

WELLINGTON REGIONAL COUNCIL

AND

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CONTRACT FOR THE PROVISION OF  
SUBURBAN RAIL SERVICES FOR  
WELLINGTON REGION

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Draft

# CONTRACT FOR THE PROVISION OF SUBURBAN RAIL SERVICES FOR WELLINGTON REGION

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*Date:*

## **PARTIES**

1. WELLINGTON REGIONAL COUNCIL, a body corporate constituted under the Local Government Act 2002 (“Greater Wellington”)
2. TRANZ METRO WELLINGTON LIMITED, a company having its registered office at Wellington (“the Operator”)
3. TOLL RAIL LIMITED, a company having its registered office at Auckland who is the owner of all the shares in the Operator (“Toll Rail”)
4. TOLL HOLDINGS LIMITED, a company having its registered office at Melbourne, Australia (the Guarantor)

## **BACKGROUND**

- A. The current Greater Wellington Regional Land Transport Strategy has objectives to maintain urban rail as an arterial priority in the public transport network and to enhance the quality, reliability and importance of public transport facilities and services.
- B. Greater Wellington wishes to purchase safe, fair, reliable and environmentally friendly transport services in the Wellington region.
- C. Transfund makes available to Greater Wellington funds to assist it to achieve its Regional Land Transport Strategy.
- D. Greater Wellington may make funds available for approved transportation projects.
- E. The Operator has agreed to assist Greater Wellington to achieve its objectives in respect of urban rail transport services in the Wellington region on a long-term basis by the provision of the Rail Services.
- F. The objectives of this Agreement include to;
  - secure the existing services and to restore customer confidence
  - improve the quality of the service and to grow patronage
- G. The Operator is entitled to earn a reasonable return on its funds invested together with adequate reward for the expertise it brings to the Rail Services.

- H. The Operator has prepared an agreed Business Plan for the next 30 years and agreed that plan with Greater Wellington.
- I. The Guarantor has agreed to guarantee the performance of the Operator’s obligations under this contract.

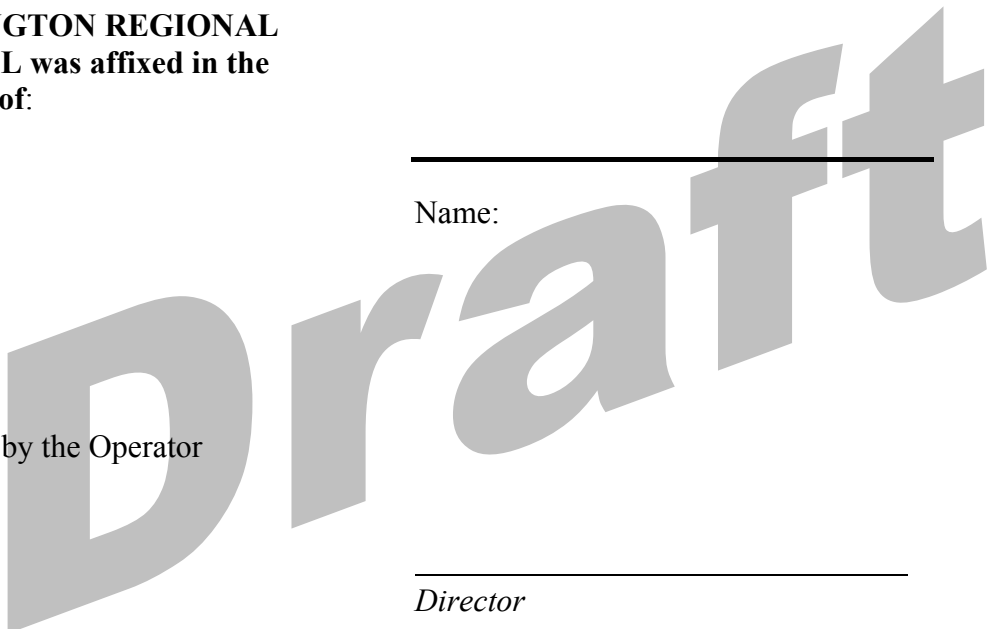
**AGREEMENT**

Greater Wellington agrees to provide funding, and the Operator agrees to provide the Rail Services in a safe, efficient and cost effective manner and to at least the Minimum Service Requirements throughout the term of this Agreement to better facilitate Greater Wellington meeting its objectives in the Greater Wellington Regional Land Transport Strategy as stated above, or as may be from time to time varied by it.

**The Common Seal of WELLINGTON REGIONAL COUNCIL was affixed in the presence of:**

\_\_\_\_\_  
Name:

**SIGNED** by the Operator



\_\_\_\_\_  
*Director*

\_\_\_\_\_  
*Director*

**SIGNED** by TOLL RAIL LIMITED

\_\_\_\_\_  
*Director*

\_\_\_\_\_  
*Director*

**SIGNED** by TOLL HOLDINGS  
LIMITED

\_\_\_\_\_  
*Director*

\_\_\_\_\_  
*Director*

**Draft**

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## TERMS AND CONDITIONS

### 1 GREATER WELLINGTON REGIONAL LAND TRANSPORT STRATEGY

1.1 The Greater Wellington Regional Land Transport Strategy currently includes the provision of passenger rail services. The Strategy includes objectives to :

- improve the accessibility of passenger transport
- maintain urban rail as an arterial priority in the public transport network
- enhance the quality, reliability and priority of public transport facilities and services
- improve the interchange between bus, rail, car and cycle
- improve pedestrian and cycle access to key public nodes
- develop a transport system which is environmentally and economically sustainable at least cost
- price the transport network to encourage its efficient use.

1.2 The Operator shall conduct its passenger rail business in a manner that will assist Greater Wellington achieve the policies and objectives relating to passenger rail in the Greater Wellington Regional Land Transport Strategy. This includes, without limitation, the environmental objectives and a particular emphasis on increasing patronage of the Rail Services at Peak Periods.

1.3 In managing this Agreement and in making decisions and exercising all rights under this Agreement, Greater Wellington shall have regard to the Greater Wellington Regional Land Transport Strategy.

### 2 CONDITIONS PRECEDENT

The following conditions precedent must be in place:

- Tranz Metro has been set up as a separate legal entity.
- An Access Agreement between the Operator and Trackco or between Toll Rail and Trackco with passenger rail access assigned to the Operator that has been agreed by Greater Wellington.
- A Business Plan prepared by the Operator that has been agreed by the Greater Wellington.

- An Asset Management Plan for infrastructure assets prepared by the Operator and agreed by the Greater Wellington.

### 3 BUSINESS PLAN

- 3.1 At the commencement of this contract the Operator and Greater Wellington agreed a Business Plan which addressed the matters set out in Schedule 1.
- 3.2 The Operator agrees that it will maintain an agreed Business Plan for the duration of this contract. The Business Plan shall be revised on each Review Date. Changes to the Business Plan as part of the review process shall not be incorporated until written agreement is received from Greater Wellington.
- 3.3 The Business Plan shall incorporate those activities set out in the Asset Management Plan.
- 3.4 Greater Wellington may at any time request that additional capital projects be included in the Business Plan and that the timing of any projects within the Business Plan be varied.
- 3.5 The Operator shall not undertake any activities not set out in the Business Plan without the written agreement of Greater Wellington.

### 4 TERM OF AGREEMENT

- 4.1 This Agreement shall commence on [ ] 2004 ('the Commencement Date') and, unless terminated earlier in accordance with its provisions or by agreement, shall terminate on 30 June following the completion of 10 years tenure.
- 4.2 Notwithstanding Clause 4.1 above Greater Wellington may at its option following the review of the contract at year 5 and every 5 years thereafter, offer the Operator an extension of tenure not exceeding 5 years to a maximum tenure of 31 years.

### 5 DEFINITIONS AND INTERPRETATION

- 5.1 Terms that begin with a capital letter are defined in clause 5.2. The principles of interpretation that govern this Agreement are set out later in this clause.
- 5.2 Unless the context requires otherwise:
- “Agreed Asset Life”** means the period of time the asset could remain in use without the need for other than planned maintenance as agreed by the Operator and Greater Wellington.



“**Agreement**” means the contract between Greater Wellington and the Operator for the provision of Rail Services for Wellington region.

“**Asset Management Plan**” means a plan developed for the management of the assets required to provide the Rail Services that combines multi-disciplinary management techniques (including technical and financial) over the lifecycle of the asset in the most cost effective manner to provide a specified level of service. This document shall include any third party assets that the Operator is required to maintain.

“**Business Day**” means any day other than a Saturday or a Sunday or a public holiday in Wellington.

“**Business Plan**” means a plan prepared by the Operator which sets out the business activities proposed over the next 30 years with detailed estimates of costs and revenues for the next five years. Matters to be included in the Business Plan are set out in Schedule 1.

“**Capital Expenditure Programme**” means the Capital Expenditure Programme included in the Business Plan.

“**Capital Works**” means the purchase of assets required to provide the Rail Services as set out in the Business Plan.

“**Commencement Date**” means [ ] 2004.

“**EE**” means English Electric.

“**EMU**” means Electric Multiple Unit.

“**Extraordinary Circumstances**” means any Force Majeure event or other event or circumstances that is outside the control of the party affected, which is of an extraordinary nature, and which could not have been reasonably foreseen by the parties at the most recent Review Date, and has a material effect on either revenues or costs of providing the Rail Services.

“**Force Majeure**” means any act of God, strike, riot, (excluding the Operators or the Operator’s sub-contracted employees) electrical supply failure, order of the Court, earthquake, landslide, flood or other similar cause beyond the control of the party seeking to rely on it which prevents that party from performing its obligations under this Agreement.

“**GM**” means Ganz Mavag.

“**Greater Wellington**” and “**Greater Wellington Regional Council**” are trading names for the Wellington Regional Council

**“Greater Wellington Regional Land Transport Strategy”** means the current Regional Land Transport Strategy adopted by Greater Wellington at the relevant time pursuant to the Land Transport Management Act 2003.

**“Guarantor”** means Toll Holdings Pty Limited having their Head Office in Melbourne, Australia.

**“GST”** means Goods and Services Tax.

**“Indemnity”** means security against hurt, loss or damage.

**“Infrastructure”** means all physical assets used to provide the Rail Services, including but not limited to, track, bridges and other structures, traction system, signalling, communications, stations and platforms.

**“Infrastructure Agreements”** means any agreement entered into by the Operator whereby access to the use of Infrastructure is obtained which is used to assist in the provision of the Rail Services.

**“Key Performance Indicators”** means the performance indicators set out in Schedule 4.

**“Long Term Council Community Plan”** means the plan prepared by Greater Wellington pursuant to the requirements of the Local Government Act 2003.

**“Minimum Service Requirements”** means the rail service requirements set out in Schedule 2 and the minimum service standards set out in Schedule 3.

**“Notifiable Occurrences”** means:

- the death of any person
- an incapacitating injury to any person (admitted to hospital)
- any attack upon a passenger or staff member which required the intervention of the Police
- any incident where any Rail Vehicle passed a signal at danger without authority
- any derailment of any unit of passenger rolling stock while in revenue service and any derailment which resulted in damage to property or equipment in excess of \$100,000
- any significant unplanned delays to the provision of the Rail Services and the resultant emergency implementation of contingency arrangements.

- any threat or action deemed as an “Act of Terrorism”
- any collision between any rolling stock and any person, other vehicle, infrastructure or any other obstruction or cause resulting from the construction, maintenance or operation of the railway for which the person is accredited which resulted in significant damage to any property or equipment
- any fire, explosion or any other occurrence which resulted in significant property damage

“**Open book**” means after full and accurate disclosure of all financial information (both cost and revenue) associated with providing the Rail Services, including disclosure of the methodology of allocation of the costs of any goods or services provided under contract by any associated entity or by third parties, and supporting documentation showing identity.

“**Off-Peak Periods**” means those periods from Monday to Sunday inclusive which are not Peak Periods.

“**Peak Periods**” means the periods from 6 am to 9 am and 4 pm to 7 pm, Monday to Friday (but excluding public holidays and the period 25 December to 10 January inclusive).

“**Rail Services**” means those passenger rail services operated by the Operator over all or part of the following routes that have been registered by Greater Wellington in accordance with the provisions of the Transport Licensing Act 1989, but excluding long distance passenger rail services such as the Overlander, and for Special Events:

- (i) Otaki/Wellington;
- (ii) Wairarapa (Masterton)/Wellington;
- (iii) Melling/Wellington;
- (iv) Johnsonville/Wellington;
- (v) Upper Hutt/Wellington

and in the case of Off-Peak Periods, means passenger services provided at least 90% by train and no more than 10% by bus, provided that where an accident, incident or significant planned maintenance or construction work precludes full use of rail services alternative services may be provided by bus until it becomes possible to resume full rail service.

“**Rail Vehicle**” means any vehicle used in the provision of the Rail Services or used for the maintenance of the Rail Infrastructure while travelling on the rails.

**“Review Date”** means 30 June following the commencement date and each year for the four years following, and every five years thereafter.

**“Rolling Stock”** means the Rail Vehicles required to provide the Rail Services.

**“Rolling Stock Agreement”** means any agreement entered into by the Operator whereby the use of Rolling Stock is obtained for the purpose of providing the Rail Services.

**“Special Events”** means any event for which additional capacity and/or non-timetabled commuter passenger rail services are provided.

**“Step In Rights”** means the rights set out in clause 27.7 whereby Greater Wellington may take over certain management functions related to the Rail Services should the Operator breach specified conditions of this contract.

**“Suitable Alternative Transport”** means a bus, taxi or other form of public passenger transport.

**“Track Access Agreement”** means the agreement made between Trackco (including its successors and assigns or any party acquiring ownership or rights of access to the Infrastructure subject to the Track Access Agreement), and Toll Rail pursuant to which the Operator obtains the right of access to the tracks used to provide the Rail Services, such agreement made on [ ]. The Track Access Agreement will also include any Common Access Terms entered into between Trackco and Toll Rail collateral to the Track Access Agreement.

**“Trackco”** means a Government authority set up to maintain the rail network infrastructure assets.

**“Transfund”** means Transfund New Zealand and its successors and assigns.

- 5.3 A reference to a clause or Schedule is a reference to a clause of or schedule to this Agreement.
- 5.4 The Schedules form part of this Agreement.
- 5.5 Where the context requires, references to the singular include references to the plural and vice versa.
- 5.6 This Agreement shall be governed by and construed in accordance with the laws of New Zealand.
- 5.7 A reference to an enactment includes regulations made under that enactment, and is also a reference to that enactment or those regulations

as amended and to any enactment or regulations substituted for that enactment or those regulations.

- 5.8 A reference to any document includes amendments and revisions to that document.

## **6 FARES AND TIMETABLING**

- 6.1 Until amended in accordance with this Agreement, the timetable of Rail Services to be provided and fares payable are set out in Schedules 2 and 5. The Operator may offer “special” fares at more advantageous terms than those specified for Special Events or as specific marketing strategies. The Operator may attach special conditions to such fares. The introduction of such fares shall not be grounds for any increase in funding pursuant to clauses 16 or 18.

- 6.2 Greater Wellington may at any time advise the Operator that it intends to alter fares. Where such alteration to fares coincides with the review of the funding level pursuant to clause 18, regard to anticipated fare revenue under clause 18.1 shall be on the basis of the altered fares. Where the alteration in fares occurs at any other time, the funding payable shall be adjusted so that, until the next review of funding under clause 18, the Operator’s financial position is unchanged by the alteration in fares.

- 6.3 The Operator agrees that the maximum fare for any single journey on any of the Rail Services shall not exceed the published adult single fare.

- 6.4 The Operator may impose conditions on the concessionary fares set out in Schedule 5 relating to the minimum number of trips purchased, the point(s) of purchase and in relation to period passes, the minimum period which may be purchased.

- 6.5 The Operator shall maintain any integrated fare agreements which exist at the Commencement Date and shall within two years of the Commencement Date extend or introduce an integrated ticketing scheme which permits single fare and single ticket travel on the Rail Services and all connecting urban bus services.

## **7 QUALITY OF RAIL SERVICES**

- 7.1 The Rail Services will be provided in a safe, reliable, punctual and cost effective manner, to at least the Minimum Service Requirements and in accordance with the approved Business Plan.

- 7.2 The Operator shall not alter the Rail Services in any manner other than that contemplated in the Minimum Service Requirements and in any event the Operator shall not take any action that, in the opinion of

Greater Wellington, would jeopardise any approval given by Transfund to the funding of the Rail Services.

7.3 The Operator may suspend certain Rail Services as follows:

- any train in an Off-Peak Period may be suspended to permit maintenance operations which cannot reasonably be carried out either between scheduled trains or between 1.00am and 4.00am. On every such suspension, the Operator will transport passengers by Suitable Alternative Transport
- any train may be suspended due to Force Majeure or at the instruction of the New Zealand Police. On every such suspension, the Operator will endeavour to transport passengers by Suitable Alternative Transport
- any train scheduled to operate between 12.01am and 4.00am Sunday to Friday may be suspended to permit maintenance operations. On every such suspension, the Operator will transport passengers by Suitable Alternative Transport

7.4 In all other cases where scheduled Rail Services fail to operate, the Operator must use its best endeavours to offer all passengers alternative travel options which as near as possible mirror the scheduled Rail Service. Where the cancellation of Rail Services has occurred at short notice and it has not been possible to arrange adequate alternative transport, on the resumption of Rail Services, the Operator shall at its cost increase passenger capacity or provide supplementary buses until passenger loadings return to normal levels.

## **8 PROMOTION OF RAIL SERVICES**

8.1 The Operator shall use its best endeavours to increase the numbers of passengers using the Rail Services and to improve the standard of service offered consistent with public demand and the parties' objectives of increasing patronage. The Operator shall at its cost, implement the growth strategy set out in the agreed Business Plan. The strategy will be revised at regular intervals and representatives of the Operator and Greater Wellington shall meet on a regular basis to discuss the strategy and its effectiveness, such meetings to take place at least four times a year.

The Operator shall liaise as required but at least quarterly with bus operators in the Wellington region who carry passengers to or from stations with a view to promoting better co-ordination and inter connection of bus services with the Rail Services. Greater Wellington shall facilitate this liaison. The Operator shall make all reasonable efforts to co-ordinate Rail Service timetables with the services provided

by such bus operators and shall from time to time on request by Greater Wellington advise it of those efforts.

## 9 INFRASTRUCTURE & TRACK ACCESS AGREEMENTS

- 9.1 The Operator shall obtain the necessary track access rights to enable it to provide the Rail Services and may acquire the use of, or secure access to, other Infrastructure and/or Rolling Stock not owned by it to provide the Rail Services.
- 9.2 The Track Access Agreement insofar as it relates to the provision of the Rail Services shall be deemed to confer direct benefits on Greater Wellington such that it is entitled to enforce its terms pursuant to the Contracts (Privity) Act 1982.
- 9.3 The Operator agrees that it shall not alter the terms of the Track Access Agreement without the prior written approval of Greater Wellington. In particular it is acknowledged that there may be no change to the Track Access Agreement unless::
- the quantum or basis of calculating the track access charge is agreed;
  - or
  - where safeguards to ensure that the basis of charging for new services introduced by the Operator are priced equitably
- 9.4 Where any such agreement for Infrastructure and/or Rolling Stock relates to assets which are necessary for the continued efficient provision of the Rail Services, including by way of example rolling stock, locomotives etc, then the Operator shall only enter an agreement after first obtaining the written approval to the terms of such agreements from Greater Wellington (such approval not to be unreasonably withheld). Any such agreement will include the following:
- the agreement is entered into on an open-book basis and full disclosure of related information is given to Greater Wellington in conjunction with the obtaining of its approval to the agreement; and
  - that all such agreements will include provisions enabling Greater Wellington the first option to acquire the assets being the subject of any Infrastructure Agreement, or Rolling Stock Agreement should for any reason the Operator default in its obligations under the Infrastructure or Rolling Stock Agreement; and

- that all such agreements will include provisions that there shall be no alteration to the terms of any Infrastructure Agreements or Rolling Stock Agreements without the prior written approval of Greater Wellington.

## **10 RESPONSIBILITY FOR PLANT AND INFRASTRUCTURE**

- 10.1 Subject to the provisions of clause 10.2 the Operator shall at its cost arrange or provide, maintain and repair, develop and replace when necessary, all Infrastructure and equipment necessary to provide the Rail Services in accordance with the agreed Asset Management Plan.

Where assets are capital funded by Greater Wellington ownership shall reside with Greater Wellington for the life of the asset and the Operator may use the asset for the provision of the Rail Services pursuant to a written lease agreement.

- 10.2 The Operator shall make all necessary arrangements for access to, and maintenance of, all Infrastructure or other assets not owned or controlled by the Operator necessary to provide the Rail Services. The basis of access to such use will be under the Track Access Agreement, an Infrastructure Agreement or a Rolling Stock Agreement as set out in clause 9.

- 10.3 Subject to the provisions of clause 10.2 the Operator shall at its cost provide ongoing maintenance, refurbishment, and parts necessary to provide the Rail Services in accordance with the agreed Rolling Stock Management Plan.

## **11 ASSET MANAGEMENT PLAN**

- 11.1 It is agreed by the Operator that ongoing maintenance, refurbishment and renewal of railway rolling stock, appropriate maintenance of Infrastructure and maintenance of and provision of appropriate station facilities needs to be made to maintain and improve existing service quality and passenger comfort. The Operator shall, following consultation with Greater Wellington maintain over the currency of this Agreement, an Asset Management Plan. The Operator shall carry out, in accordance with the Asset Management Plan, those works committed in the first 5 year period.

- 11.2 A copy of the Asset Management Plan shall be provided to Greater Wellington upon preparation and following any significant amendment.

As a minimum the Plan shall include:

- A Capital Expenditure Programme for the 30 year period



- A list of assets used in the provision of the Rail Services whether owned by the Operator or not but excluding those assets owned and maintained by Trackco
- A condition assessment of assets
- Remaining useful life of assets
- A maintenance programme by class of asset
- Proposals and options for the timely replacement of assets

The costs of carrying out the activities set out in the Asset Management Plan shall be carried into the Business Plan as part of the costs of operating the business.

- 11.3 The Operator shall carry out, in accordance with the Asset Management Plan, those works committed in the first 5 year period.
- 11.4 The Operator and Greater Wellington shall meet annually to:
- review the extent to which the items in the Asset Management Plan have been progressed or achieved, in particular those works committed
  - discuss any changes proposed by the Operator to the Asset Management Plan.
- 11.5 In addition to any other revisions required by this contract, prior to November of the fourth year of this agreement and each three years thereafter, the Operator will, following consultation with Greater Wellington, provide Greater Wellington with a revision of the Asset Management Plan and Capital Expenditure Programme which extends the scope of the plan to 30 years. The revisions shall specify full details of those projects, including anticipated expenditure, committed to be carried out in the following 5 year period. In completing such revisions the Operator shall have regard to the priorities established under the Greater Wellington Regional Land Transport Strategy. The revised Asset Management Plan shall not be amended by the Operator without the prior written agreement of Greater Wellington.

## 12 STATIONS

- 12.1 The Operator will by the first anniversary of the Commencement Date (or such later time as the parties may reasonably agree) ensure all unattended suburban stations meet standards set out in Schedule 3.
- 12.2 The Minimum Service Standards shall apply to each unattended suburban station covered by the preceding clause from the completion of the upgrading of that station.

- 12.3 The Operator shall make space available on stations and platforms as set out in Schedule 3 which may be utilised by Greater Wellington for signage and information.
- 12.4 Within 6 months of the Commencement Date, the Operator agrees to provide and maintain, at all stations from which connecting bus services operate, information displays showing in “real time” anticipated time of arrival, and destination of the next three trains. The displays shall be positioned so as to be visible to waiting rail passengers and the drivers of any waiting buses.

### **13 LIVERY**

- 13.1 The Operator shall maintain livery (which includes the colour scheme of the interior and exterior of the railway rolling stock, the interior and exterior of stations, public buildings and other facilities provided by the Operator) to the standard specified in Schedule 3. The Operator must obtain the prior consent of Greater Wellington to any change to the livery.
- 13.2 Should Greater Wellington resolve to introduce a “public transport” livery or “brand”, the Operator will adopt and apply such livery or brand in the same manner and under the same conditions as the major bus operators to those assets owned by it and seek the necessary approvals for any other relevant assets.
- 13.3 The Operator shall not be required to fund any such change or introduction of livery or brand beyond making the assets available for application of brands or livery as may be appropriate.

### **14 INFORMATION AND PUBLICITY**

- 14.1 The Operator shall use reasonable endeavours to ensure that the public is kept well informed of the benefits of travelling by rail. All Rail Services facilities shall be clearly signposted to the standard specified in Schedule 3 and the Operator shall (without limitation) provide Greater Wellington with all necessary information to enable Greater Wellington to produce and distribute adequate supplies of timetables and fare information in a timely manner.
- 14.2 The Operator shall co-operate with Greater Wellington in any schemes designed to promote or publicise public transport in the Wellington region, such schemes to be at the cost of Greater Wellington.
- 14.3 Where practicable, the Rail Services will be publicly acknowledged as having been funded by Greater Wellington. Any such public acknowledgement shall be in a form approved by Greater Wellington.

- 14.4 The Operator shall maintain on the company's website, a current set of fares and timetables and any alterations applicable to maintenance works, public holidays or special events within the next 60 days. This information shall also be available for inclusion on the Greater Wellington website on request.

## 15 PAYMENTS

- 15.1 For the first year of this Agreement, Greater Wellington will pay the Operator the sum of [ ] per annum (plus GST), towards the provision of the Rail Services, subject to any adjustment under clauses 16 and/or 17. This payment shall be made up of an operating payment relating to the day to day provision of Rail Services in accordance with the approved Business Plan, and a capital payment relating to any agreed contribution towards capital for assets obtained during the currency of this agreement. The Operator warrants that during negotiations to agree this sum, it made full disclosure on an 'open book' basis
- 15.2 For years 2 to 5 and thence every 5 years of this Agreement, Greater Wellington will pay the Operator the sum determined in accordance with clause 18 as adjusted in accordance with clause 16 and/or 17.
- 15.3 Payments under clauses 15.1 and 15.2 plus GST will be made to the Operator in equal instalments on the 20<sup>th</sup> day of each month in the month following the provision of the Rail Services. If a payment day is not a Business Day, payment will be made on the next Business Day.
- 15.4 All payments under this Agreement include a contribution towards the track access costs payable by the Operator under the Track Access Agreement.

## 16 WITHHOLDING PAYMENTS FOR NON-PERFORMANCE

- 16.1 The sum payable pursuant to clause 15 towards operating costs shall be reduced by the sums set out in this Clause where the Operator has failed to comply with either the provisions of Clause 6 and/or the Minimum Service Standards set out in Schedule 3.
- 16.2 Where scheduled rail services failed to run and alternative bus transport was provided:
- Operating payments will be reduced by \$0.50 (plus GST) for each seat kilometre not operated on the third and all subsequent occasions in any calendar month.
- 16.3 Services which have run ahead of the times specified in the public timetable shall be deemed to not have run for the distance they were ahead of time:
- For the first five occasions in any calendar month operating payments will be reduced by \$0.50 (plus GST) for each seat kilometre operated ahead of time. For the sixth and subsequent occasions in any calendar month payments will be reduced by \$1 (plus GST) for each seat kilometre so operated.
- 16.4 Where scheduled rail services failed to run and no alternative transport was provided:
- Operating payments will be reduced by \$1.00 (plus GST) for each seat kilometre not operated
- 16.5 Where arrival time within 3 minutes of scheduled time occurs fewer than 95% of the time in any week:
- Operating payments shall be reduced by 5% until 3 consecutive months of compliance can be demonstrated.
- 16.6 Where the operator receives more than 5 substantiated complaints in any calendar month relating to ride comfort, cleanliness of stations or rolling stock, or staff behaviour (Multiple complaints relating to the same event shall be regarded as one complaint):
- Payments towards operating costs shall be reduced by 5% each month until 3 consecutive months of compliance can be demonstrated
- A substantiated complaint will be deemed to have been made if the complaint reasonably required a responsive action.
- 16.7 Where the Operator fails to undertake any maintenance or repairs to any station:

- Payment shall be reduced by 25% of the estimated cost of the repairs until the repairs are completed or Greater Wellington takes action pursuant to clause 25.

16.8 Where the Operator fails to undertake any maintenance or repairs to any rolling stock or infrastructure that the operator is responsible to maintain specified in the agreed Asset Management Plan:

- Payment shall be reduced by \$1000 for each failure in the first month and increased by a further \$1000 for each month thereafter until the required maintenance or repairs are completed.

16.9 Where it can be demonstrated that the cause of any delay was due to a breach of the agreed service standards by Trackco, the penalty imposed on the Operator shall be the same as any penalty imposed on Trackco through the terms of the Access Agreement.

## 17 ADJUSTMENT OF FUNDING

17.1 The sums payable under clauses 15.1 and 15.2 will be adjusted to reflect the imposition of any new statutory charges levied on the Operator by central or local government (excluding any additional charges levied by Trackco), not in existence on the Commencement Date to the extent necessary to compensate for the net effect of such new charge.

17.2 The level of cumulative economic gain or loss as shown in the statements prepared by the Operator in accordance with clause 22.5 will be reviewed by Greater Wellington on each Review Date . The Operator will adopt a financial year ending 30 June to better facilitate the calculation of the cumulative economic gain or loss.

17.3 If on any Review Date the Operator has generated a cumulative economic gain, as shown by the statement of cumulative economic gain/(loss), and the Operator, to the reasonable satisfaction of Greater Wellington, has at all times since the preceding Review Date provided the Rail Service consistently in accordance with the Minimum Service Requirements:

- The Operator will pay to Greater Wellington forthwith, and in any event no later than 90 days from the respective Review Date, an amount equal to 50% of the cumulative economic gain
- The remaining 50% of the cumulative economic gain will be to the account of the Operator
- Whether payable or not, the cumulative economic gain account will be set to zero such that there will be no economic

gain carried over into the financial year immediately following each Review Date.

- 17.4 If on any Review Date the Operator has generated a cumulative economic gain, as shown by the statement of cumulative economic gain/(loss), and the Operator has not to the reasonable satisfaction of Greater Wellington provided the Rail Services consistently in accordance with the Minimum Service Standards:
- The Operator shall pay to Greater Wellington forthwith, and in any event no later than 90 days from the respective Review Date, an amount equal to the cumulative economic gain; and
  - The cumulative economic gain account will be set to zero such that there will be no economic gain carried over into the financial year immediately following each Review Date.
- 17.5 If at the Review Date, the Operator has generated a cumulative economic loss, as shown by the statement of cumulative economic gain/(loss), and the Operator, to the reasonable satisfaction of Greater Wellington, has at all times during the preceding period provided the Rail Service consistently in accordance with the Minimum Service Standards then:
- 50% of the cumulative economic loss will be carried over into the financial year immediately following the respective Review Date. This will represent the opening balance in the cumulative economic gain/(loss) account for the next review period.
  - The portion of the cumulative economic loss carried over into the next five year period will be taken into account when reviewing the funding for the next five year period under clause 18.1.
- 17.6 If at the Review Date, the Operator has not to the reasonable satisfaction of Greater Wellington provided the Rail Services consistently in accordance with the Minimum Service Standards, and there is a cumulative economic loss, then no amount of such loss will be taken into account when reviewing the funding for the period to the next Review Date under clause 18.1, and no amount of such cumulative economic loss shall be carried over into the next payment period.
- 17.7 The sum payable under clauses 15.1 and 14.2 may be increased or decreased by Greater Wellington for any part or whole year or years where the parties agree an alteration to the Rail Services or the facilities or equipment by which they are provided, or to reflect an agreed improvement to the standard of the Rail Services.

## 18 REVIEW OF FUNDING OF RAIL SERVICES

18.1 The level of funding paid by Greater Wellington to the Operator under this Agreement shall be reviewed at each Review Date. Three months prior to each Review Date the parties shall meet to renegotiate the level of funding payable until the next Review Date. The parties will negotiate in good faith to agree the funding payable, having regard to the following factors:

- the actual and estimated future cost to the Operator of providing the Rail Services, including the individual components which make up the cost
- details of any negotiated prices for the access or use of any infrastructure or goods or services used to provide the Rail Services that are not directly owned or provided by the Operator, and the reasonable price for such access or use
- the then current level of funding
- the availability and amount of subsidies available to Greater Wellington from Transfund in respect of public transport
- the portion of Greater Wellington income derived from transport related rates and the relative priorities established for contribution to urban rail under the Long-Term Council Community Plan then current for Greater Wellington
- the strategy and objectives under Greater Wellington Regional Land Transport Strategy and in particular the objectives in that strategy for urban rail
- the standards of service required by the travelling public consistent with the parties' objective of increasing patronage for urban rail and the financial consequences of such on the Operator's maintenance including the Capital Expenditure Programme
- subject to clause 20, future capital and maintenance requirements set out in the Asset Management Plan as necessary for the provision of the Rail Services in accordance with this Agreement. It is acknowledged by Greater Wellington that any portion of the funding previously agreed as a result of an approved Capital Expenditure Programme going beyond the Review Date under consideration, will be accepted at the previously agreed level
- the need for the Operator to operate the Rail Services with continuing improvements in efficiency and as an economic

business including a reasonable return on capital employed in providing the Rail Services

- the anticipated income from both fares and other income sources for the forthcoming period.

18.2 Should the level of funding not be agreed between the parties by the Review Date, Greater Wellington shall continue to make payments to the Operator under this Agreement until such time agreement is reached. The payments shall be at a level equal to 80% of the operating sum payable immediately prior to the review but reduced pro rata to reflect any reduction to the provision of Rail Services from those provided immediately prior to the review. When agreement on the funding level is concluded, an appropriate adjustment for any under or overpayment shall be made on the next scheduled payment date.

18.3 It is acknowledged that a review of the level of funding payable by Greater Wellington will include a review of the Rail Services where the funding review may result in a reduction in funding from that payable during the previous period.

18.4 The Operator warrants that during negotiations to agree the level of funding, it has made full disclosure on an 'Open Book' basis.

## **19 REVIEW FOR EXTRAORDINARY CIRCUMSTANCES**

19.1 If at any time during years 6 to 10 (inclusive) an Extraordinary Circumstance occurs, then either party may by notice to the other require there to be conducted good faith negotiations for either or both the variation of the funding payable under this Agreement or the standard or frequency of Rail Services provided to equitably deal with such Extraordinary Circumstance.

19.2 Any variation to the terms of this Agreement to deal with an Extraordinary Circumstance shall continue only for so long as the Extraordinary Circumstance continues. The normal level of funding and Rail Services shall be resumed as soon as reasonably possible after the termination or abatement of the Extraordinary Circumstance.

## **20 CAPITAL WORKS PROJECTS**

20.1 Unless otherwise agreed in writing the Operator is solely responsible to fund all capital expenditure required and must carry out those capital projects committed to in the first 5 year cycle of the Asset Management Plan and each revision. Greater Wellington shall in negotiating the appropriate level of funding on each Review Date, have regard to such committed expenditure. Alternatively, and at the option of Greater Wellington, capital expenditure may be excluded (either in whole or in part) in fixing the level of funding paid by Greater Wellington on any



Review Date and such contribution (if any) that Greater Wellington makes towards capital expenditure, shall be agreed on a case by case basis relative to the capital project being undertaken.

- 20.2 Where Greater Wellington funds Capital Works the Operator agrees that such assets shall remain in the ownership of Greater Wellington available for use in the provision of the Rail Services for the Agreed Asset Life or such other period of time agreed by the parties.

## **21 FUNDING CAPITAL WORKS**

- 21.1 Where Greater Wellington funds Capital Works, including such funding provided prior to the Commencement Date, the Operator may not pledge or offer these assets in support of any loan, bond or other financial instrument which may, should the Operator default on the terms and conditions of the loan, bond or other financial instrument, result in the assets being liable to forfeit. Greater Wellington may at any time require the Operator to grant a registrable security interest over such assets to protect its rights under this clause.
- 21.2 It is anticipated that Capital Works would be funded by an agreed increase in the monthly payment for a period calculated by reference to the Agreed Asset Life of the particular Special Capital Works and that portion of such cost which Greater Wellington agrees to fund. Where the Agreed Asset Life of such works exceeds the Termination Date, the parties will agree the appropriate residual value of that portion being funded by Greater Wellington or a basis for determining such value on the Termination Date.
- 21.3 If, on the Termination Date, the Operator does not obtain a further contract for the provision of Rail Services from Greater Wellington, other than because of any breach or non-performance of the Operator, the Operator and Greater Wellington agree to work co-operatively in order to assist the Operator recover or realise the residual value. In the first instance this will require the Operator to explore the sale of such assets on a basis that they will continue to be available to provide the Rail Services. Should a sale not result the Operator shall on the Termination Date transfer to Greater Wellington those assets listed in Schedule 7.

If Greater Wellington provided capital funds to fully or partially purchase any asset used in the provision of the Rail Services the Operator shall not be entitled to any payment in relation to that part of any asset funded in this manner. Nor shall the Operator be entitled to revalue any asset funded in this manner.

## 22 REPORTING REQUIREMENTS

### Operational

- 22.1 Notifiable Occurrences shall be reported to Greater Wellington on the next business day.
- 22.2 As soon as is practicable but in any event not later than 21 days after the end of every calendar month, the Operator shall provide a written report to Greater Wellington regarding the operations of the Rail Services. This is to enable Greater Wellington to appropriately monitor the performance of the Operator under this Agreement. This includes its observance of the Minimum Service Requirements, achievement of the Key Performance Indicators, safety obligations and its overall obligation to promote and operate the Rail Services in a manner consistent with this Agreement. The form and content of such report shall be as agreed between the parties from time to time, but shall include as a minimum:
- A report on any Notifiable Occurrences which were reported during the month
  - a compliance report on all appropriate safety measures including any incidence of breach and compliance with its obligations under clauses 23.1 and 23.2
  - a compliance report on achievement or otherwise of the Minimum Service Requirements including notifications of breach and/or complaints
  - Certificate indicating that all periodic maintenance of infrastructure and rolling stock has been carried in accordance with the Asset Management Plan and details of any non compliance.

In addition, in the reports covering the months March, June, September and December

- The mean time between inservice failures by class of vehicle
- A progress report on any capital projects underway
- the results of an inspection of all stations together with a work programme to remedy any deficiencies
- confirmation that any Infrastructure not owned by the Operator but used for the efficient provision of the Rail Services has been maintained and is “fit for purpose”.
- such other reasonable information and forecasts regarding

operations required from time to time by Greater Wellington.

- 22.3 The Operator shall also immediately notify Greater Wellington of any action taken by the Director of Land Transport Safety under the Transport Services Licensing Act 1989 (or any similar statute) or any other event which will or is likely to have a material adverse effect on any of the Rail Services.

### **Financial**

- 22.4 As soon as is practicable but in any event not later than 45 days after the 30<sup>th</sup> day of June and the 31<sup>st</sup> day of December, the Operator shall provide to Greater Wellington a financial report in respect of the operation of the Rail Services. Such financial report shall be in a form reasonably agreed between Greater Wellington and the Operator but shall include as a minimum:

- full and comprehensive management accounts including full disclosure of costs and revenues (including any revenues from non rail activities)
- financial statements (of performance, position and cash flow) in respect of the Rail Services
- comparison of actual financial performance versus budget including commentary on the reasons for major variances
- commitments and projected commitments in regard to capital expenditure
- such other reasonable financial information and forecasts required from time to time by Greater Wellington.
- A report on the sums charged and paid under the Track Access Agreement and any Infrastructure or Rolling Stock Agreement or any other agreement for the provision of services not owned by the Operator but used for the provision of the Rail services

At any time at which an adjustment or review of the funding payable takes place, the Operator shall obtain the agreement of any party imposing charges for shared use of infrastructure or other assets for Greater Wellington to engage an independent third party to examine the makeup of such charges to ensure that they represent an equitable apportionment of costs.

- 22.5 The Operator shall prepare annual statements of:
- economic gain/(loss)
  - economic capital; and

- cumulative economic gain/(loss)

in accordance with the format set out in schedule 7. These will be based on the Operator's audited financial statements adjusted in accordance with agreed New Zealand Accounting Standards and consistently applied. The economic statements are to be accompanied by a statement of the principles used to prepare them and appropriate notes.

- 22.6 The economic statements shall be reviewed by the Operator's auditors and include a statement whether the economic statements have been based on the audited financial statements and have been compiled in accordance with the agreed principles.
- 22.7 The Operator shall within 3 months of 30 June (or such other date as may be agreed between the parties) in each year provide to Greater Wellington a copy of an annual report prepared including audited financial statements for the year to which the annual report relates. The financial statements shall be prepared in accordance with the Financial Reporting Act 1993 and shall include economic statements prepared and audited in accordance with clauses 22.5 and 22.6.
- 22.8 Greater Wellington shall be entitled (but not obliged) at any reasonable time to have undertaken an audit of the financial information provided to it pursuant to clauses 22.4, 22.5 and 22.7, or the operational and/or safety obligations of the Operator under this Agreement. Greater Wellington shall appoint such auditor(s). The Operator shall co-operate to facilitate any such audit(s) occurring on a transparent and efficient basis. Greater Wellington shall meet the costs of an audit, unless the audit results show any material inaccuracy in the financial information or material breach of the operational or safety obligations of the Operator. In such circumstances, the cost of the audit shall be borne by the Operator.
- 22.9 The Operator shall meet with representatives of Greater Wellington at least quarterly and shall generally co-operate and assist in explaining the reports and keeping Greater Wellington fully informed as to the operational and financial aspects of the operations of the Rail Services at all times.
- 22.10 The Operator shall retain all records of the information which it is obliged to provide under this clause 22 of this Agreement for seven years after the date on which this Agreement terminates and shall make all such records and related documentation available to Greater Wellington or its agents on request.

## **23 COMPLIANCE WITH LEGAL REQUIREMENTS, SAFETY STANDARDS AND CONTINGENCY PLAN**

- 23.1 In providing the Rail Services, the Operator shall comply with all applicable enactments and regulations including (to the extent that it is applicable) the Health and Safety in Employment Act 2002 and shall (without limitation) maintain a valid rail service licence and approved safety system and comply with all of the other requirements of the Transport Services Licensing Act 1989 within the periods specified in that Act.
- 23.2 The Operator shall be fully responsible for all matters relating to passenger safety and security, and Greater Wellington shall have no responsibility for such matters. Without limiting the preceding sentence, and in addition to any statutory or other obligations imposed on it, the Operator shall ensure the Rail Services and related infrastructure do not pose an unreasonable hazard to any person, and that the Rail Services are conducted at all times in accordance with appropriate safety standards.
- 23.3 The Operator shall prepare and maintain up to date a business contingency plan. The objective of the Plan will be to provide procedures and actions that will aim to minimise the period of disruption in the provision of Rail Services. The plan shall set out the actions proposed to reinstate Rail Services should any disaster or other significant event occur which interrupts the reliable provision of the Rail Services in accordance with the Minimum Service Standards. The Operator shall provide a copy of the current business contingency plan to Greater Wellington at any time upon request. If reasonably required, Greater Wellington may require the business contingency plan to be independently reviewed or audited at the expense of the Operator.

## **24 INSURANCE AND LIABILITY**

- 24.1 The Operator shall maintain all such forms of insurance in relation to the Rail Services as would be maintained by a prudent rail service operator.
- 24.2 Where any Infrastructure required for the provision of the Rail Services is sourced from a third party or parties, the Operator shall ensure that insurance as would be maintained by a prudent rail operator is maintained.
- 24.3 The Operator unconditionally and irrevocably indemnifies Greater Wellington against all losses, damages, expenses, charges, liabilities and costs suffered or incurred by Greater Wellington directly or indirectly as a result of any breach by the Operator of this Agreement

## 25 FORCE MAJEURE

- 25.1 Neither party shall be liable to the other for any failure or delay in performing its obligations under this Agreement which results from Force Majeure and the obligations, the performance of which is prevented by reason of Force Majeure, shall be suspended until such time as performance becomes possible once more. In the interim, the party whose performance has been prevented shall take all reasonable steps to remedy or abate Force Majeure.
- 25.2 Performance of any obligation affected by Force Majeure shall be resumed as soon as reasonably possible after the termination or abatement of Force Majeure. If the event or circumstance giving rise to the Force Majeure continues for more than 28 days either party may terminate this Agreement by giving 48 hours notice in writing.

## 26 NON-PAYMENT

- 26.1 If for any reason any amount payable by a party pursuant to this Agreement is not paid within 7 days of the due date for payment, the defaulting party shall pay on demand interest at the then current bid rate as shown on page BKBM of the Reuters Monitor Screen (or its equivalent page) for bank accepted bills of exchange having a term approximately equal to 90 days plus 2% per annum, calculated daily on the amount unpaid from and including the due date until payment is made in full.
- 26.2 If, when any payment is due to the Operator under this Agreement, either it or Toll Rail is in breach of any of their obligations under this Agreement, and written notice of such breach has been given by Greater Wellington to the Operator and Toll Rail, Greater Wellington:
- may withhold from the Operator payment of any amount (or part) due to the Operator
  - shall not be liable to pay any interest on any amount withheld
  - must pay any amount withheld upon the Operator or Toll Rail remedying the notified breach.

## 27 BREACH AND TERMINATION

- 27.1 On receipt of a written notice from Greater Wellington specifying any breach of the Operator's obligations under this Agreement, the Operator shall ensure the breach is promptly rectified and shall advise Greater Wellington when that has occurred. If Greater Wellington does not provide any notice under this clause, that shall not in any way relieve the Operator from its responsibilities under this Agreement.

- 27.2 Should the Operator fail without reasonable excuse to comply with any of its obligations under this Agreement, Greater Wellington may, after advising the Operator of its intention to do so, remedy the breach itself or arrange for a third party to do so, and may deduct the costs of such remedying plus a reasonable charge for the time spent by Greater Wellington staff dealing with the matter from amounts payable to the Operator under this Agreement.
- 27.3 Subject to clause 27.5, Greater Wellington may terminate this Agreement at the end of any year ending 30 June if (but under this clause only if) the funding available to Greater Wellington from Transfund NZ or its successors, being funding that is required to be credited to the Land Transport Disbursement Account, ceases or is substantially reduced and, in the reasonable judgement of Greater Wellington, there is no reasonable alternative source of funding available other than non-transport related rates.
- 27.4 Subject to clause 27.5, Greater Wellington may terminate this Agreement immediately prior to or as soon as reasonably possible after such unlawfulness or restriction or reduction coming into effect if any change in the law or in Government policy or any decision of a Court makes it unlawful for Greater Wellington to fund the provision of the Rail Services or has the effect of (i) substantially reducing the funds available to Greater Wellington for the funding of the Rail Services; or (ii) making Greater Wellington no longer responsible for regional transportation matters.
- 27.5 Where the funds available to Greater Wellington to fund the Rail Services have been or will be reduced, Greater Wellington shall not terminate this Agreement unless and until the parties have met to discuss the possibility of varying this Agreement to take account of the reduced funding and no agreement has been reached.
- 27.6 Greater Wellington may terminate this Agreement immediately by giving written notice to the Operator and Toll Rail if:
- the Operator breaches clause 7.2, or
  - the Operator or Toll Rail breaches any of their obligations under clause 28; or
  - any event occurs which has a significant material adverse effect on the ability of the Operator to perform its obligations under this Agreement; or
  - a judgement or order for \$1,000,000 or more is entered against the Operator and the Operator fails to satisfy it within fourteen days, unless the Operator is contesting such

judgement or order in good faith by appropriate legal proceedings; or

- the Operator proposes or enters into any scheme of arrangement or composition with its creditors or any group of creditors; or
- the Operator goes into liquidation or has a receiver or statutory manager appointed in respect of all or any of its assets or is liquidated (except for the purpose of a reconstruction which Greater Wellington has previously approved in writing) or a meeting is called to consider the appointment of a liquidator; or
- a holder of any security takes possession of or exercises its power of sale in respect of all or any of the Operator's assets which are material to the performance of this Agreement; or
- any shares of the Operator, or the Operator's business are transferred to any person other than Greater Wellington, or
- Either party may terminate this Agreement immediately by giving written notice to the other, where the other party has breached this Agreement and does not remedy the breach within 30 days of receiving written notice specifying the breach and requiring it to be remedied. Any notice given must specify in reasonable detail the breaches complained of to enable the defaulting party every opportunity of remedying such breaches to avoid termination. In determining whether it is appropriate to terminate this Agreement for breach, the terminating party shall be entitled to have regard to both the current breach and also to the pattern and occurrence of any historical breaches even if they have been subsequently remedied.

27.7 If at any time Greater Wellington is entitled to terminate this contact pursuant to clause 27.6 it may at its sole discretion invoke Step In rights.

Greater Wellington may do anything in respect of the Rail Services including:

- Enter into and remain in possession of all or any or the assets required to operate the Rail Services
- Operate and manage all or any of the assets required to operate the Rail Services



- Enter into and remain on any of the land required for the efficient operation of the Rail Services
- Assume any powers and rights to access the track set out in any agreements between the Operator and Trackco
- Exercise any and all powers and perform any and all obligations in connection with the operation of the Rail Services as if it were the Operator
- Do anything which it deems necessary to remedy the termination event of Operator breach
- The Operator will pay on demand to Greater Wellington all costs and expenses arising from the exercise of its step-in powers
- The Operator recognises that Greater Wellington in exercising its step-in powers is not liable to the Operator for any costs or liabilities incurred by the Operator as a result of Greater Wellington exercising its step-in powers.

27.8 The expiration of this Agreement, whether through termination, effluxion of time or any other reason, will not release any party from any existing liability or outstanding obligation that is expressed to continue beyond the expiration of this Agreement or which has arisen by virtue of any breach of this Agreement.

27.9 Any breach by the Operator of any material provision in either the Track Access Agreement or any Infrastructure or Rolling Stock Agreement shall be deemed a breach of this Agreement.

## **28 RIGHT OF FIRST REFUSAL/PRE-EMPTIVE RIGHTS**

28.1 Toll Rail and the Operator agree that they will not:

- sell all or any part of the Operator's business or any assets that are material to the provision of the Rail Services
- sell or transfer all or any of the Operator shares
- issue more shares or capital in the Operator

except in accordance with this clause 28.

28.2 If Toll Rail or the Operator wishes to do any act contemplated in clause 28.1, it must first deliver a written offer in respect of the same business, assets, shares and capital (collectively and individually called the 'Item') to Greater Wellington ('a Right of First Refusal Offer'), that:

- sets out the price;

- sets out all other terms and conditions of the offer;
  - remains open for acceptance in writing for 60 Business Days, excluding its date of delivery, after which period, if not validly accepted by Greater Wellington or its nominee, the offer will lapse (time being of the essence).
- 28.3 If the Right of First Refusal Offer lapses or is not accepted by Greater Wellington or its nominee, the offering party may offer the Item to any third party. That offer may only be made within 6 months of the date on which the relevant Right of First Refusal Offer lapsed or was declined, whichever is the earlier, and on conditions no more favourable than those offered to Greater Wellington in that Right of First Refusal Offer.
- 28.4 Toll Rail and the Operator may not enter into a legally binding agreement to sell or transfer the offered Item to a third party except on the same terms as the relevant lapsed or declined Right of First Refusal Offer to Greater Wellington, unless Toll Rail or the Operator has delivered an offer of last refusal to Greater Wellington on the same terms and conditions offered to or by that third party (an 'Offer of Last Refusal').
- 28.5 An Offer of Last Refusal must remain open for acceptance in writing for 30 Business Days, excluding its date of delivery, and will lapse at the end of that period if not validly accepted by Greater Wellington or its nominee (time being of the essence).
- 28.6 If an Offer of Last Refusal lapses or is not accepted by Greater Wellington or its nominee, then Toll Rail or the Operator may enter into a legally binding agreement to sell or transfer the offered Item to a third party on the same terms and conditions contained in the Offer of Last Refusal within 6 months of that lapsing or being declined.
- 28.7 The Operator shall give Greater Wellington all reasonable assistance in any due diligence which Greater Wellington wishes to conduct during the period a Right of First Refusal Offer or a Offer of Last Refusal is open for acceptance by Greater Wellington.

## **29 GUARANTEE AND INDEMNITY**

- 29.1 The Guarantor acknowledges that Greater Wellington enters into this Agreement at the Guarantor's request and subject to the Guarantor giving this guarantee and indemnity and that the Guarantor has received valuable consideration.
- 29.2 The Guarantor unconditionally and irrevocably guarantees the punctual performance of all of the Operator's obligations under this Agreement. The Guarantor must immediately upon demand pay Greater Wellington

an amount not paid when due by the Operator under this Agreement, and perform or arrange to be performed any obligation on the Operator under this Agreement that it fails or will fail to perform.

- 29.3 The Guarantor unconditionally and irrevocably indemnifies Greater Wellington against all losses, damages, costs, charges, liabilities and expenses which Greater Wellington may at any time suffer or incur because of any of the following:
- an obligation of the Operator expressed in this Agreement is void, voidable or wholly or partially unenforceable
  - Greater Wellington has to repay any money paid to it on the Operator's account under this Agreement
  - the Operator fails to perform an obligation on it under this Agreement.
- 29.4 The Guarantor must pay money owing under this Agreement in immediately available funds without deduction. The Guarantor waives the right of set-off and the right to rely on a defence available to the Operator.
- 29.5 The obligations and liabilities of the Guarantor and the rights of Greater Wellington under this Agreement continue and are not affected by:
- Greater Wellington granting time or indulgence to the Operator or another person
  - Greater Wellington compounding or compromising with or wholly or partially releasing the Operator or another person
  - laches, acquiescence, delay, acts, omissions or mistakes by Greater Wellington
  - Greater Wellington taking, varying, wholly or partially discharging or otherwise dealing with or losing or impairing any security for the Operator's obligations under this Agreement or a security of that kind being or becoming void, voidable or unenforceable
  - a person who is intended to assume liability as a guarantor under this Agreement not doing so effectively or being discharged
  - a transfer or sale
  - a novation, assignment, termination or variation of this Agreement

- the insolvency or deregistration of the Operator
- anything else which might have a similar effect at law or in equity to any of those actions or events.

**30 AMENDMENTS OR VARIATIONS**

30.1 The terms and conditions of this Agreement can be varied by agreement between the parties provided any such variation is in writing signed by all parties.

**31 NOTICES**

31.1 Any notification under this Agreement must be in writing and shall either be delivered by hand, sent by fastpost or equivalent (with postage pre-paid) or transmitted by facsimile to the address of the recipient set out below or such other address as the recipient has subsequently advised in writing:

The Wellington Regional Council  
 PO Box 11 646  
 142-146 Wakefield Street  
 Wellington

Fax No. (04) 385-6969  
 Attention: [ ]

The Operator  
 [ ]  
 Auckland

Fax No. (09) [ ]  
 Attention: Managing Director

Toll Rail  
 [ ]

Fax No. [ ]  
 Attention: [ ]

The Guarantor  
 [ ]

Fax No. [ ]  
 Attention: [ ]

31.2 Notices delivered by hand or sent by facsimile will be deemed to have been delivered or sent on the next Business Day if they are delivered or sent on a Saturday, Sunday or public holiday or after 4pm on any Business Day. Notices sent by post will be considered to have been

received on the second Business Day after mailing provided they were sent by fastpost or equivalent with postage pre-paid.

## **32 NON-WAIVER**

32.1 If any party fails to enforce any of the provisions of this Agreement at any time this does not mean that the party has waived its right to do so and any such failure will not affect the validity of this Agreement. If any party exercises any rights or discretions under this Agreement this will not preclude it from exercising the same right or discretion or any other right or discretion at any later date.

## **33 PARTIAL INVALIDITY**

33.1 If any part of this Agreement proves to be invalid this will not stop any other part of this Agreement from being enforceable.

## **34 RELATIONSHIP BETWEEN THE PARTIES**

34.1 Nothing in this Agreement shall create or evidence any partnership, joint venture, agency or trust between the Operator, Toll Rail or Toll Holdings and Greater Wellington and neither the Operator, Toll Rail, Toll Holdings nor Greater Wellington shall make any representation that any such relationship exists between the parties as a result of this Agreement.

## **35 RESOLUTION OF DISPUTES**

35.1 If a dispute arises between the parties concerning the construction or performance of this Agreement, or their rights and obligations then, unless other provisions of this Agreement govern the manner in which that dispute is to be resolved, the parties must enter into negotiations in good faith to try to resolve the dispute. Any party may initiate the negotiations by giving written notice to the other. The party who initiates the resolution procedures must name its representative in the negotiations when giving written notice to the other party. The other party must then promptly name its representative in the negotiations. Each representative must have authority to settle the dispute. Within 3 Business Days of the parties having advised each other of their representatives, the representatives must enter into negotiations to try to resolve the dispute.

35.2 If the dispute is not resolved within the following 5 Business Days, or within a longer period agreed on in writing by the representatives, the parties must refer the dispute to mediation. The mediation must be conducted in terms of the LEADR (Lawyers Engaged in Alternative Dispute Resolution) New Zealand Inc. Standard Mediation Agreement. The mediation must be conducted by a mediator (and at a fee) agreed by the parties. Failing agreement between the parties, the mediator will

be selected and the fee determined by the Chair for the time being of LEADR New Zealand Inc.

- 35.3 If the parties fail to resolve the dispute by the alternative dispute resolution process, the parties must submit the dispute to arbitration in accordance with the Arbitration Act 1996 (excluding clauses 4 and 5 of the Second Schedule). The arbitration shall be conducted by one arbitrator, if the parties can agree upon one or, failing agreement, by two arbitrators, one to be appointed by each party. If the reference is to two arbitrators, those arbitrators must appoint a third arbitrator before they begin to consider the dispute. The parties agree that the determination of the arbitration shall be final and binding.

## **36 CONFIDENTIALITY**

- 36.1 The Operator acknowledges that the funding it receives under this Agreement is public money, the quantum of which and basis of provision will be publicly disclosed. Greater Wellington acknowledges however that information provided to it by the Operator pursuant to this Agreement may be commercially sensitive. Greater Wellington shall, subject to its legal obligations and its reporting obligations to Transfund, keep confidential all information and data relating to this Agreement and the matters contemplated by it that it may acquire from the Operator pursuant to this Agreement.

## **37 ASSIGNMENT**

- 37.1 The Operator may not assign its rights and obligations under this Agreement.
- 37.2 If with the consent of Greater Wellington the rights and obligations of the Operator are assigned to any new party, or where on the expiry of this Agreement for any purpose, a new Contract is granted to a new operator for the Rail Services, the Operator will fully co-operate with such new party to enable the efficient continuation of Rail Services to the public with as least inconvenience as is possible.
- 37.3 In considering whether to assign any significant aspect of the operation or maintenance of the Rail Service, the Operator shall consult with Greater Wellington to demonstrate that new arrangement proposed will not result in any lessening of standard nor any reduction in the ability to react to restore services following an unexpected incident which disrupts services.

## **38 SUBCONTRACTING**

- 38.1 In considering whether to subcontract any significant aspect of the operation or maintenance of the Rail Service, the Operator shall obtain written permission of Greater Wellington and demonstrate that new

arrangement proposed will not result in any lessening of standard nor any reduction in the ability to react to restore services following an unexpected incident which disrupts services.

- 38.2 On no account will any subcontracting arrangement relieve the Operator of any responsibilities set out in this Agreement.

The Operator agrees whenever it proposes to subcontract any aspect of its operations or to acquire any significant asset or service as a component part of the provision of Rail Services, all such procurements must first be examined for their potential for competitive tendering, and that unless good reason can be shown, all possible areas must be competitively tendered in accordance with a procedure to be agreed with Greater Wellington.

### **39 PURCHASING PROCEDURES**

The Operator shall ensure all significant and ongoing purchases of inputs required for the provision of the Rail Services must first be examined for their potential for competitive tendering, and that unless good reason can be shown, all possible areas must be competitively tendered in accordance with a procedure to be agreed with Greater Wellington.

### **40 ENTIRE AGREEMENT**

- 40.1 This Agreement constitutes the entire agreement between the parties in relation to its subject matter and supersedes all earlier agreements, understandings or representations.

## **SCHEDULE 1 BUSINESS PLAN REQUIREMENTS**

The agreed Business Plan shall at a minimum address the matters set out below:

- **Purposes of Document**
- **Executive Summary**
- **Introduction**
- **Duration of Plan**
- **Assumptions**
- **The Market**
  - **Total travel market**
  - **Total travel market by route**
    - Peak
    - Off peak
    - Holidays and special events
  - **Boardings and alightings now**
  - **Origins and destinations now**
  - **Market Share and Patronage by service now**
  - **Market Share and Patronage by route now**
  - **Special events now**
  - **Total market share and patronage now**
  - **Modal travel costs**
    - Rail



- Bus
- Private car
- **The Current Business**
  - **Revenue**
    - By service
    - By route
    - By Business
    - Non fare box revenue by source
  - **Costs**
    - Opex
      - Operational staff
      - Non-operational staff
      - Maintenance by asset class
      - Renewals and refurbishment by asset class
    - Energy and fuel
    - Track access charges
    - 3<sup>rd</sup> party contracts by contract
    - Overheads
  - Capex
    - By asset class
- **Profitability analysis**
  - By service
  - By route

- By business

- **The Future Business**

- **Strategy to grow business**

- **Target markets**

- Target market shares and patronage
      - By Service
      - By Route
      - By Special Events
      - By Business

- **Capacity analysis**

- Car parks
    - Stations
    - Train services and rolling stock
    - Yards and stabling
    - Maintenance facilities
    - Workshops
    - Manpower

- **Fares structure**

- Scheduled services
    - Peak and Off Peak
    - Special Events

- **Revenue**

- By service

- By route
- By Business
- Non fare box revenue by source
- **Resources and Assets Needs Statement**
  - Manpower
  - Rolling stock
  - Stations
  - Car parks
  - Track configuration
  - Other operational infrastructure
  - Overhead power system
  - Signalling and train control
  - Yards and stabling
  - Maintenance facilities
  - Workshops
  - Plant and equipment
  - 3<sup>rd</sup> party contracts
- **Statement of asset condition at commencement**
  - By asset class
- **Costs**
  - Opex
    - Operational staff
    - Non-operational staff

- Maintenance by asset class
- Renewals and refurbishment by asset class
- Energy and fuel
- Track access charges
- 3<sup>rd</sup> party contracts by contract
- Overheads
- Capex proposals
  - By asset class and location
- Profitability Analysis
  - By service
  - By route
  - By business
- **Statement of Request for funding**

Draft

## **SCHEDULE 2: RAIL SERVICE REQUIREMENTS**

The Rail Services to be operated are as follow:

### **Normal Services:**

See attached timetables which include minimum consists.

Paraparaumu

Hutt Valley

Johnsonville

Wairarapa

### **Public Holidays**

A minimum of a Sunday service shall be operated from 6.00am.

### **27 December to 3 January**

For the period 27 December to 3 January week day services may be reduced to 75% of the standard week day timetable provided services are scheduled to arrive in Wellington for passengers commencing work at 0700, 0730, 0800, 0830, and 0900, and equivalent departures are provided in the evening. During this period consists may be reduced provided the seating standards set out in Schedule 2 are complied with.

Where services are altered pursuant to the above paragraph, the Operator shall submit the alterations to Greater Wellington in writing for approval at least 2 months prior to them taking effect.

The Operator shall provide all necessary information to Greater Wellington in sufficient time to enable it to make printed timetables showing the altered services available to the public at least 3 weeks prior to the alteration taking effect.

**Special Events:** The Operator will be expected to make reasonable endeavours to meet the requirements of public travelling to and from special events. On such occasions the Operator shall be cognizant of the need to meet the travel requirements of regular passengers as far as is possible. Fare levels for travel to and/or from the special events shall be struck at a level which will as a minimum, cover the avoidable costs of providing the additional services.

**Timetables and consists current at the Commencement date to be listed below**

### **SCHEDULE 3: MINIMUM SERVICE STANDARDS**

The Operator is required to meet the following Minimum Service Standards.

- At least 98% of Rail Services shall depart from their originating station on time as measured on a calendar month basis.
- At least 95% of Rail Services shall arrive at their terminating station within 3 minutes of the timetabled time.
- Operating staff shall, within five minutes of any delay advise, on-train passengers by use of the public address system the reason for, and estimated duration of the delay.
- Scheduled Rail Services which do not operate and where no suitable alternative transport is provided shall not occur;
- No scheduled Rail Service shall run early more often than twice per quarter.
- All paintwork shall be free from excessive oxidation or deterioration.
- Unattended suburban stations which have a platform veranda on the Commencement Date shall provide as a minimum under cover seating for at least 20 passengers and under cover standing room for the average maximum number of boarding passengers.
- Unattended suburban stations which do not have verandas on the Commencement Date shall provide under cover seating for at least 5 passengers and cover for at least 10 standing passengers.
- All stations shall be maintained in a workmanlike manner including but not exclusively:
  - ⇒ All graffiti to be removed or painted out within 48 hours;
  - ⇒ All shelters, seats, guttering and downpipes to maintained in a weatherproof and working order; and
  - ⇒ All platform surfaces to be maintained free from pot holes.
- All stations will display the station name and directions to the exit(s) of the station and shall be lit during the hours of darkness to minimum of XXX lumens.
- A public address or similar system will be maintained by which waiting passengers at suburban stations can be advised of any delay exceeding 10 minutes.
- Except as permitted by Clause 8.4 scheduled Rail Services which do not operate and where suitable alternative bus transport is provided, shall occur not more often than twice per quarter;

- The Operator shall make available to Greater Wellington display space at each station served by the Rail Services. The space provided shall at a minimum be:
  - Officered Stations:      10m<sup>2</sup>
  - Unattended Stations:      2m<sup>2</sup>
- The Operator shall ensure that:
  - Officered stations shall sell all tickets relevant to the railway line served by the station.
  - Wellington Station shall sell all tickets relevant to the Rail Services.
  - Concession tickets shall be available for purchase within 5 km of every station within the area bounded by Waikanae, Wellington and Upper Hutt.
  - Concession tickets shall be available for purchase within the shopping centres of Featherston, Greytown, Carterton and Masterton.
  - Single tickets relevant to the journey being undertaken shall be available for purchase on every train.
  - All complaints are dealt with within five working days or an interim response is given.
- Cleaning of rolling stock used to provide the Rail Services shall be carried out at least as follows:
  - ⇒ Interior full clean (sweep/dust/clean windows) at least once each weekday;
  - ⇒ Interior minor clean (remove rubbish) at least after each return trip; and
  - ⇒ Exterior wash at least twice per week while in service.
- All interior fittings in the rolling stock shall be maintained in working order.
- An operational public address system shall be maintained in all GM EMUs and shall be fitted and maintained in any EE EMUs refurbished after the Commencement Date or any other EMU's put in service during the currency of this Agreement
- The Operator shall provide sufficient seating on Rail Services so that all passengers can have a seat:
  - ⇒ during Off-Peak Periods;
  - ⇒ on all scheduled trips exceeding 25 minutes

other than while Rail Services are disrupted or at times of specific significant public events.



## **SCHEDULE 4**

### **KEY PERFORMANCE INDICATORS**

To be reported following the end of each calendar month:

- Patronage by line
- Incidents of passenger load standards being exceeded
- Timetable compliance report including timekeeping and service reliability.
- Speed Restrictions which in total exceed 2 minutes on any one line and the duration of the breach
- Vehicles cleaned internally and externally against targets
- Incidents of failure in the passenger information systems and the time taken to remedy any defects
- Summary of passenger complaints by subject
- Instances of train consist requirements not being met
- The total passenger kilometres and the methodology used to calculate
- Peak vehicle numbers
- Total vehicle hours and kilometres
- In service vehicle hours and kilometres
- Total train hours and kilometres
- Empty train hours and kilometres
- Paid “on train” staff hours per vehicle “in service” hour

To be reported half yearly

- Ride comfort index by agreed line segment together with report outlining procedures to remedy any sub-standard sections

**SCHEDULE 5:  
FARES**

**Fare tables current at the Commencement Date to be set out below**

**SCHEDULE 6:  
CAPITAL MAINTENANCE PROGRAMME**

[Here will be included draft Capital Maintenance Programme for a 30 year period, together with firm commitments for the 1<sup>st</sup> 5 year period.]

**SCHEDULE 7:  
STATEMENT OF ECONOMIC GAIN(LOSS) FORMAT**

**Statement of Economic Gain/(Loss)**

	2003	2004	2005	2006	2007
	\$000	\$000	\$000	\$000	\$000
<b>Revenue</b>					
Fares					
Greater Wellington Subsidies					
Total					
<b>Expenses</b>					
Personnel costs					
Other cash costs					
Total					
Other income					
<hr/>					
<b>Net operating profit before tax and depreciation</b>					
Depreciation					
<hr/>					
<b>Net operating profit before tax</b>					
Taxation					
<hr/>					
<b>Net operating profit after tax</b>					
<b>Capital charge/agreed operating margin</b>					
<hr/>					
<b>Economic gain/(Loss) for the period</b>					
<hr/>					

## Statement of Economic Capital

	Opening	2003	2004	2005	2006	2007
	\$000	\$000	\$000	\$000	\$000	\$000
<b>Long Term Assets</b>						
Fixed assets						
Other long term assets						
Total long term assets						
<b>Current Assets</b>						
Accounts receivables						
Other current assets						
Total current assets						
<b>Current Liabilities</b>						
Accounts payable						
Accruals						
Tax payable						
Total current liabilities						
<b>Net Working Capital</b>						
<b>Net Operating Capital</b>						
<b>Debt Capital</b>						
Current debt						
Current portion of term debt						
Long term debt						
Debt equivalents						
Less surplus cash						
Total net debt capital						
<b>Equity Capital</b>						
Shareholders' funds						
Equity equivalents						
Total equity capital						
<b>Net Financing Capital</b>						

### Statement of Cumulative Economic Gain/ (Loss)

	2003	2004	2005	2006	2007
	\$000	\$000	\$000	\$000	\$000
Opening balance					
Economic gain/(loss) for the period					
Allocation to Greater Wellington at end of review period					
Allocation to the Operator at end of review period					
Closing balance of cumulative economic gain/(loss) attributable to shareholders					

## Capital Charge

	2003	2004	2005	2006	2007
	\$000	\$000	\$000	\$000	\$000
<b>Capital charge on total operating capital</b>					
Average net operating capital					
Cost of capital					
<hr/>					
Capital charge on operating capital					
<hr/>					
<b>Comprising:</b>					
<b><i>Capital charge attributable to equity</i></b>					
Average equity capital					
Cost of equity post tax					
<hr/>					
Equity capital charge					
<hr/>					
<b><i>Capital charge attributable to debt</i></b>					
Average debt capital					
Cost of debt post tax					
<hr/>					
Debt capital charge					
<hr/>					
Total of capital charges attributable to equity and debt					
<hr/>					

0

## Cost of Capital

		2003	2004	2005	2006	2007
<b>Cost of equity post tax</b>						
5 year government stock yield at commencement of financial year	a					
Weighted average investor tax rate	b					
Risk margin	c					
Cost of equity post tax	$d = a*(1-b)+c$					
<b>Cost of debt</b>						
	e					
<b>Gearing</b>						
Debt as percentage of total capital	f					
Equity as percentage of total capital	g					
<b>Corporate tax rate</b>	h	33%	33%	33%	33%	33%
<b>Cost of capital</b>	$e*(1-h)*f+d*g$					



## **SCHEDULE 8**

### **PRIMARY ASSETS**

- All rights of access and use of infrastructure owned by Trackco.
- All rights of access to, and use of, any other third party owned assets required for the efficient provision of the Rail Services.
- All Rolling Stock.
- All maintenance vehicles including, but not limited to, Hi Rail vehicles, Ballast Tampers, Ballast Regulator, Track Inspection Cars.
- Ticket stocks and ticket dispensing equipment.
- Staff facilities.
- Locomotive and EMU maintenance facilities.