADVERTISING AND" in the heading of clause 11; and

(v) the reference to “Advertising and” in clause 21.6.

6.2 Definitions in this clause: In this clause 6, “**Advertising Arrangements**”, “**Surrender Land**” and “**station environs**” have the meanings given in the Auckland Agreement for Sale and Purchase.

7. DESIGNATION DEED

7.1 Termination of Designation Deed: From the Effective Date, the Designation Deed is terminated.

7.2 Reason for termination: The parties acknowledge that the Designation Deed is being terminated because all designations that are subject to the Designation Deed are being transferred by Toll Rail to the Crown under the National Agreement for Sale and Purchase.

7.3 NZRC’s agreement:

- (a) NZRC is a party to the Designation Deed.
- (b) The Crown agrees to use its Best Endeavours to procure NZRC’s agreement to terminate the Designation Deed.
- (c) Until the Crown procures, and to the extent that the Crown is unable to procure, NZRC’s agreement to terminate the Designation Deed, the Crown indemnifies Toll Rail against any liability suffered or incurred by Toll Rail under the Designation Deed from the Effective Date.

8. CLEAR DEED

8.1 Termination of CLEAR Deed: From the Effective Date, the CLEAR Deed is terminated.

8.2 NZRC’s agreement:

- (a) NZRC is a party to the CLEAR Deed.
- (b) The Crown agrees to use its Best Endeavours to procure NZRC’s agreement to terminate the CLEAR Deed.
- (c) Until the Crown procures, and to the extent that the Crown is unable to procure, NZRC’s agreement to terminate the CLEAR Deed, the Crown indemnifies Toll Rail against any liability suffered or incurred by Toll Rail under the CLEAR Deed from the Effective Date.

9. PROJECT BOSTON

9.1 Novation of Project Boston Agreements: On or around the End of the Transition Period, the Crown and Toll Rail agree to procure the novation of the Project Boston Agreements to the Crown Transferee by means of:

- (a) in the case of the Tranz Rail Construction Contract, the Deed of Contractor’s Novation (Schedule 7, Part 1, to the Tranz Rail Construction Contract); and

- (b) in the case of each Tranz Rail Subcontract, the Deed of Subcontractor's Novation or Deed of Consultant's Novation (as the case may be) (Schedule 7, Part 2 or 3, to the Tranz Rail Construction Contract).

9.2 Timing of the novation: The Crown and Toll Rail must use their Best Endeavours to ensure that the Effective Date of novation of the Project Boston Agreements is the End of the Transition Period.

9.3 Other persons' signature: The parties acknowledge that:

- (a) for the Deed of Contractor's Novation for the Tranz Rail Construction Contract, the Auckland Regional Council's signature is required; and
- (b) for the Deeds of Subcontractor Novation and Deeds of Consultant Novation for the Tranz Rail Subcontracts, the relevant subcontractors' and consultants' signatures are required.

9.4 Notice for the Tranz Rail Construction Contract:

- (a) For the purposes of clause 3.2 of the Deed of Contractor's Novation for Tranz Rail Construction Contract:
 - (i) the Crown is deemed to have given Toll Rail the notice in clause 3.2.1 of that Deed 3 Working Days prior to the Effective Date; and
 - (ii) Toll Rail waives the requirement under clause 3.2.2 that it receive an original copy of the Deed of Contractor's Novation 3 Working Days prior to the Effective Date; and
 - (iii) the Crown agrees that it will give notice to the Auckland Regional Council in accordance with clause 3.2 of the Deed of Contractor's Novation 3 Working Days prior to the Effective Date.
- (b) For the purposes of the Side Letter in respect of Project Boston from the Crown to Toll Rail (named as Tranz Rail Limited) dated 8 April 2004, the Crown is deemed to have given Toll Rail the notice referred to in that letter that relates to the novation of the Tranz Rail Construction Contract.
- (c) The parties agree that the Deed of Contractor's Novation, the Deed of Subcontractor's Novation and the Deed of Consultant's Novation will be signed by Toll Rail and the Crown Transferee on the same date.

9.5 Payment of monies:

- (a) Toll Rail acknowledges and confirms to the Crown Transferee that, prior to the Effective Date of each deed of novation relating to the Tranz Rail Subcontracts, Toll Rail has certified and paid all amounts properly due to each subcontractor and consultant under those Tranz Rail Subcontracts. This clause 9.5(a) comes into effect on the Effective Date.
- (b) Clause 9.5(a) confers a benefit on, and is enforceable by, the Crown Transferee under the Contracts (Privity) Act 1982.

- 9.6 Provision of information:** Promptly after signing this Deed, Toll Rail must provide to the Crown:
- (a) a list of all Tranz Rail Subcontracts, and the names of the subcontractors and consultants who are parties to those subcontracts; and
 - (b) draft deeds of novation for those Tranz Rail Subcontracts in the form set out in Schedule 7, Parts 2 and 3, to the Tranz Rail Construction Contract.
- 9.7 Provision of Tranz Rail Subcontracts:** On or prior to the End of the Transition Period, Toll Rail must provide to the Crown Transferee its original executed copies of the Tranz Rail Subcontracts.
- 9.8 Definitions in this clause:** In this clause 9 (and despite the definition of “Effective Date” in clause 1.1 of this Deed), “**Effective Date**”, and “**Working Day**” have the meaning given in the Form of Deed of Contractor’s Novation (Schedule 7, Part 1, to the Tranz Rail Construction Contract).

10. EFFECT OF VARIATION AND TERMINATION

Consequences of variation and termination: Except to the extent that this Deed requires otherwise, the termination of the Maintenance and Network Control Agreement, the Designation Deed and the CLEAR Deed, and the effective termination of any rights and obligations as a result of variations made under this Deed, do not affect:

- (a) any accrued right or liability of either party up to the effective termination or variation date (as the case may be); and
- (b) in the case of the Maintenance and Network Control Agreement, the Designation Deed and the CLEAR Deed, the coming into force or the continuation in force of any provision in those documents which is expressly or by implication intended to come into force or continue in force on or after such termination.

11. MISCELLANEOUS PROVISIONS

- 11.1 Governing Law:** This Deed is governed by, and construed in accordance with, the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the Courts of New Zealand.
- 11.2 Further assurance:** Each party must promptly do everything reasonably required to give effect to this Deed according to its spirit and intent.
- 11.3 Time of essence:** Time is of the essence in the performance by the parties of obligations under this Deed.
- 11.4 Partial invalidity:** The illegality, invalidity or unenforceability at any time of any provision of this Deed under any law, will not affect the legality, validity or enforceability of the remaining provisions of this Deed nor the legality, validity or enforceability of those provisions under any other law.
- 11.5 No waiver or consent:** No waiver of any breach, or failure to enforce any provision, of this Deed at any time by any party in any way affects, limits or waives the right of such party to later enforce and compel strict compliance with the provisions of this Deed.

- 11.6 No implied waivers:** A failure to exercise or delay in exercising any right under this Deed will not operate as a waiver of that right, nor will any single or partial exercise of any right preclude any other or further exercise of that right or the exercise of any other right.
- 11.7 Counterparts:** This Deed may be executed in two or more counterparts, each of which is deemed an original and all of which constitute one and the same agreement. This Deed is effective upon the exchange by facsimile of executed signature pages.

EXECUTION

Executed as a Deed

SIGNED for and on behalf
of **HER MAJESTY THE QUEEN IN
RIGHT OF NEW ZEALAND** by her
MINISTER OF FINANCE:

in the presence of:

Signature of witness

Full name of witness

Address

Occupation

SIGNED for and on behalf
of **TOLL NZ CONSOLIDATED**
LIMITED by:

Signature of Attorney

Signature of Attorney

Full name of Attorney

Full name of Attorney

SIGNED for and on behalf
of **TRANZ METRO AUCKLAND**
LIMITED by:

Signature of Attorney

Signature of Attorney

Full name of Attorney

Full name of Attorney