

## PART 1

ACCESS UNDERTAKING dated

2001

BY

AUSTRALIAN RAIL TRACK CORPORATION LIMITED ABN 75 081 455 754 of Passenger Terminal Road,  
Mile End SA 5000 (“ARTC”)

IN FAVOUR OF

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION being a body corporate established under  
section 6A of the TPA (“ACCC”)

### 1. PREAMBLE

#### 1.1 Introduction

- (a) On 14 November 1997, the Commonwealth of Australia, the State Governments of New South Wales, Victoria, Queensland, Western Australia and South Australia signed the Intergovernmental Agreement (“IGA”) concerning, amongst other things, the formation of ARTC and the granting of access to rail operators of the Interstate Rail Network.
- (b) One of the stated objectives of the IGA is to create a single process of access to the Interstate Rail Network consistent with the Competition Principles Agreement and the National Rail Summit Heads of Agreement.
- (c) Pursuant to clause 4 of the IGA, ARTC was established on 24 February 1998 as a company under the Corporations Law owned by the Commonwealth Government as the entity to manage the granting of access to rail operators to the Interstate Rail Network.
- (d) ARTC currently owns or leases and is responsible for the granting of access to that part of the Interstate Rail Network comprising the Network.
- (e) As a vertically separated provider of access, ARTC operates in a competitive environment where competitive pressure from other modes of transport (particularly road) place constraints on rail ~~freight transport~~ and access pricing. Accordingly, in ARTC’s view, it is unlikely to be able to price in any of its markets at levels which will fully recover the full economic costs of its assets.
- (f) As the manager of a significant part of the Interstate Rail Network, ARTC has adopted the concepts of equity and transparency as key elements of its pricing policies. ARTC will not discriminate price on the basis of the identity of the customer, the commodity being transported. By so doing, ARTC seeks to stimulate customer confidence and market growth in rail industry in an evolving environment in which government owned vertically integrated railways are being replaced by privately owned operators with access to shared track infrastructure.
- (g) As an access provider, maintenance of the Network and Associated Facilities is a large component of ARTC’s current cost structure. These services are outsourced and managed under maintenance contracts entered into on commercial terms as a result of a competitive tender process. ARTC has adopted this practice with a view to ensuring that ARTC’s cost structure will reflect efficient infrastructure practice.
- (h) ARTC has prepared this Undertaking voluntarily in pursuance of the objectives of the IGA and to provide a framework to manage negotiations with Applicants for Access to the Network for the purpose of operating Services.
- (i) This Undertaking will be applied consistently to Access Applications where such applications are within the scope of this Undertaking as set out in Part 2.

## 1.2 Objectives

This Undertaking is a voluntary undertaking submitted by ARTC under Part IIIA of the TPA. The intent of the Undertaking is to:

- (a) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing Access Applications;
- (b) use transparent and detailed methodologies, principles and processes for determining access price limits, terms and conditions;
- (c) reach an appropriate balance between:
  - (i) the legitimate business interest of ARTC:
    - (A) the recovery of all reasonable costs associated with the granting of Access to the Network;
    - (B) a fair and reasonable return on ARTC's investment in the Network and Associated Facilities (including maintenance costs) commensurate with its commercial risk; and
    - (C) stimulate customer confidence and market growth in the rail industry;
  - (ii) the interest of the public:
    - (A) increase competition ensuring efficient use of resources;
    - (B) reducing the potential for abuse of market power by operators or major users of single purpose infrastructure facilities; and
    - (C) promoting other relevant social objectives, such as an increase of ~~freight~~ traffic from road to rail;
  - (iii) the interests of Applicant's wanting Access to the Network:
    - (A) providing Access to the Network on fair and reasonable terms; and
    - (B) providing Access in a open, efficient and non-discriminatory manner;
- (d) provide an efficient, effective and binding resolution process in the event that ARTC and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (e) operate consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement.

## PART 2

### ~~1.2.~~ SCOPE AND ADMINISTRATION OF UNDERTAKING

#### 2.1 Scope

- (a) This Undertaking provides for the negotiations of Access required for the operation of Train Services by Operators on the Network, with details of the specified services and sections of the Network defined during Access negotiations. Access will include, in addition to the track, the benefit of Associated Facilities required to facilitate such Access.
- (b) This Undertaking does not extend to providing access to such parts of the Interstate Rail Network not included in the definition of “Network”. If Operators require access to such segments of the Interstate Rail Network, they should make contact with the relevant owners or managers of such segments.
- (c) Without limiting clause 2.1(b), this Undertaking does not extend to any extensions to the Network nor to the track and infrastructure of other track owners that may connect to the Network.
- (d) If ARTC:
  - (i) becomes a Provider with respect to rail services utilising Other Track; and
  - (ii) is permitted by the TPA to submit an access undertaking in respect of the provision of access to such Other Track,

ARTC will, as soon as is practicable after becoming such a Provider, submit a separate access undertaking to the ACCC in respect of the Other Track.

#### ~~1.12.2~~ Grant and Duration of Undertaking

ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking in relation to the grant of Access to Operators to the Network for Services. This Undertaking takes effect one (1) month after it is accepted by the ACCC under section 44ZZA(3) of the TPA and will continue until the earlier to occur of:

- (a) the expiry of the Term; or
- (b) termination of this Undertaking in accordance with its terms or the TPA.

#### 2.3 Term

This Undertaking will continue to be binding upon ARTC until:

- (a) the fifth (5<sup>th</sup>) anniversary of the Commencement Date; or
  - (b) the date upon which the ACCC consents to the withdrawal of the Undertaking by ARTC,
- whichever is the earlier.

#### ~~1.12.4~~ Review of Undertaking

- (a) If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC, ARTC may seek the approval of the ACCC to vary this Undertaking.
- (b) Prior to seeking the approval of the ACCC under clause 2.4(a), ARTC shall first consult with Operators regarding the proposed variation.

- (c) ARTC may only vary the Undertaking with the consent of the ACCC under section 44ZZA(6) of the TPA.

## 2.5 Existing Contractual Agreements

This Undertaking applies only to the negotiations of new Access Agreements or the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

### ~~1.12.6~~ Contact Details

- (a) Persons wishing to contact ARTC for further information or to apply for Access to the Network should contact ARTC at any of the following addresses:

- (i) The Secretary  
Australian Rail Track Corporation Ltd  
Keswick Passenger Terminal Road  
(Off Sir Donald Bradman Drive)  
MILE END SA 5031

Telephone: (08) 8217 4366  
Facsimile: (08) 217 4190

- ~~(ii)~~ The Secretary  
Australian Rail Track Corporation Ltd  
PO Box 10343  
Gouger Street  
ADELAIDE SA 5000

- ~~(iii)~~ secretary@artc.com.au

- (b) Applicants are also encouraged to search ARTC's internet web site at [www.artc.com.au](http://www.artc.com.au) on which will be published various information regarding ARTC and this Undertaking including:

- (i) a map containing a geographical description of the Network;
- (ii) a narrative description of the Network;
- (iii) Indicative Access Charges;
- (iv) prices for which Access has been granted together with general description of the Services to which such prices relate;
- (v) the Network Management Principles;
- (vi) the ~~standard~~ Indicative Access Agreement; ~~and~~
- (vii) a copy of ARTC's annual report;
- ~~(viii) a graphical representation of Committed Capacity on the Network (excluding track possessions for Network maintenance);~~
- ~~(ix) indicative section running times for indicative Services by corridor;~~
- ~~(x) route standards by corridor; and~~
- ~~(xi) the Performance Indicators.~~

## PART 3

### ~~1.3.~~ NEGOTIATING FOR ACCESS

#### 3.1 Introduction

As part of ARTC's philosophy, it seeks to encourage utilisation of the Network and as such, will ~~not seek to frustrate the negotiation process~~negotiate with the Applicant in good faith. ARTC recognises that the process needs to be flexible to suit specific circumstances and is willing to tailor the process in consultation with the Applicant. However, ARTC also recognises that the industry seeks some certainty and provides this framework to satisfy that need.

#### ~~1.3.2~~ Framework

This part of the Undertaking seeks to outline the process which will be followed to enable an ~~Operator~~Applicant to gain Access to the Network. It provides for:

- (a) preliminary meetings and exchanges of information;
- (b) submission of an Access Application by the Operator;
- (c) preparation of an Indicative Access Proposal by ARTC;
- (d) negotiations to develop an Access Agreement for execution; ~~and~~
- (e) dispute resolution procedures ~~; and~~
- (f) both ARTC and the Applicant to negotiate in good faith.

#### 3.3 Parties to Negotiation

- (a) ARTC reserves the right to only negotiate with Applicants who comply with the relevant obligations and applicable processes set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and ARTC considers that such non-compliance is material, ARTC will not be obliged to continue negotiations regarding the provision of Access for that Applicant.
- (b) ARTC will negotiate Access with an Applicant which is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the proposed Services provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.
- (c) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC reasonable satisfaction that it is able to meet the prudential requirements set out in clause 3.3(d). In the event the Applicant cannot meet these prudential requirements, ARTC may refuse to commence negotiations or may cease negotiations with that Applicant.
- (d) For the purposes of clause 3.3(c), the Applicant will be required to meet the following prudential requirements:
  - (i) the Applicant must be Solvent;
  - (ii) the Applicant, or a Related Party of the Applicant, must not be currently, or have been in the previous (2) years, in Material Default of any agreement with ARTC, or any agreement in accordance with which access to rail infrastructure not managed by ARTC, has been provided to the Applicant or a Related Party of the Applicant.
- (e) If ARTC refuses to negotiate Access with an Applicant in accordance with clause 3.3(c), it shall provide the Applicant with written reasons for its refusal.

- (f) If the Applicant considers that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations in accordance with clause 3.3, then the Applicant may refer the matter to the arbitrator in accordance with clause 3.11. If the arbitrator determines that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations, ARTC will recommence negotiations immediately.
- (g) If at any time, ARTC is of the view that an Applicant's request for Access is frivolous in nature, ARTC may refer the request to the arbitrator in accordance with clause 3.11 for determination. If the arbitrator determines that the request is in fact frivolous, then ARTC will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

#### 3.4 **Confidentiality**

- (a) ARTC and the Applicant will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged as part of the negotiation for Access under this Undertaking, without the approval of the party who provided it, except where disclosure is in accordance with clause 3.4(c). If required by either party, the parties shall enter in appropriate confidentiality arrangements to reflect this obligation.
- (b) Both ARTC and the Applicant will ensure that all Confidential Information provided by the other party is used only for the purposes for which the information was provided.
- (c) Clauses 3.4(a) and (b) shall not apply to disclosure of Confidential Information in any of the following circumstances:
  - (i) any disclosure required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority;
  - (ii) disclosure to recipient's advisers under a duty of confidentiality;
  - (iii) where such Confidential Information was obtained lawfully from a third party without restriction on use or disclosure.

#### 3.5 **Access Application**

- (a) Requests for Access are to be submitted to ARTC in the form of an Access Application.
- (b) In order for ARTC to consider the requests for Access, the information set out in Schedule B must accompany the Access Application.
- (c) Prior to submitting the Access Application, the Applicant may seek initial meetings with ARTC to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and in particular, the information requirements set out in Schedule B.

#### 3.6 **Acknowledgment**

- (a) Upon receiving an Access Application from an Applicant, ARTC must acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within five (5) Business Days of its receipt, or such longer period as specified in accordance with clause 3.6(b).
- (b) Prior to acknowledging the Access Application, ARTC may seek:
  - (i) additional information where ARTC can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal; or
  - (ii) clarification of the information that has been provided in the Access Application.

In such circumstances, ARTC will advise the Applicant of the additional information or the clarification required within five (5) Business Days of receipt of the Access Application.

Upon receiving the required information or clarification from the Applicant, ARTC must provide written acknowledgment of the receipt of the completed Access Application within five (5) Business Days.

~~1.4.3.7~~ **Indicative Access Proposal**

- (a) Subject to clause 3.7(b), ARTC will use reasonable efforts to provide the Indicative Access Proposal to the Applicant within thirty (30) Business Days of the acknowledgment given under clause 3.6.
- (b) In assessing an Access Application, ARTC may consider that, due to the complexity of the Access Application or due to other extenuating circumstances, it is not reasonable for it to provide an Indicative Access Proposal within the thirty (30) Business Days referred to in clause 3.7(a). In these circumstances, ARTC will advise of such in its acknowledgment and within a further five (5) Business Days will advise the Applicant of its estimate of the time required to deliver the Indicative Access Proposal. Where the Applicant is of the view that the time estimated for preparation of the Indicative Access Proposal under this clause 3.7(b) is excessive, then the Applicant may refer the matter to the arbitrator for a determination in accordance with clause 3.11. ARTC will use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by ARTC or as otherwise determined by the arbitrator pursuant to that clause.
- (c) The Indicative Access Proposal will set out, amongst other things:
  - (i) the results of a Capacity Analysis determining whether there is sufficient Available Capacity to accommodate the requested Access Rights;
  - (ii) in the event the Access Application requires the Applicant to have recourse to Additional Capacity, an outline of the works and an indicative estimate of the cost of such works required to provide the Additional Capacity or an outline of the requirements for an investigation into the provision of Additional Capacity for the requested Access Rights;
  - (iii) advice in respect of the existence of other ~~operators~~ Applicants who have submitted an Access Application (where negotiations are continuing in accordance with this Undertaking) in respect of Access which, if it were to be provided, would limit the ability of ARTC to provide Access in accordance with the Indicative Access Proposal;
  - (iv) a copy of ARTC's standard terms and conditions of Access;
  - (v) an initial estimate of the Charges for the Access Rights, based on the pricing principles set out in Part 4;
  - ~~(vi)~~ details of the additional information required for ARTC to progress the proposal and further develop the Charges and terms and conditions for acceptance; and
  - ~~(vii)~~ the indicative Train Path availability.
- (d) The Indicative Access Proposal will, unless it contains specific provisions to the contrary, contain indicative arrangements only and does not oblige ARTC to provide Access in accordance with specific terms and conditions, including Charges, contained within it.
- (e) If, after thirty (30) Business Days following ARTC's acknowledgment of the Access Application, or if applicable, after expiration of the time estimated by ARTC or determined by the arbitrator in accordance with clause 3.7(b), the Applicant believes that ARTC is not making reasonable progress in the preparation of the proposal, then the Applicant may refer the matter to the arbitrator for a determination in accordance with clause 3.11.
- (f) In the event that ARTC is unable to provide an Indicative Access Proposal based on the Access Application, ARTC will, if possible, submit to the Applicant an Indicative Access

Proposal offering alternative Access which it reasonably believes may meet the Applicant's Access requirements.

### 3.8 **Negotiation**

- (a) If the Applicant intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the Indicative Access Proposal, the Applicant must notify ARTC of its intention to do so within thirty (30) Business Days of the date it receives the Indicative Access Proposal (or such other period of time that the parties agree). In the event that a notification is given after this period of time, ARTC will review the Indicative Access Proposal and, if considered necessary by ARTC, prepare a revised Indicative Access Proposal in accordance with clause 3.7 and the negotiation process outlined in this Part 3 will recommence from that point.
- (b) If the Applicant is of the view that the Indicative Access Proposal has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, then the Applicant shall notify ARTC of its concerns within thirty (30) Business Days of the date of receipt of the Indicative Access Proposal.
- (c) ARTC will respond to these concerns including, where appropriate, the making of revisions to the Indicative Access Proposal, within a reasonable time frame. If the Applicant is satisfied with the response received from ARTC, including any revision to the Indicative Access Proposal, it must notify ARTC of its intention to proceed with negotiations within thirty (30) Business Days of receiving ARTC's response.
- (d) If the Applicant is not satisfied with the response from ARTC, including any revision to the Indicative Access Proposal, the Applicant may seek to resolve the dispute in accordance with the dispute resolution process outlined in clause 3.11. The Applicant must commence this dispute resolution process within thirty (30) Business Days of receiving ARTC's response.

### 3.9 **Negotiation Process**

- (a) If the Applicant indicates its willingness to progress negotiations under clause 3.8, then both parties shall commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The negotiation period shall commence upon the Applicant providing a notification pursuant to clause 3.8 and shall cease upon any of the following events:
  - (i) execution of an Access Agreement in respect of Access sought by the Applicant;
  - (ii) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
  - (iii) a reduction in Available Capacity as a consequence of another operator finalising an Access Agreement where that reduction in Available Capacity impacts upon ARTC's ability to offer Access to the Applicant under the terms of the Indicative Access Proposal;
  - (iv) the expiration of three (3) months from the commencement of the negotiation period, or if both parties agree to extend the negotiation period, the expiration of the agreed extended period;
  - ~~(iv)~~ (v) if ARTC is of the view that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period and ARTC refers the matter to the arbitrator under clause 3.11 for a determination on this issue and such determination is found in ARTC's favour;
  - or



~~(iv)~~(vi) ARTC receives evidence confirming that the Applicant no longer satisfies the prudential requirements of clause 3.4(d).

- (c) Upon cessation of the negotiation period, ARTC will be entitled to cease negotiations with the Applicant.
- (d) In circumstances where two or more Applicants are seeking mutually exclusive Access Rights:
  - (i) each Applicant will be so notified as soon as practicable after the relevant conflict arises;
  - (ii) Access will be granted to the Applicant who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.

Failure by ARTC to provide such notification shall not constitute a breach of the Undertaking where such failure was not wilful and ARTC acted in good faith.

~~(a)~~(e) If, at any time during the negotiation period, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in clause 3.11.

### 3.10 Access Agreement

- (a) The granting of Access will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be ARTC and:
  - (i) If the Applicant is an Accredited Operator, that Applicant; or
  - (ii) If the Applicant is not an Accredited Operator, that Applicant or the Accredited Operator or both (as the case may be).
- (b) The Access Agreement must, unless otherwise agreed between ARTC and the Applicant, be consistent with the principles outlined in the Indicative Access Agreement and must address at least the matters set out in Schedule C. The details of Schedule C do not provide an exhaustive list of the issues that may be included in an Access Agreement.
- (c) Once the Applicant has notified ARTC that it is satisfied with the terms and conditions of the Access Agreement as drafted, ARTC will, as soon as reasonably practicable, provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (d) The parties will use reasonable endeavours to duly execute the final Access Agreement as soon as practicable after its completion by ARTC.

### 3.11 Dispute Resolution

#### 3.11.1 Disputes

- (a) If any dispute arises under this Undertaking or in relation to the negotiation of Access between an Applicant and ARTC ("Dispute") then, unless otherwise expressly agreed to the contrary by both parties, such ~~dispute~~ Dispute shall be resolved in accordance with this clause 3.11 and 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 in the manner set out in this clause 3.11. The parties must use reasonable endeavours acting in good faith to settle the Dispute as soon as is practicable.

- (b) Disputes in relation to an Access Agreement once executed shall be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

### 3.11.2 Negotiation

Within seven (7) days of a party ~~notifying giving~~ the other party ~~to the a~~ Dispute ~~Notice of the Dispute~~, senior representatives from each party must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

### 3.11.3 Mediation

~~(a) (a) Unless otherwise agreed by both parties, if the Dispute is not resolved under clause 3.11.2 within twenty one (21) days after notification, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the dispute, including by informal mediation. If the Dispute is not resolved under clause 3.11.2 within twenty one (21) days after the date of the Dispute Notice then:~~

~~(i) if the parties agree, they shall attempt to resolve the Dispute by mediation pursuant to this clauses 3.11.3(b), (c) and (d); or~~

~~(ii) if the parties do not wish to resolve the Dispute by mediation under clauses 3.11.3(b), (c) and (d), either party may by notice in writing to the other and the ACCC, refer the Dispute to be determined by arbitration under clause 3.11.4(b).~~

~~(b) If this clause applies to the Dispute, 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)(c)~~ If the Dispute is not resolved within fourteen (14) days after being referred to the chief executive officers under clause 3.11.3~~(ab)~~, 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)(d)~~ Unless the parties agree otherwise:

- (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 mediation;
- (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.

### 3.11.4 Arbitration

(a) If the Dispute is not resolved within one (1) month of the appointment of the mediator ~~(if any)~~ under clause 3.11.3~~(c)~~, either party may by notice in writing to the other ~~and the ACCC~~ terminate the mediation proceedings and ~~refer the dispute~~ notify the ACCC of a Dispute to be determined by arbitration under this clause 3.11.4~~(b)~~.

(b) Where a Dispute is referred to arbitration under this clause 3.11.4~~(b)~~ (whether under clauses 3.11.3(a)(ii) or 3.11.4(a)), the following shall apply:

~~(i) The parties shall appoint an arbitrator, or where the parties cannot reach agreement within fourteen (14) days, by the President of the Institute of Commercial Arbitrators.~~

~~(ii) The arbitrator so appointed shall have no interest or duty which conflicts or may conflict with his or her functions as an arbitrator, he or she being required to fully disclose any such interest or duty before his or her appointment and cannot be an employee of the Applicant, ARTC or a Related Party of either of them.~~

~~(i) The arbitrator shall be the ACCC. For the purposes of a particular arbitration, the ACCC is to be constituted by 2 or more members of the ACCC nominated in writing by the chairperson of the ACCC.~~

~~(ii) The procedures of the arbitration will be determined by Subdivision D of Part IIIA of the TPA, except that:~~

~~(iii) The arbitration will be conducted in accordance with the Commercial Arbitration Act 1986 (SA) except that:~~

(A) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;

(B) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration; and

~~(C) the arbitrator does not have the power conferred by section 25 of the Commercial Arbitration Act 1986;~~

~~(D)(C)~~ the arbitrator must include in the arbitration determination ~~award the~~ findings on material questions of law and fact, including references to evidence on which the findings of fact were based;

~~(E) the arbitrator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of the appointment and performance of his or her duties.~~

~~(iv)(iii)~~ The arbitrator will when conducting the arbitration:

(A) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;

(B) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;

(C) call on any party the arbitrator believes necessary to give evidence;

(D) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;

(E) present ~~his or her award~~ their determination in a draft form to the parties and hear argument from the parties before making a final award determination; and

(F) hand down a final award determination in writing which includes all ~~his or her~~ their reasons for making the award determination.

~~(iv)~~(iv) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:

- (A) the notification of the Dispute is vexatious;
- (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
- (C) the party who notified the Dispute has not engaged in negotiations in good faith.

~~(v)~~(v) In deciding a Dispute the arbitrator must take into account:

- (A) the principles, methodologies and provisions set out in this Undertaking;
- (B) the objectives and principles enunciated in Part IIIA of the TPA and the Competition Principles Agreement;
- (C) ARTC's legitimate business interests and investment in the Network;
- (D) all costs that ARTC incurs in providing Access, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (E) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;
- (F) the interests of all persons holding contracts for use of the Network;
- (G) the firm and binding contractual obligations of ARTC or other persons (or both) already using the Network;
- (H) the operational and technical requirements necessary for the safe and reliable operation of the Network;
- (I) the economically efficient operation of the Network;
- (J) the benefit to the public from having competitive markets;
- (K) any other matters that the arbitrator thinks are appropriate to have regard to.

(vi) In making its determination, the ACCC:

- (A) may deal with any matters referred to in section 44V of the TPA;
- (B) must not make a determination that would have any of the effects described in section 44W of the TPA;
- (C) must take into account the matters referred to in section 44X of the TPA;
- (D) comply with the procedures described in Subdivision D of Part IIIA of the Act.

(vii) ~~In the absence of manifest error, The decision determination~~ of the arbitrator shall be final and binding on the parties subject to any rights of appeal granted under the TPA. If a party believes that there has been a

~~manifest error, it may refer the matter to the ACCC for a determination. If the ACCC determines that there has been a manifest error, then the parties may agree to refer the Dispute to another arbitrator in accordance with clause 3.11.4, or failing agreement, either party may refer the Dispute to the ACCC for resolution in accordance with clause 3.11.5.~~

- (viii) The costs of the arbitrator and any advisers shall be borne by the parties in such proportions as determined by the arbitrator.

~~3.11.5 Determination by the ACCC~~

- ~~(a) If a Dispute is referred to the ACCC in accordance with clause 3.11.4, then Division 3 of Part IIIA of the TPA shall apply subject to any determination by the ACCC being consistent with the provisions of this Undertaking.~~

- ~~(ix) (b) Except in the circumstances described in clause 3.11.4(b)(vii) where the determination has been appealed by the Applicant, if an Applicant does not comply with a decision determination of an the arbitrator pursuant to under clause 3.11.4, then such Applicant will not be entitled to refer that Dispute to the ACCC and~~ ARTC will no longer be obliged to continue negotiations regarding the provision of Access for that Applicant.

- ~~(c) If an Applicant does not comply with a decision of the ACCC pursuant to this clause 3.11.5, then ARTC will no longer be obligated to continue negotiations regarding the provision of Access for that Applicant.~~

- ~~(d) In making its determination, the ACCC:~~

- ~~(i) may deal with any matters referred to in section 44V of the TPA;~~
- ~~(ii) must not make a determination that would have any of the effects described in section 44W of the TPA;~~
- ~~(iii) must take into account the matters referred to in section 44X of the TPA;~~
- ~~(iv) comply with the procedures described in Subdivision D of Part IIIA of the Act.~~

## PART 4

### ~~1.4.~~ PRICING PRINCIPLES

#### 4.1 Objectives

ARTC will develop its Charges with a view to achieving the objective set out in clause 1.2(c). As part of achieving that objective, ARTC has a legitimate business interest in recovering all of its reasonable costs associated with granting Access to the Network and obtaining a fair and reasonable return on ARTC's investment in the Network (including maintenance costs) commensurate with its risk and its competitive environment. The Charges are also developed with a view to stimulating customer confidence and market growth in the rail industry and also promote efficient use and investment in the Network.

#### ~~1.4.2~~ Charge Differentiation

In formulating its Charges, ARTC will have regard to a range of factors which impact on its business including, but not limited to, the following:

- (a) the particular characteristics of the relevant Service, which without limitation include, axle load, speed, wheel diameter, Train length, origin and destination (including number and length of intermediate stops) departure and arrival times and days of the week;
- (b) the Indicative Access Charges set out in clause 4.6;
- (c) the commercial impact on ARTC's business, which without limitation includes factors such as:
  - (i) the term of the Access Agreement;
  - (ii) the potential for growth of the business;
  - (iii) the opportunity costs to ARTC;
  - (iv) the consumption of ARTC's resources;
  - (v) the credit risk associated with the business;
  - (vi) the market value of the Train Path sought;
  - (vii) the segments of the Network relevant to the Access being sought; and
  - (viii) previously negotiated Charges agreed under the terms of this Undertaking, where relevant, as published by ARTC as set out in clause 2.6(b).
- (d) logistical impacts on ARTC's business which without limitation include:
  - (i) the impact on other Services and risk of failure of the Operator to perform;
  - (ii) reduced Capacity and system flexibility.
- (e) capital or other contributions by the Applicant to ARTC's costs; and
- (f) the cost of any Additional Capacity.

#### 4.3 Limits on Charge Differentiations

- (a) In formulating its Charges, ARTC will not have regard to:
  - (i) the identity or characteristics of the Applicant; and

- (ii) whether or not the Applicant is a Government Authority.
- (b) In formulating its Charges, ARTC will not differentiate between Applicants in circumstances where:
  - (i) the characteristics of the Services are alike; and
  - (ii) the Applicants are operating within the same end market.

For the purposes of this clause, ARTC shall determine whether the characteristics of two Services are alike having regard to matters including but without limitation location, duration and quality of the Train Path, nature of Train consist, characteristics of the Service, longevity of Access, arrival and departure times of the day and week.

#### ~~1.14.4~~ **Revenue Limits**

- (a) Notwithstanding any other clause within this Part 4, the Charges formulated by ARTC for the Services will be such that the revenue generated by ARTC for the Segment or group of Segments (applicable to the Service as the case may be) will:
  - (i) not be lower than the Floor Limit (unless otherwise agreed by ARTC); and
  - (ii) not be higher than the Ceiling Limit (unless otherwise agreed by the Applicant).
- (b) The Floor Limit means the Charges which, if applied to all Operators on a Segment or a group of Segments, would generate revenue for ARTC sufficient to cover the incremental cost of that Segment or group of Segments. For the purpose of this clause, incremental costs means the costs that could have been avoided if a Segment was removed from the Network excluding Depreciation and a return on assets employed, such return being an amount determined by applying to WACC to the DORC associated with the assets.
- (g) The Ceiling Limit means the Charges which, if applied to all operators of a segment or a group of segments would generate revenue for ARTC sufficient to cover the Economic Cost of that segment or group of segments.
- (c) In calculating the Economic Cost for the purposes of the Ceiling Limit, the Network and Associated Facilities will be:
  - (i) valued using the depreciated optimised replacement cost method of valuing assets (“**DORC**”);
  - (ii) revalued annually by CPI; and
  - (iii) revalued every five (5) years by estimating the depreciated optimised replacement cost.

For the purpose of this clause, the optimised replacement cost means the cost of replacement by commercially efficient application of best known currently available technology based on reasonably forecasted demand characteristics for the asset.

~~(a)(d)~~ For the purposes of this Part 4, Economic Cost means:

- (i) costs specific to a Segment;
- (ii) the costs of Additional Capacity;
- (iii) Depreciation;
- (iv) Return on Segment specific assets; and

- (v) an allocation of non-Segment specific costs including Train control, Depreciation and a Return on non-Segment specific assets and other overheads of ARTC.
- (e) For the purposes of clause 4.4(e), non-Segment specific costs will be allocated to Segments in proportion to:
  - (i) gtkm with respect to 60% of the track maintenance cost;
  - (ii) track kilometres with respect to 40% of the track maintenance cost: and
  - (iii) Train kilometres with respect to all other costs.

Where possible, costs will be directly attributable to a Segment. All costs shall comprise ARTC's reasonably anticipated costs over a reasonable future timeframe.

~~(e)(f)~~ The Rate of Return for the purposes of this Part shall be equivalent to ARTC's weighted average cost of capital ("WACC") after consideration of all risks with the commercial environment in which ARTC operates, the elements of which shall comprise:

- (i) a capital asset pricing model ("CAPM") method of determining the cost of equity;
- (ii) a debt to equity ratio which would be considered prudent for ARTC by reputable lenders; and
- (iv) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure.

#### 4.5 Structure of Charges

- (a) Access charges will comprise:
  - (i) a variable component, which is a function of distance and gross mass (\$/gtkm); and
  - (ii) a flagfall component, which is fixed and specific to each Train service type and Segment (\$/km).
- (b) Except as otherwise provided in the Access Agreement, the flagfall component of the Charges is levied from the date the Train Path vests in the Operator until the expiry of that Train Path irrespective of whether such Train Path is utilised.
- (c) Notwithstanding the structure described above, both elements of the Charge are open to negotiation.

#### 4.6 Indicative Access Charge

- (a) As part of this Undertaking, ARTC will offer the Indicative Access Charges described in clause 4.6(b) below for Applicants seeking Access for a Service with the following characteristics:
  - (i) axle load of 21 tonnes;
  - (ii) maximum speed of 110 km/h and average speed of 80km/h; and
  - (iii) length not exceeding Adelaide 1500 metres east of Adelaide and 1800 metres west of Adelaide.



- (b) The Indicative Access Charge will be the sum of the flagfall and variable components as follows:

Segment	Variable \$/kgtkm	Flagfall \$/km
Adelaide – Parkeston	2.056	2.605
Crystal Brook – Broken Hill	2.325	1.642
Port Augusta – Whyalla	3.633	1.644
Adelaide – Pelican Point	3.234	1.917
Adelaide – Melbourne	2.365	1.766
Melbourne – Albury	2.156	1.527

Note: The Indicative Access Charges specified above reflect ARTC's pricing as at 30 June 2001. Such Charges will be updated when the review conducted on 1 July 2001 is implemented.

- ~~(a)~~(c) The Indicative Access Charges may be varied annually by ARTC. If a variation is to occur, the Indicative Access Charges will be varied by multiplying them by the greater of:

- (i) CPI less 2%; or
- (ii) 2/3 thirds of CPI.

Such variations, if made, will be effective as from 1 July in each year the variation occurs.

## PART 5

### **4.5. MANAGEMENT OF CAPACITY**

#### **5.1 Capacity Analysis**

- (a) A Capacity Analysis will be undertaken by ARTC as part of the preparation of the Indicative Access Proposal. The Capacity Analysis will identify whether there is sufficient Available Capacity to meet the Applicant's requirements and, if not, the extent to which Additional Capacity is required.
- (b) Where it is believed that there are major impediments to the provision of Additional Capacity to meet the requirements of the Applicant, and that the Capacity enhancement that might be necessary would have a significant bearing on the economics of the proposed operation, the Capacity Analysis may be done in more detail which may require more time for the preparation of the Indicative Access Proposal (see clause 3.7(b)).
- (c) The finalisation of the Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, Train Paths, Charges and terms and conditions of the resultant Access Agreement.

#### **5.2 Capacity Allocation**

- (a) Subject to clause 5.2(b), Access Rights will be allocated to the first Customer with whom ARTC can negotiate and execute an Access Agreement which, in the opinion of ARTC, is most favourable to it.
- (b) As previously stated in this Undertaking, if, at any time, two or more Applicants are seeking access with respect to mutually exclusive Access Rights, each of the Applicants who have received an Indicative Access Proposal with respect to those mutually exclusive Access Rights will be so advised. In such circumstances, ARTC is entitled to seek to finalise an Access Agreement in respect of such Access with the Applicant with whom ARTC can agree terms and conditions, including Charges, which are considered in the opinion of ARTC, to be most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement. Failure to give notification in accordance with this clause 5.2(b) will not constitute default under this Undertaking or invalidate or prejudice any Access Agreement which may have been entered into by ARTC provided such failure was not wilful and ARTC has acted in good faith.

#### **5.3 Capacity Transfer**

- (a) Where a Customer has under-utilised its Capacity Entitlement granted to it under the Access Agreement, the terms of the Access Agreement will provide that ARTC may reduce such Train Paths by removing particular Train Paths. Any decision by ARTC in this regard is subject to the dispute resolution provision in the Access Agreement.
- (b) A Customer may also reduce its Capacity Entitlement by cancelling Train Paths in accordance with the terms of the Access Agreement.
- (c) Train Paths may be assigned by a Customer to a third party with the approval from ARTC in accordance with the assignment provisions of that Access Agreement.

## PART 6

### ~~4.6.~~ NETWORK CONNECTIONS AND ADDITIONS

#### 6.1 Network Connections

In the event that other owners of track wish to connect such track to the Network, ARTC will consent to such a connection provided:

- (a) all relevant approvals from all relevant Government Authority have been obtained;
- (b) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity;
- (c) procedural and physical interface arrangements are in compliance with ARTC's existing interface arrangements and there is no impact on the safety of all users of the Network;
- (d) the other track owners ensures that all users of such track comply with the directions of ARTC's Train controllers regarding entry to and exit from the Network;
- (e) the connection meets ARTC's engineering and operational standards; and
- (f) the other track owners meet the initial and continued costs associated with constructing and maintaining the connection.

#### 6.2 Additional Capacity

- (a) As indicated in clauses 3.7 and 5.1, ARTC will consider as part of the negotiation process, any requests by Applicants for Additional Capacity. ARTC will consent to the provision of Additional Capacity if:
  - (i) in ARTC's opinion, such provision is commercially viable to ARTC having regard to the relevant Access Agreement and ARTC's total business activity; or
  - (ii) the Applicant agrees to meet the cost of the Additional Capacity; and
  - (iii) the ~~extension to~~ Additional Capacity of the Network is, in the opinion of ARTC, technically and economically feasible, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity, meets ARTC's engineering and operational standards and does not compromise ARTC's legitimate business interests.
- (b) In the event ARTC agrees to the creation of Additional Capacity, ARTC's costs of providing that Additional Capacity may be met by the Applicant;
  - (i) reimbursing the relevant costs as and when they are incurred by ARTC; or
  - (ii) through increased Charges, or making other periodic payments, reimbursing ARTC for recurring costs, plus an annuity in advance calculated by application of WACC to ARTC's capital outlay.
- (c) The option of increasing Charges or making periodic payments including an annuity as set out in clause 6.2(b)(ii) is only available to an Applicant if arrangements are made which satisfy ARTC that the risk of the Applicant failing to make such payments is commercially acceptable and is at ARTC's discretion.
- (d) Any Additional Capacity, once created, shall be owned and managed by ARTC.

## **PART 7**

### **~~1.7.~~ NETWORK TRANSIT MANAGEMENT**

ARTC's objective in Train management is to exit Trains according to their contracted exit time. Where conflicts arise between Trains in transit, Train management will be conducted according to the Network Management Principles.

## **PART 8**

### **8. PERFORMANCE INDICATORS**

#### **8.1 Commitment by ARTC**

ARTC commits to Customers to maintain the Network in a fit for purpose condition for the duration of the Term.

#### **8.2 Reporting**

Set out in tables 1 and 2 below are the Performance Indicators relating to the Network. ARTC shall publish on its website referred to in clause 2.6(b) the performance by it, the Customer (or both) as against the Performance Indicators at the frequency referred to in the table set out below.

**Table 1 - Service Quality Performance Reporting**

<b><u>Performance Measure</u></b>	<b><u>Responsibility</u></b>	<b><u>Reporting Frequency</u></b>
<b><u>Reliability<sup>1</sup></u></b>		
<u>Number and percentages of healthy<sup>2</sup> Services<sup>3</sup> that exit the Network within tolerance<sup>4</sup>.</u>	<u>ARTC</u>	<u>Quarterly</u>
<u>Number and percentage of unhealthy Services that do not deteriorate further, within tolerance.</u>	<u>ARTC</u>	<u>Quarterly</u>
<u>Number and percentages of unhealthy Services that exit the Network within tolerance.</u>	<u>ARTC</u>	<u>Quarterly</u>
<u>Number and percentage of Services which are operated in a healthy manner.</u>	<u>Operator</u>	<u>Quarterly</u>
<u>Number and percentage of Services which exit the Network no later than schedule, within tolerance.</u>	<u>Both</u>	<u>Quarterly</u>
<u>Number and percentage of Services which enter the Network no later than schedule, within tolerance.</u>	<u>Operator</u>	<u>Quarterly</u>
<u>Number and percentage of Services which exit the Network no later than one hour<sup>5</sup> after schedule.</u>	<u>Both</u>	<u>Quarterly</u>
<b><u>Transit Time<sup>1</sup></u></b>		
<u>Number and percentage of Services which transit<sup>6</sup> the Network no later than schedule transit, within tolerance.</u>	<u>Both</u>	<u>Quarterly</u>
<u>Sum of minutes delay (and minutes per hour transit) attributed to below rail cause by type of delay eg track, signals/communications, train management/control.</u>	<u>ARTC</u>	<u>Quarterly</u>
<u>Sum of minutes delay (and minutes per hour transit) attributed to above rail cause by type of delay eg late entry, yard/terminal, crew, locomotive, rollingstock, running.</u>	<u>Operator</u>	<u>Quarterly</u>
<u>Sum of minutes delay (and minutes per hour transit) unable to be attributed to a cause or beyond either party reasonable control.</u>	<u>Neither</u>	<u>Quarterly</u>
<u>Number of kilometres and percentage of track under temporary speed restriction at the beginning of a reporting period.</u>	<u>ARTC</u>	<u>Quarterly</u>
<b><u>Track Condition</u></b>		
<u>Track quality measured by index</u>	<u>ARTC</u>	<u>Quarterly</u>

<sup>1</sup> All measures would not reflect Services materially affected by a Force Majeure event (as defined in the Indicative Access Agreement).

- <sup>2</sup> For this purpose, a healthy service is one which has experienced no above rail related delay, within tolerance. Delays are attributed by ARTC personnel following advice from relevant sources (including the Operator). This attribution will determine the health or otherwise of the Service.
- <sup>3</sup> Services include all Committed and scheduled Capacity (excludes adhoc Services).
- <sup>4</sup> For this purpose tolerance is to be 15 minutes (unless otherwise agreed).
- <sup>5</sup> It may be appropriate to employ shorter or longer timeframes as appropriate depending on corridor transit times.
- <sup>6</sup> Transit time is the difference between entry and exit times and so includes all time for all enroute activities (scheduled and actual).

**Table 2 - Periodic Reporting of ARTC Unit Costs**

<u>Cost Area</u>	<u>Unit Cost</u>	<u>Frequency</u>
<u>Infrastructure Maintenance</u> <sup>1</sup>	<u>\$/track km, \$/GTK</u>	<u>Annually</u>
<u>Train Control</u> <sup>2</sup>	<u>\$/train km</u>	<u>Annually</u>
<u>Operations</u> <sup>3</sup>	<u>\$/train km</u>	<u>Annually</u>

<sup>1</sup> Total annual expenditure associated with outsourced infrastructure maintenance and associated ARTC maintenance contract management function.

<sup>2</sup> Total annual expenditure associated with ARTC train control and transit management function.

<sup>3</sup> Total annual expenditure associated with 2 above, and ARTC operations planning and management function.

## PART 89

### 2.9. DEFINITIONS AND INTERPRETATION

9.1 The following terms shall have the meaning set out below unless the context otherwise requires:

“**Access**” means access to use the Network, or any part thereof, for the purpose of running a Service;

“**Access Agreement**” means an access agreement entered into between ARTC and the Customer, the current indicative terms and conditions of which are set out in Schedule D;

“**Access Application**” means the application for Access as described in clause 3.4;

“**Accredited**” means in relation to an Operator, having accreditation as an operator under the Rail Safety Act of each State in which such Operator runs its Services on the Network;

“**Additional Capacity**” means ~~additions to the Network or other enhancement of Capacity~~the capability of the Network to carry additional task;

“**Applicant**” means the person seeking Access from ARTC and seeking to become a Customer;

“**Available Capacity**” means Capacity that is not Committed Capacity (including Committed Capacity in instances where it will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed);

“**Associated Facilities**” means all associated track structures, over and under track structures, supports (including support 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 related to or connected with use of the Network;

“**Business Day**” means a day which is not a Saturday, Sunday or public or bank holiday in the State of South Australia;

“**Capacity**” means the capability of the Network for Services, including Additional Capacity, after taking the account:

- (a) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements; and
- (b) the operation of work Trains.

“**Capacity Analysis**” means the assessment by ARTC as to the Available Capacity of the Network and whether or not there is sufficient Available Capacity to accept the Access Application and, if not, an assessment of the Additional Capacity required to accept the Access Application as described in Part 5;

“**Capacity Entitlement**” means the Capacity granted to the Operator under the Access Agreement in the form of Train Paths;

“**Ceiling Limit**” has the meaning described in clause 4.4(c);

“**Charges**” means the charges payable by the Operator to ARTC for the provision of Access under the Access Agreement;

“**Committed Capacity**” means that portion of the Capacity that is required to meet the Capacity Entitlement of Operators;

“**Competition Principles Agreement**” means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia;

**“Confidential Information”** means any commercially sensitive information or data (as reasonably determined) given by one party to the other together with information or data specifically marked confidential by a party when disclosed to the other.

**“CPI”** means the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics;

**“Customer”** means an Applicant who has been granted Access and, where such Customer is also the Accredited Operator to operate the Trains relating to such Access, the expression “Customer” shall also mean “Operator”;

**“Depreciation”** means matching asset cost, valued by the depreciated optimised replacement cost method (“DORC”) on a straight line basis over the useful life of the asset;

**“Economic Cost”** means the cost described in clause 4.4(e);

**“Floor Limit”** has the meaning described in clause 4.4(b);

**“Government Authority”** means any Commonwealth, State or Local government department or other body exercising an executive, legislative, judicial or governmental function;

**“Indicative Access Charges”** mean the Access Charges described in clause 4.6 as varied from time to time in accordance with clause 4.6(c);

**“Indicative Access Proposal”** means the preliminary Access proposal submitted by ARTC under clause 3.6;

**“Indicative Access Agreement” means the indicative access agreement in Schedule D;**

**“kgtkm”** means a thousand gross tonnes multiplied by kilometres travelled;

**“Material Default”** any breach of a fundamental or essential term or repeated breaches of any of the terms of the agreements referred to in clause 3.2(d)(ii);

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

**“Network Management Principles”** means the principles set out in Schedule F;

**“Operator”** means the Accredited Operator that will operate the Trains in accordance with the Access Agreement;

**“Other Track” means rail track and infrastructure not part of the Network but owned by any State or Territory government or government authority;**

**“Performance Indicators” means the performance indicators described in Part 8;**

**“Provider” means a provider as defined by section 44B of the TPA;**

**“Rail Safety Acts”** means the Acts passed by the Commonwealth, the States and Northern Territory regarding rail safety as contemplated in the Intergovernmental Agreement;

**“Rate of Return”** has the meaning described in clause 4.4(g);

**“Related Party”** has the meaning given to Related Body Corporate in the Corporations Law;

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

**“Segment”** means a component of the Network as defined in Schedule G and distinguished for the purposes of applying Charges and is the smallest component for which the Ceiling Limit and Floor Limits apply;



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

“**Solvent**” means none of the following events have happened to the Applicant:

- (a) the Applicant is unable to pay all its debts as and when they become due or it has failed to comply with a statutory demand under section 459F(1) of the Corporations Law;
- (b) a meeting is convened to place it in voluntary liquidation or to appoint an administrator;
- (c) an application is made to a court for it to be wound up and that application is not dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Law) of any of its assets; or
- (e) the Applicant proposes to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

“**Term**” means the term of this Undertaking as described in clause 2.3;

“**TPA**” means the Trade Practices Act, 1974;

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

“**Train Path**” means the entitlement of the Operator to use the Network between the times and between the locations as specified in an Access Agreement entered into between ARTC and the Operator (whether being scheduled or on an ad hoc basis);

“**Undertaking**” means this undertaking as amended from time to time in accordance with clause 2.4;

9.2 In this Undertaking 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 consent of a party means the prior written consent of that party;
- (e) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (f) a reference to a ~~clause~~ clause, Part or a Schedule is a reference to a clause, Part or Schedule ~~in~~ of this Undertaking;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to ARTC may, if so agreed by ARTC, be provided in electronic form.

## **SCHEDULE A**

(Access Application)

Any Electronic or written form is acceptable providing it clearly states:

“This is an application made in accordance with the ARTC Access Undertaking of [ *Date undertaking becomes effective* ]”

## **SCHEDULE B**

### **(Information to Accompany Access Application)**

The Applicant shall furnish ARTC with the following information:

1. Applicants details including:
  - (a) Business Name of Applicant
  - (b) ACN and ABN of Applicant
  - (c) Business Address of Applicant
  - (d) Telephone contact details
  - (e) Fax contact details
  - (f) Email contact details
  - (g) Contact person for progression of Access Application
2. Access Requirements including:
  - (a) Required entry and exit locations to and from Network
  - (b) Frequency and times of entry and exit
  - (c) Term of access requirement including approximate commencement date
  - (d) Service category (maximum speed) of train or if not applicable alternative proposed train characteristics for path schedule required
  - (e) Maximum intended axle load of Service
  - (f) Physical Length of Service in metres
3. Details of all Rolling Stock and vehicles to be used

## **SCHEDULE C**

### **(Essential Elements of Access Agreement)**

- non-exclusive access to Network and use of Associated Facilities;
- contracted Train Paths subject to the matters outside ARTC's control, safety and Network Management Principles;
- each party warranting the accuracy of information provided;
- Customers paying an access charge based on flagfall and gtkm;
- charges varying annually by greater of 2/3 CPI or CPI minus 2%;
- payment by the Customer of charges and premiums to the Transport Accident Commission in respect of the Network in Victoria;
- the right of ARTC to seek security from the customer;
- ARTC to conduct Train Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- the Customer providing warranties regarding Rolling Stock, complying with the Code of Practice and Instructions issued by ARTC;
- the party operating the Trains relating to the contracted Train Paths having appropriate Accreditation and insurance (for \$200,000,000.00);
- ARTC having the ability to vary (temporarily or permanently), remove and review contracted Train Paths in appropriate circumstances and to take possession of the Network for repairs, maintenance and upgrades;
- the ability of ARTC to conduct audits on the Operator;
- compliance by the Customer with plans dealing with Incidents and environmental requirements;
- compliance by the Operator with applicable and appropriate safety standards;
- contracted capacity not utilised seven out of twelve times may be withdrawn by ARTC;
- appropriate termination and suspension provisions;
- indemnities by the Operator and ARTC; and
- dispute resolution procedures.

**SCHEDULE D**

(Indicative ~~Track~~ Access Agreement as at Commencement Date)

(see attached fifty one (51) pages)

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

**and**

ACN

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**TRACK ACCESS AGREEMENT**

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**KELLY & CO**  
Solicitors  
Level 17  
91 King William Street  
Adelaide SA 5000  
Telephone: (08) 8205 0800  
Facsimile: (08) 8205 0805

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## TRACK ACCESS AGREEMENT

AGREEMENT dated

20 .

**BETWEEN**      **AUSTRALIAN RAIL TRACK CORPORATION LIMITED** ABN 75 081 455 754 a corporation having its registered office at Ground Floor, ARTC Building, Burbridge Road, Mile End, South Australia ("**ARTC**")

**AND**

---

("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 contemplated in the Intergovernmental Agreement and given (or to be given) the force of law pursuant to 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 (to the extent the Rail Safety Acts are operative) 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 (to the extent that the Rail Safety Acts are operative) 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**" means Australian Rail Track Corporation Limited described on page 1 of this Agreement;

"**ARTC's Reference Rates**" means the document described as such and published by ARTC from time to time detailing ARTC's reference rates for Train paths and services as amended 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 (and in relation to the Network in Victoria, only to the extent that such assets are leased by Victorian Rail Track to ARTC) and does not include yards;

“**Charges**” means the charges set out in Schedule 3;

“**Claim**” means all claims, legal actions and demands (including the costs and expenses of defending or settling any action, proceeding, claim or demand);

“**Code of Practice**” means the document originally produced by Australian National Railways Commission (Track Access Business Unit) entitled “Code of Practice Commonwealth Network Operations” effective 5 October 1997 as amended from time to time by ARTC;

“**Commencement Date**” means [ ] or such other date as the parties may agree in writing;

“**Dangerous Goods Code**” means the Australian Code for the Transport of Dangerous Goods by Road and Rail prepared by the National Road Transport Commission (or successor body) from time to time;

“**Environmental Condition**” means any Environmental Damage or any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Damage and which in ARTC’s reasonable opinion could result in ARTC or any other person incurring any material liability or being subjected to a direction of any competent authority;

“**Environmental Damage**” means any material injury or damage to persons, living organisms or property or any material pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

“**Expiry Date**” means [ ];

“**Incident**” has the meaning set out in clause 11.1;

“**Instructions**” means all instructions and directions, including instructions and directions of the kind listed in Schedule 4, 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; and
  - (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;
- (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;
- (h) relate to safety;
- (i) are given to implement or support the Network Management Principles;
- (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;

**“Intergovernmental Agreement”** means the Agreement between the Commonwealth of Australia, the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania and the Northern Territory in relation to rail safety effective from 1 July 1996;

**“Invoice”** means the invoice referred to in clause 4.4;

**“Key Performance Indicators”** means the Key Performance Indicators referred to in clause 2.9 and further described in Schedule 6;

**“Long-Term Contracted Path”** means a Scheduled Train Path granted by ARTC to the Operator under this Agreement where the term of the same is for a duration of more than 3 years from the date of commencement of the Scheduled Train Path;

**“Medium-Term Contracted Path”** means a Scheduled Train Path granted by ARTC to the Operator under this Agreement where if the term of the same is for a duration of more than 1 year and less than 3 years from the date of commencement of the Scheduled Train Path.;

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

**“Network Management Principles”** means the principles regulating Train movements on the Network, as set out in Schedule 5;

**“Operator”** means the Operator described on page 1 of this Agreement;

**“Parking Surcharge”** means the charge specified by ARTC for the entitlement of the Operator to have specified parking time on the Network as part of its Scheduled Train Path set out in Schedule 3;

**“Rail Safety Acts”** means the Acts passed by the Commonwealth, the States and the Northern Territory as contemplated in the Intergovernmental Agreement;

**“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 of this Agreement 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;

**“Short-Term Contracted Path”** means a Scheduled Train Path granted by ARTC to the Operator under this Agreement where the term of the same is for a duration of 1 year or less from the date of commencement of the Scheduled Train Path (irrespective of the date on which the Term will expire);

**“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;

**“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 upon the exercise of reasonable care 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 Manifest”** means a written notice (including, if agreed, in electronic form) 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;
- (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:

- (a) the Scheduled Train Paths;
- (b) the Train paths provided to the Operator pursuant to clause 2.4; and
- (c) 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; and
- (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.

## 2. TRACK ACCESS RIGHTS

### 2.1 Grant to Operator of Train Paths

- (a) ARTC grants to the Operator during the term of this Agreement 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.
- (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 breach of its obligations under this Agreement);
  - (iv) material failure of the Operator's Service; and
  - (v) the Network Management Principles.
- (c) The Operator agrees at all times during the term of this Agreement 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 **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 breach of this Agreement or negligence by ARTC.
- (b) Nothing in this clause 2.3 derogates from ARTC's obligations under the Key Performance Indicators.

### 2.4 **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).

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.
- (b) Nothing in this clause 2.4 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 2.4 relates).

### 2.5 **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 first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.

### 2.6 **Manner of Control of the Network by ARTC**

ARTC agrees at all times during the term of this Agreement 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 Train Paths applicable to the Services, and 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.

### 2.7 **Light Engine Movements**

The Operator's rights to Scheduled Train Paths and clause 2.4 Train Paths do not include 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 paragraph (c) of the definition of "Train Paths".

## 2.8 Re-negotiation of Long-Term Contracted Path

- (a) The Operator has the rights set out in this clause 2.8 to the extent that it has been granted a Long-Term Contracted Path under this Agreement (and not otherwise).
- (b) The Operator may not less than 60 days before the expiry of the term of the Long-Term Contracted Path give notice in writing to ARTC that the Operator wishes to renew this Agreement in relation to the Long-Term Contracted Path, 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 2.8(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 will not unreasonably withhold its consent to the renewal of the Long-Term Contracted Path and enter into a new track access agreement with the Operator on terms and conditions determined by clauses 2.8(d) or 2.8 (e), as the case may be.
- (d) If, at the time clause 2.8(c) applies, ARTC has submitted the Access Undertaking to the ACCC, the terms and conditions of the new track access agreement (including the Charges) shall be determined by the Access Undertaking.
- (e) If, at the time clause 2.8(c) applies, ARTC has not submitted an Access Undertaking to the ACCC, the terms and conditions of the new access agreement (including the Charges) shall be determined by ARTC acting reasonably. In the event that there is a material dispute between the parties as to the terms of the proposed new access agreement (including the Charges), either party may notify the other of a dispute under clause 17.2 whereupon the matter in dispute shall be determined in accordance with clause 17.
- (f) Until such time as the new track access agreement, (referred to in clause 2.8(d) or (e)) has been executed by the parties, the Operator has no contractual right to the Long-Term Contracted Path under this Agreement notwithstanding that ARTC may, in its discretion, allow the Operator to utilise the Long-Term Contracted Path on an adhoc basis after the Expiry Date.
- (g) Subject only to the preceding provisions of this clause 2.8 and any written agreement between the parties to the contrary, the Operator does not have any automatic or enforceable rights of renewal or extension of any Scheduled Train Paths under this Agreement.

## 2.9 Key Performance Indicators

- (a) The Key Performance Indicators described in Schedule 6 are relevant to both parties and must be complied with for at least a period of one year from the Commencement Date. ARTC and the Operator will monitor the appropriateness of the key performance indicators for a period of one year from the Commencement Date.
- (b) The parties must meet not less than monthly during the one year specified in clause 2.9(a) for the purpose of discussing actual performance against the Key Performance Indicators.
- (c) Upon the expiry of the one year period specified in clause 2.9(a), the parties will jointly determine the appropriateness of the Key Performance Indicators for the purpose of reward or penalty. The provisions of clause 17 do not apply to this clause.

## 3. TERM OF AGREEMENT

- (a) This Agreement commences on the Commencement Date and, unless terminated earlier under clause 14, will continue until 24:00 hours on the Expiry Date (“**Term**”).

- (b) If, after the Expiry Date, ARTC continues to allow the Operator to utilise particular Scheduled Train Paths on an adhoc basis, the obligations of the Operator set out in this Agreement shall be deemed to continue to apply to the Operator.

#### 4. CHARGES AND PAYMENT

##### 4.1 Flagfall Charges

- (a) 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.
- (b) The Operator must pay all flagfall Charges at the end of each calendar month (as amended, if applicable, in accordance with clause 4.5)

##### 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 (as amended, if applicable, in accordance with clause 4.5).

##### 4.3 Parking Surcharge

In the event the Operator negotiates with ARTC an entitlement for specified parking time on the Network as part of its Scheduled Train Path (beyond the usual standing time forming part of the Scheduled Train Path in accordance with the Network Management Principles), the Operator must pay to ARTC the Parking Surcharge for each such Scheduled Train Path calculated by reference to Schedule 3 (as amended, if applicable, in accordance with clause 4.5).

##### 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 and Parking Surcharges payable for each Scheduled Train Path calculated by reference to Schedule 3 (as amended, if applicable, in accordance with clause 4.5) and variable and flagfall charges for each ad hoc entitlement calculated in accordance with ARTC's Reference Rates.
- (b) The Operator will (subject to clause 4.4(c)) pay in full the amount shown in the monthly statement issued by ARTC to ARTC, such payment to be received by ARTC on or before the last business day of the following calendar month.
- (c) Despite any unresolved dispute between the Operator and ARTC as to the accuracy of any individual item on an Invoice or the Operator's liability to pay in relation to such an item, payment in full for all other items of the Invoice which are not genuinely disputed must be made in accordance with clause 4.4(b).

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

- (a) Unless otherwise agreed between the parties and subject to clause 4.5(c), the Charges will on each 1 July after the Commencement Date during the term of this Agreement be adjusted by the greater of:
  - (i) two-thirds of the annual rate of inflation expressed in percentage terms; and
  - (ii) the annual rate of inflation expressed in percentage terms less 2.
- (b) The annual rate of inflation referred to in clause 4.5(a) is to be determined by reference to the All Groups Consumer Price Index statistics published for the preceding March quarter.
- (c) ARTC will give the Operator notice of any proposed increase of the Charges under clause 4.5(a). 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 on the earlier of:

- (i) if no subsequent notification is given by ARTC to the Operator, sixty (60) days after 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 4.5(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 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 4.10 hereof.
- (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 Track Extensions

- (a) In the event that ARTC, at its cost, constructs further railways lines or track not currently defined as 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 4.6(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.

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 4.6(a) for access to such extended Network.

#### 4.7 **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 2percentage points above the prime lending rate charged by the Commonwealth Bank of Australia at that time on overdrafts of \$100,000.00 or more. That interest will accrue and be recoverable from day to day. If a disputed clause 4.4(c) item is subsequently resolved in a party's favour, the amount of that clause 4.4(c) item will be deemed to have accrued interest on the terms set out in this clause 4.7.

#### 4.8 **Obligation to Grant Security**

- (a) Subject to clause 4.8(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 4.8 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 4.8(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 4.8(d), the continuance of the Security (or any replacement thereof under clause 4.9(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 4.9(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 4.8(d) does not preclude ARTC from issuing a further notice under clause 4.8(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 of this Agreement under clause 3. The term of the Security must be extended to at least match any extension of the term of this Agreement.
- (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.

#### 4.9 **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.

#### 4.10 **Goods and Services Tax**

- (a) **Definitions**

In this clause:

“**ABN**” means Australian Business Number and has the meaning attributed in the GST Legislation;

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

“**Attributable Input Costs**” means the cost to ARTC of providing the service the subject of this Agreement which constitutes a Taxable Supply;

“**GST**” means a goods and services tax imposed by the ANTS GST Act;

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

“**GST Rate**” means, at any particular time, the rate (expressed as a percentage) at which GST is payable by ARTC on a Taxable Supply;

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

“**Input Cost Variation**” means the amount by which the Attributable Input Cost will be increased or reduced as a result of the implementation of the ANTS GST Act;

“**Supply**” means any supply provided pursuant to this Agreement including but not limited to a Taxable Supply;

“**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 of Charges for GST**

- (i) **Application of this Clause**

Charges levied under this Agreement must be adjusted in accordance with the provisions of this clause.

- (ii) **Adjustment**

The adjusted Charges paid by the Operator on a Taxable Supply under this Agreement must be calculated by:

- (A) deducting the Input Cost Variation from the Charges; and
- (B) multiplying the result by one plus the GST Rate.

- (c) **Input Cost Variation**

The amount of the Input Cost Variation must:

- (i) reflect a reasonable assessment, based on available information and economic modelling of reductions in Attributable Input Costs that can be expected to result from the introduction of the ANTS GST Act; and

- (ii) subject to clause 4.10(d), be determined by negotiation in good faith between the parties.

(d) **Expert Determination**

If the parties cannot agree the amount of an Input Cost Variation, either party may require the appointment of an expert being a firm of accountants appointed by agreement of the parties and in default of agreement within one week, appointed by the President of the Institute of Chartered Accountants (SA Branch) and the Input Cost Variation must be determined by the expert so appointed. Such firm of accountants will act as an expert and not as an arbitrator and its decision will be final and binding on the parties. The Operator must bear the cost of the expert so appointed.

(e) **Tax Invoice**

If any Supply under this Agreement is a Taxable Supply, then ARTC must provide the Operator with a Tax Invoice in respect of the Taxable Supply.

(f) **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.

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

5.1 **ARTC to Control**

Control of the Network, and, subject to this Agreement, 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 of this Agreement:

- (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;
- (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 4.2 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;
- (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 **Warranty in Relation to Rolling Stock Standards**

The Operator warrants as at the Commencement Date and at all times during the Term that:

- (a) each Train operated by the Operator on the Network is at all times in a good and safe operational condition; and
- (b) all of the equipment used by the Operator on or in connection with the Network is maintained to a sufficient standard of safety and to a sufficient level of operational efficiency,

but in any case to standards at least as high as those set out in all relevant volumes as amended or superseded from time to time of:

- (c) the "Railways of Australia Manual of Engineering Standards and Practices"; or
- (d) the draft code of practice on Rolling Stock issued or published by the Australasian Railways Association; or
- (e) in the event the said draft code of practice on Rolling Stock is subsequently endorsed by the Commonwealth of Australia (including, without limitation, any of its governmental departments or authorities) for national implementation on the Network, then such code of practice once it is so endorsed,

which ever standard be the highest.

#### 5.5 **Operator's Obligations**

The Operator agrees at all times during the term of this Agreement:

- (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, damage or otherwise affect any part of the Network;

- (h) to provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre as at the Commencement Date and to use such equipment to communicate with the Train Control Centre. Where ARTC proposes to change communications equipment in the Train Control Centre and 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;
- (i) 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, other operators, its owner and the public;
- (j) 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 written notice of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network;
- (k) to inform ARTC as soon as reasonably practicable of any cancellation or intended cancellation by the Operator of any Service.

#### 5.6 Conduct of ARTC

- (a) ARTC will use all reasonable endeavours to submit an Access Undertaking in respect of the Network by [ ].
- (b) ARTC will in complying with this Agreement:
  - (i) not discriminate between government and non-government users of the Network; and
  - (ii) not discriminate between any two government or between any two non-government users of the Network,

in terms of the application of pricing principles and considerations, the determination of other contractual terms and the application of the Network Management Principles, it nevertheless being acknowledged by the Operator that these matters may be applied differently between operators by reason of the location, duration and quality of Train Paths, nature of Train consist, nature of Train service and the longevity of access agreements.

- (c) Without limiting clause 5.6(b), ARTC shall treat all operators in a like manner in respect of like services purchased by them. That is to say, if the services purchased by the Operators are alike in respect of location, duration and quality of Train Paths, nature of Train consist, nature of Train service, longevity of access, times of departure and arrival and other matters, ARTC shall be obliged to treat each Operator equally in respect of the application of its pricing principles to such services.
- (d) Without limiting clauses 5.6(b) or (c), if:
  - (i) ARTC sells a train path 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 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 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 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(c);
  - (vi) the Charges that the Operator asserts ARTC is charging the third party for the Third Party Train Path.
- (e) ARTC will, within 30 days of receipt of a written submission under clause 5.6(d), notify the Operator whether:
- (i) it agrees with the submission and that the Operator's Charges have been reduced accordingly; or
  - (ii) it disagrees with the submission and the reasons why.
- (f) In the event that the Operator does not agree with ARTC's decision under clause 5.6(e)(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.

## **6. REPAIRS AND MAINTENANCE OF THE NETWORK**

### **6.1 ARTC to Repair and Maintain the Network**

Despite clause 6.2, ARTC agrees at all times during the term of this Agreement to maintain the Network (but only in so far as the Network is relevant to the Operator's Scheduled Train Paths ) to the higher of:

- (a) the standard existing as at the Commencement Date;
- (b) if ARTC is required to be an Accredited Owner, the minimum standard required to maintain its Accreditation as a track owner; and
- (c) such other standards as the parties may agree.

### **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 WITH INSTRUCTIONS**

## **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.

## **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 or any Associated Facility;
    - (C) injury to any person or damage to any property; or
    - (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
  - (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 by Agreement Between the Parties

- (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 remaining term of this Agreement (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 9.3, 9.4, 9.5 and 19.2, the Notified Party consents to the Requesting Party's proposed variation, such consent to be withheld only upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required by reason of ARTC's obligations relating to safety of the Network).
- (c) Subject to clauses 9.3, 9.4, 9.5 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) and (c), ARTC may, without notice to the Operator, perform repairs, maintenance or upgrading of the Network, or take possession of any part of the Network, at any time.
- (b) If repairs, maintenance or upgrading of 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 **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 9.4(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.

#### 9.5 **Review of Scheduled Train Paths**

- (a) Scheduled Train Paths will be subject to a review in accordance with this clause 9.5.
- (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 9.5 compels ARTC to offer a Train path to the Operator under clause 9.5(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.
- (e) Nothing in this clause 9.5 compels the Operator to accept a Train path offered by ARTC under clause 9.5(c) if contractual obligations owed by the Operator to any person (including ARTC ) would prevent it from doing so.

#### 9.6 **Cost of Variation**

Subject to clause 15, any losses, additional costs or other damage suffered by a party in complying with a variation under clause 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.

**9.7      Affect of Variations to Train Paths on Schedule 2**

- (a)      A temporary variation pursuant to clauses 8.1, 9.1 or 9.3 or 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, 19.2 or 22 of the Operator's Scheduled Train Paths will be, and are hereby, deemed to be an amendment to Schedule 2.

**9.8      Cancellation of Scheduled Train Paths**

- (a)      The Operator may, upon 24 hours prior written notice to ARTC, cancel in any 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)      Where an Operator has been granted like Scheduled Train Paths, the allowable cancellations referred to in clause 9.8(a) may be transferred by the Operator between the like Scheduled Train Paths by notice in writing to ARTC. Whether particular Scheduled Train Paths are alike (and therefore whether a transfer under this clause is permissible) is to be determined by reference to the criteria referred to in clause 5.6(c).
- (c)      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.
- (d)      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.
- (e)      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.
- (f)      For Scheduled Train Paths of between 5 and 10 years duration, the period of notice shall be, subject to clause 9.8(h), a pro-rata period of notice determined by the following formula:

$$N = \frac{365 + 365 \frac{(A-5)}{5}}{7}$$

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.

- (g)      During the notice period under this clause, the Operator will still be obliged to pay the flagfall component 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.
- (h)      Where the Operator has given notice under clause 9.8(f) and continues to operate Services during the notice period as calculated under clause 9.8(f), 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 9.8(f)

U = the number of weeks of the notice period calculated under clause 9.8(f) during which the Scheduled Train Path will be utilised.

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

- (i) 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.
- (j) 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 component 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.

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

## 10. INSPECTION AND AUDIT BY NETWORK ACCESS PROVIDER

### 10.1 Audit Obligation

Subject to clause 10.3, 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) of this Agreement 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 Non-compliance

If, pursuant to clause 10.1(a), the Operator is found to have breached this Agreement by:

- (a) understating the loading of Rolling Stock in the Train Manifest but where the actual loading is within the axle load specifications for the relevant Train Path purchased, ARTC may impose an overloading charge on the Operator equivalent to 2 times the GTK Rate for each tonne of excess loading above that stated in the Train Manifest over the entire Train Path; and
- (b) overloading Rolling Stock contrary to the axle load specifications for such Rolling Stock (whether or not the Operator has or has not understated the loading of the Rolling Stock in the Train Manifest) ARTC may impose an overloading charge on the Operator equivalent to 10 times the GTK Rate for each tonne of excess loading above the specification for the Rolling Stock over the entire Train Path.

If circumstances exist whereby clauses 10.2(a) and 10.2(b) apply, only clause 10.2(b) shall apply. The overloading charge will be payable within 14 days of written notification by ARTC to the Operator. ARTC's rights under this clause are in addition to and do not derogate from any other rights ARTC has under this Agreement for breach of this Agreement by the Operator.

### 10.3 **Limitations on Audit**

ARTC must:

- (a) subject to clause 10.3(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.

### 10.4 **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.

### 10.5 **Monitoring Equipment**

ARTC or its agent may place, on or about its Network, monitoring equipment which will take readings or measurements with the purpose of monitoring the operation of Rolling Stock and assessing the Operator's compliance with clause 10.1. The Operator hereby authorises and consents to ARTC undertaking such monitoring and the collection of data from such monitoring equipment. ARTC shall ensure that systems are put into effect whereby any data collected by it or any approved person (on behalf of ARTC) is transmitted or forwarded direct to ARTC and will constitute "Confidential Information" of ARTC as defined in clause 18 for the sole purpose of ARTC monitoring the Operator's compliance with clause 10.1 and shall not be disclosed to any other party without the prior written consent of ARTC.

### 10.6 **Audit by Operator**

- (a) Subject to clause 10.6(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 10.6(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 **"Incident"**

In this clause 11, "Incident" means a breakdown, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:

- (a) material damage to or interference with the Network or any Associated Facility managed by ARTC;
- (b) material damage to property;

- (c) material personal injury to any person;
- (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);
- (g) an incident requiring notification under the Dangerous Goods Code.

#### **11.2 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 for dealing with Incidents, and make such plans available to the Operator.
- (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 11.2 and is subject to the approval of ARTC, such approval not to be unreasonably withheld.

#### **11.3 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 11.2 and will comply with their respective obligations under the Rail Safety Acts.

#### **11.4 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.

#### **11.5 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.

#### **11.6 Operator's Report**

Without limiting clause 11.4, 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 Operator's Train and to the Network;
- (c) the factors which may have contributed to the cause of the loss or damage to the Operator's Train and to the Network (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 Operator's Train;
- (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.

#### 11.7 **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).

#### 11.8 **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 the Operator will be responsible for recovery costs in relation to all above-rail matters (including the Operator's train).

### 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);
- (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 noncompliance 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 under this Agreement, 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 under this Agreement,

then ARTC must 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 and steps and any other necessary action so that the Environmental Condition is no longer present or the Environmental Damage is rectified.



## 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) cure 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 cure 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:

  - (v) 7 days written notice in relation to a default relating to safety; or
  - (vi) 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) cure the default, this Agreement may be terminated by giving not less than the period of notice described in clauses 14.1(b)(v) and (vi).
- (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 or inspector or administrator appointed pursuant to the provisions of the Corporations Law.

#### **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 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 the Authority Network Access Provider 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**

#### **15.1 Indemnity by Operator**

- (a) Subject to clause 15.1(b), (c) and 15.6, the Operator shall indemnify and keep indemnified ARTC from and against all Claims on, against or by ARTC in respect of:
  - (i) the death of or injury to any person; or
  - (ii) any loss of, damage to or destruction of any property of ARTC (including, without limitation, the Network and Associated Facilities), the Operator or any other person,

in each case arising in connection with or out of:

- (iii) the use by the Operator of the Network and Associated Facilities;
  - (iv) the presence, otherwise than in accordance with this Agreement, of any property or personnel of the Operator or its contractors upon the Network; or
  - (v) the acts or omissions of a third party (other than employees, agents or contractors of ARTC) arising in connection with the use by the Operator of the Network and Associated Facilities.
- (b) The indemnity in clause 15.1(a) does not apply to the extent that any Claim:
- (i) arises in connection with or out of the use by another person of the Network and Associated Facilities, including another operator of train services (but only if the Operator did not cause or (to the extent of the contribution) contribute to the loss or damage the subject of the Claim);
  - (ii) arises from a breach of this Agreement by ARTC (which breach must be relevant to the incident under consideration) or is caused or (to the extent of the contribution) contributed to by ARTC;
  - (iii) is in respect of:
    - (A) the death of or injury to any person; and
    - (B) any loss of, damages to or destruction of any property of the Operator, ARTC or any other person,where the same was not caused nor (to the extent of such contribution) contributed to by any act or omission of the Operator; and
  - (iv) is in respect of indirect or consequential loss.
- (c) ARTC releases the Operator from any liability to ARTC under the indemnity in clause 15.1(a) in the circumstances described in clause 15.1(b)(i) to (iv).

## 15.2 Indemnity by ARTC

- (a) Subject to clause 15.2(b), (c) and 15.6, ARTC shall indemnify and keep indemnified the Operator from and against all Claims on, against or by the Operator in respect of:
- (i) the death of or injury to any person;
  - (ii) any loss or, damage to or destruction of any property of the Operator, ARTC or any other person,
- in each case arising in connection with or out of:
- (iii) the use by the Operator of the Network or Associated Facilities; or
  - (iv) the presence, in accordance with this Agreement, of any property or personnel of ARTC or its contractors on the Network.
- (b) The indemnity in clause 15.2(a) does not apply to the extent that any Claim:
- (i) arises in connection with or out of use by another person of the Network or Associated Facilities, including another operator of train services (but only if ARTC did not cause or (to the extent of the contribution) contribute to the loss or damage the subject of the Claim);

- (ii) arises from a breach of this Agreement by the Operator (which breach must be relevant to the incident under consideration) or was caused or (to the extent of the contribution) contributed to by the Operator; or
  - (iii) is in respect of:
    - (A) the death of or injury to any person; and
    - (B) any loss of, damage to or destruction of any property of the Operator or any other person,where the same was not caused nor (to the extent of such contribution) contributed to by any act or omission of ARTC; and
  - (iv) is in respect of indirect or consequential loss.
- (c) The Operator releases ARTC from any liability to the Operator under the indemnity in clause 15.2(a) in the circumstances described in clause 15.2(b)(i) to (iv).

### 15.3 Defence of Claims

- (a) The parties shall render each other all reasonable assistance in the defence of any claim made against a party by a third party arising out any Incident or other event giving rise to a Claim.
- (b) To the extent that a party (“**responsible party**”) is obliged to indemnify the other party (“**indemnified party**”) against a Claim by a third party against the indemnified party, the responsible party 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 the indemnified party in respect of all costs, expenses and losses which the indemnified party may incur on account of the action or proceedings.

### 15.4 Cost of Recovery

For the purposes of the indemnities given in this clause 15, the property of a person includes that person’s cost of recovery of any of their property damaged or affected by the relevant loss, damage or destruction.

### 15.5 Indirect or Consequential Loss

For the purposes of this clause, “indirect or consequential loss” does not include:

- (a) property damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death;

but does include:

- (b) consequential loss, economic loss, loss of profits, loss of business opportunity, payment of liquidated sums, penalties or damages under any agreement (other than this Agreement).

### 15.6 Limitations of Claims

- (a) Each party agrees that, subject to clause 15.6(c), it will not make a Claim against the other under clause 15.1 or 15.2 (as the case may be) if the total loss or damage the subject of the Claim does not exceed \$50,000.00 in respect of any one event or cause of action or series of related events or causes of action.
- (b) In the event that either party proposes making a Claim against the other under clause 15.1 or 15.2 (as the case may be) to recover loss or damages for an amount greater than \$50,000.00 but less than \$200,000.00 in respect of any one event or cause of actions or series of related

events or causes of action, the party making the Claim must give notice of a dispute under clause 17.1 and otherwise comply with the terms of clause 17 before taking any other action to prosecute its Claim. Nothing in this clause 15.6(b) prohibits a party from seeking and obtaining appropriate injunctive relief.

- (c) The limitation in clause 15.6(a) will not apply to a Claim if the loss or damage the subject of that Claim, when aggregated with any other Claims made (including Claims for loss or damage which, but for clause 15.6(a), would be recoverable under clauses 15.1 and 15.2) exceeds the sum of \$500,000.00 per annum commencing from the Commencement Date.

## 16. **INSURANCE**

### 16.1 **Operator's Insurance Policies**

The Operator will during the term of this Agreement:

- (a) take out and maintain:
  - (i) a public liability insurance policy;
  - (ii) a policy of insurance with respect to the Operator's liability to ARTC pursuant to the indemnity provisions contained in clause 15 to the extent coverable by insurance (it being acknowledged that such indemnity provisions exclude the liability of the Operator for loss of or damage to Network and Associated Facilities except to the extent that the same was caused or contributed (to the extent of such contribution) by any act or omission of the Operator) with a reputable and solvent insurer for an amount of \$200,000,000.00 in respect of each policy containing provisions which are standard industry terms for railway operators (it being acknowledged that the Operator is not exempted from any liability in excess of the sum insured nor from any liability to which such insurance does not apply); and
- (b) deliver to ARTC when reasonably requested by ARTC copies of such parts of the policies as are relevant to the insurances required under this Agreement and the Certificates of Currency in relation to the policies referred to in clause 16.1(a)(i) and (ii) subject to the details of such policies being kept confidential by ARTC (other than for the purpose of seeking indemnification thereunder).

### 16.2 **ARTC's Insurance Policies**

ARTC will:

- (a) take out and maintain:
  - (i) a public liability insurance policy;
  - (ii) a policy of insurance with respect to ARTC's liability to the Operator pursuant to the indemnity provisions contained in clause 15 to the extent coverable by insurance with a reputable and solvent insurer for an amount of \$200,000,000.00 in respect of each policy containing provisions which are standard industry terms for railway track owners (it being acknowledged that ARTC is not exempted from any liability in excess of the sum insured nor from any liability to which such insurance does not apply);
- (b) deliver to the Operator when reasonably requested by the Operator copies of such parts of the policies as are relevant to the insurances required under this Agreement and the Certificates of Currency in relation to the policies referred to in clause 16.2(a)(i) and (ii) subject to the details of such policies being kept confidential by the Operator (other than for the purpose of seeking indemnification thereunder);
- (c) publish annually the amounts paid by it by way of premiums for the insurances referred to in 16.2(a); and

- (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), 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;
  - (ii) second, if the parties agree, mediation of the Dispute under clause 17.3; and
  - (iii) third, determination of the Dispute under clause 17.4.

### 17.2 Negotiation

If there is a Dispute between the parties relating to or arising out of this Agreement, then within 7 days of a party ~~notifying~~ giving the other ~~of a 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:~~
  - ~~(i) if the parties agree, they shall attempt to resolve the Dispute by mediation pursuant to this clauses 17.3(b), (c), (d) and (e) or~~
  - ~~(ii) if the parties do not wish to resolve the Dispute by mediation under clauses 17.3(b), (c), (d) and (e), either party may by notice in writing to the other, refer the Dispute to be determined by arbitration under clause 17.4(b).~~
- ~~(b) If this clause applies to the Dispute, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.~~
- ~~(a) If a dispute arising under this Agreement is not resolved within 21 days of notification of the dispute under clause 17.2, the dispute will be referred:~~
  - ~~(i) in the first instance, to the chief executive officers of the parties who will attempt to resolve the dispute, including by informal mediation;~~
  - ~~(ii) thereafter, if the dispute is not resolved within 14 days, to formal mediation in South Australia by a single mediator appointed by agreement of the parties, or if they fail to agree, appointed by the President of the Law Society of South Australia acting on the request of either party.~~
- ~~(c) If the Dispute is not resolved within fourteen (14) days after being referred to the chief executive officers under clause 17.3(b), 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.

~~(b)(d)~~ 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 meditations;
- (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.

~~(e)(e)~~ Nothing in this clause 17.3 prohibits a party from seeking and obtaining appropriate injunctive relief.

#### 17.4 Arbitration

(a) If the Dispute is not resolved within one (1) month of the appointment of the mediator (if any) under clause 17.3(c), either party may by notice in writing to the other terminate the mediation proceedings and refer the Dispute to be determined by arbitration under this clause 17.4(b).

(b) Where a Dispute is referred to arbitration under this clause 17.4(b) (whether under clauses 17.3(a)(ii) or 17.4(a)), the following shall apply:

- (i) The parties shall appoint an arbitrator, or where the parties cannot reach agreement within fourteen (14) days, by the President of the Institute of Commercial Arbitrators.
- (ii) The arbitrator so appointed shall have no interest or duty which conflicts or may conflict with his or her functions as an arbitrator, he or she being required to fully disclose any such interest or duty before his or her appointment and cannot be an employee of the Operator, ARTC or a related party of either of them.
- (iii) The arbitration will be conducted in accordance with the Commercial Arbitration Act 1986 (SA) except that:
  - (A) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
  - (B) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration;
  - (C) the arbitrator does not have the power conferred by section 25 of the Commercial Arbitration Act 1986;
  - (D) the arbitrator must include in the arbitration award the findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
  - (E) the arbitrator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of the appointment and performance of his or her duties.

- (iv) The arbitrator will when conducting the arbitration:
- (A) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (B) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
  - (C) call on any party the arbitrator believes necessary to give evidence;
  - (D) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (E) present his or her award in a draft form to the parties and hear argument from the parties before making a final award; and
  - (F) hand down a final award in writing which includes all his or her reasons for making the award.
- (v) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
- (A) the notification of the Dispute is vexatious;
  - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (C) the party who notified the Dispute has not engaged in negotiations in good faith.
- (vi) In deciding a Dispute the arbitrator must take into account:
- (A) first, the principles, methodologies and provisions set out in the negotiated Access Agreement;
  - (B) secondly, should there be any ambiguity after consideration of the negotiated Access Agreement:
    - (I) the objectives and principles enunciated in Part IIIA of the Trade Practices Act 1973 (Cwlth) ("TPA") and the Competition Principles Agreement;
    - ~~(C)~~(II) ARTC's legitimate business interests and investment in the Network;
    - ~~(D)~~(III) all costs that ARTC incurs in providing access, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;
    - ~~(E)~~(IV) the economic value to ARTC of any additional investment that the Operator or ARTC has agreed to undertake;
    - ~~(F)~~(V) the interests of all persons holding contracts for use of the Network;



~~(G)(VI)~~ the firm and binding contractual obligations of ARTC or other persons (or both) already using the Network;

~~(H)(VII)~~ the operational and technical requirements necessary for the safe and reliable operation of the Network;

~~(I)(VIII)~~ the economically efficient operation of the Network;

~~(J)(IX)~~ the benefit to the public from having competitive markets;

(X) any other matters that the arbitrator thinks are appropriate to have regard to.

(vii) In the absence of manifest error, the decision of the arbitrator shall be final and binding on the parties. If a party believes that there has been a manifest error, it may refer the matter to the ACCC for a determination. If the ACCC determines that there has been a manifest error, then the parties may agree to refer the Dispute to another arbitrator in accordance with clause 17.4(b), or failing agreement, either party may refer the Dispute to the ACCC for resolution in accordance with clause 17.5.

(viii) The costs of the arbitrator and any advisers shall be borne by the parties in such proportions as determined by the arbitrator.

#### 17.5 Determination by the ACCC

(a) If a Dispute is referred to the ACCC in accordance with clause 17.4, then Division 3 of Part IIIA of the TPA shall apply subject to any determination by the ACCC being consistent with the provisions of the Access Undertaking.

(b) Except in the circumstances described in clause 17.4(b)(vii), if an Operator does not comply with a decision of an arbitrator pursuant to clause 17.4, then such Operator will not be entitled to refer that Dispute to the ACCC and ARTC will no longer be obliged to continue negotiations regarding the resolution of the Dispute.

(c) If an Applicant does not comply with a decision of the ACCC pursuant to this clause 17.5, then ARTC will no longer be obligated to continue negotiations regarding the resolution of the Dispute.

(d) In making its determination, the ACCC:

(i) may deal with any matters referred to in section 44V of the TPA;

(ii) must not make a determination that would have any of the effects described in section 44W of the TPA;

(iii) must take into account the matters referred to in section 44X of the TPA;

(iv) comply with the procedures described in Subdivision D of Part IIIA of the Act.

~~(a) If the Dispute relating to or arising out of this Agreement is not settled under clause 17.3 within one (1) month of the appointment of the mediator, either party may terminate the mediation proceedings by written notice. The giving of such notice by a party will, for the purposes of this Agreement, refer to dispute to be determined by arbitration under this clause 17.4.~~

~~(b) The arbitrator shall be chosen by the parties, but in the absence of an agreement by the parties as to the arbitrator within 7 days of the notice referring the matter to arbitration, the arbitrator shall be:~~

- ~~(i) in the first instance, the ACCC; or~~
- ~~(ii) in the event that the ACCC is unwilling or unable to act as arbitrator, such persons appointed by the President of the Law Society of South Australia acting on the request of either party;~~
- ~~(c) The arbitration will be conducted in accordance with the Commercial Arbitration Act 1986 of South Australia except that:~~
  - ~~(i) the arbitrator must observe the rule of natural justice but is not required to observe the rules of evidence;~~
  - ~~(ii) the parties may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration;~~
  - ~~(iii) the arbitrator does not have the power conferred by section 25 of the Commercial Arbitration Act 1986;~~
  - ~~(iv) the arbitrator must include in the arbitration award the findings on material questions of law and fact, including references to evidence on which the findings of fact were based; and~~
  - ~~(v) the parties consent to an appeal to the Supreme Court of South Australia on any questions of law arising in the court of arbitration or out of the arbitration award.~~

## 18. **CONFIDENTIALITY**

### **18.1 Acknowledgment of Confidentiality**

Each party acknowledges, subject to clause 18.2, that the terms of this Agreement and all information provided by one party (“**Provider**”) to the other (“**Receiver**”) under this Agreement (“**Confidential Information**”) are 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;
- (d) the amount of the Charges disclosed by the Operator to its customers or potential customers; or
- (e) 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.

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; and
  - (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, 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 submit themselves to the jurisdiction of the Courts of South Australia for all proceedings arising from this Agreement.

## 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 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  
Burbridge 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.

**EXECUTED** as an Agreement.

**THE COMMON SEAL of AUSTRALIAN RAIL** )  
**TRACK CORPORATION LIMITED ACN 081** )  
455 754 was affixed in the presence of: )

\_\_\_\_\_  
Signed

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

\_\_\_\_\_  
Position

\_\_\_\_\_  
Signed

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

\_\_\_\_\_  
Position

**THE COMMON SEAL of** )  
\_\_\_\_\_)  
\_\_\_\_\_)  
\_\_\_\_\_)  
was affixed in the presence of: )

\_\_\_\_\_  
Signed

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

\_\_\_\_\_  
Position

\_\_\_\_\_  
Signed

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

\_\_\_\_\_  
Position



**SCHEDULE 1**

**Network**

**( Clause 1.1 )**

## SCHEDULE 2

### Scheduled Train Paths

( Clause 1.1 )

Refer to the following \_\_\_\_\_ ( \_\_ ) pages

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#### SCHEDULE TRAIN PATH ENTITLEMENTS

#### OPERATOR

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			ORIGIN		DESTINATION		ENTRY	EXIT			
Flagfall	Train No	Days	Location	Day	Depart Time	Location	Day	Arrival Time	Location	Event	Day

**SCHEDULE 3**

**Charges**

**( Clause 1.1 )**

**IF THE PATH IS A LONG-TERM CONTRACTED PATH OR A MEDIUM-TERM CONTRACTED PATH:**

**IF THE PATH IS A SHORT-TERM CONTRACTED PATH:**

**IF THE PATH IS AN AD-HOC ENTITLEMENT:**

**PARKING SURCHARGE CALCULATION:**

## **SCHEDULE 4**

### **Instructions**

#### **( Clause 1.1 )**

1. Code of Practice - Commonwealth Network Operations and Book of Rules and Operating Procedures.
2. Network Interface Co-ordination Plan TA02, being the Operational Interface Plan in accordance with AS4292.
3. Advices for train running information, including speed restrictions and train notices of the following types:
  - daily, standing and temporary standing
  - Weekly notices issued on Network in Victoria
  - Safeworking circulars
  - Weekly operational notices
  - WOLO heat restriction notices
4. Train Control Directions.
5. Network Operating Standards and Network Services Plan.
6. Signalling instructions.
7. Safety directions or instructions.

## **SCHEDULE 5**

### **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.

## SCHEDULE 6

### Key Performance Indicators

( Clause 1.1, 2.9 )

#### KEY PERFORMANCE MEASURES

##### Reliability

Measured by:

Indicator	Measure	Level of Detail
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	
Recovery of Unhealthy* Trains	% on time exit (within agreed tolerance from ARTC network of unhealthy services	
Train Health (Operator Performance)	% of total services which are operated in a healthy manner	

\* A healthy train has experienced no delay (within agreed tolerance) attributable to the operator, either on entry or whilst on the ARTC network.

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.
- Costs should be borne jointly.
- Modelling/estimation would be on a quarterly or semi-annual 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 (wheel impact and loading, 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 related to track alignment) for a corridor /segment of track.
  - Relevant TQI component measures include:
    - Rail surface height (height of top of both rails)
    - Alignment (rail/line straightness)
    - Twist/Cross level (relative height of two rails)
    - Gauge variation (distance between tracks)
- 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 (eg. EM-80 measurement on previous Commonwealth network, EM-100 measurement on Victorian network)
- Reporting would be on a major basis relevant to the operator and carried out on a semi-annual basis.

## **SCHEDULE E**

(Network)

1. **Kalgoorlie to Crystal Brook**

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.

2. **Port Augusta to Whyalla**

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.

3. **Crystal Brook to Broken Hill**

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

4. **Crystal Brook to Dry Creek**

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

5. **Adelaide Metropolitan Area**

5.2 From Dry Creek including all tracks, points and signals forming the Dry Creek triangle to Pelican Point/Outer Harbour.

5.3 From Gillman Junction to a point approximately 100 metres before the Eastern Parade level crossing at Port Adelaide flat.

6. **Dry Creek to the South Australian/Victorian border**

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

7. **Crossing Loops**

All crossing loops within each corridor described above as at Commencement of undertaking

8. **Authority Points**

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



**ARTC Track in Victoria**

**Part 1 – Mainline South Australia to Melbourne**

<b>Location</b>	<b>Boundary</b>
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”

**Part 2 – Mainline New South Wales to Melbourne**

<b>Location</b>	<b>Boundary</b>
Albury	Marked distance 306.523 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”

**ARTC Track in Victoria**

**Part 3 – Melbourne Boundaries**

South Dynon Junction to Spencer Street	
<b>Location</b>	<b>Boundary</b>
Spencer Street	Home Signal SST184
Reversing Loop Junction	Last long timber in the mixed gauge
Contrans Siding	Dwarf Signal 208
South Dynon Loco & Carriage Sheds	Dwarf Signal 210
South Dynon NRC Terminal (east end)	Dwarf Signals 210 & 214
South Dynon NRC Terminal (west end)	Dwarf Signals 126, 228, 230 & 232
Sims Street Junction to North Dynon	
<b>Location</b>	<b>Boundary</b>
North Dynon Intermodal Terminal	Dwarf Signals 92 & 94
North Dynon Agents Area	Dwarf Signal 90
South Dynon Junction to Appleton Dock	
<b>Location</b>	<b>Boundary</b>
Track to NRC Operations Terminal	Dwarf Signal 142
Other Areas	
<b>Location</b>	<b>Boundary</b>
NRC Wagon maintenance Centre	Dwarf Signal 154
NRC Locomotive Provisioning Centre	Dwarf Signal 130, Fouling point of Mainline and Provisioning Centre #1 track, and Dwarf Signals 114 & 114P
Sims Street Triangle	Sims Street Junction Weighbridge Junction South Dynon Junction

## **SCHEDULE F**

(Network Management Principles)

The schedule applies in 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.

# 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 PLAN	Train A	AGREED NETWORK ENTRY/EXIT TIMES									
Train B	TRAIN RUN	Actual Performance	OT running Premium	Running ahead Premium	Late running Premium	OT running High	Running ahead High	Late running High	OT running Standard	Running ahead Standard	Late running Standard
AGREED NETWORK ENTRY/EXIT TIMES	Actual Performance	<b>TC OBJECTIVE</b>	OT Exit	OT Exit	1 No more time lost 2 Make up time 3 Hold the gain	OT Exit	OT Exit	1. No more time lost 2. Make up time 3. Hold the gain	OT Exit	OT Exit	1 No more time lost 2 Make up time 3 Hold the gain
	OT running Premium	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	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 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	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	A or B Rule 2	A or B Rule 2	B Rule 3	B or A 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 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	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	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 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 G**

(Segments)

1. Dry Creek – Parkeston
2. Dry Creek – Spencer Street
3. Tottenham – Albury
4. Dry Creek – Outer Harbour
5. Crystal Brook – Broken Hill
6. Port Augusta - Whyalla

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED**  
**("ARTC")**

in favour of

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**  
**("ACCC")**

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**ACCESS UNDERTAKING**

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