

AUSTRALIAN RAIL TRACK CORPORATION LIMITED
(ABN 75 081 455 754)

and

ACN

TRACK ACCESS AGREEMENT

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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)*;

Note: This definition should be considered with Section 44ZZA of the TPA. This definition gives rise to questions as to how and when variations are to be effected; variations are effected only with the consent of the ACCC not when “given or submitted”.

“**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, signaling 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;

Note: The Code or the relevant parts of it, should be readily available.

“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;

Note: FreightCorp and Toll are concerned as to how this definition will work in practice. FreightCorp and Toll consider that the intent behind this definition and Train Control Directions needs to be understood. It is not possible to discern the intent as the definitions are currently drawn.

“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;

Note: Not a big point but what about 3 year grants? Given that the definitions relate to extensions of the Term and relinquishment/surrender of Train Paths it is important.

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

Note: Elsewhere in comments on the access undertaking it is noted that a fuller description of the Network maybe more appropriate.

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

Note: Elsewhere in comments on the access undertaking it is noted that FreightCorp and Toll consider that it may be appropriate to consider and to develop the Principles in an industry forum.

“**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;

Note: FreightCorp and Toll consider that the concept of Parking needs to be considered.

“**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;

Note: There is no certainty of definition, nor does this definition relate to legal requirements.

“**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;

Note: FreightCorp and Toll are concerned that that which they contract for maybe varied over time, and from time to time, without a clear understanding as to the basis upon which this may occur.

“**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;

Note: As noted in respect of the definition of Instructions, greater clarity is required to understand what this will mean in practice.

“**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.

Note: There is an issue as to whether Train Path is intended to be different from “Scheduled Train Path”.

- 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.

Note: As a general comment, the basis upon which a Scheduled Train Path may not be available must be clearly stated, it goes to the essence of what is being paid for. Issues of clarification arise with items (ii) to (iv).

- 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.

Note: The effect of this clause is unclear because amongst other things of the open ended definition of Safeworking Rules (ARTC may vary the Safeworking Rules at any time without reference to the Operator).

Note: There is an issue as to whether Train Path is intended to be different from “Scheduled Train Path”.

Further, there is an issue as to what the Operator is paying for. Is the Operator paying for a Scheduled Train Path which if the Operator presents the Train within the ± 15 minute band it will be able to run to the exclusion of others operators?

4.32.3 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.

Note: This goes to whether there is a meaningful supply of service obligation on ARTC, and whether there should be a regime that provides monetary consequences of non-provision of that which ARTC has contracted to provide.

- b) Nothing in this clause 2.3 derogates from ARTC's obligations under the Key Performance Indicators.

Note: It is not clear what these obligations are, and more importantly, the consequences of non-compliance.

4.42.4 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).

Note: The basis upon which an early or late Train is to be treated under the Network Management Principles is of critical importance.

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.

Note: Again a clearer and fuller statement of the Network Management Principles is critical to understanding the application of these clauses.

- 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).

Note: Again a clearer and fuller statement of the Network Management Principles is critical to understanding the application of these clauses.

4.52.5 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.

Note: FreightCorp and Toll consider that it would be helpful to understand the information that ARTC anticipates will be subject to this clause.

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 Scheduled 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".

Note: FreightCorp and Toll consider that it is appropriate for ARTC to explain the basis for this.

2.8 Re-negotiation of Long-Term Contracted Path

Note: Generally, FreightCorp and Toll query why three years + access agreements have been identified for contractual extension rights. The QCA, in its Draft Decision on the Queensland Rail Access Undertaking, does not prescribe a time period of three years +, or for that matter any time period.

- 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.

Note: This is not clear. On what basis does ARTC consider that it would be reasonable for it not to renew.

- 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.

Note: A minor point of clarification arises which would be resolved if the drafting provided that all access agreements must comply with any current access undertaking under Part IIIA.

- 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.

Note: What would be the issue that would be in dispute? Whether ARTC was acting reasonably? If so, on what basis does ARTC consider that it would be reasonable for it to seek to vary the existing access agreement to be extended? Or would that whole access agreement be in dispute? If so, on what basis, and by reference to what criteria, would an arbitrator make a determination?

- 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 Operates 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.

Note: FreightCorp and Toll question what purpose the KPI's serve absent a consequence. As drawn, this KPI regime does not provide for "reward" or "penalty", and will not unless the parties agree. FreightCorp and Toll consider that it is appropriate for an industry forum to develop specific performance levels to form the basis of industry standards, and for monetary consequences to result from non-compliance.

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).

4.3.3 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).

Note: Consistent with the comment made in respect of the definition Parking Surcharge, FreightCorp and Toll consider that it is appropriate to understand what constitutes parking for these purposes.

4.4.4 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).

Note: One may imply that any amount in dispute need not be paid. It is appropriate for this to be stated expressly.

4.54.5 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.]

Note: As noted in the body of the submission, FreightCorp and Toll question the appropriateness of a CPI escalation model.

- 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.

Note: FreightCorp and Toll noted in the body of the submission and in the annotated copy of the access undertaking that extensions do **not** fall within the access undertaking. On this basis, there is an issue as to whether clause 4.6 is required.

- 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.

Note: It is not clear how this clause is intended to relate to clause 9.2. This is due to the use of the imperative "must" in this clause, suggesting that the operator must allow variation, whereas clause 9.2 does not provide an imperative unless for safety.

~~4.74.7~~ 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 2 percentage 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~~ **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.

Note: FreightCorp and Toll do not consider that it is appropriate for security to be sought from them.

~~4.9~~ **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.

Note: FreightCorp and Toll do not consider that it is appropriate for security to be sought from them.

1.104.10 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.

Note: FreightCorp and Toll consider that this clause could probably be revisited given the time that has elapsed since the introduction of GST.

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.

4.25.2 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).

Note: FreightCorp and Toll consider that it is appropriate for ARTC to state clearly which parts of the Network will not benefit from an unqualified warranty.

4.35.3 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.

Note: FreightCorp and Toll note that these are ancillary obligations and are not tightly drawn so as to be outcome based.

1.45.4 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.

1.55.5 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);

Note: The words in parenthesis give rise to an issue of principle. Should the Operator be concerned about the properness or the validity of an Instruction? If an Instruction is given should not the Operator comply with it?

- 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;

Note: FreightCorp and Toll note that a cost issue arises here, in particular whether ARTC should have the ability to increase Operator costs without consultation possibly at industry level.

- 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;

Note: This obligation should have a trigger, ie a request from ARTC.

- 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 [].

Note: Is clause 5.6(a) required?

- 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.

Note: As noted in the body of the submission and the annotated copy of the access undertaking, FreightCorp and Toll consider that the most favoured nation clause should relate to terms in addition to price. Paragraph 35 of the submission on Schedule 3 of the access undertaking also addresses this issue.

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.

Note: As noted elsewhere, there is no clear statement that the Network must be maintained to enable ARTC to fulfil its obligation to provide access to and use of the Network to allow the Operator to use its Scheduled Train Paths. Again this goes to the "firmness" of the obligation to provide access to and use of the Network.

4.26.2 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.

14.37.3 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.

Note: FreightCorp and Toll note that this provision goes to the core of the service obligation of ARTC. It is difficult to determine how this clause is intended to interrelate to the definition of Instruction.

- 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.

Note: Potentially, this allows a de facto permanent variation to persist, ie, there is no obligation to seek a permanent variation. This is odd. Further, in any event, the provision should make it clear that the “clause 9.2 procedure” is “satisfied” if consent is not given.

- 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.

Note: There is an issue as to how this is intended to interrelate with clause 8.1(e).

- 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.

Note: This illustrates lack of clarity in this area; no operator should be obliged to do anything unless it is told what to do and has time to do what it has been asked to do.

- 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.

Note: This is odd; compliance with the Instruction is the issue, not compliance in such a way as to achieve an outcome.

- 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).

Note: The words in parenthesis need to be understood. As drafted, absent an understanding as to what is meant by "ARTC's obligations relating to safety", many variations could seemingly be made on this basis. Also note that clause 9.6 will allow increased costs to be passed on to the Operator.

FreightCorp and Toll consider that a Change of Law provision should be considered. The Change of Law provision would allow ARTC to initiate the variation process but the process would involve negotiation and referral to an expert if agreement is not reached. The referral could address necessity of the variation, the form of the variation and the cost of it.

- 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.

Note: FreightCorp and Toll are concerned about the lack of consultation on maintenance, and have suggested as part of the submission that planned maintenance provisions be considered. Ultimately, ARTC will determine the planned maintenance program, but consultation must occur. FreightCorp and Toll recognise that whilst their consent should not ultimately be required they should be consulted consultation only appears to be anticipated on “possession”.

4.49.4 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.

Note: FreightCorp and Toll suggest an approach in paragraph 5 of their comments on Schedule C to the access undertaking.

4.59.5 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.

Note: It is not clear whether this clause is intended to allow ARTC to vary Scheduled Train Paths without agreement. If it is, FreightCorp and Toll are concerned, especially given clause 9.5(d). As with clause 9.4, the economic basis for this clause needs to be made out by ARTC.

4.69.6 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.

Note: FreightCorp and Toll note that the cost of variations defaults to those on whom it falls. Further, FreightCorp and Toll would like to understand the circumstances in which ARTC considers clause 15 may apply as anticipated by the clause.

4.79.7 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.

Note: This seems to allow consequential variations to arise, ie other Train Paths may be affected by one 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:

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

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:

N₂ = the amended period of notice in weeks

N₁ = 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 **N₂** equates to zero or a negative figure, no notice is required.

Note: FreightCorp and Toll welcome the ability to surrender Scheduled Train Paths however they question the length of the notice periods suggested by ARTC. FreightCorp and Toll consider that notice periods should be no longer than six months.

- 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).

Note: FreightCorp and Toll note that ARTC must refund.

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.

Note: FreightCorp and Toll consider that an open ended audit right is intrusive. FreightCorp and Toll consider that ARTC must demonstrate a reasonable apprehension of non-compliance and notify the Operator of the apprehension. If the Operator does not acknowledge the non-compliance or disputes the non-compliance the inspection may take place, but if it proves ill founded ARTC must pay the Operator's costs incurred to allow the inspection.

~~10.1~~ 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 10.1(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.

Note: FreightCorp and Toll note that the agreement does not provide for weighing. This gives rise to how clause 10.2 will be policed. Further, FreightCorp and Toll query the basis for the charges suggested by ARTC.

4.310.3 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.

Note: This emphasises the importance of ARTC having to demonstrate a reasonable apprehension.

4.510.5 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.

Note: FreightCorp and Toll consider that it would be helpful to understand the logic behind the treatment of the information referred to in clause 10.5 as confidential information of ARTC.

4.610.6 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.

~~4.4~~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.

~~4.5~~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.

Note: FreightCorp and Toll note that this should be drawn in such a way that does not jeopardise legal professional privilege.

- 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.

Note: Again this must be drawn in such a way that does not jeopardise legal professional privilege or incriminate.

~~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;

Note: Again FreightCorp and Toll note that the Safeworking Rules may be varied by ARTC. It may be appropriate for the Rules to be varied in consultation with the Operators or in an industry forum and by reference to clear outcomes.

- 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.

Note: Again, FreightCorp and Toll emphasise that variation may occur without consultation.

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.

~~4.2~~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 inconsistent with ARTC's plan, and give a copy of its plan to ARTC.

Note: FreightCorp and Toll consider that a requirement for the Operator's plan not to be inconsistent with that of ARTC is more appropriate.

~~4.3~~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).

~~4.4~~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.

Note: FreightCorp and Toll would again note the importance of having regard to legal professional privilege and self-incrimination.

~~4.5~~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

Note: Generally, FreightCorp and Toll note that in their submission on Schedule C of the access undertaking they have set out principles that they consider to be appropriate. The advantage of them is that they are clear.

~~14.1~~ 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~~ 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

As noted in the submission on Schedule C of the access undertaking, FreightCorp and Toll do not consider that a “no-fault” indemnity is appropriate. This is a “no fault” indemnity.

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).

Note: FreightCorp and Toll note that this clause 15 does not provide an effective limitation of liability clause for claims made on a non-indemnity basis, ie. on the basis of Hadley v. Baxendale. This should be addressed.

~~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

Note: FreightCorp and Toll consider that for the purposes of information a policy of this kind should be sought and the terms considered, including the cost, and a cost benefit analysis conducted as to how much more it adds versus the public liability insurance policy.

- 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);

Note: FreightCorp and Toll consider that for the purposes of information a policy of this kind should be sought and the terms considered, including the cost, and a cost benefit analysis conducted as to how much more it adds versus the public liability insurance policy.

- 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

Note: In the submission on Schedule C of the access undertaking (at paragraph 28) FreightCorp and Toll suggest the form that the dispute resolution regime should take. That regime takes account of the fact that different dispute resolution processes are required for different disputes.

17.1 Procedure to settle disputes

- a) If there is a dispute between the parties relating to or arising out of this Agreement, 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, 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 the other of a dispute, 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 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, of if they fail to agree, appointed by the President of the Law Society of South Australia acting on the request of either party.

- b) 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.
- c) Nothing in this clause 17.3 prohibits a party from seeking and obtaining appropriate injunctive relief.

17.4 **Arbitration**

- 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

Note: Generally, FreightCorp and Toll suggest (at paragraph 33 of the comments on Schedule C of the access undertaking) reciprocal assignment provisions that address, objectively, relevant concerns of both ARTC and the Operator

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.

Note: FreightCorp and Toll suggest at paragraph 32 of their comments on Schedule C of the access undertaking the form that the transfer provisions might take.

- 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.

Note: FreightCorp and Toll consider that the matters ARTC is seeking to exclude should be Force Majeure events because they may impact on operational obligations.

FreightCorp and Toll note that the agreement does not deal with the monetary consequences of Force Majeure expressly. Nor does the agreement deal with the monetary consequences of non-provision/non-availability of access because of breach by ARTC, ie. whether the flagfall charge is payable or not.

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.

Note: If change of law or taxes is to be addressed, or for that matter change in control of a party, it should be dealt with such that it provides a basis for a final and binding outcome. This does not. It is an agreement to negotiate and as such in contractual terms incomplete and uncertain.

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 other 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

Signed

Full Name (Print)

Full Name (Print)

Position

Position

SCHEDULE 1

Network

(Clause 1.1)

SCHEDULE 2

Scheduled Train Paths

(Clause 1.1)

Refer to the following _____ (____) pages

SCHEDULE TRAIN PATH ENTITLEMENTS

OPERATOR

			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. Signaling instructions.
7. Safety directions or instructions.

Note: Consistent with comments on the definitions of Instructions and Train Control Directions all of these matters need to be understood and tied to Network Management Principles to allow a clear view of the nature of the Instructions that may be given and when they may be given.

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. [[010450182: 6]] Draft No. 5

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.