

## TRACK ACCESS AGREEMENT

AGREEMENT dated

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**BETWEEN** **AUSTRALIAN RAIL TRACK CORPORATION LIMITED** (ABN 75 081 455 754) of Ground Floor, ARTC Building, off Sir Donald Bradman Drive, Passenger Rail Terminal Road, Mile End, South Australia (“**ARTC**”)

**AND**

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(“**Operator**”)

### RECITALS

- A. ARTC is the manager of the Network.
- B. ARTC agrees to grant the Operator access to the Network upon the terms and conditions set out in this Agreement.

### AGREEMENT

#### 1. DEFINITIONS AND INTERPRETATION

##### 1.1 Definitions

In this Agreement unless the context otherwise requires:

“**ACCC**” means the Australian Competition and Consumer Commission;

“**Access Undertaking**” means the access undertaking (if any) together with any amendments thereto from time to time, dealing with the subject matter of this Agreement given or submitted by ARTC to the ACCC under Division 6 of Part IIIA of the *Trade Practices Act 1974 (Commonwealth)*;

“**Accreditation**” means to be an Accredited Operator or an Accredited Owner (as the case may be) as defined under the Rail Safety Acts and “**Accredited**” bears a corresponding meaning;

“**Accredited Operator**” means an operator (including the Operator) who is Accredited or taken to be Accredited under the Rail Safety Acts of each State or Territory in which the Operator runs its Services on the Network (being Accreditation in whatever named capacity may be applicable under the Rail Safety Acts);

“**Accredited Owner**” means an owner (including ARTC) who is Accredited or taken to be Accredited under the Rail Safety Acts of each State or Territory in which the Operator runs its Services on the Network (being Accreditation in whatever named capacity may be applicable under the Rail Safety Acts);

“**ARTC’s Environmental Licence**” means ARTC’s:

- (a) environment protection licence under the Protection of the Environment Operations Act 1997 (NSW) in respect of the Network that is situated in New South Wales; and
  - (b) environment protection authority licence under the Environment Protection Act 1993 (SA) in respect of the Network that is situated in South Australia;
- or such other replacement licences that may be issued from time to time;

“**Associated Facilities**” means all associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the Network), tunnels, bridges, Train Control systems, signalling systems, communication systems and associated plant, machinery and equipment from time to time but only to the extent that such assets are related to or connected with the Network;



- (d) an Environmental Condition;
- (e) a Category A incident or a Category B incident as defined in the Standards;
- (f) an incident which requires notification under the relevant Rail Safety Act to the Administering Authority (as defined in such Act); or
- (g) an incident requiring notification under the Dangerous Goods Code;

“**Indicative Access Charges**” means those ~~indicative~~ access charges for Indicative Services specified in Schedule 3;

Amended to clarify that Schedule 3 can contain Charges other than Indicative

“**Indicative Services**” means ~~a for a~~ Services with the following characteristics:

- (a) maximum axle load of 21 tonnes;
- (b) maximum speed of 110 km/h; and
- (c) length not exceeding:
  - (i) 1800 metres West of Adelaide and Parkes;
  - (ii) 1500 metres East of Adelaide and Parkes, subject to sub-clause (c)(iii) of this definition; or
  - (iii) upon commissioning of the capital expenditure for the Melbourne to Macarthur segment of the Network, 1800 metres on:
    - (A) the Melbourne to Macarthur segment of the Network; and
    - (B) that part of the Crystal Brook to Cootamundra segment of Network between Parkes and Cootamundra;

Corrected typo and clarified axle load is upper limit.

“**Instructions**” means all instructions and directions issued by ARTC from time to time:

- (a) which ensure, facilitate or encourage the proper, efficient, safe and lawful:
  - (i) use of and access to the Network by all Network users; or
  - (ii) management of the Network by ARTC;
- (b) which ARTC honestly believes upon the exercise of reasonable care are consistent with the Network Management Principles; and
- (c) which are given with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of ARTC (as set out in paragraphs (a) and (b) of this definition of “Instructions”) in issuing the instruction or direction,

but does not include instructions and directions:

- (d) which derogate from the Train Paths; or
- (e) which prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or

- (f) which are given for the purpose only of achieving ARTC internal commercial objectives unrelated to the valid objectives of ARTC as set out in paragraphs (a) and (b) of this definition of “Instructions”,

unless the instructions or directions:

- (g) are Train Control Directions properly given; or
- (h) relate to safety; or
- (i) are given to implement or support the Network Management Principles; or
- (j) are necessary to prevent or to minimise the effect of a material breach of this Agreement; or
- (k) are otherwise authorised by this Agreement,

and a reference to “ARTC” in this definition of “Instructions” includes also a reference to ARTC’s agents;

“**Invoice**” means the invoice referred to in **clause 4.5**;

“**Key Performance Indicators**” means the Key Performance Indicators referred to in **clause 2.9** and further described in **Schedule 5**;

“**Network**” means the network of railway lines as delineated or defined in **Schedule 1**;

“**Network Management Principles**” means the principles regulating Train movements on the Network, as set out in **Schedule 4**, ~~except in relation to the Network situated in New South Wales where it means the Train Decision Factors;~~

Incorporated Train Decision Factors into schedule 4, deleted Schedule 6.

“**Operator**” means the Operator described on page 1 of this Agreement and where applicable includes any Train it operates;

“**Passenger Priority**” means reasonable priority and certainty of access for rail passenger services delivered in accordance with clause 2.3;

“**Rail Safety Acts**” means the Acts passed by the Commonwealth and the States, ~~and any successor enactments~~, which relate to rail safety, including without limitation the:

- (a) Rail Safety Act 1998 (WA);
- (b) Rail Safety Act 1996 (SA);
- (c) Rail Safety Act 2006 (VIC); and
- (d) Rail Safety Act 2002 (NSW);

Amended for clarity into the future.

“**Remediation**” means the investigation, clean-up, removal, abatement, disposal, dispersal, reduction, destruction, mitigation, control, neutralisation, containment, encapsulation and other treatment of any contamination and any hazard arising from contamination, and includes without limitation the monitoring and remediation of contamination and hazards;

“**RIC**” means the Rail Infrastructure Corporation ABN 21 298 300 693 of Level 3, 237 Wharf Road Newcastle NSW 2300 as renamed, reconstituted, dissolved, replaced or restructured from time to time;

“**Rolling Stock**” means a locomotive, carriage, wagon or other vehicle for use on a railway;

“**Safeworking Rules**” means all policies and notices issued by ARTC for the purpose of ensuring the safe use of the Network;

“**Scheduled Train Paths**” means the entitlements of the Operator to use the Network between the times and between the locations set out in **Schedule 2** as amended or varied permanently under **clause 9** or under **clause 22**;

“**Service**” means a Train run by the Operator using the Network by which the Operator provides railway freight or passenger services;

“**SRA**” means the State Rail Authority of New South Wales ABN 73 997 983 198 of Level 6/18 Lee Street, Chippendale, NSW as renamed, reconstituted, dissolved, replaced or restructured from time to time;

“**Standards**” means the Australian Standard AS4292.1 - Railway Safety Management (General and Interstate Requirements), and any other principles and standards prepared, approved and published by the Standards Association of Australia in relation to rail safety;

“**Term**” means the term of this Agreement as determined in accordance with **clause 3**;

“**Third Party Works**” means: any works, Remediation or the provision or maintenance of services undertaken or required to be undertaken on, over or under the Network or any Associated Facilities (including design, construction, testing and commissioning) by or on behalf of:

- (a) a Governmental Agency carrying out its statutory functions; or
- (b) an owner of land adjoining the Network wanting to install services across the Network to that adjoining land; or
- (c) a corporation with statutory powers to enter land or acquire an interest in or right over land (other than a Governmental Agency) wanting to install services across the Network to that adjoining land;

~~“**Third Party Works**” means any works, Remediation or the provision or maintenance of services which a Third Party undertakes or requires to be undertaken on, over or under the Network (including design, construction, testing and commissioning) by or on behalf of a Third Party;~~

Incorporated definition of Third Party into Third Party Works.

“**Train**” means one or more units of Rolling Stock coupled together, at least one of which is a locomotive or other self-propelled unit;

“**Train Control**” means the control of Trains by ARTC or its agents on the Network;

“**Train Control Centre**” means the facility or facilities maintained and operated by ARTC or its agents for the purposes of Train Control;

“**Train Control Directions**” means all Instructions issued by ARTC or its agents relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains, but only to the extent such Instructions:

- (a) are honestly believed by ARTC to be consistent with the Network Management Principles, and
- (b) are made with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of ARTC in issuing the Instruction,

which must be complied with by the Operator immediately;

~~**Train Decision Factors** means the document relating to the Network situated in New South Wales detailing the allocation of train priority in real time train control (including Passenger Priority) which is set out in Schedule 6;~~

**Train Decision Factors incorporated into Network Management Principles.**

**“Train Manifest”** means a notice (in a form specified by ARTC) prepared by the Operator in relation to a Service and containing the following details in relation to that Service:

- (a) the number of vehicles in the Train;
- (b) the gross mass of the Train;
- (c) the length of the Train;
- (d) the motive power employed by the Train; and
- (e) for each vehicle in the Train in the order in which they will be placed, leading end first, the following information:
  - (i) vehicle number;
  - (ii) vehicle classification;
  - (iii) vehicle type;
  - (iv) gross weight of vehicle;

**“Train Paths”** means:

- (f) the Scheduled Train Paths;
- (g) the Train paths provided to the Operator pursuant to **clause 2.5**; and
- (h) all other ad hoc entitlements (including Train paths arising by reason of compliance with Instructions) to access to the Network which are provided by ARTC to the Operator on the terms set out in this Agreement and otherwise on such terms as ARTC may stipulate in accordance with this Agreement or as otherwise agreed between the parties;

## **1.2 Interpretation**

In this Agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to one gender includes all genders;
- (c) a reference to a person includes companies and associations;
- (d) a reference to a party includes a person to whom any right or obligation under this Agreement is transferred;
- (e) a reference to the consent of a party means the prior written consent of that party;
- (f) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (g) a reference to a clause or a Schedule is a reference to a clause or Schedule of this Agreement;

- (h) where any party comprises more than one person then all of those persons together as well as each of them individually must comply with that party's obligations under this Agreement;
- (i) notices that are required to be given in writing by the Operator to ARTC, may, if so agreed by ARTC, be provided in electronic form;
- (j) a reference to any Act includes all statutes regulations codes by-laws or ordinances and any notice demand order direction requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations amendments re-enactments or replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law; and
- (k) a reference to \$ and dollars is to Australian currency.

### 1.3 Payment Due on Business Day

If any amount becomes payable under this document on a day which is not a Business Day, that amount is payable on the next Business Day.

## 2. TRACK ACCESS RIGHTS

### 2.1 Grant to Operator of Train Paths

- (a) ARTC grants to the Operator during the Term the use and availability of the Train Paths and the use of the Network for this purpose upon the terms and conditions set out in this Agreement, subject to ARTC's Passenger Priority obligations and clause 2.3 of this Agreement.
- (b) Notwithstanding **clause 2.1(a)**, the availability of a Scheduled Train Path is subject to:
  - (i) presentation by the Operator to Train Control of a Train which is ready in all things for departure within 15 minutes of the scheduled time for departure of that Train according to the relevant Scheduled Train Path;
  - (ii) emergencies or genuine and material safety considerations;
  - (iii) matters outside of the reasonable control of ARTC (except for matters which arise due to ARTC's negligence or **material** breach of its obligations under this Agreement);

Reverted to original wording following first round consultation.

- (iv) material failure of the Operator's Service;
- (v) the Network Management Principles;
- (vi) without limiting any other clause of this Agreement, any lawful order, direction or requirement given to ARTC by a Governmental Agency, including without limitation the Director of Public Transport under section 10 of the Transport Act, 1983 (Vic); and
- (vii) Third Party Works.
- (c) The Operator agrees at all times during the Term not to access or attempt to access the Network in any way other than is authorised by this Agreement.

### 2.2 Use of a Train Path is not Exclusive

Subject to **clause 2.1(a)**, the Operator's rights to the Train Paths do not give the Operator an exclusive right to any Train Path. Notwithstanding the foregoing, no two Trains (whether the Operator's Trains or the Trains of another user of the Network) will be allotted scheduled arrival or departure times such that there are conflicts in arrival or departure times having regard to the Safeworking Rules.

### **2.3 Passenger Priority in New South Wales**

- (a) The Operator acknowledges, and will not do anything to interfere with or breach, ARTC's obligations to at all times, in relation to the Network situated in New South Wales to:
  - (i) maintain Passenger Priority in carrying out rail operations by undertaking each of the following:
    - (A) service planning for timetabling to ensure that passenger services receive priority in train path planning;
    - (B) train programming for daily operations to achieve passenger service priority in daily programming; and
    - (C) Train Control in accordance with the Network Management Principles;
  - (ii) preserve existing or future passenger train paths; and
  - (iii) apply Passenger Priority in undertaking any maintenance to the Network situated in New South Wales.

### **2.4 Disclaimer**

- (a) Notwithstanding any other clause of this Agreement, ARTC is not responsible for any loss, additional cost or other damage suffered by the Operator in the event that a Train Path or any part of it is not available or that an Operator's Train will not be delivered on time to its ultimate or intermediate destination if such unavailability or failure to deliver occurred by reason of any of the matters described in **clause 2.1(b)** and without material breach of this Agreement by ARTC.
- (b) Nothing in this **clause 2.4** derogates from ARTC's obligations under the Key Performance Indicators.

### **2.5 Early and Late Services**

- (a) Despite **clause 2.1(b)**, ARTC will use its best endeavours to accommodate a Service which is running early or late, is presented at the point of entry to the Network late or is presented at the point of entry to the Network more than 15 minutes early by providing a Train path for that Service at ARTC's first available opportunity (subject to the Network Management Principles).
- (b) Both parties will, subject to this Agreement, use their best endeavours to:
  - (i) ensure that such Services which are running or presented late recover the lost time; and
  - (ii) ensure that such Services which are presented more than 15 minutes early depart the Network no later than the scheduled time.
- (c) Nothing in this **clause 2.5** requires ARTC to provide a Train path where to do so would be inconsistent with the Network Management Principles or ARTC's obligations (consistent with the Network Management Principles) to a user of the Network other than the Operator (where such obligations had first arisen before the first entry of the Train on the Network to which this **clause 2.5** relates).

### **2.6 Warranty of Accuracy of Information**



Each party represents and warrants to the other that all material information provided by the first-mentioned party to the other, whether pursuant to this Agreement or otherwise, in relation to use of the Network is, to the ~~best of the~~ first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.

Reverted to original wording following first round consultation.

## 2.7 Manner of Control of the Network by ARTC

ARTC agrees at all times during the Term to control the Network in a manner which facilitates:

- (a) compliance by the Operator with the relevant Scheduled Train Paths applicable to the Services; and
- (b) the use by the Operator of the relevant Scheduled Train Paths applicable to the Services, and ~~to use its reasonable endeavours in so doing~~ to ensure (subject to the matters in **clause 2.1(b)**) that an Operator's Train which enters the Network on schedule or is early will exit the Network no later than the scheduled time.

Reverted to original wording following first round consultation.

## 2.8 Light Engine Movements

The Operator's rights to Scheduled Train Paths and Train paths under **clause 2.5** exclude, without limitation, any rights to access to the Network for the purpose of the Operator's light engine movements other than through negotiated ad hoc entitlements as referred to in subsection (c) of the definition of "Train Paths".

## 2.9 Re~~negotiation~~ of Scheduled Train Paths

- (a) The Operator has the rights set out in this **clause 2.9** to the extent that it has been granted Scheduled Train Paths under this Agreement (and not otherwise).
- (b) The Operator may not less than 120 days before the expiry of the term of the Scheduled Train Paths give notice in writing to ARTC that the Operator wishes to renew this Agreement in relation to the Scheduled Train Paths, specifying also the desired term of such renewal, and ARTC will enter into negotiations with the Operator in relation to the possibility of such renewal.
- (c) If, at the time the Operator has given notice under **clause 2.9(b)**, it:
  - (i) has paid to ARTC all monies due to it under this Agreement; and
  - (ii) is not otherwise in breach of this Agreement,

ARTC may consent to the renewal of the Scheduled Train Paths and enter into a new track access agreement with the Operator on terms and conditions (including Charges) determined by **clauses 2.9(d)**.

- (d) If, at the time **clause 2.9(c)** applies, ARTC has an Access Undertaking in force, the terms and conditions of the new track access agreement (including the Charges) shall be determined ~~by~~ in accordance with the Access Undertaking.

Adopted change recommended in first round consultation.

- ~~(e) The Operator agrees that ARTC may contact the Operator's customers to request when their arrangements for the provision of rail services to the Operator's customers are due to expire.~~

Those expiry dates may be taken into consideration by ARTC in determining what the proposed new access agreement under clause 2.9(e) will be.

Deleted this new clause based on feedback from first round consultation.

- (e) The Operator does not have any automatic or enforceable rights of renewal or extension of any Scheduled Train Paths under this Agreement.

## 2.10 Key Performance Indicators

- (a) The Key Performance Indicators described in **Schedule 5** are relevant to both parties and both parties will monitor from the Commencement Date.
- (b) The parties must will meet not less than monthly regularly for the purpose of discussing actual performance against the Key Performance Indicators.

Amended to correct typo and recognise current practice.

## 3. TERM OF AGREEMENT

This Agreement commences on the Commencement Date and, unless terminated earlier under **clause 14**, will continue until 23:59 hours Australian Central Standard Time on the Expiry Date (“**Term**”).

## 4. CHARGES AND PAYMENT

### 4.1 Flagfall Charges

The Operator must pay all flagfall Charges specified in **Schedule 3** in respect of each Train Path irrespective of whether or not the Operator uses all or any such Train Paths in accordance with **clause 4.5(b)** (as amended, if applicable, in accordance with **clause 4.6**). irrespective of whether or not the Operator uses all or any such Train Paths.

### 4.2 Variable Charges

The Operator must pay to ARTC all variable Charges payable for each Scheduled Train Path calculated by reference to **Schedule 3** in accordance with **clause 4.5(b)** (as amended, if applicable, in accordance with **clause 4.6**).

### ~~4.3 Prime Path Charges~~

~~The Operator must pay all prime path Charges specified in **Schedule 3** in respect of each Train Path or any part of such Train Paths in accordance with **clause 4.5(b)** (as amended, if applicable, in accordance with **clause 4.6**) irrespective of whether or not the Operator uses all or any such Train Paths.~~

Deleted this new clause based on feedback from first round consultation.

### 4.3 Excess Network Occupancy Charges

The Operator must pay all excess network occupancy Charges specified in **Schedule 3** in respect of each Train Path or any part of such Train Paths in accordance with **clause 4.5(b)** (as amended, if applicable, in accordance with **clause 4.6**) irrespective of whether or not the Operator uses all or any such Train Paths.

### 4.4 Invoices and Monthly Statement

- (a) ARTC will issue the Operator with an invoice relating to each period from Sunday to the next Saturday (both inclusive), itemising the variable Charges payable for each Scheduled Train Path and variable and flagfall charges for each ad hoc entitlement calculated by reference to **Schedule 3** (as amended, if applicable, in accordance with **clause 4.65**).
- (b) The Operator will pay to ARTC in full the amount shown in the monthly statement issued by ARTC (such statements specifying the flagfall and variable components of the Charges, together with the ~~prime occupancy Charges under clause 4.3 and~~ excess network occupancy Charges under **clause 4.43**), such payment to be received by ARTC within twenty one (21) days from the date of issue of the statement.

#### 4.5 Variation of Charges - Consumer Price Index

- (a) Subject to **clause 4.65(c)** of this Agreement, ARTC may at any time after the Commencement Date vary the Indicative Access Charges for Indicative Services (“Review Date”) by up to an amount determined in accordance with the following formula:

$$AC_t = AC_{t-1} \times (1 + TV_i)$$

Where

$AC_t$  is the Indicative Access Charges payable by the Operator following the relevant Review Date.

$AC_{t-1}$  is the Indicative Access Charges payable by the Operator immediately preceding the relevant Review Date.

$TV_i$  is the maximum variation to Indicative Access Charges (measured as a percentage) that may be applied from the Commencement Date and thereafter from each 1 July during the Term (“Determination Date”) and is to be determined in accordance with the following formula:

$TV_i$  = is the greater of:

- (i)  $\left( \frac{CPI\ Index_i}{CPI\ Index_0} / CV_{i-1} - 1 \right) \times 100$ ; or
- (ii) Zero;

Where,

**CPI Index<sub>i</sub>** is the All Groups Consumer Price Index, Weighted Average of Eight Capital Cities, Index Number for the March quarter preceding the relevant Determination Date.

**CPI Index<sub>0</sub>** is the All Groups Consumer Price Index, Weighted Average of Eight Capital Cities, Index Number for the March 2006, being 151.9.

$CV_{i-1}$  is the cumulative effect of the variations actually applied by ARTC to the indicative access charges specified in the Access Undertaking from the 1 July 2007 to the relevant Determination Date (“i”). That cumulative effect is to be determined in accordance with the following formula:

$$CV_{i-1} = (1 + V_1) \times (1 + V_2) \times \dots \times (1 + V_{i-1})$$

where

$V_1, V_2, \dots, V_{i-1}$  are the actual % variations which have been applied to the indicative access charges specified in the Access Undertaking from the 1 July 2007 to the relevant Determination Date.

- (b) Notwithstanding any other provision of this Agreement, except for **clause 4.65(c)** of this Agreement, ARTC may vary some or all of the Indicative Access Charges more than once in between Determination Dates during the Term, provided that the total of the variations do not exceed  $TV_i$  from the first of those two (2) relevant Determination Dates.
- (c) ARTC will give the Operator at least sixty (60) days notice of any proposed increase of the Charges under **clause 4.65(a)** and such notice may be given at any time. The Operator may, within the period of sixty (60) days from the date of the notice, make written submissions to ARTC on the proposed increase in Charges. Such written submissions will be considered by ARTC. The increase in Charges proposed by ARTC shall become effective and payable on the earlier of:
  - (i) if no subsequent notification is given by ARTC to the Operator, the date specified in the notice of the proposed increase of the Charges is given under this clause; or
  - (ii) if a subsequent notice is issued by ARTC to the Operator, such date as specified in that notice, in which case, the Charges shall be increased by the amount specified in such notice.
- (d) Subject to **clause 4.65(e)**, ARTC will immediately pass on to the Operator any net effect of any imposition of new taxes or charges, increases or decreases in taxes or charges (other than income tax) which is a tax, royalty, rate, duty, levy or impost of general application imposed on ARTC by any government or regulatory authority and which is directly attributable to the provision by ARTC to the Operator of access to the Network.
- (e) ARTC will not pass on any such tax or charge which becomes payable as a result of ARTC failing to comply with any applicable law or any applicable provision of this Agreement.
- (f) The Operator acknowledges that the Charges payable by them have been calculated without regard to any GST (as defined in **clause 4.1211**) that might become payable by ARTC in respect of the supply of or access to the Network in accordance with this Agreement. If at any time GST is payable by ARTC on the supply of access to the Network in accordance with this Agreement, the Charges will be varied in accordance with **clause 4.1211**.
- (g) The Operator agrees and acknowledges that in the event any charges or premiums are payable to the Transport Accident Commission under section 115 of the Transport Accident Act 1986 (Vic) in relation to the operation of the Operator's Train on Network situated in Victoria, then:
  - (i) if such charges or premiums in respect of the Operator have been paid by ARTC on behalf of the Operator, the Operator shall reimburse ARTC the full amount so paid to the Transport Accident Commission;
  - (ii) if such charges or premiums in respect of the Operator have not been paid by ARTC but are to be paid by the Operator under an agreement under the said section 115, the Operator shall pay such charges or premiums directly to the Transport Accident Commission in accordance with the relevant section 115 Agreement.

#### **4.6 Transport Act 1983 (Vic)**

If:

- (i) the Operator is or becomes a train operator for the purposes of section 10 of the Transport Act 1983 (VIC); and
- (ii) the Director of Public Transport gives a lawful direction to ARTC under section 10 of the Act requiring or approving a timetable change; and
- (iii) the effect of the direction by the Director of Public Transport is to interfere with any existing train paths granted by ARTC to other rail operators; and

- (iv) in order to minimise or prevent any interference to such existing train paths, ARTC, acting reasonably, chooses to effect improvements or extensions to the Network or Associated Facilities,

the reasonable costs incurred by ARTC in effecting such improvements or extensions shall be payable by the Operator.

#### 4.7 ~~Track~~ Extensions and Additional Capacity

- (a) In the event that ARTC, at its cost, ~~constructs further railways lines or track~~ adds infrastructure not currently defined as forming part of the Network (“~~Track~~ Extensions”) and the parties agree to the Operator being granted access to the ~~Track~~ Extensions as part of the extended Network, ARTC may, ~~subject to clause 4.7(b)~~, charge the Operator for access to the ~~Track~~ Extensions as a term of it agreeing to such variation. ARTC may charge the Operator such amount it determines as being reasonable after taking into account:
  - (i) the costs incurred by it in constructing the ~~Track~~ Extensions and the recovery of such costs over the time such ~~Track~~ Extensions can be utilised by all operators;
  - (ii) the location of the ~~Track~~ Extensions;
  - (iii) the number of operators that ARTC estimates will use the ~~Track~~ Extensions; and
  - (iv) any other legitimate commercial factors which ARTC might reasonably consider.

- (b) In the event that ARTC adds to the capability of the Network to carry additional task by an enhancement or improvement of the infrastructure associated with the Network (“Additional Capacity”) and the Operator’s existing Scheduled Train Path must be varied under clause 9.2 to include the extended Network, the Operator will not be obliged under clause 4.7(a) to pay any additional fee or charge for access to such extended Network. Nothing in this clause 4.7(b) prevents ARTC from negotiating funding arrangements with an operator or operators for the provision of Additional Capacity.

The provisions of **clause 17** dealing with resolution of disputes do not apply to ARTC’s determination under this clause.

- ~~(b) If, as a result of the Track Extensions an Operator’s existing Scheduled Train Path must be varied under clause 9.2 to include the extended Network, ARTC will not be able to charge the Operator under clause 4.7(a) for access to such extended Network.~~

Amended to reflect Access Undertaking definitions.

#### 4.8 Interest

If the Operator defaults in the due payment of any amount due to ARTC under this Agreement (including all amounts in an Invoice), the Operator must pay interest on that amount, or the outstanding balance, until it is paid in full. The interest rate will be 2 percentage points above the:

- (a) bench mark lending rate charged by the National Australia Bank or its successors (“NAB”), as published in the Australian Financial Review newspaper, at the time of such default; or
- (b) if the lending rate specified in clause 4.9(a) does not exist at the time of such default, then the base business overdraft lending rate at that time on overdrafts of \$100,000.00 or more as determined in writing by or on behalf of the senior manager of the South Australian head office of the NAB, currently known as the General Manager Business and Premium, at his discretion.

That interest will accrue and be recoverable from day to day.

#### 4.9 Obligation to Grant Security

- (a) Subject to **clause 4.109(b)**, the Operator must deliver to ARTC and keep current at all times during the Term, security for the Operator’s obligations under this Agreement in the form of an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond (“**Security**”) issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by ARTC in the amount of the average of 4 weeks Charges and containing such other terms and conditions acceptable to ARTC.
- (b) The Security referred to in **clause 4.109(a)** must be provided by the Operator within seven (7) days of the Operator receiving a notice from ARTC requesting the same. ARTC may only serve such a notice on the Operator under this **clause 4.109(b)** if the Operator has defaulted in the payment of any monies owed by it to ARTC under this Agreement and has not remedied that default before the expiry of seven (7) days.
- (c) The request for the Security by ARTC is in addition to and without derogation from any other rights ARTC may exercise against the Operator by reason of the breach of the Agreement. Subject to **clause 4.109(d)**, the continuance of the Security (or any replacement thereof under **clause 4.109(b)**) is a condition of the performance by ARTC of its obligations under this Agreement. The decision of ARTC to issue a notice under **clause 4.109(b)** is not subject to **clause 17**.
- (d) If, after Security has been provided in accordance with this clause, the Operator has not been in default in the payment of monies owed by it to ARTC under this Agreement for a continuous period of three (3) months, ARTC will, on request of the Operator, notify it that the Security is no longer required and forthwith release the Security to the Operator. This **clause 4.109(d)** does not preclude ARTC from issuing a further notice under **clause 4.109(b)** if the circumstances described in that clause apply.
- (e) The amount of the Security will be reviewed every 12 months from the Commencement Date. The results of the review are not subject to **clause 17**.
- (f) The term of the Security must be for the same or a greater period than the Term under **clause 3**. The term of the Security must be extended to at least match any extension of the Term.
- (g) Upon expiry of the Agreement, ARTC shall release the Security to the Operator provided that at such time the Operator is not in default in the payment of any monies owed by it to ARTC under this Agreement.

#### **4.10 Exercise of Security**

- (a) The Security shall be held by ARTC as security for the performance of the obligations of the Operator under this Agreement and may be called upon by ARTC in any circumstances in which ARTC suffers any loss as a result of default by the Operator under this Agreement.
- (b) If ARTC exercises or draws on the Security, the Operator must promptly provide a replacement bank guarantee or letter of credit for the amount drawn or exercised by ARTC against the Security and otherwise on the same terms as the Security.

#### **4.11 Goods and Services Tax**

##### **(a) Definitions**

In this clause:

“**ANTS GST Act**” means the A New Tax System (Goods and Services Tax) Act 1999;

“**Consideration**” has the same meaning as in the GST Legislation but does not include the GST amount payable;

“**GST Legislation**” means the ANTS GST Act and associated legislation and regulations;

“**Input Tax Credit**” has the meaning given by Section 9-5 of the ANTS GST Act;

“**Tax Invoice**” means an invoice as prescribed in the GST Legislation;

“**Taxable Supply**” is a Taxable Supply as defined in section 9-5 of the ANTS GST Act.

(b) **Adjustment**

ARTC and the Operator acknowledge and agree and/or warrant (as the case may be) that if GST has application to any Taxable Supply made under this Agreement by either ARTC or the Operator (“**supplier**”) to either ARTC or the Operator (“**recipient**”) as the case may be that the supplier may, in addition to the Consideration but subject to providing a Tax Invoice to the recipient, recover from the recipient (and the recipient shall pay or reimburse the supplier) an additional amount on account of GST, such additional amount to be calculated in accordance with GST Legislation and shall be paid by the recipient on the same terms and conditions as stated in this Agreement.

(c) **Reimbursement**

If either party is entitled under this Agreement to be reimbursed or indemnified by the other party for a cost or expense incurred in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the cost or expense for which an Input Tax Credit may be claimed by the party entitled to be reimbursed or indemnified.

**4.12 Costs**

The Operator agrees:-

(a) ~~to pay at least one half of ARTC’s as between the parties, to pay, if payable, any legal costs of and incidental to the preparation, negotiation and engrossment of this Agreement, together with any extension or renewal of this Agreement; and~~

~~as between the parties, to pay, if payable, any stamp duty~~ execution (including without limitation any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on this Agreement and any document contemplated or allowed by this Agreement.

Revised following first round consultation.

**5. CONTROL AND MANAGEMENT OF ACCESS TO THE NETWORK**

**5.1 ARTC to Control**

As between the parties, control of the Network and management of access to the Network, remains at all times with ARTC.

**5.2 Warranty of Entitlement to Grant Access**

ARTC warrants that it is entitled to grant to the Operator all of the Operator’s rights of access to the Network described in this Agreement (but in the case of that part of the Network owned or managed by another person, subject to the terms by which that other person permits the Operator access to such part of the Network or by which that other person permits ARTC to allow the Operator to have access to such part of the Network).

**5.3 Network Access Provider’s Obligations**

ARTC agrees at all times during the Term:

- (a) to undertake the function of Train Control over the Network;
- (b) to comply with the Network Management Principles;



- (c) to safely and efficiently operate the Network so that any permitted use of the Network by the Operator is facilitated promptly and effectively and in accordance with this Agreement;
- (d) to have Associated Facilities in place to enable ARTC to grant to the Operator the Scheduled Train Paths on the terms of this Agreement;

Reverted to original wording following first round consultation.

- (e) to receive, record and collate information from the Operator and other users of the Network for the purposes of generating the Invoices referred to in **clause 4.5** and more effectively exercising the functions referred to in **clauses 5.3(a)** and **(b)**;
- (f) to maintain and operate the Train Control Centre and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system;
- (g) to use its best endeavours to provide the Operator with details, as soon as reasonably practicable of all operating incidents (including an Incident) which has affected or could potentially affect the ability of any Train to retain its Train Path, or else affect its security or safety or the security and safety of the freight or passengers; and
- (h) to comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to ARTC's management, control and ownership of the Network.

#### 5.4 Rolling Stock

The Operator agrees as at the Commencement Date and at all material times during the Term to maintain each Train operated by the Operator on the Network in a ~~good and safe operational~~ condition which is fit for use on the Network having regard to the terms of this Agreement.

Reverted to original wording following first round consultation.

#### 5.5 Operator's Obligations

The Operator agrees at all times during the Term:

- (a) to use its best endeavours to ensure that its use of the Network complies with the Train Paths applicable to each Service;
- (b) to comply with the Code of Practice;
- (c) to conduct itself in accordance with Instructions issued;
- (d) that if it becomes aware that material non-compliance by a Service with the applicable Scheduled Train Path (or such other Train path which may be agreed) has occurred or is a reasonable possibility, to notify the Train Control Centre immediately;
- (e) to ensure that its use of the Network is carried out in such a way as to minimise obstruction of the Network and so that use of the Network by any other user authorised by ARTC is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an Instruction validly given);
- (f) to comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to operation of the Services or its use of the Network;
- (g) not to materially change, alter, repair, deface or otherwise affect any part of the Network, Associated Facilities, ARTC's property or property of third parties provided that the obligation



of the Operator in this clause extends only to such matters to the extent that they were caused or contributed to by the Operator and train operations it conducts and does not include normal wear and tear where the Operator is accessing the Network in accordance with the terms of this Agreement.

Adopted change recommended in first round consultation.

- (h) not to materially damage the Network, Associated Facilities, ARTC's property or property of third parties. For the purposes of this clause "damage" does not include normal wear and tear where the Operator is accessing the Network ~~or Associated Facilities~~ in accordance with the terms of this Agreement;

Clarified use of term 'Associated Facilities' – refer various amendments.

- (i) to provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre and to use such equipment to communicate with the Train Control Centre.
- (j) where ARTC proposes to change communications equipment in the Train Control Centre:
  - (i) the Operator agrees to share information and cooperate with ARTC and any Communications or TMS Provider to the extent that may be required to ensure that the parties' objectives in **clauses 5.3** and **5.5** are achieved;
  - (ii) if ~~where~~ such proposal will result in the Operator having to replace or upgrade its communications equipment, ARTC will consult with the Operator and the Operator will, after such consultation and after reasonable notice from ARTC to the Operator, reasonably replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre.
- (k) subject to **clause 18**, to provide to ARTC such information related to the operation of the Services (excluding commercial information) as ARTC reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator and other operators.
- (l) to provide to ARTC a Train Manifest in a format acceptable to ARTC for each Service not less than 15 minutes prior to that Service commencing use of the Network and to provide notice in a form specified by ARTC of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network.
- (m) to inform ARTC as soon as reasonably practicable of any cancellation or intended cancellation by the Operator of any Service.
- (n) to ensure that the any item of freight or material, including but not limited to minerals, bulk goods or commodity (in whatever form), being hauled on or in Train operated by the Operator does not fall, leak, spill, escape or become deposited on or adjacent to the Network.

## 5.6 Conduct of ARTC

- (a) In formulating its Indicative Access Charges, ARTC will not differentiate between operators in circumstances where:
  - (i) the characteristics of the Indicative Services are alike; and
  - (ii) the operators are operating within the same end market.

In determining whether the characteristics of two Indicative Services are alike ARTC may have regard to matters including but without limitation location, duration and quality of the Train Path, nature of Train consist, characteristics of the Indicative Service, longevity of access, arrival and departure times of the day and week.

- (b) Without limiting **clauses 5.6(a)**, if:
- (i) ARTC sells a train path for an Indicative Service to a third party (“**Third Party Train Path**”); and
  - (ii) the Operator considers, acting reasonably, that the Third Party Train Path is a like train path when compared to a Train Path for an Indicative Service purchased by it under this Agreement (“**Like Train Path**”); and
  - (iii) the Operator has evidence to suggest that the Third Party Train Path has been sold by ARTC for a price less than that charged by ARTC to the Operator for the Like Train Path,

then the Operator may make a written submission to ARTC claiming that the Indicative Access Charges payable by it under this Agreement for the Like Train Path should be reduced to that charged by ARTC for the Third Party Train Path, such submission detailing at least the following:

- (iv) the Indicative Access Charges payable by it for the Like Train Path;
  - (v) why the Like Train Path and the Third Party Train Path are to be considered like Train Paths in the context of **clause 5.6(b)**;
  - (vi) the Indicative Access Charges that the Operator asserts ARTC is charging the third party for the Third Party Train Path.
- (c) ARTC will, within 30 days of receipt of a written submission under **clause 5.6(c)**, notify the Operator whether:
- (i) it agrees with the submission and that the Operator’s Indicative Access Charges have been reduced accordingly; or
  - (ii) it disagrees with the submission and the reasons why.
- (d) In the event that the Operator does not agree with ARTC’s decision under **clause 5.6(c)(ii)** and the reasons for it, the Operator may give ARTC a notice under **clause 17** whereupon the dispute will be resolved in accordance with **clause 17**.

## 5.7 Removal of Rolling Stock from Network

- (a) If ARTC **reasonably** considers that a Train operated by the Operator is obstructing the Network, the Operator will upon being notified in writing or by electronic mail of that obstruction arrange for the Train operated by the Operator to be moved by or at the time specified in such notice off or to another part or parts of the Network nominated by ARTC.

Adopted change recommended in first round consultation.

- (b) Subject to **clause 5.7(c)**, if the Operator does not so remove or move the Train operated by the Operator under **clause 5.7(a)**, the Operator consents to ARTC arranging for the Train operated by the Operator to be removed from or moved to another part or parts of the Network, at the cost and expense of the Operator in all things.
- (c) Notwithstanding any other provision of this Agreement, the Operator will release and indemnify ARTC or its servant, agent, employee, contractor or volunteer for all and any injury, loss and damage arising from or related to the removal or movement arranged by ARTC under **clause 5.7(b)**, including without limitation where such injury, loss and damage is caused by the negligence of ARTC or its servant, agent, employee, contractor or volunteer.

## 6. REPAIRS AND MAINTENANCE OF THE NETWORK

### 6.1 ARTC to Repair and Maintain the Network

Subject to **clauses 6.2, 9.3 and 9.4** ARTC agrees at all times during the Term to maintain the Network (but only in so far as the Network is relevant to the Operator's Scheduled Train Paths) in a condition which is fit for ~~the~~ use by the Operator to provide rail transport services.

### 6.2 Operating Restrictions

When required by the condition of the Network or any part of the Network, ARTC may (to the extent of such requirement only) give notice of speed and weight restrictions and the Operator must comply with such a notice.

## 7. ACCREDITATION

### 7.1 Accreditation Warranty

- (a) Each party warrants that during the Term each such party has and will maintain Accreditation to the extent required by law, including, in the case of the Operator, all accreditation required by law in relation to Rolling Stock used by the Operator on the Network.
- (b) The parties will notify each other of any notice received from any government authority affecting Accreditation.
- (c) The Operator must not run Rolling Stock on the Network in breach of **clause 7.1(a)**.
- (d) Where a third party audit of equipment or maintenance practices is requested by the Accrediting Authority with respect to the maintenance of the Operator's Accreditation, the Operator will provide a copy of that audit to ARTC at the same time such audit report is given to the Accrediting Authority.
- (e) If a party loses part or all of its Accreditation or has part or all of its Accreditation suspended, that party must use its best endeavours to regain or have restored its full Accreditation as soon as is reasonably practicable.

### 7.2 Evidence of Accreditation

Each party must on or before the Commencement Date (and in the case of Accreditation which is obtained for the first time after the Commencement Date, then as soon as practicable such Accreditation is obtained) provide to the other party evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation must be provided by a party to the other party on the written request of the other party.

### 7.3 Termination of this Agreement by Reason of Suspension or Cancellation of Accreditation

If either party's Accreditation is:

- (a) suspended for a continuous period of longer than 6 months; or
- (b) cancelled for a continuous period of longer than 1 month,

the other party has the rights of termination set out in **clause 14.3**. This clause does not derogate from the parties' rights under **clause 14** in respect of termination of this Agreement.

## 8. COMPLIANCE

## 8.1 Issue of Instructions by ARTC

- (a) ARTC may issue Instructions to the Operator.
- (b) Instructions may include, but are not limited to, instructions or directions:
  - (i) to cease use of a Scheduled Train Path by the Service and for the Service to proceed over such path on the Network as ARTC nominates;
  - (ii) to continue use by the Service of the Network subject to such variation of the applicable Scheduled Train Path or the Service or the composition or quality of Trains as ARTC nominates;
  - (iii) to cause the Service to proceed to a point on the Network and stand there until ARTC issues a further instruction or direction in relation to the Service; or
  - (iv) without limiting the generality of **clauses 8.1(b)(i) to (iii)**, if the Service operates outside of its Scheduled Train Path, to delay or redirect the Service to allow access to the Network by another operator of a Train (including, if relevant, ARTC) whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed.
- (c) ARTC must:
  - (i) in giving any Instruction have due regard to minimising the disruption to the Operator's Services; and
  - (ii) other than in an emergency, consult with the Operator in giving an Instruction concerning the use of an Operator's locomotive and its crew for the purpose of assisting in the clearing of a Network blockage.
- (d) If an Instruction which varies the Operator's Train Paths is intended by ARTC to be permanent, such permanent effect of the Instruction will not take effect until the procedure in **clause 9.2** for permanent variation of a Train Path has been satisfied. Until the **clause 9.2** procedure has been satisfied such Instruction will nevertheless have a temporary effect.
- (e) As soon as is reasonably practicable and in any event before an Instruction becomes effective, ARTC must give to the Operator a written copy of the Instruction if such Instruction is ordinarily advised in writing by ARTC to operators.

## 8.2 Compliance by the Operator with Instructions and Train Control Directions

- (a) Subject to **clause 8.2(c)**, the Operator will comply with all Instructions and will promptly advise all relevant Train crew of any changes to or the making or giving of Instructions.
- (b) If an Instruction is a Train Control Direction, it must be complied with immediately.
- (c) Unless the Train Control Centre gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance.
- (d) The Operator must comply with all Instructions in such a way as to reasonably minimise disruption to any other person's use of the Network.
- (e) Subject to **clause 15**, ARTC is not responsible for any delay suffered or cost incurred by the Operator in complying with a proper Instruction of ARTC, and the Operator releases ARTC from any Claim arising from such compliance.
- (f) Subject to **clause 15**, the Operator is not responsible for any delay suffered or cost incurred by ARTC in the Operator complying with a proper Instruction of ARTC, and ARTC releases the Operator from any such Claim arising from such compliance.

### 8.3 Compliance

The Operator must at its own cost during the Term:

- (a) comply with all laws which affect or relate to the use of Train Paths ~~regardless of whether the law requires compliance by either or both of ARTC and the Operator or any other person, but not to the extent that compliance by the Operator is prohibited by law;~~
- (b) comply with all notices, orders and directions lawfully issued or given by or agreements with a Governmental Agency which affect or relate to the use of Train Paths ~~regardless of whether the notice, order or direction is addressed to or requires compliance by either or both of ARTC, and the Operator or any other person, but not to the extent that compliance by the Operator is prohibited by law;~~
- (c) obtain, maintain and comply with all approvals, licences or permits which from time to time may be necessary or appropriate for the use by the Operator of Train Paths ~~regardless of whether the approval, licence or permit requires compliance by either or both of ARTC and the Operator or any other person, but not to the extent that compliance by the Operator is prohibited by law; and, comply with and/or not cause ARTC not to comply with all approvals, licences or permits obtained by ARTC with respect to the Network, provided ARTC has given the Operator notice of such approval, licence or permit.~~

Adopted change recommended in first round consultation.

## 9. VARIATION OR CANCELLATION OF TRAIN PATHS

### 9.1 Examples of Temporary Variations of Train Paths by the giving of Instructions by ARTC

- (a) For the avoidance of doubt, and without limiting the generality of **clause 8.1(a)**, the Operator's Train Paths may be temporarily varied by the giving of Instructions:
  - (i) for the purpose of preventing any actual or potential:
    - (A) breach of the Safeworking Rules or of **clause 12** by the Operator or of similar safety requirements by other operators on the Network;
    - (B) material damage to the Network, ARTC's property or any Associated Facilities;
    - (C) injury to any person or damage to any property;
    - (D) delay to the progress of Trains on the Network (but only insofar as any trains operated by a third party have priority over the Operator's trains having regard to the Network Management Principles); ~~or~~
    - (E) terrorism and security matters; or
  - (ii) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its material obligations under this Agreement.
- (b) The Instructions referred to in **clause 9.1(a)** may comprise, but need not be confined to, Instructions in one or more of the following terms:
  - (i) to cease use of a Train Path by the Service and for the Service to proceed over such path on the Network as ARTC nominates;
  - (ii) to continue use by the Service of the Network subject to such variation of the applicable Train Path or the Service or the composition or quality of Trains as ARTC nominates;

- (iii) to cause the Service to proceed to a point on the Network and stand there until ARTC issues a further Instruction in relation to the Service; or
- (iv) if the Service operates outside of its Train Paths, to delay or redirect the Service to allow access to the Network by another operator of a Train whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed.

## 9.2 Permanent Variations to Scheduled Train Paths

- (a) This **clause 9.2** sets out the procedure to be followed by the parties if it is intended that a Scheduled Train Path is to be permanently varied.
- (b) A Scheduled Train Path may be varied for the remainder of the Term (or for such other duration as may be agreed) if:
  - (i) one party to this Agreement ("**Requesting Party**") sends a notice to the other party ("**Notified Party**") stating:
    - (A) that the Requesting Party wishes to vary the use by the Operator of a Scheduled Train Path;
    - (B) the length of time such variation will be in force; and
    - (C) the reason or reasons for the proposal by the Requesting Party; and
  - (ii) subject to the qualifications set out in **clause 9.2(b)(ii)**, **9.3**, **9.4**, **9.5**, **9.6** and **19.2**, the Notified Party consents to the Requesting Party's proposed variation, such consent to be withheld only upon reasonable grounds
  - (iii) For the purpose of **clause 9.2(b)(ii)** the Operator cannot withhold consent in the case of variations required:
    - (A) by reason of ARTC's obligations relating to safety of the Network;
    - (B) for the purpose of Passenger Priority; and
    - (C) for the purpose of maximising the use and the reliability of the Network.
- (c) Subject to **clauses 9.3**, **9.4**, **9.5**, **9.6** and **19.2**, the Requesting Party must give not less than 30 days notice of a variation request under **clause 9.2(b)(i)**.
- (d) The Notified Party's response as to whether it consents or not under **clause 9.2(b)(ii)** to the Requesting Party's notice given under **clause 9.2(b)(i)** must be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party's response is to refuse consent, the Notified Party must within such time also provide full reasons in writing to the Requesting Party.

## 9.3 Repairs, Maintenance and Upgrading of the Network

- (a) Notwithstanding any other provisions to the contrary in this **clause 9**, but subject only to **clauses 9.3(b)**, **9.3(c)** and **9.4** ARTC may, without notice to the Operator, perform repairs, maintenance or upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network, the carrying out any new work on the Network, or taking possession of the Network, are reasonably likely to materially affect the Scheduled Train Paths, ARTC must, prior to commencement of the works:
  - (i) take all reasonable steps to minimise any disruption to the Scheduled Train Paths;

- (ii) notify the Operator of the works as soon as reasonably practicable; and
- (iii) use its best endeavours to provide an alternative Train Path,

but need not obtain the Operator's consent to such repairs, maintenance or upgrading, or possession of the Network.

- (c) Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. ARTC will consult with the Operator a reasonable time before taking possession of the Network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to Services.

#### **9.4 Third Party Works**

- (a) The Operator acknowledges that:
  - (i) Third Parties (some of whom have statutory rights) may wish to carry out or require to be carried out Third Party Works on the Network during the Term; and
  - (ii) Notwithstanding any other provision of this Agreement, ARTC reserves the right to permit Third Parties to carry out Third Party Works.
- (b) Notwithstanding any other provision of this Agreement, the Operator agrees that ARTC has no liability to the Operator nor will the Operator make a claim against ARTC for any costs, expenses, losses or damages incurred by the Operator in relation to or as a consequence of Third Party Works.

#### **9.5 Removal of Train Path for Under-utilisation**

- (a) ARTC has the right, by notice in writing to the Operator, to delete any Scheduled Train Path from **Schedule 2** (upon which deletion **Schedule 2** is deemed to be amended accordingly) if the Service using that Scheduled Train Path is not operated 7 or more times (whether consecutively or not) out of any 12 such Services which are consecutively scheduled. Such notice may only be given within 14 days after the seventh occasion of not operating.
- (b) Other than if the parties agree to substitute an alternative Train Path a Service has not been operated within the meaning of **clause 9.5(a)** if the Operator has failed:
  - (i) to present a Train at the scheduled entry point onto the Network; or
  - (ii) to operate the relevant Train so that it completes its full journey,in conformance with the locations, days and times set out in the Scheduled Train Paths applicable to such Service.

#### **9.6 Review of Scheduled Train Paths**

- (a) Scheduled Train Paths will be subject to a review in accordance with this **clause 9.6**.
- (b) ARTC may at its discretion by written notice given to the Operator cause a Scheduled Train Path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the Scheduled Train Path with the performance during the preceding continuous 3 month period of the actual Trains using or purporting to use that reviewable entitlement ("**3-month history**").
- (c) If on such comparison of the Scheduled Train Path with the 3-month history the departure or arrival times for a Train using or purporting to use the Scheduled Train Path differ in material respects, the parties will negotiate in good faith to amend the Scheduled Train Path so that the Scheduled Train Path reflects, as closely as is reasonably practicable, the 3-month history.

- (d) Nothing in this **clause 9.6** compels ARTC to offer a Train path to the Operator under **clause 9.6(c)** if:
  - (i) such Train path is unavailable by reason of contractual obligations owed by ARTC to any person (including the Operator); ~~or~~
  - (ii) to do so would materially adversely impact on ARTC's ability or opportunity to efficiently and safely manage the Network; or
  - (iii) the Operator does not agree to pay all fees and Charges applicable to such offered Train path.
- (e) Nothing in this **clause 9.6** compels the Operator to accept a Train path offered by ARTC under **clause 9.6(c)** if contractual obligations owed by the Operator to any person (including ARTC ) would prevent it from doing so.

### 9.7 Cost of Variation

Subject to **clause 15**, any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under **clauses 9, 19.2** and **22** will be borne between the parties to this Agreement in such proportion as the parties agree (based on negotiations carried on in good faith), or in the absence of such agreement, and subject to a party's obligation under **clause 15** to indemnify the other in the circumstances set out in that clause, by the party which incurs such losses, additional costs or other damages.

### 9.8 Effect of Variations to Train Paths on Schedule 2

- (a) A temporary variation pursuant to **clauses 8.1, 9.1, 9.2, 9.3** or **9.4** of the Scheduled Train Paths has the effect of suspending all contrary or inconsistent Scheduled Train Paths in **Schedule 2** for the duration of such temporary variation.
- (b) Only permanent variations pursuant to **clauses 8.1, 9.2, 9.4, 9.5, 9.6, 19.2** or **22** of the Operator's Scheduled Train Paths will be, and are hereby, deemed to be an amendment to **Schedule 2**.

### 9.9 Cancellation of Scheduled Train Paths

- (a) The Operator may, upon 24 hours prior written notice to ARTC, cancel in any 12 month period within the first 12 month period commencing on the Commencement Date, such number of Services per Scheduled Train Path as specified in **Schedule 2** with no liability to ARTC to pay for the Charges in respect of the Services so cancelled. For the purpose of this clause, each one way journey is deemed to be a separate service.
- (b) The Operator may cancel certain Scheduled Train Paths at will by serving a written notice on ARTC to that effect in accordance with this clause.
- (c) For a Scheduled Train Path of up to 5 years duration, the period of notice required is one (1) year or the balance of the term of the Scheduled Train Path, whichever is the lesser.
- (d) For a Scheduled Train Path of 10 years duration, the period of notice required is two (2) years or the balance of the term of the Scheduled Train Path, whichever is the lesser.
- (e) For Scheduled Train Paths of between 5 and 10 years duration, the period of notice shall be, subject to **clause 9.9(g)**, a pro-rata period of notice determined by the following formula:

$$N = 365 + 365 \frac{(A-5)}{5}$$

where:

N = is the period of notice in weeks



A = is the term of the Scheduled Train Path in years

or the balance of the term of the Scheduled Train Path, whichever is the lesser.

- (f) During the notice period under this clause, the Operator will still be obliged to pay the flagfall and network occupancy charge components of the Charges whether or not the Operator operates a Service. Nothing in this clause prevents the Operator from operating a Service during the notice period and paying ARTC the full Charges payable under this Agreement in respect of that Service.

Amended for clarification following first round consultation comments.

- (g) Where the Operator has given notice under **clause 9.9(e)** and continues to operate Services during the notice period as calculated under **clause 9.9(e)**, the notice period required shall be reduced in accordance with the following formula:

$$N_2 = N_1 - 2 (U)$$

where:

- $N_2$  = The amended period of notice in weeks  
 $N_1$  = The period of notice calculated under **clause 9.9(e)**  
U = the number of weeks of the notice period calculated under **clause 9.9(e)** during which the Scheduled Train Path will be utilised.

Where  $N_2$  equates to zero or a negative figure, no notice is required.

- (h) A notice given by the Operator in accordance with this clause will be, and is hereby deemed to be, an amendment to **Schedule 2** upon the expiry of the notice period.
- (i) If:
- (i) a Scheduled Train Path is cancelled by an Operator; and
  - (ii) by virtue of this clause, the Operator is required to pay ARTC the flagfall and network occupancy charge components of the Charges during the relevant notice period (“Cancellation Charge”); and
  - (iii) ARTC is able to sell a Scheduled Train Path to another operator (which is a like Train Path when compared to the Scheduled Train Path cancelled by the Operator) within three (3) months of the date of cancellation;

- 9.10** ARTC may refund the Cancellation Charge to the Operator. Whether the cancelled and new Scheduled Train Paths are alike is to be determined by ARTC having regard to the criteria referred to in **clause 5.6(a)**.

## 10. INSPECTION AND AUDIT BY NETWORK ACCESS PROVIDER

### 10.1 Audit Obligation

Subject to **clause 10.2**, ARTC may at any time by Instruction from ARTC to the Operator require a particular Service of the Operator which is using the Network to undergo an audit for the purpose of assessing:

- (a) the Operator’s compliance with the terms and conditions of this Agreement, including whether the Train Manifest provided by the Operator under **clause 5.5(j)** is correct;

- (b) whether any one or more of the individual wagons used by the Operator in the provision of a Service is loaded in excess of its rated carrying capacity; or
- (c) whether any one or more of the individual wagons used by the Operator in the provision of the Service is loaded in an unsafe or potentially unsafe manner.

## 10.2 Limitations on Audit

ARTC must:

- (a) subject to **clause 10.2(b)**, carry out not more than such number of audits under **clause 10.1** as are reasonably necessary in all the circumstances; and
- (b) use its best endeavours in the conduct of such audit to minimise the disruption to the Operator's Service.

## 10.3 Instructions

In conducting an audit under **clause 10.1**, ARTC may give an Instruction to the Operator, including an Instruction to divert or delay a Service or make any part of a train engaged in providing a Service available for inspection or weighing.

## 10.4 Monitoring Equipment

- ~~(a) ARTC or its agent may place on or about its Network, but is under no obligation to, monitoring equipment which will take readings or measurements ("Readings") with the purpose of monitoring the operation of Rolling Stock. The Operator hereby authorises and consents to ARTC undertaking such monitoring and the collection of data from such monitoring equipment.~~
- ~~(b) The Readings will constitute "Confidential Information" of ARTC as defined in clause 18 and shall not be disclosed to any other party without the prior written consent of the Operator, or as required by law.~~
- ~~(c) ARTC does not have the technical expertise to and does not monitor the Readings.~~
- ~~(d) ARTC is not required to and is not obliged to provide the Operator with access to the Readings or and the Operator has no rights to access such readings or measurements.~~
- ~~(e) If the Operator wishes to obtain access to the Readings, ARTC may, but is under no obligation to, grant such access under a separate written agreement with the Operator.~~

Deleted redundant clause. Alternative arrangements for wayside equipment exist.

## 10.4 Audit by Operator

- (a) Subject to **clause 10.54(b)**, the Operator may at any time, at its cost and risk, audit any of the railway track and lines comprising the Network for the purpose of monitoring ARTC's compliance with **clause 6.1**.
- (b) The Operator's audit under **clause 10.54(a)** shall:
  - (i) be subject to the ability of ARTC to issue an Instruction to the Operator at any time during the audit to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and other operators;

- (ii) be conducted in such a manner so that it does not cause any disruption to any service of any other operator granted access to the Network by ARTC or the provision of services by ARTC to such operators.

## **11. EMERGENCIES AND INCIDENTS**

### **11.1 Plans for Dealing with Incidents**

- (a) In consultation with the Operator, ARTC will formulate and periodically review and update plans which are consistent with ARTC's Accreditation requirements.
- (b) The Operator will formulate a plan for dealing with Incidents and provide it to ARTC. The Operator's plan must be consistent with any plan prepared by ARTC under **clause 11.1(a)** and is subject to the approval of ARTC, such approval not to be unreasonably withheld.

### **11.2 Compliance with Plans and Directions and with Rail Safety Acts**

The Operator and ARTC will follow any plan of the type referred to in **clause 11.3** and will comply with their respective obligations under the Rail Safety Acts.

### **11.3 Notification of Incidents**

The Operator and ARTC each agree to notify the other party to this Agreement of any Incident as soon as possible after it comes to their attention.

### **11.4 Investigation of Incidents**

- (a) Incidents will be investigated as required by law and in the absence of a requirement by law in accordance with the applicable Rail Safety Act.
- (b) Each party will co-operate with an investigation under this clause and make available records and personnel relevant to the incident.
- (c) The parties will consult with each other to determine any action to be taken as a result of any investigation.

### **11.5 Operator's Report**

Without limiting **clause 11.3**, if an Incident occurs which involves the Operator and in relation to which ARTC has given written notice to the Operator that a report is required, the Operator must promptly prepare and submit to ARTC a written report which must include the following (to the extent relevant to the Incident and reasonably possible for the Operator to ascertain):

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Train operated by the Operator and to the Network and Associated Facilities;
- (c) the factors which may have contributed to the cause of the loss or damage to the Train operated by the Operator and to the Network and Associated Facilities (the parties acknowledging that such statement will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary));
- (d) names of the Operator's staff including volunteers in any way involved in the Incident either as principals or as witnesses;
- (e) an analysis in printed format of speed recorder charts for the Train operated by the Operator;

- (f) such other information which is required to be disclosed in a report to the Administering Authority under the relevant Rail Safety Act;
- (g) such other information which is required to be disclosed in a report under the Dangerous Goods Code.

#### **11.6 No Disposal of Equipment**

Subject to any contrary requirement at law or a pre-existing contract to which the Operator or ARTC is a party, the Operator and ARTC must not engage in conduct which would prejudice an investigation into an Incident, including the disposal of any equipment involved in such Incident (but only to the extent that such non-disposal is necessary to such investigation).

#### **11.7 Interim Responsibility for Recovery Costs**

Until fault can be properly determined or agreed in relation to an Incident, ARTC will be responsible for recovery costs in relation to the Network and Associated Facilities and the Operator will be responsible for recovery costs in relation to all above-rail matters (including the Train operated by the Operator).

## **12. SAFETY STANDARDS**

### **12.1 Compliance by the Parties**

The parties will, in relation to their respective responsibilities and rights under this Agreement:

- (a) comply with all applicable safety standards and laws dealing with safety;
- (b) comply with the Safeworking Rules;
- (c) comply with the Dangerous Goods Code;
- (d) comply with the Standards (including any codes of practice developed under the Standards) to the extent not inconsistent with **clauses 12.1(a)(b) and (c)**;
- (e) in addition to the Operator's Accreditation or the Owner's Accreditation (as the case may be), obtain and maintain such additional accreditation, licences and approvals, and maintain such additional standards, which are required by law;
- (f) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in **clause 7**, to ensure that their respective employees, agents and subcontractors engaged by the parties in or in connection with the Services are competent and appropriately qualified and obtain and maintain any applicable or appropriate Accreditation and training, and to provide to the other party evidence of any such matters upon reasonable request; and
- (g) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in **clause 7**, to ensure that their respective employees and subcontractors of the parties engaged in or in connection with the use by the Operator of the Network submit to drug and alcohol tests or to such other tests as ARTC or the Operator is in the practice of requiring of its own employees or subcontractors.

### **12.2 Notification of Breach**

As soon as ARTC becomes aware of a breach by the Operator of any Safeworking Rules which occurs during or as a result of the use by the Operator of the Network ("**Breach**") it must give written notice to the Operator setting out:

- (a) the time, place and a general description of the Breach;

- (b) what, in ARTC's opinion, caused the Breach and which person or persons were responsible for the Breach;
- (c) the consequences, if any, of the Breach for operation of the Services or the use by other users of the Network;
- (d) any proposed modification of its procedures which ARTC intends to make; and
- (e) any Instruction requiring modification to the Operator's procedures which ARTC considers that the Operator must make.

### **12.3 Provision of Safeworking Rules**

ARTC will provide a copy of the Safeworking Rules to the Operator on the Operator's request, and must thereafter forward to the Operator a copy of all amendments to the Safeworking Rules.

## **13. ENVIRONMENTAL REQUIREMENTS; DANGEROUS GOODS**

### **13.1 Compliance with Environmental Requirements**

Each party must comply with all environmental laws and with their respective environmental policies (insofar as they comply with the law), including all applicable laws and lawful policies dealing with dangerous goods.

### **13.2 Environmental Management Plans**

After ARTC has given to the Operator a copy of its plan for dealing with environmental effects of operating Trains on the Network, the Operator must within a reasonable time prepare its own plan for dealing with environmental effects of its operations on the Network, the plan to be consistent with ARTC's plan, and give a copy of its plan to ARTC.

### **13.3 Notification of Carriage of Certain Materials**

Other than in the case of Trains which are wholly passenger Trains, the Operator must include in all Train Manifests such detail in relation to the identification of dangerous goods as is required by the Dangerous Goods Code and as is otherwise reasonably required by ARTC (on terms not inconsistent with the Dangerous Goods Code).

### **13.4 Notification of Incident involving Dangerous Goods**

Other than in the case of Trains which are wholly passenger Trains, the Operator will provide to ARTC details, at the earliest practicable time after the Operator becomes aware, of all incidents (including non-compliance with relevant codes, regulations, bylaws or other statutory provisions, whether or not an Incident) involving dangerous goods including but not limited to any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

### **13.5 Notification of Environmental Condition**

Where:

- (a) ARTC becomes aware that, as a result of the activities of the Operator, an Environmental Condition exists or has occurred and ARTC reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or
- (b) ARTC is given a direction by a competent authority that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition resulting from the activities of the Operator;

then ARTC may inform the Operator of the relevant requirements and, where practicable, any steps which ARTC reasonably considers will be necessary to prevent, mitigate or remedy the situation, and the Operator must immediately, or as soon as reasonably practicable after receiving such notice, implement such requirements, Remediation and steps and any other necessary action so that the Environmental Condition is no longer present or the Environmental Damage is rectified.

### 13.6 ARTC's Environmental Licence

The Operator must implement and comply with the conditions of ARTC's Environmental Licence ("Licence Conditions") to the extent that:

- (a) ARTC has notified the Operator of the Licence Conditions; and
- (b) the Licence Conditions apply to the Operator's operations and Trains operated by the Operator on the Network situated in South Australia and New South Wales.

### 13.7 Operator Compliance

The Operator agrees that in order to facilitate such implementation and compliance the Operator will, without limiting the Operator's obligations under clause 13.6:

- (a) ensure that any Trains operated by the Operator comply with the Licence Conditions;
- (b) not operate any Trains on the Network situated or which operate in New South Wales until Environment Protection Authority ("EPA") approval has been obtained; and
- (c) comply with the terms of any applicable EPA approval.

### 13.8 Environmental Manual

The Operator must implement and comply with the environmental management system manual developed by ARTC, as amended from time to time, ("the Manual"), and must also maintain, implement and comply with the Operator's own environmental management plan (which must not be inconsistent with the Manual).

## 14. TERMINATION

### 14.1 Termination for Breach

- (a) If a party ("**defaulting party**") defaults in the performance of any of its material obligations under this Agreement, the other party ("**aggrieved party**") may give notice in writing ("**Rectification Notice**") to the defaulting party requiring the defaulting party to:
  - (i) rectify the default within a reasonable time; and
  - (ii) respond in writing to the aggrieved party, within 48 hours of the receipt of the Rectification Notice:
    - (A) indicating to the aggrieved party the steps to be taken to rectify the default within such reasonable time and a reasonable timetable for the completion of such steps; and
    - (B) confirming that the performance of the steps has commenced ("**Rectification Response**").
- (b) If the defaulting party:
  - (i) does not rectify the default within a reasonable time;

- (ii) does not provide a Rectification Response within the time specified in **clause 14.1(a)(ii)**;
- (iii) does not provide a satisfactory Rectification Response meeting the requirements of **clause 14.1(a)(ii)(A)** and **(B)**; or
- (iv) does not comply with the timetable set out in the Rectification Response subject to **clause 14.1(a)**,

the aggrieved party may at any time thereafter suspend such rights of the defaulting party under this Agreement as are necessary to prevent a continuation of the default by giving not less than:

- (A) 7 days written notice in relation to a default relating to safety; or
  - (B) 14 days written notice in relation to defaults other than relating to safety.
- (c) If the defaulting party does not within a reasonable time after the suspension of this Agreement under **clause 14.1(b)** rectify the default, this Agreement may be terminated by giving not less than the period of notice described in **clauses 14.1(b)(A)** and **(B)**.
  - (d) Notwithstanding that ARTC may be the defaulting party, nothing in **clause 14.1(b)** derogates from or affects ARTC's rights and powers to manage the Network and any of its other rights or powers under this Agreement or any other agreement with any other person, including any track access agreement with any other operator.

## **14.2 Immediate Termination**

A party has the right to immediately terminate this Agreement by notice in writing to the other party upon the occurrence of any of the following events:

- (a) the other party assigns or attempts to assign this Agreement in breach of **clause 19**;
- (b) if any execution is levied against the assets of the other party which are necessary or material for the conduct of the Operator's business of running the Services or if any such assets of the other party are taken or sold by an encumbrancer or if the other party ceases to carry on business, stops payment or fails to maintain normal and continuous operation of its business for a period of in excess of 14 continuous days except for reasons wholly beyond its control;
- (c) if the other party:
  - (i) goes into liquidation otherwise than for the purpose of reconstruction or a meeting was called for the purpose of considering liquidation;
  - (ii) has a receiver or a receiver and manager appointed over any of its property;
  - (iii) proposes or enters into any scheme of arrangement or a composition with its creditor; or
  - (iv) has an official manager, receiver, inspector, administrator or controller appointed pursuant to the provisions of the Corporations Act 2001 (Cwlth).

## **14.3 Termination of this Agreement by Reason of Suspension or Cancellation of Accreditation**

If either party's Accreditation is suspended for a continuous period of six months or cancelled for a continuous period of one month the other party may terminate this Agreement by notice in writing to the party which has had its Accreditation so suspended or cancelled.

## **14.4 Suspension**

- (a) Without in any way limiting the rights of a party under **clause 14.1, 14.2** or **14.3**, a party who is entitled to terminate this Agreement under any of those clauses may elect instead to suspend the

obligations of both parties under this Agreement (subject to **clause 14.4(b)**) until such time as the cause giving rise to the right to terminate is remedied.

- (b) An election referred to in **clause 14.4(a)** is revocable at any time by the party who made it and has no effect upon obligations, debts or liabilities which have accrued before the election to suspend this Agreement.

#### 14.5 Effect of Termination or Suspension

- (a) Upon termination or suspension of this Agreement all rights of the Operator to use the Network (to the extent of the termination or suspension) will cease immediately.
- (b) Termination or suspension of this Agreement under any circumstances shall not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement including without limitation any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (c) Upon termination or suspension of this Agreement under any circumstances all covenants and agreements of ARTC and the Operator which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement shall survive such termination or suspension.

### 15. INDEMNITIES/LOSS OR DAMAGE ARISING FROM AN INCIDENT

Clause amended for clarity following first round consultation.

#### 15.1 General

- (a) The purpose of this **clause 15** is to establish a regime in which the liability of ARTC and the Operator to each other for loss or damage arising out of an Incident is clearly defined, and is determined only by reference to this **clause 15**.
- (b) ARTC and the Operator release each other from all Claims for loss or damage resulting from an Incident, including where the Incident is caused or contributed to by the negligence of one or both parties, except Claims that each party to this Agreement may make against the other pursuant to this **clause 15**.
- (c) The provisions of this clause should be interpreted to give effect to the intention that where ARTC and/or the Operator are in breach of this Agreement, and any such breach is the cause or a contributing factor to loss and or damage arising from an Incident~~;~~
  - (i) any party in breach should bear responsibility for such loss and or damage to the extent of such cause or contribution, and ~~that~~;
  - (ii) where the acts or omissions of a party other than ARTC or the Operator (as defined in this clause) has caused or contributed to such loss and or damage, neither ARTC or the Operator shall be responsible to the other for loss and or damage to the extent that the loss and or damage is caused by or contributed to by the acts or omissions of that other party.

#### 15.2 Definitions

In this **clause 15**:

- (a) '**Claim Period**' means each and every twelve month period during the Term of this Agreement, such that the first Claim Period commences on the Commencement Date and expires at midnight on the day before the first anniversary of the Commencement Date, the second Claim Period



commences on the first anniversary of the Commencement Date and expires at midnight on the day before the second anniversary of the Commencement Date, and so on;

- (b) **'loss or damage'** includes loss or damage to property belonging to a party to this Agreement, any liability to or claim made by a third party, and the costs of recovery of any property damaged or affected by the relevant Incident and reasonable legal expenses on a solicitor/client basis;
- (c) **'Prohibited Claim'** means, subject to **clause 15.5(b)**, a Claim arising from an Incident where the total value of the loss or damage suffered by a party to this Agreement is less than \$50,000.00;
- (d) A reference to ARTC or the Operator includes a reference to any servant, agent, employee, contractor, supplier to, or volunteer of or associated with, or a related entity (as defined in the *Corporations Act 2001*) of ARTC or the Operator, ~~and~~;
- (e) A reference to a "breach" includes a breach arising from the acts or omissions of a servant, agent, employee, contractor, supplier to, or volunteer of or associated with or a related entity (as defined in the *Corporations Act 2001*) of, ~~ARTC or the Operator.~~

### 15.3 Indemnity

Where ARTC and/or the Operator suffer loss or damage as a result of an Incident, and:

- (a) if:
  - (i) there is a breach of this Agreement by ARTC or the Operator; and
  - (ii) the breach is the sole cause of the Incident,then the party in breach must:
  - (iii) be responsible for its own loss or damage arising from the Incident; and
  - (iv) completely and effectually indemnify the other party in respect of loss or damage suffered by the other party as a result of the Incident;
- (b) if:
  - (i) there is a breach or are breaches of this Agreement by ARTC or the Operator;
  - (ii) there is no breach of this Agreement by the other party; and
  - (iii) the breach or breaches contributed to the Incident but was or were not the sole cause of the Incident:then,
  - (iv) the party in breach is to be responsible for its own loss or damage arising from the Incident;
  - (v) the party in breach is to indemnify the other party (that is, the party not in breach) in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that the breach or breaches contributed to the Incident;
  - (vi) the other party (that is, the party not in breach) is to be responsible for its own loss or damage arising from the Incident to the extent that the breach or breaches did not contribute to the Incident;
- (c) if:
  - (i) there has been a breach of the Agreement by ARTC and the Operator; and

(ii) ~~both~~ breaches by both parties contribute to the Incident,

then each of ARTC and the Operator will:

(iii) indemnify the other party in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that the breach or breaches of that party contributed to the Incident;

(iv) be responsible for their own loss and or damage arising from the Incident to the extent that the loss and or damage was not contributed to by the breach or breaches of the other party;

(d) if there has been a breach or breaches of the Agreement by both ARTC and the Operator, but the breach or breaches of one of them has not or have not caused or contributed to the Incident, then (whether or not there is any other person or party who has caused or contributed to the Incident) the party whose breach has caused or contributed to the Incident shall bear their own loss and damage and indemnify the other party in respect of the loss or damage suffered by that other party as a result of that Incident to the extent that the breach or breaches contributed to the Incident.

#### **15.4 No Claim for Consequential Loss**

Notwithstanding:

(a) how an Incident is caused;

(b) that ARTC and/or the Operator is in breach of any duty of care or in breach of this Agreement;

(c) any other rights that ARTC and/or the Operator may have under this Agreement;

(d) that ARTC and/or the Operator may be liable to the other for other loss or damage other Consequential Loss.

ARTC and the Operator will not make a Claim against the other, and hereby release the other from any Claim, in respect of any Consequential Loss they suffer arising out of any Incident. For the avoidance of doubt, it is agreed that Consequential Loss does not include any liability of ARTC or the Operator to a third party.

#### **15.5 Prohibited Claim**

(a) Subject to clause 15.5 paragraph (b), ARTC and the Operator agree that they will not make a Claim against the other if the Claim is a Prohibited Claim.

(b) Where, in any Claim Period, the total value of all Prohibited Claims exceeds \$250,000.00, then no further Claims arising from Incidents that occur during that Claim Period will be Prohibited Claims.

#### **15.6 No Other Limitations**

Nothing in this **clause 15** is intended to remove, limit, restrict, or otherwise prejudice the right of ARTC or the Operator to recover loss or damage or a contribution from a third party.

#### **15.7 Obligation to Mitigate/ Betterment**

(a) Each party to this Agreement must take reasonable steps to mitigate that party's losses, damages, liabilities, costs and expenses, and a party's entitlement to recover losses, damages, liabilities, costs and expenses will be determined on the basis that the party should have observed the obligation to mitigate.

(b) Where a party restores or repairs a damaged asset and that repair or restoration results in improved functionality of an asset, such improved functionality shall not be regarded as a

betterment and no reduction or adjustment of the costs of repair or restoration shall be made on that account.

## 15.8 Obligation to Pay

- (a) In this sub-clause, a party liable to indemnify the other is called the "Responsible Party" and a party who is entitled to be indemnified is called an "Indemnified Party".
- (b) An Indemnified Party shall, as soon as practicable after an incident, give written notice to the Responsible Party of any claim to indemnity including:
  - (i) the date of the incident;
  - (ii) brief details of the loss **and or** damage suffered or which might be suffered;
  - (iii) a brief description of the grounds upon which indemnity is claimed.
- ~~(c) **An Indemnified Party may deliver notices requesting reimbursement of costs or expenses incurred, or payment of other loss and damage, on an ongoing basis, as and when such costs and expenses are incurred or such other loss and damage is identified and quantified.**~~
- ~~(de)~~ The Responsible Party shall
  - (i) reimburse the indemnified party all costs or expenses incurred by the Indemnified Party in repairing or reinstating plant, equipment or other assets, and
  - (ii) pay any other loss **and or** damage which is the subject of the indemnity,within fourteen days of being requested in writing by the Indemnified Party to do so.
- ~~(d) **An Indemnified Party may deliver notices requesting reimbursement of costs or expenses incurred, or payment of other loss and damage, on an ongoing basis, as and when such costs and expenses are incurred or such other loss and damage is identified and quantified.**~~
- (e) Where a Responsible Party has not complied with sub-clause ~~(ed)~~ above, the Responsible Party shall also be liable to pay interest to the Indemnified Party from the time that such monies should have been paid as requested, until that amount or any outstanding balance is paid in full. The interest rate shall be determined in the same manner as the interest rate is determined under clause 4.9 hereof.
- (f) The making of any **progress or part** payment by a Responsible Party to the Indemnified Party shall not relieve the Responsible Party of its obligation to **fully** indemnify the Indemnified Party for all loss **and or** damage arising out of the same incident **to the full extent to which it is liable to do so under this clause 15**, unless the Indemnified Party shall have given the Responsible Party a release in writing to that effect.
- (g) The making of any payment by a party under this clause 15.8 **shall may** be **made** without prejudice to any rights of that party to contest its liability to indemnify.

## 15.9 Defence of Claims

- (a) The parties shall render **to** each other all reasonable assistance in the defence of any Claim made against the other party by a third party arising out of any Incident.
- (b) To the extent that a party ('**Responsible Party**') is obliged to fully indemnify the other party ('**Indemnified Party**') against a Claim by a third party against the Indemnified Party, the Responsible Party:
  - (i) may, subject only to the terms of any applicable insurance which the Indemnified Party may have, at its own expense, defend and settle any action or proceedings in

the name of the Indemnified Party and execute such documents in the action or proceedings as the Responsible Party sees fit. ~~The Responsible Party indemnifies~~

- (ii) shall indemnify the Indemnified Party in respect of all costs, expenses and losses that the Indemnified Party may incur or have incurred on account of the action or proceedings.

## 16. INSURANCE

### 16.1 Operator's Insurance Policies

- (a) The Operator will during the Term take out and maintain a liability insurance policy which provides an indemnity in respect of:
  - (i) loss of, loss of use of, and destruction or damage to, real or personal property;
  - (ii) injury to, or disease or death of, persons;
  - (iii) the Operator's liability to ARTC under **clause 15** to the extent coverable by insurance.
- (b) The liability insurance policy referred to in **clause 16.1(a)** must:
  - (i) be with an insurer approved by ARTC (and ARTC will not unreasonably withhold such approval);
  - (ii) have a limit of liability of not less than \$250,000,000 (or such other amount as ARTC may reasonably require and notify to the Operator from time to time) for any one occurrence;
  - (iii) contain provisions that are standard industry terms for railway operators.
- (c) The Operator will deliver to ARTC when reasonably requested by ARTC copies of such parts of the liability insurance policy referred to in **clause 16.1(a)** and the Certificates of Currency in relation to such policy, subject to the details of such policy being kept confidential by ARTC (other than for the purpose of seeking indemnification thereunder).
- (d) The liability limit referred to in **clause 16.1(b)(ii)** may at ARTC's absolute discretion be reduced to such other amount as ARTC expressly authorises in writing from time to time.
- (e) The Operator acknowledges and agrees that:
  - (i) it is the Operator's responsibility to assess and consider the risks and scope of insurance required for the Operator's business;
  - (ii) nothing in this clause will exempt the Operator from any liability that is not covered by the liability insurance policy referred to in **clause 16.1(a)**; and
  - (iii) nothing in this clause will impose liability on ARTC, including where ARTC approves a reduction in the liability limit referred to in **clause 16.1(b)(ii)**.

### 16.2 ARTC's Insurance Policies

- (a) ARTC will during the Term take out and maintain a liability insurance policy which provides an indemnity in respect of:
  - (i) loss of, loss of use of, and destruction or damage to, real or personal property;
  - (ii) injury to, or disease or death of, persons;

- (iii) ARTC's liability to the Operator under **clause 15** to the extent coverable by insurance.
- (b) The liability insurance policy referred to in **clause 16.2(a)** must have a limit of liability of not less than \$250,000,000 for any one occurrence.
- (c) ARTC will:
  - (i) deliver to the Operator when reasonably requested by the Operator copies of such parts of the liability insurance policy referred to in **clause 16.2(a)** and the Certificates of Currency in relation to such policy, subject to the details of such policy being kept confidential by the Operator (other than for the purpose of seeking indemnification thereunder);
  - (ii) publish annually the amounts paid by it by way of premiums for the insurance referred to in **clause 16.2(a)**.
- (d) In the event that there is a substantial reduction in the amounts paid by way of premiums as disclosed under **clause 16.2(c)(ii)**, ARTC will, in consultation with all operators granted access to the Network, apply any such savings towards repairs, maintenance or upgrading of the Network or as otherwise agreed between the parties.

## 17. RESOLUTION OF DISPUTES

### 17.1 Procedure to settle disputes

- (a) If there is a dispute between the parties relating to or arising out of this Agreement (“**Dispute**”) then, unless otherwise expressly agreed to the contrary by both parties, such Dispute shall be resolved in accordance with this **clause 17**. Either party may give to the other party to the Dispute notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with under this **clause 17**. The parties must use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
- (b) The procedure that is to be followed to settle a Dispute arising under this Agreement is as follows:
  - (i) first, negotiation of the Dispute under **clause 17.2**; and
  - (ii) second, mediation of the Dispute under **clause 17.3**.

### 17.2 Negotiation

If there is a Dispute between the parties relating to or arising out of this Agreement, then within 7 days after the date of the Dispute Notice, senior representatives from each party must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

### 17.3 Mediation

- (a) If the Dispute is not resolved under **clause 17.2** within twenty one (21) days after the date of the Dispute Notice then the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.
- (b) If the Dispute is not resolved within fourteen (14) days after being referred to the chief executive officers under **clause 17.3(a)**, the Dispute will be referred to formal mediation in South Australia to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within fourteen (14) days, a mediator appointed by the President of the Law Society of South Australia acting on the request of either party.
- (c) Unless the parties otherwise agree:

- (i) the mediation shall be conducted by a mediator under the “Guidelines for Legal Practitioners Acting as Mediators” of the Law Society of South Australia (whether or not the mediator is a legal practitioner);
  - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediations;
  - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
  - (iv) the costs of the mediator will be borne equally by the parties.
- (d) Nothing in this **clause 17.3** prohibits a party from seeking and obtaining appropriate injunctive relief.
- (e) Subject to **clauses 17.3(d) and (f)**, pending completion of the procedure set out in this **clause 17**, a Dispute must not be the subject of legal proceedings between the parties. If legal proceedings are initiated or continued in breach of this **clause 17.3(e)**, a party to the Dispute is entitled to apply for and be granted an order of the court adjourning those proceedings pending completion of the procedure set out in this **clause 17**.
- (f) This **clause 17** does not prejudice the right of a party:
- (i) to require the continuing observance and performance of this Agreement by all parties;
  - (ii) to institute proceedings to enforce payment due under this Agreement where the requirement for payment is not in dispute;
  - (iii) to terminate the Agreement where the basis for doing so is not in dispute.

#### 17.4 Termination of mediation

If the Dispute is not resolved within one (1) month of the appointment of the mediator (if any) under **clause 17.3(b)**, either party may by notice in writing to the other terminate the mediation proceedings.

## 18. CONFIDENTIALITY

Amended to align with Access Undertaking – see comments at AU cl.3.5.

### 18.1 Acknowledgment of Confidentiality

Each party acknowledges, subject to **clause 18.2**, that all information provided by one party (“**Provider**”) to the other (“**Receiver**”) under this Agreement that relates directly to:

- (a) ~~ARTC’s or~~ the Operator’s future markets;
- (b) ~~ARTC’s or~~ the Operator’s future market and business strategies; and
- (c) the strategies of ARTC’s or the Operator’s customers; ~~and~~
- ~~(d) the Operator’s application for or ARTC’s intended allocation of train paths to other operators;~~

(“**Confidential Information**”) is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider and not use that Confidential Information for any purpose other than the provisions of this Agreement allow.

## 18.2 Exclusions from “Confidential Information”

For the purposes of this **clause 18** “Confidential Information” does not include information which is:

- (a) in the public domain at the time of disclosure other than through the fault of the Receiver or of anyone to whom the Receiver has disclosed it;
- (b) obtained lawfully from a third party without restriction on use or disclosure;
- (c) required to be made public by operation of law (subject to the Receiver claiming any immunity, privilege or restriction on or from disclosure that it can reasonably claim), including without limitation information required by any stock exchange, rail safety or economic regulator;

~~(d) the amount of the Charges disclosed by the Operator to its customers or potential customers;~~

~~(e) the amount of the Charges disclosed by ARTC to its customers or potential customers;~~

~~(f) information reasonably necessary to be disclosed;~~

~~(i) by the Operator to customers or potential customers in the course of and for the purposes of furthering its business; or~~

~~(ii) by ARTC in connection with any of the matters described in **clause 19.1**;~~

~~(g) the terms and conditions of this Agreement;~~

- (d) necessary for the provision of advice by the Receiver's legal advisers, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party);

~~(i) in relation to the rail operations and the tonnages hauled on rail lines or rail line segments;~~

~~(j) the publishing by ARTC of details of the train paths allocated or intended to be allocated to ARTC's customers or potential customers; and~~

~~in relation to recordings or measurements from wayside monitoring equipment, provided that such recordings or measurements do not specifically identify the Operator.~~

## 19. ASSIGNMENT OR NOVATION

### 19.1 By ARTC

- (a) Other than to a successor of ARTC or to any body established by any person in relation to the management of the Network or any relevant or material part of it, ARTC may not assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement without the prior written consent of the Operator which consent will not be unreasonably withheld.
- (b) Nothing in **clause 19.1(a)** prevents ARTC from entering into any sub-contracting or agency agreements or arrangements in relation to any of its functions.

### 19.2 By the Operator

- (a) Subject to the following provisions of this **clause 19.2**, the Operator may not license, assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement (in this **clause 19.2**, “assign”):
  - (i) without the prior written consent of ARTC, which consent is not to be unreasonably withheld; and

- (ii) unless on or before such assignment the assignee enters into a track access or other agreement with ARTC on such terms not inconsistent with this Agreement as ARTC may reasonably determine.
- (b) The Operator may without obtaining consent under **clause 19.2(a)(i)** assign this Agreement, its interest in this Agreement or any right under this Agreement to a related body corporate if on or before such assignment the related body corporate enters into a track access or other agreement with ARTC on such terms not inconsistent with this Agreement as ARTC may reasonably determine.
- (c) Subject to the Operator complying with the following provisions of this **clause 19.2(c)**, the Operator may, sell, trade, or sub-licence (“**Trade**”) any Scheduled Train Paths (but not this entire Agreement) to a person who proposes to operate a Train using such Scheduled Train Paths (“**Proposed Operator**”):
  - (i) All of the terms of proposed Trade of Scheduled Train Paths must be recorded in a written agreement (“**Trade Agreement**”), and must include at least the following terms:
    - (A) the Proposed Operator must agree to be bound by all of the terms of this Agreement as if it were named as the Operator therein and must provide to ARTC evidence of its Accreditation under **clause 7** of this Agreement;
    - (B) the Proposed Operator must comply with all Instructions of ARTC as if the Proposed Operator was the Operator named in this Agreement;
    - (C) the Proposed Operator indemnifies the Operator in respect of all of the Operator’s obligations and responsibilities under the Agreement;
    - (D) the Proposed Operator must take out insurance on commercial terms sufficient to cover such indemnity;
    - (E) the Operator appoints ARTC its attorney for the purposes of enforcing the Trade Agreement should ARTC in its absolute discretion determine that it wishes to take this action;
    - (F) all recoveries by the Operator under the Trade Agreement which are in connection with any matter, act or thing in respect of which ARTC has suffered loss is to be held on trust for ARTC and is to be applied first in satisfaction of ARTC’s loss in the manner which ARTC in its absolute discretion determines;
    - (G) the Proposed Operator may not in turn Trade or otherwise assign any Scheduled Train Paths which have been Traded by the Operator to the Proposed Operator;
    - (H) the Proposed Operator acknowledges and agrees that ARTC is not liable in any respect whatsoever under the Trade Agreement or at common law or equity by reason of engaging in the process referred to in this **clause 19.2** or in vetting the Proposed Operator or in permitting Trading of Scheduled Train Paths, and the Proposed Operator releases and indemnifies ARTC in respect of such liability;
    - (I) any other terms which ARTC may in its absolute discretion require.
  - (ii) The Trade Agreement cannot commence operation without ARTC being provided a copy of the Trade Agreement and evidence of the Proposed Operator’s accreditation as referred to in **clause 19.2(c)(i)(A)**.



- (iii) The Operator agrees with ARTC as a term of this Agreement those matters referred to in **clauses 19.2(c)(i)(E) and (F)**.
- (iv) The entering into a Trade Agreement by the Operator will not abrogate, impair, release or extinguish any debt, obligation or liability of the Operator to ARTC under this Agreement which may have accrued before entering into such Trade Agreement or which may accrue thereafter.
- (v) The Operator indemnifies ARTC against all loss or damage suffered by ARTC caused by any acts and omissions of the Proposed Operator or of any third party arising out of or in connection with the Proposed Operator's use of the Network, whether or not caused by the Proposed Operator's negligence or default.
- (vi) The Operator acknowledges and agrees that ARTC is not liable to the Operator and to third parties in any respect whatsoever under this Agreement or under the Trade Agreement or at common law or equity by reason of engaging in the process referred to in this **clause 19.2 (c)** or in vetting the Proposed Operator or in permitting Trading of Scheduled Train Paths, and the Operator releases and indemnifies ARTC in respect of such liability.

### **19.3 The effect of Assignment**

Assignment of this Agreement will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement prior to the date of such an assignment.

## **20. FORCE MAJEURE**

### **20.1 Suspension of Obligations**

The obligations of a party are suspended during the time and to the extent that a party is prevented from or delayed in complying with its obligations for reasons of Force Majeure.

### **20.2 Obligations of a Party**

If a party is unable to perform its obligations due to Force Majeure it will:

- (a) as soon as possible after being affected, give to the other party full particulars of the Force Majeure and the manner in which its performance is thereby prevented or delayed; and
- (b) promptly and diligently take all reasonable and appropriate action to enable it to perform the obligations prevented or delayed by Force Majeure, except that the other party is not obliged to settle a strike, lockout or other industrial dispute.

### **20.3 "Force Majeure"**

In this **clause 20 "Force Majeure"** means a circumstance beyond the reasonable control of a party which occurs without the negligence of that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, terrorism and security matters, nuclear ionisation, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator.

## **21. GOVERNING LAW**

### **21.1 Law of the Agreement**

The law of this Agreement is the law of South Australia.

### **21.2 Jurisdiction**

The parties to this Agreement agree that the Courts of South Australia shall have exclusive jurisdiction to hear and determine all disputes which may arise out of this Agreement.

### **21.3 Commencement**

The parties agree that if either party commences or maintains any claim or proceeding relating to this Agreement in any place in the world this clause may be pleaded by the other party as an absolute bar to such claim or proceeding if they are commenced anywhere other than in the State of South Australia.

## **22. VARIATION**

### **22.1 Variation to be in Writing**

The variation or waiver of a provision of this Agreement, or a party's consent to a departure from a provision by another party, will be ineffective unless in writing, signed by the parties.

### **22.2 Change of Circumstances**

The parties agree that if circumstances relevant to this Agreement materially change, the parties will meet in good faith and consider the future arrangements between the parties under this Agreement.

## **23. SEVERABILITY**

If any provision of this Agreement is voidable, illegal, or unenforceable, or if the Agreement would, if a particular provision were not omitted be void, voidable, illegal or unenforceable, that provision shall (without in any way affecting the validity, legality and enforceability of the remainder of the Agreement) be severed from the Agreement and the Agreement must be read and construed and take effect for all purposes as if that provision were not contained in this Agreement.

## **24. NOTICES**

### **24.1 Notice**

A notice or other communication required or permitted to be given by a party to another must be in writing and:

- (a) delivered personally;
- (b) sent to an address in Australia by security post or certified mail, postage prepaid; or
- (c) sent by facsimile transmission, to the facsimile number described below.

### **24.2 Deemed Notice**

A notice or other communication is deemed given if:

- (a) personally delivered, upon delivery;

- (b) mailed to an address in Australia, on actual delivery to the addressee, as evidenced by Australia Post documentation;
- (c) sent by facsimile (and is other than a notice of termination or suspension of this entire Agreement), on the next ~~business day~~ **Business Day** after being sent if following transmission the sender receives a transmission confirmation report or if the sender's machine is not so equipped to issue a transmission confirmation report then upon the sender receiving acknowledgment of receipt.

**24.3 Addresses for Service**

Each party's address for service is:

- (a) in the case of ARTC:

Name: Australian Rail Track Corporation Limited  
 Address: Ground Floor  
 ARTC Building  
 off Sir Donald Bradman Drive  
 Passenger Rail Terminal Road  
 MILE END SA 5031  
 Attention: Chief Executive Officer  
 Facsimile: (08) 8217 4578

- (b) and in the case of the Operator:

Name: #  
 Address: #  
 Attention: #  
 Facsimile: #

**24.4 Change of Address**

A party may change its address for service by giving written notice of that change to the other party.

**24.5 Twenty-four hour contact details**

Each party must provide to the other party, and maintain as current, the name and full details of one or more persons who, together, are available at any time on any day for emergency contact by the other party.

**25. RISK AND COST OF PERFORMING OBLIGATIONS**

Subject to this Agreement:

- 25.1** whenever the Operator is obliged or required hereunder to do or effect any act, matter or thing then the doing of such act, matter or thing will, unless this Agreement otherwise provides, be at the sole risk and expense of the Operator;
- 25.2** whenever ARTC is obliged or required hereunder to do or effect any act, matter or thing then the doing of such act, matter or thing will unless this Agreement otherwise provides, be at the sole risk and expense of ARTC.

**26. NO PARTNERSHIP OR AGENCY**

Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the parties or be deemed to constitute the Operator as agent of ARTC for any purpose whatever and the Operator has no authority or power to bind ARTC or to contract in its name or to create a liability against it in any way or for any purpose.

**27. OTHER AGREEMENTS**

This document comprises the whole Agreement between the parties relating to use of the Network, and to the extent to which it is inconsistent with any existing agreement between the parties, will prevail over those existing agreements.

**28. COUNTERPARTS**

This Agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument. The parties agree that copies provided to the other party by facsimile transmission evidence signing by the party sending such facsimile.

**EXECUTED** as an Agreement.

SIGNED for and on behalf of **AUSTRALIAN RAIL** )  
**TRACK CORPORATION LIMITED** by authority )  
of its Directors in accordance with section 127 of the )  
Corporations Act 2001: )

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Full Name (Print)

\_\_\_\_\_  
Director

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Full Name (Print)

\_\_\_\_\_  
Director/ Secretary

SIGNED for and on behalf of )  
 )  
by )  
authority of its Directors in accordance with section )  
127 of the Corporations Act 2001: )

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Full Name (Print)

\_\_\_\_\_  
Director

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Full Name (Print)

\_\_\_\_\_  
Director/ Secretary

## SCHEDULE 1

### Network (Clause 1.1)

#### South Australia, part Western Australia (Kalgoorlie to WA/ SA border) and part New South Wales ( SA/ NSW Border to Broken Hill)

1. **Tarcoola – Asia Pacific Interface Point**

~~From~~ Mainline from the 504.5 kms mark to the 510.85 km mark.

2. **Kalgoorlie to Crystal Brook**

~~From~~ Mainline from the eastern end of Kalgoorlie at 1781.500 kms to Crystal Brook including all tracks, turnouts and signals forming the Crystal Brook and Coonamia triangle.

3. **Port Augusta to Whyalla**

Mainline from the point of connection with the Kalgoorlie to Port Augusta line to the main line facing points located at 166.590 kms at the northern entrance to the Whyalla yard.

4. **Crystal Brook to Broken Hill**

~~From~~ Mainline from the eastern end of the Crystal Brook triangle to the western end of Broken Hill at 391.990 kms.

~~45.~~ **Crystal Brook to Dry Creek**

~~From~~ Mainline from the southern end of the Crystal Brook triangle to the southern apex of the Dry Creek triangle.

~~56.~~ **Adelaide Metropolitan Area**

- ~~From~~ Mainline from Dry Creek including all tracks, points and signals forming the Dry Creek triangle to Port Adelaide Junction (signal 1155)
- ~~From~~ Mainline from Glanville (signal 1456) to Pelican Point/Outer Harbour
- ~~From~~ Mainline from Gillman Junction to a point approximately 100 metres before the Eastern Parade level crossing at Port Adelaide flat.

~~67.~~ **Dry Creek to the South Australian/Victorian border**

~~From~~ Mainline from the southern apex of Dry Creek Triangle to the Victorian border at 313.210 kms.

~~78.~~ **Crossing Loops**

All crossing loops within each corridor described above.

~~89.~~ **Authority Points**

All other rail track connecting with those running lines within each corridor described above between the ~~running lines~~ mainline and the last signal, derail or other point of authority on that rail track protecting access to the running line.

Amended to clarify extent of Network and match language used on next page.

## SCHEDULE 1

### Mainline South Australia to Melbourne\*

Location	Boundary
SA/VIC Border	Marked distance 463.687 km
Mainline including crossing loops, dual gauge, turnouts, and diamond	Last long timber at turnouts to sidings and diamond crossings
Dimboola	Last long timber to Yaapect branch line
Murtoa	Last long timber to Hopetoun branch line
Maroona	Last long timber to Portland branch line
Gheringhap	Last long timber at Divergence of dual gauge at Butcher Road 81.600 km
North Geelong “C”	Last long timber at divergence of dual gauge
Newport	Last long timber at divergence of dual gauge
Brooklyn	Last long timber at divergence of dual gauge
Sims Street Junction	Ref “Part 3 – Melbourne Boundaries”

### Mainline New South Wales to Melbourne\*

Location	Boundary
Albury**	Marked distance 304.163 km
Mainline including crossing loops, cripple roads, dual gauge, turnouts, and diamond	Last long timber at turnouts to sidings (other than cripple roads) and diamond crossings
Somerton	Last long timber in turnout to No. 3
McIntyre	Last long timber in turnout No. 2
Sims Street Junction	Ref “Part 3 – Melbourne Boundaries”

\* To the extent that such railway lines are owned by ARTC or leased by Victorian Rail Track to ARTC.

\*\* To the extent that such railway lines are leased by RIC and SRA to ARTC

### Melbourne Boundaries\*

South Dynon Junction to Spencer Street	
Location	Boundary
Spencer Street signal	SST184
Reversing Loop Junction	Last long timber in the mixed gauge
Contrans Siding	Dwarf Signal 204
South Dynon Terminal (east end)	Dwarf Signals 214 & 210
South Dynon Terminal (west end)	Dwarf Signals 126, 228, 230 & 232
Sims Street Junction to North Dynon	
Location	Boundary
North Dynon Intermodal Terminal	Dwarf Signals 92 & 94
North Dynon Agents Area	Dwarf Signal 90
South Dynon Junction to Appleton Dock	
Location	Boundary
Operations Terminal (west end)	Dwarf Signal 142
Operations Terminal (east end)	Dwarf Signal 236 Note: track on the crossover between MOT No.3 track and MOT no.2 track, beyond the last long timber on turnout No.235, does not form part of the ARTC Network. Dwarf Signal 238, although beyond the ARTC boundary, forms part of the ARTC Network
Appleton Dock	Footscray Road Level Crossing
Other Areas	
Location	Boundary
Track to NRC Wagon maintenance Centre	Dwarf Signal 154
Locomotive Provisioning Centre (west end)	Dwarf Signal 130
Locomotive Provisioning Centre (east end)	Dwarf Signal 128 Note: track between the last long timber on turnout No.127D and the last long timber on turnout No.123U, does not form part of the ARTC Network
Sims Street Triangle	Sims Street Junction Weighbridge Junction South Dynon Junction

\* To the extent that such railway lines are owned by ARTC or leased by Victorian Rail Track to ARTC.



## New South Wales Leased Network \*\*

### Mainline and crossing loops as defined on the attached maps and summarised below:

1. Albury to Macarthur
2. Newcastle (Islington Junction) to Queensland Border (Border Loop Tunnel)\*
3. Cootamundra to Broken Hill
4. Moss Vale to Unanderra
5. Goobang Junction to The Gap
6. Merrygoen to Ulan

Excluding the Sandgate Flyover and the following Newcastle Coal Lines:

<u>ARTC Sector number</u>	<u>Description</u>
7. 915	Islington Junction – Scholey Street Junction
8. 917	Scholey Street Junction – Waratah (via Coal)
9. 925	Waratah – Hanbury <del>Jueyion</del> Junction (via Coal)
10. 926	Hanbury Junction – Sandgate (via Coal)
11. 927	Hanbury Junction – Kooragang East Junction
12. 931	Kooragang East Junction – Sandgate
13. 936	Sandgate – Thornton (via Coal)
14. 937	Thornton – Maitland (via Coal)
15. 944	Telarah - Farley

\*\* To the extent that such railway lines are leased by RIC and SRA to ARTC

Yards are not included as part of the Network.

**SCHEDULE 2**  
**Scheduled Train Paths**

**( Clause 1.1 )**

Refer to the following \_\_\_\_\_ ( \_ ) pages, as amended from time to time.

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SCHEDULE TRAIN PATH ENTITLEMENTS

**OPERATOR**

---

EXPIRY DATE SCHEDULE TRAIN PATH ENTITLEMENTS

**SCHEDULE 3**  
**Charges**  
**( Clause 1.1 )**

**CHARGES**

The Charges are subject to variation in accordance with clause 4 of this Agreement.

**SCHEDULE 4**  
**Network Management Principles**  
**( Clause 1.1 )**

The schedule applies in the circumstances where Train Paths are interrupted due to matters outside ARTC's control and there is a need to resolve competing interests of users of the Network. ~~Refer to the following one (1) page-~~

Deleted Decision Matrix in favour of modified NSW Train Decision Factors.

**Train Decision Factors**

The following definitions apply in this Schedule ~~46 as applicable to the NSW Leased Network only.~~

**"Commuter Peak Services"** means RailCorp's commuter rail passenger services arriving at Sydney Central Station or Newcastle Station between 0600 and 0900 hours and departing Sydney Central Station or Newcastle Station between 1600 and 1800 hours and continuing until they reach their destination point.

**"Express Freight Services"** means those freight services capable of maintaining sectional running times that are, or are determined by the appropriate Train Controller, to operate at faster sectional times than local Frequent-Stopping Services.

**"Frequent-Stopping Services"** means those rail passenger services on the NSW Leased Network that stop at most or all stations along their Train Path.

**"Healthy Train"** means a Train that, having regard to the daily train plan applicable on the day:

- (a) presents to the Network on time, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
- (b) is running late only due to causes within the Network, but only where the root cause is outside the rail operator's control; or
- (c) is running on time, regardless of previous delays.

**"Limited-Stop Services"** means those rail passenger services on the NSW Leased Network that stop at a few selected stations along their Train Path.

**"Long-distance Passenger Services"** means those rail passenger services operating to or from points outside the metropolitan rail area, excluding RailCorp's CityRail services.

**"Non-Revenue Positioning Movements"** means movements of Trains required for reasons other than revenue services.

**"Special Event"** means a major community, cultural, sporting or similar event within the Sydney metropolitan rail area, which is identified as such by a relevant NSW agency, and which may require:

- (a) a special timetable for the operation of RailCorp rail passenger services before, during and after the event; and
- (b) significant operational priority for RailCorp rail passenger services; and
- (c) consequential adjustments to other rail operators' services;

**"Train"** means a single unit of rolling stock or 2 or more units of rolling stock including a locomotive or other self propelled unit coupled together to operate on the Track as a single unit.

**"Train Control"** means the control and regulation of all rail operations (including Train Movements, movements of rolling stock and track maintenance vehicles) to ensure the safe, efficient and proper operation of the Network.

"Train Movement" means a particular trip by a Train on a Train Path.

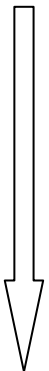
"Train Path" means the series of network segments over a particular time interval through which a Train can travel and may include stopping points and intervals and fuelling stations and other set down or changeover points.

**TRAIN DECISION FACTORS:**

1. **Where Trains are on-time**, they will be managed as specified in the daily train plan.
2. **Where one or more Trains are late or unhealthy**, they will be managed as specified in the matrices below subject to a rail operator’s preferences for its own services.

The 2 tables are used in conjunction with each other. Table 1 will enable a person undertaking Train Control ("Train Controller") to define the relative priority of two conflicting Trains. Table 2 will specify the type of decision available to Train Controller in delivering Train Control directions to resolve the potential conflict.

**Table 1 – Train Priority Matrix**

Decreasing order of priority	Type of train service in ARTC Network
From Highest	Long-distance Passenger Services
	Commuter Peak Services and rail passenger services likely to affect Commuter Peak Services or Special Event services <u>on the NSW Leased Network</u>
	Limited -stop non-Commuter Peak Services <u>on the NSW Leased Network</u>
	Freight services likely to affect Commuter Peak Services or Special Event services <u>on the NSW Leased Network</u>
	Express Freight Services
	Frequent-Stopping Services (non-Commuter Peak Services) <u>on the NSW Leased Network</u>
	Non-express Freight Services
To Lowest	Non-Revenue Positioning Movements

**Table 2 – Decision Matrix**

Trains of Equal Health	Both Healthy One on Time & One Late	Both Late
Equal Priority Trains	Rule 1 + 2	Rule 3
Unequal Priority Trains		Rule 6 + 3
Higher Priority Train is On Time + Lower Priority is Late	Rule 5 + 2	
Higher Priority Train is Late + Lower Priority Train is On Time	Rule 4 + 2	
Trains of Unequal Health		Rule 7 + 2

**Rule 1:**

- (a) A Healthy Train should be managed such that it will exit on time.
- (b) If a Healthy Train is running late, it should be given equal preference to other Healthy Trains and advanced wherever possible to regain lost time. Any delay to other Healthy Trains as a result of such advancement must be kept to a minimum as defined in Rule 2.

**Rule 2:** The following delay limits apply to the full journey of a Healthy Train being held back:

- (a) the delay to the individual rail passenger service held back does not exceed 5 minutes;
- (b) there is a plan in place to recover lost time so that the downstream effect on the service held back and on individual subsequent rail passenger services also does not exceed 5 minutes;
- (c) the delay to a freight service held back does not exceed 15 minutes; or
- (d) there is a plan in place to recover lost time so that the downstream effect on the healthy freight service held back and on individual subsequent healthy freight services also does not exceed 15 minutes. Any plan for the recovery of time by freight services must be capable of being achieved prior to their entry into the [Sydney](#) metropolitan rail area.

**Rule 3:** Give preference to the Train whose Train performance indicates it will lose least or no more time and even make up time and hold the gain; and consider downstream effect to minimise overall delay.

**Rule 4:** A lower priority Train gets preference. A higher priority Train can be given preference subject to the delay to the lower priority Train being kept to a minimum as defined in Rule 2.

**Rule 5:** A higher priority Train should be given preference over a lower priority Train. A lower priority Train may be given preference over higher priority Train provided the delay to that Train is kept to a minimum as defined in Rule 2.

**Rule 6:** A high priority Train has preference, subject to Rule 3.

**Rule 7:** A Healthy Train should be given preference over an unhealthy Train. An unhealthy Train may be given preference over a Healthy Train provided the delay to that Train is kept to a minimum as defined in Rule 2.

**General Principles for Train Management**  
 All – To ensure operational safety is maintained through compliance with Safeworking Rules, Regulations and Procedures  
 Track Authority – To ensure the integrity of the track and other infrastructure so that the train plan can be met  
 Train Operators – To ensure operating integrity, including train crewing, locomotives, wagons and loading so that the train plan can be met  
 Track Authority – To manage the Network on behalf of Train Operators based on agreed Entry/Exit times. Objectives of Track Authority are to manage trains according to their schedule for OT Exit, not to contribute to lost running, to make-up time and to hold the gains.

Train-A		AGREED NETWORK ENTRY/EXIT TIMES									
Train-B PLAN	Train-A RUN	Actual Performance	OT running Premium	Running ahead Premium	Late running Premium	OT running High	Running ahead High	Late running High	OT Exit Standard	Running ahead Standard	Late running Standard
Actual Performance	TC	<b>OBJECTIVE</b>	OT-Exit	OT-Exit	1.No more time lost 2.Make-up time 3.1. Hold the gain	OT-Exit	OT-Exit	1.No more time lost 2.Make-up time 3.1. Hold the gain	OT-Exit	OT-Exit	1.No more time lost 2.Make-up time 3.1. Hold the gain
OT running Premium	OT-Exit	OT-Exit	Scheduled-Cross	A-or-B Rule-2	B Rule-3	Scheduled-Cross	B-or-A Rule-2	B Rule-3	Scheduled-Cross	B-or-A Rule-2	B Rule-3
Running ahead Premium	OT-Exit	OT-Exit	A-or-B Rule-2	A-or-B Rule-2	B Rule-3	B-or-A Rule-2	B-or-A Rule-2	B Rule-3	B-or-A Rule-2	B-or-A Rule-2	B Rule-3
Late running Premium	1.No more time lost 2.Make-up time 3.1. Hold the gain	1.No more time lost 2.Make-up time 3.1. Hold the gain	A Rule-1	A Rule-1	A-or-B Rule-4	A Rule-1	A Rule-1	B Rule-6	A Rule-1	A Rule-1	B Rule-6
OT running High	OT-Exit	OT-Exit	Scheduled-Cross	A-or-B Rule-2	B Rule-3	Scheduled-Cross	A-or-B Rule-2	B Rule-3	Scheduled-Cross	B-or-A Rule-2	B Rule-3
Running ahead High	OT-Exit	OT-Exit	A-or-B Rule-2	A-or-B Rule-2	B Rule-3	A-or-B Rule-2	A-or-B Rule-2	B Rule-3	B-or-A Rule-2	B-or-A Rule-2	B Rule-3
Late running High	1.No more time lost 2.Make-up time 3.1. Hold the gain	1.No more time lost 2.Make-up time 3.1. Hold the gain	A Rule-1	A Rule-1	A Rule-5	A Rule-1	A Rule-1	A-or-B Rule-4	A Rule-1	A Rule-1	B Rule-6
OT running Standard	OT-Exit	OT-Exit	Scheduled-Cross	A-or-B Rule-2	B Rule-3	Scheduled-Cross	A-or-B Rule-2	B Rule-3	Scheduled-Cross	B-or-A Rule-2	B Rule-3
Running ahead Standard	OT-Exit	OT-Exit	A-or-B Rule-2	A-or-B Rule-2	B Rule-3	A-or-B Rule-2	A-or-B Rule-2	B Rule-3	B-or-A Rule-2	B-or-A Rule-2	B Rule-3
Late running Standard	1.No more time lost 2.Make-up time 3.1. Hold the gain	1.No more time lost 2.Make-up time 3.1. Hold the gain	A Rule-1	A Rule-1	A Rule-5	A Rule-1	A Rule-1	A Rule-5	A Rule-1	A Rule-1	A-or-B Rule-4

Rule 1 – Train B may be given preference on condition Train-A will still meet OT exit objective  
 Rule 2 – Both trains must meet OT exit objective  
 Rule 3 – Train A may be given preference on condition Train-B will still meet OT exit objective  
 Rule 4 – Give priority to train where performance indicates it will lose least or no more time and even make up time and hold the gain  
 Rule 5 – Train B may be given preference if Train A will continue to lose time and any gains made cannot be held  
 Rule 6 – Train A may be given preference if Train B will continue to lose time and any gains made cannot be held

**SCHEDULE 5**  
**Key Performance Indicators**  
**(Clauses 1.1 & 2.109)**

**KEY PERFORMANCE MEASURES**

**Reliability**

Measured by:

<b>Indicator</b>	<b>Measure</b>	<b>Level of Detail</b>
Exit Performance of Healthy Trains*	% on time exit (within agreed tolerance) from ARTC network of healthy services	By operator By service (MP5, AP4 etc)
Non-deterioration of Unhealthy Trains*	% non-deterioration (within agreed tolerance) of unhealthy services while on ARTC network	
Train Health*	% of total services which are operated in a healthy manner	

\* "Healthy Train" means a Train that, having regard to the daily train plan applicable on the day:

- (a) presents to the Network within agreed tolerance, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
  - (b) is running late only due to causes within the Network, but only where the root cause is outside the rail operator's control; or
  - (c) is running on time within agreed tolerance, regardless of previous delays.
- Measurement should exclude performance affected by a force majeure event.  
Measurement would be on a monthly basis.

**Speed Restriction Impact - Theoretical Benchmark**

Measure the movement over time of the impact of prevailing speed restrictions on train running (measured in minutes):

- Model/estimate the extent of the impact of temporary speed restrictions in existence as at an agreed point in time.
  - Impact estimates for a typical train over current track under typical environmental conditions
- Periodically model/estimate the impact of prevailing temporary speed restrictions on typical train running.
- Measure the variation in the impact of prevailing temporary restrictions over time compared to initial measurements.
- Typical train and track should be specific to operator, flagfall type and route.
- Measurement and modelling costs should be borne jointly.
- Modelling/estimation would be on a monthly or quarterly basis depending on cost.

**Availability**

Measure:

- % of agreed paths varied for the purpose of track owner possession
  - Exclude force majeure events
  - Reporting would be at total operator level and on a monthly basis.

**Safety**



Measure:

- No. of reportable occurrences specific to an operator and categorised as per current regulatory requirement.
  - Major/Minor
  - By type of incident (rollingstock defect, safeworking breach etc)
- Reporting should focus at the operator and relevant corridor level, and be carried out on a monthly basis.
- Reporting will be carried out by network manager (to operator) and by operator (to network manager).

### **Train/Rollingstock Quality**

Identify those aspects of train and rollingstock “quality” which can be reasonably and should be measured (eg. wheel condition, axle loading, wagon ride quality, train length/power).

Identification of aspects suitable for measurement and reporting may evolve over time.

Measure:

- Incidence of failure by aspect of train quality.
  - Measurement would be made by various available detection devices (eg wheel impact detector, bearing detector etc)
  - Reporting would be at a total operator level and on a monthly basis.
  - Measurement should be jointly funded.

### **Track Quality**

Measure:

- Track Quality Index (summation of weighted measures (standard deviations x 3) related to track condition parameters) for a corridor /segment of track.
  - Calculated over 100m sections, using 0.5m raw data from measuring car equipment.
  - Relevant TQI component measures include:
    - Vertical alignment (20m inertial top (average of left and right rails))
    - Horizontal alignment (versine over a 10m chord (average over left and right rail))
    - Twist (relative height of two rails measured over 2.0m)
    - Gauge variation (distance between tracks)
- Other track surface condition measures:
  - Impact Loading (weld dips)
  - Roughness (corrugations)
- Standards of measurement and definitions would be consistent with those currently employed and available to ARTC (AK car)
- Reporting would be on the basis of corridors/segments relevant to the operator and carried out on a quarterly basis (TQI) and up to annually (other measures).

**SCHEDULE 76**  
**Code of Practice**  
**(Clauses 1.1 & 5.5)**

**WA, SA, part VIC and part NSW (Kalgoorlie to Dimboola and Crystal Brook to Broken Hill)**

Network Rules

1. Volume 1 General Requirements and Interface Management - ARTC's Code of Practice for the Defined Interstate Rail Network;
2. Volume 2 Glossary - ARTC's Code of Practice for the Defined Interstate Rail Network;
3. Volume 3 Parts 1 and 2 Operations and Safeworking - ARTC's Code of Practice for the Defined Interstate Rail Network;
4. ARTC Addendum to the Code of Practice for the Defined Interstate Rail Network;

Interface Requirements

5. Network Interface Co-ordination Plan [TA02]

**VIC (Dimboola to Albury)**

Network Rules

6. ARTC Code of Practice for Victorian Mainline Operations [TA20]

Interface Requirements

7. Network Interface Co-ordination Plan [TA02]

**NSW (Excluding Cockburn to Broken Hill)**

Network Rules

8. ARTC Network Rules;
9. ARTC Network Procedures;

Interface Requirements

10. ARTC Train Operating Conditions Manual

Copies of all of these documents are available on ARTC's website [www.artc.com.au](http://www.artc.com.au)

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED**  
ABN 75 081 455 754

and

ABN

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**TRACK ACCESS AGREEMENT**  
for Indicative Services

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