

Network Access Agreement
(Freight Services)

V/Line Pty. Ltd.
and
[Operator]

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THIS AGREEMENT is made on.....

PARTIES

V/LINE PTY. LTD. ABN 29 087 425 269 of Level 23, 570 Bourke Street, Melbourne VIC 3000
("Access Provider")

AND

[Insert name and ACN] of [Insert address] ("Operator")

INTRODUCTION

- A The Access Provider operates the Network.
- B The Operator is an access seeker for the purposes of the Rail Corporations Act.
- C The Access Provider has agreed to provide the Operator with access for Freight Trains to those parts of the Network described at Item 4 of Schedule 1 of this Agreement, on the terms and conditions contained in this Agreement.
- D This Agreement sets out the terms and conditions upon which the Access Provider agrees to provide the Operator with access to the Network.

1 Definitions

In this Agreement:

- 1.1 "**Access Arrangement**" means the access arrangement made by the Victorian Essential Services Commission under the Rail Corporations Act, which is binding on the Access Provider;
- 1.2 "**Access Charges**" means the fees and charges payable by the Operator under clause 5.1 and clause 5.2 of this Agreement;
- 1.3 "**Access Fee**" means the fees that the Operator is required to pay for access to an Approved Train Path, as described in clause 5.1 and specified in Schedule 2;
- 1.4 "**Accreditation**" means:
 - 1.4.1 in relation to the Operator, the rail safety accreditation under the Rail Safety Act that a person must obtain if it is to operate a Train in Victoria; and
 - 1.4.2 in relation to the Access Provider, the rail safety accreditation under the Rail Safety Act that a person must obtain if it is to manage rail infrastructure in Victoria;;
- 1.5 "**Agreement**" means this agreement;
- 1.6 "**Ancillary Movement**" means a Train movement on the Network of not more than 1 kilometre which is not part of an Approved Train Path but which is necessary or

reasonably required in connection with the use of an Approved Train Path, including a movement:

- 1.6.1 for Stabling purposes;
 - 1.6.2 of empty wagons and light engines; and
 - 1.6.3 for operational or maintenance purposes to workshops, locomotive depots and fuel points;
- 1.7 **“Approved Train Path”** means:
- 1.7.1 an Operator’s Scheduled Train Path; or
 - 1.7.2 an Operator’s Unscheduled Train Path;
- 1.8 **“Available”** means in relation to:
- 1.8.1 an application for an Unscheduled Train Path, a Train Path that:
 - (a) has not already been granted (whether to the Operator, the Access Provider, or to a Third Party Operator), and the operation of that Train Path does not or will not conflict with any Train Path already granted (unless that other Train Path is required to be surrendered under the Capacity Use Rules); or
 - (b) has already been granted but is required to be surrendered under the Capacity Use Rules; and
 - 1.8.2 an application for a Scheduled Train Path by the Operator:
 - (a) a Train Path that has not previously been granted as
 - (i) a Scheduled Train Path;
 - (ii) a Passenger Train Path,and the operation of that Train Path would not conflict with any Scheduled Train Path (which is not required to be surrendered under the Capacity Use Rules) and would not conflict with a Passenger Train Path;
 - (b) any Unscheduled Train Path; or
 - (c) a Train Path that is required to be surrendered under the Capacity Use Rules.
- 1.9 **“Book of Rules”** means the Public Transport Commission book of rules and operating procedures 1994, as these rules and procedures are amended or replaced from time to time with the approval of the Director, Public Transport Safety appointed by the Secretary of the Victorian Department of Infrastructure under the Transport Act;
- 1.10 **“Business Day”** means a day not being a Saturday or Sunday, on which banks are generally open for business in Melbourne, Victoria;
- 1.11 **“Capacity Use Rules”** means the capacity use rules made by the Victorian Essential Services Commission pursuant to section 38T of the Rail Corporations Act;
- 1.12 **“Change of Control Event”** means, in relation to an entity, an event the occurrence of which has the effect that:

- 1.12.1 if a person controlled the entity prior to the time the event occurred, the person ceased to control the entity or another person obtained control of the entity; or
- 1.12.2 if no person controlled the entity prior to the time the event occurred, a person obtained control of the entity; or
- 1.12.3 if the entity is owned or controlled by a group or consortium of persons, or if the group or consortium could control the entity were they to act collectively, there is any material change in the composition of the group or consortium; and
- for the purposes of this definition, “control” and “controlled” have the meaning given in section 50AA of the Corporations Act;
- 1.13 **"Claim"** means all claims, legal actions and demands (including the costs and expenses of defending or settling any action, proceeding, claim or demand);
- 1.14 **"Commencement Date"** means the date of this Agreement;
- 1.15 **"Confidential Information"** means the terms of this Agreement and all information provided by one party to another which is marked confidential, being information other than information which:
- 1.15.1 at the time of the first disclosure by the disclosing party was already in the lawful possession of the other party and which was not at the time of such disclosure the subject of any obligation of confidentiality;
- 1.15.2 is or becomes generally available to the public otherwise than by disclosure in breach of the terms of this Agreement or an obligation of confidence owed to the disclosing party by the other party; or
- 1.15.3 becomes available to the other party, from a third person legally entitled to possess the information and provide it to the other party, without breaching any obligation of confidentiality in relation to such information or any Law.
- 1.16 **"Consequential Loss"** means any loss or damage which is indirect or consequential, including loss of revenue, loss of profits, loss of goodwill or credit, loss of business reputation, future reputation or publicity, loss of use, loss of interest, damage to credit rating, loss or denial of opportunity, or increased overhead costs, but does not include property damage or losses arising for third party claims in respect of property damage, personal injury, nervous shock or death;
- 1.17 **"Corporations Act"** means the *Corporations Act 2001* (Cth);
- 1.18 **"Dangerous Goods"** has the same meaning that it has in the Dangerous Goods Code;
- 1.19 **"Dangerous Goods Code"** means Australian Code for the Carriage of Dangerous Goods by Road and Rail (as in force from time to time);
- 1.20 **"Default Rate"** means the rate of interest prescribed from time to time under section 2 of the *Penalty Interest Rates Act 1983* (Vic);
- 1.21 **"Delay Loss"** has the meaning given in clause 17.16;
- 1.22 **"Director"** means the Director of Public Transport, under the Transport Act, acting on behalf of the Crown in right of the State of Victoria;

- 1.23 “**Emergency Management Compliance Plan**” means an emergency management compliance plan prepared by the Operator and acceptable to the Access Provider, which describes how the Operator will comply with the Emergency Management Plan;
- 1.24 “**Emergency Management Plan**” means the emergency management plan published by the Access Provider from time to time;
- 1.25 “**Entry Point**” means:
- 1.25.1 in respect of a Scheduled Train Path, the entry point for that Scheduled Train Path set out in Schedule 4; and
 - 1.25.2 in respect of an Unscheduled Train Path, the place of entry specified by the Access Provider in relation to that Unscheduled Train Path;
- 1.26 “**Entry Time**” means:
- 1.26.1 in respect of a Scheduled Train Path, the entry time for that Scheduled Train Path set out in Schedule 4; and
 - 1.26.2 in respect of an Unscheduled Train Path, the time and date of entry specified by the Access Provider in relation to that Unscheduled Train Path;
- 1.27 “**Environment**” includes the meaning given to that term at common law and in any Law in force in Victoria, including any land, water, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factors of aesthetics;
- 1.28 “**Environmental Hazard**” means a state of danger to human beings or the Environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics;
- 1.29 “**Environmental Law**” means any Law relating to the Environment, including any Law relating to land use, planning, pollution of air, water, soil or groundwater, chemicals, waste, the use of transport, the storage and handling of dangerous goods, the health or safety of any person, or any other matters relating to but not limited to the protection of the Environment, health or property;
- 1.30 “**Environmental Management Plan**” means an environmental management plan prepared by the Operator and acceptable to the Access Provider, for dealing with the environmental effects of the Operator’s operations on the Network;
- 1.31 “**Exit Point**” means:
- 1.31.1 in respect of a Scheduled Train Path, the exit point for that Scheduled Train Path set out in Schedule 4; and
 - 1.31.2 in respect of an Unscheduled Train Path, the place of exit specified by the Access Provider in relation to that Unscheduled Train Path;
- 1.32 “**Exit Time**” means:
- 1.32.1 in respect of a Scheduled Train Path, the exit time for that Scheduled Train Path set out in Schedule 4; and
 - 1.32.2 in respect of an Unscheduled Train Path, the time and date of exit specified by the Access Provider in relation to that Unscheduled Train Path;

- 1.33 “**Expiry Date**” means the date specified in clause 3 of Schedule 1;
- 1.34 “**Force Majeure**” means:
- 1.34.1 acts of God, lightning, storm, natural flood, landslide, bush fire or earthquake;
 - 1.34.2 high temperatures resulting in the imposition of operating restrictions pursuant to the Network Operating Requirements;
 - 1.34.3 strikes or other industrial action;
 - 1.34.4 acts of public enemy, war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion, epidemic;
 - 1.34.5 the effect of any change in applicable Laws of any government or other competent authority;
 - 1.34.6 embargo or power or water shortage; and
 - 1.34.7 other occurrences which are beyond the reasonable control of the Access Provider, including deliberate and accidental damage to infrastructure;
- 1.35 “**Freight Train**” means a Train used to carry freight or other goods and materials for reward and includes such a Train when it is empty;
- 1.36 “**Government Agency**” means any government and any governmental body whether:
- 1.36.1 legislative, judicial or administrative;
 - 1.36.2 a department, commission, authority, tribunal, agency or entity; or
 - 1.36.3 commonwealth, state, territorial or local;
- but does not include a governmental body in respect of any service or trading functions as distinguished from regulatory or fiscal functions;
- 1.37 “**GST**” has the meaning given by the GST Law;
- 1.38 “**GST Law**” means the GST Law as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- 1.39 “**Hazardous Substance**” means any substance that causes, or might reasonably be expected to cause, injury to any person exposed to that substance, including but not limited to dangerous, inflammable, volatile or explosive substances or goods, and any emission from that substance;
- 1.40 “**Incident**” means a breakdown, accident, emergency, event or circumstance on or affecting the Network that causes, or may reasonably be expected to cause:
- 1.40.1 damage to a Train;
 - 1.40.2 injury to or death of any person;
 - 1.40.3 material damage to the property of any person;
 - 1.40.4 delay or obstruction to persons using the Network; or
 - 1.40.5 collision, derailment, signalling failure or serious safeworking breach,
- and any railway accident or incident that the Access Provider or the Operator is required to report or investigate under any applicable Law;

- 1.41 “**Industrial Waste**” means any waste arising from commercial, industrial or trade activities and any waste containing substances or materials that are potentially harmful to human beings or the Environment;
- 1.42 “**Lateness Payment**” has the meaning given in clause 17.16;
- 1.43 “**Law**” means any statute, regulation, order, rule, subordinate legislation and other document enforceable under any statute, regulation, order, rule or subordinate legislation;
- 1.44 “**Line**” means the rail path between two locations (including sidings) on the Network that may be the subject of a Train Path;
- 1.45 “**Line Segment**” means a segment or section of rail track of the Network designated as a line segment by the Access Provider in the Network Operating Requirements;
- 1.46 “**Loss**” means any loss, damage, cost, interest, expense, fee, penalty, fine, forfeiture, assessment, demand, action, suit, claim, proceeding, cause of action, liability or damages incurred by a person, and includes:
- 1.46.1 the cost of any action taken by the person to protect itself against any loss or to preserve any right it has;
 - 1.46.2 any taxes or duties payable by the person (other than tax on its assessable income); and
 - 1.46.3 where applicable, legal costs on an indemnity basis or on a solicitor and own client basis, whichever is the higher;
- 1.47 “**Material Change**” means any change or changes to:
- 1.47.1 the scope and/or operation of the access regime established pursuant to Part 2A of the Rail Corporations Act; or
 - 1.47.2 the Law, or a policy or direction from a Government Agency,
- which materially and substantially affects either the rights or obligations of the Access Provider under this Agreement or the cost to the Access Provider of performing its obligations under this Agreement;
- 1.48 “**Negotiation Guidelines**” mean the negotiation guidelines made by the Victorian Essential Services Commission pursuant to section 38V of the Rail Corporations Act;
- 1.49 “**Network**” means that part of the land and rail infrastructure that is:
- 1.49.1 operated or managed by the Access Provider; and
 - 1.49.2 declared under Part 2A of the Rail Corporations Act,
- and includes Somerton, Melbourne Arrival Sidings, those parts of Tottenham Yard not leased to Pacific National (Victoria) Limited and, for such period as the Access Provider continues to act as access manager of the Geelong Grain Loop pursuant to its appointment to do so by the Victorian Rail Track Corporation, the Geelong Grain Loop;
- 1.50 “**Network Management Rules**” means the network management rules made by the Victorian Essential Services Commission pursuant to section 38U of the Rail Corporations Act;

- 1.51 “**Network Operating Requirements**” means the regulations and standards set out in the chapters of the Network Service Plan entitled “Network Operating Requirements” and “Addenda”, as published by the Access Provider from time to time;
- 1.52 “**Network Service Plan**” means the Access Provider’s network service plan that contains requirements for rolling stock, infrastructure, safe-working, communications and train running, and sets out passenger and freight train schedules with details on section running times;
- 1.53 “**Notice**” has the meaning given in clause 21;
- 1.54 “**On Time**”, in respect of a Train or a Service, means:
- 1.54.1 on lines used only by Freight Trains, within ten minutes of the Entry Time or Exit Time (as the case may be); and
- 1.54.2 on lines used by Passenger Trains, within five minutes of the Entry Time or Exit Time (as the case may be);
- 1.55 “**Operating Handbook**” means the Access Provider’s operating handbook that applies to operations on the Network and the allocation of capacity, as published by the Access Provider from time to time in accordance with the Network Management Rules and the Capacity Use Rules;
- 1.56 “**Operational Control**” means the control exercised, or which may be exercised, by the Access Provider with regard to the efficient operation and safeworking of the Network, and includes procedures and requirements relating to Train control, Train movements, track restrictions, Track Occupations, safeworking practices, operating restrictions, emergency response, notification of authorities, network restoration, maintenance of the Network, evacuation and Incident investigation;
- 1.57 “**Operational Directions**” means the lawful instructions, directions and notifications from time to time issued by the Access Provider with regard to Operational Control;
- 1.58 “**Operator’s Scheduled Train Path**” means each Train Path described in Schedule 4 (as amended from time to time);
- 1.59 “**Operator’s Unscheduled Train Path**” means each Train Path granted to the Operator following a request under clause 2.4;
- 1.60 “**Passenger Franchisee**” means a Passenger Train operator who has entered into a franchise agreement with the Director for the operation of passenger services on the Network;
- 1.61 “**Passenger Train**” means a Train used to carry passengers for reward and includes such a Train when it is empty;
- 1.62 “**Passenger Train Path**” has the meaning given to that term in the Capacity Use Rules;
- 1.63 “**Rail Corporations Act**” means the *Rail Corporations Act 1996* (Vic);
- 1.64 “**Rail Safety Act**” means the *Rail Safety Act 2006* (Vic);
- 1.65 “**Regional Infrastructure Lease**” means the Regional Infrastructure Lease dated 4 May 2007 (as amended) between V/Line and the Director;
- 1.66 “**Related Body Corporate**” has the meaning given in the Corporations Act;

- 1.67 “**Ring Fencing Rules**” mean the ring fencing rules made by the Victorian Essential Services Commission pursuant to section 38S of the Rail Corporations Act;
- 1.68 “**Rolling Stock**” means any vehicle that operates on or uses a railway track including a locomotive, light inspection vehicle, road/rail vehicle, trolley, carriage, diesel multiple unit and wagon (but does not include a vehicle designed to operate both on and off a railway track when the vehicle is not operating on a railway track);
- 1.69 “**Rolling Stock Standards**” means the specifications and requirements for Rolling Stock set out in the Network Operating Requirements;
- 1.70 “**Safety Regulator**” means the Director, Public Transport Safety;
- 1.71 “**Scheduled Train Path**” means a Train Path that has been scheduled in the Access Provider’s master train timetable (other than a Passenger Train Path).
- 1.72 “**Scheduled Train Path Group**” means a group of Scheduled Train Paths that have:
- 1.72.1 the same Entry Point and Exit Point, and
 - 1.72.2 Entry Times and Exit Times that are the same in respect of the relevant time of day and the relevant day of the week,
- as specified in Schedule 4;
- 1.73 “**Service**” means a rail freight service provided by the Operator that uses an Approved Train Path;
- 1.74 “**Stabling**” means the parking or laying up of Rolling Stock which is necessary or expedient for giving full effect to the movements of the Rolling Stock required for the operation of Services;
- 1.75 “**Stabling Arrangement**” means an arrangement with the Access Provider or a third party to store Rolling Stock, and includes a wagon storage agreement, a lease or licence for a stabling track and permission from the facility owner to use a terminal, yard, receipt or storage facility to store Rolling Stock;
- 1.76 “**Third Party Operator**” means a person other than the Operator or a related body corporate of the Access Provider who has the right to access the Network to provide rail services;
- 1.77 “**Track**” means any single line between two turnouts, or from a turnout to the baulks;
- 1.78 “**Track Occupation**” means access to the Network in order to carry out inspections, repairs, maintenance, up-grade work, improvements, additions or any other works;
- 1.79 “**Train**” means several units of Rolling Stock coupled together to operate as a single unit;
- 1.80 “**Train Path**” means the particular route and time interval, including Entry and Exit Points and Times, through which a Train may travel on a particular day over one or more Line Segments from an origin to a destination, including such stopping points and intermediate times and locations;
- 1.81 “**Transport Act**” means the *Transport Act 1983 (Vic)*;
- 1.82 “**Trip Trains**” means train movements of rakes of a larger Freight Train;

- 1.83 “**Unhealthy**”, in relation to a Service or Train, means that a Service or Train has not entered the Approved Train Path at the Entry Point On Time or has lost time en-route as a result of “above rail” causes so that in either case it is not expected to exit the Approved Train Path at the Exit Point On Time; and
- 1.84 “**Unscheduled Train Path**” means a Train Path that is granted by the Access Provider through a short term process of nomination and allocation, and is not a Scheduled Train Path or a Passenger Train Path.

1A Good faith

- 1A.1 The parties must act reasonably and in good faith in performing their respective obligations under this Agreement.

2 Access

Grant of access

- 2.1 The Access Provider agrees to grant access for Freight Trains to those parts of the Network detailed in Item 4 of Schedule 1 to the Operator in accordance with this Agreement. The access granted may comprise:
- 2.1.1 access to Approved Train Paths; and
 - 2.1.2 the right to undertake Ancillary Movements.

Limitations on grant

- 2.2 The Operator must not access or use any part of the Network except for the purpose of:
- 2.2.1 operating a Service on an Approved Train Path; or
 - 2.2.2 undertaking Ancillary Movements,
- in accordance with this Agreement.

Scheduled Train Paths

- 2.3 The Operator may operate Freight Trains on the Operator’s Scheduled Train Paths, subject to and on the terms and conditions of this Agreement.
- 2.3.1 Requests for additional Scheduled Train paths or variations to existing Scheduled Train Paths may be made by the Operator to the Access Provider in accordance with the V/Line Operating Handbook.
 - 2.3.2 The Access Provider will not unreasonably withhold approval of Entry onto an additional Scheduled Train Path or variation to an existing Scheduled Train Path.

Application for use of Unscheduled Train Paths

- 2.4 The Operator may request that the Access Provider grant the use of an Unscheduled Train Path by providing the Access Provider with a written notice which:
- 2.4.1 specifies the Train Path sought, including Entry Point, Exit Point, Entry Time and Exit Time;
 - 2.4.2 provides details of the Rolling Stock sought to be run over the entire Train Path requested; and
 - 2.4.3 provides details of appropriate Stabling Arrangements made by the Operator for storing its Rolling Stock off the main line (or other rights to access to facilities off the main line) compatible with the requested Train Path.
- The notice must be provided to the Access Provider at least 48 hours prior to, but not more than two weeks in advance of, the Entry Time of the requested Train Path. The 48 hour notice period does not include a day that is not a Business Day.
- 2.5 The Operator must immediately provide revised information to the Access Provider if there is a material change in the information supplied pursuant to clause 2.4.

Grant of Unscheduled Train Paths

- 2.6 Subject to the Capacity Use Rules, the Access Provider is not obliged to grant a requested Unscheduled Train Path if:
- 2.6.1 the requested Train Path is not Available;
 - 2.6.2 the Operator has not made appropriate Stabling Arrangements for storing its Rolling Stock off the main line (or other rights to access to facilities off the main line) compatible with the requested Train Path;
 - 2.6.3 the Operator is in material breach of this Agreement (including without limitation any provision requiring the Operator to pay money to the Access Provider); or
 - 2.6.4 the request is not made in accordance with clause 2.4.
- 2.7 The Access Provider must make a determination as to whether a requested Unscheduled Train Path is Available having regard to the matters set out in the Network Operating Requirements and the Operating Handbook. Where the Access Provider:
- 2.7.1 receives the request on a Business Day, the Access Provider must respond to the Operator on the next Business Day (no more than 24 hours after the time the request was received); and
 - 2.7.2 receives the request on a day that is not a Business Day, the Access Provider must respond to the Operator by the close of business on the next Business Day.
- 2.8 If the requested Unscheduled Train Path is not Available, the Access Provider must:

- 2.8.1 notify the Operator and provide details of another Available Train Path that most closely resembles the Train Path that the Operator has applied for promptly (and no later than within 24 hours after the Access Provider's determination under clause 2.7); and
- 2.8.2 if the Operator is not satisfied with the alternative Train Path suggested by the Access Provider under clause 2.8.1, use reasonable endeavours to offer the Operator an alternative Train Path that does satisfy the Operator's request.

For clarification, the 24 hour period in clause 2.8.1 does not include a day that is not a Business Day.

- 2.9 The Operator acknowledges that the grant of a requested Unscheduled Train Path on any particular occasion does not:
 - 2.9.1 give rise to any entitlement in respect of any Unscheduled Train Path similar to the granted Unscheduled Train Path; or
 - 2.9.2 constitute any indication that any Unscheduled Train Path similar to the granted Unscheduled Train Path will be Available in the future.

Access to certain Sidings and Terminals

- 2.10 Without limiting any other provision of this Agreement, but subject to any relevant determination of the Victorian Essential Services Commission, during the term of this Agreement the Access Provider will provide the Operator with:
 - 2.10.1 non-exclusive access to Somerton at charges equal to the Access Fee for the movements into and out of Somerton but no further fee for the first 24 hours only, after which an additional fee of \$12.05 (excluding GST) per vehicle per day or part thereof (or such other rate as determined by the Victorian Essential Services Commission from time to time) will apply;
 - 2.10.2 non-exclusive access to Melbourne Arrival Sidings and those parts of Tottenham Yard not leased to Pacific National (Victoria) Limited ("**PN**") at charges equal to the Access Fee for the movements into and out of Melbourne Arrival Sidings and those parts of Tottenham Yard not leased to PN but no further fee for the first 24 hours only, after which an additional fee of \$12.05 (excluding GST) per vehicle per day or part thereof (or such other rate as determined by the Victorian Essential Services Commission from time to time) will apply; and
 - 2.10.3 non-exclusive track access to the Geelong Grain Loop at the rate of \$73.88 (excluding GST) per Train (or such other rate as determined by the Victorian Essential Services Commission from time to time).
- 2.11 The charges referred to in clause 2.10 will be varied in accordance with Schedule 3 (as if the references to "Access Fee" in Schedule 3 were references to the charges referred to in clause 2.10).
- 2.12 For the avoidance of doubt, the Operator must pay to the Access Provider the charges referred to in clause 2.10 (as varied from time to time under clause 2.11).

- 2.13 In clause 2.10 Somerton, Melbourne Arrival Sidings, Tottenham Yard and Geelong Grain Loop have the meaning given to those terms in the Access Arrangement.

3 Variation, surrender and non-use of Train Paths

Variation and surrender

- 3.1 Without limiting the Access Provider's rights under this Agreement, the Access Provider may vary or require the Operator to surrender an Approved Train Path or a Scheduled Train Path Group:
- 3.1.1 for the purpose of and in accordance with section 5.1, 5.2, 5.5, 5.6 or 5.7 of the Capacity Use Rules;
 - 3.1.2 if the Operator is in material breach of this Agreement in relation to an Approved Train Path or Scheduled Train Path Group, the Access Provider has notified the Operator that the material breach renders the Approved Train Path unsafe, inefficient or impracticable to operate, and the Operator has not rectified that breach within 7 days of notification;
 - 3.1.3 if circumstances outside the control of the Access Provider (including but not limited to events of Force Majeure) prevent the Approved Train Path from being provided for use by the Operator, provided that the Access Provider provides the Operator with further details of the event as soon as possible in the circumstances; or
 - 3.1.4 if the Operator:
 - (a) breaches a relevant Law or binding standard;
 - (b) has its Accreditation suspended or cancelled; or
 - (c) fails to comply with the protocols contained in the Operating Handbook or the Rolling Stock Standards,but in relation to a breach by the Operator under clause 3.1.4(c) and in relation to a particular Train Path, the Access Provider may only temporarily vary Train Paths to the extent necessary to avoid the relevant breach.
- 3.2 The Operator:
- 3.2.1 must surrender an Approved Train Path or a Scheduled Train Path Group if required to do so by the Access Provider under clause 3.1; and
 - 3.2.2 at its sole discretion, may surrender an Approved Train Path or a Scheduled Train Path Group by notice to the Access Provider.
- 3.3 If an Approved Train Path or a Scheduled Train Path Group is surrendered, it ceases to be the Operator's Approved Train Path or Scheduled Train Path Group under this Agreement and the Access Provider has the right to delete that affected Train Path or the Scheduled Train Path Group from schedule 4.

Non-use

3.4 The Operator must notify the Access Provider as soon as practicable after it becomes aware that it will not use an Approved Train Path. The Access Provider will then be free to allocate that Train Path to any other person.

3.5 When the Operator uses less than 50% of the Operator's Scheduled Train Paths in any Scheduled Train Path Group in any calendar month, the Operator must pay an amount in respect of each such Scheduled Train Path Group calculated as follows:

$$A = [(0.50 \times G) - U] \times (F \times D)$$

where:

A = the amount payable by the Operator;

U = the number of the Operator's Scheduled Train Paths in the relevant Scheduled Train Path Group that the Operator used during the relevant month;

G = the number of the Operator's Scheduled Train Paths in the relevant Scheduled Train Path Group in the relevant month;

F = the applicable flagfall rate relating to Scheduled Train Paths in the relevant month; and

D = the total distance in kilometres of all the Operator's Scheduled Train Paths in the relevant Scheduled Train Path Group in the relevant month

3.6 If the Operator does not use an Unscheduled Train Path granted to it, it must pay the flagfall component of the Access Fees for that Operator Unscheduled Train Path, except if:

3.6.1 that Operator's Unscheduled Train Path was surrendered;

3.6.2 the Operator has given the Access Provider notice of non-use by 10 AM on the Business Day prior to the Entry Time applying to that Operator's Unscheduled Train Path; or

3.6.3 the non-use occurred as a result of a direction by the Access Provider, other than a direction which has been given as the result of the act or omission of the Operator.

3.7 In respect of clauses 3.1.1 and 3.5, the Operator will not be charged for non-use of allocated Train Paths or required to surrender Train Paths to the extent that:

3.7.1 the Train Path is not available due to the Access Provider not making the Train Path available; and

3.7.2 the unavailability of the Train Path did not result from an act or omission of the Operator.

4 Conditions of Access

Limits on use of Train Paths

- 4.1 The Operator acknowledges that its right to use Approved Train Paths is subject to:
- 4.1.1 Operational Directions given by the Access Provider;
 - 4.1.2 Incidents and Force Majeure events.

Ancillary Movements

- 4.2 The Access Provider must allow the Operator access to the Network to make Ancillary Movements, subject only to Operational Directions and the terms and conditions set out in this Agreement.
- 4.3 When accessing the Network to make Ancillary Movements:
- 4.3.1 the Operator must obtain the prior consent of the Access Provider, such consent not to be unreasonably delayed or withheld;
 - 4.3.2 the Operator must comply with any Operational Directions made by the Access Provider relating to the moving of any vehicle or other equipment brought onto the Network; and
 - 4.3.3 the Operator must have appropriate arrangements in place in respect of the storage, shunting and Stabling of the Rolling Stock off the Network.

Ad hoc storage

- 4.4 The Access Provider may, at its discretion, allow the Operator to store one or more items of Rolling Stock on the Network on a short-term basis, free of charge, upon request by the Access Seeker.
- 4.5 All items of Rolling Stock stored on the Network by the Operator are stored at the Operator's risk.
- 4.6 If the Access Provider directs the Operator to remove any or all items of Rolling Stock stored on the Network, the Operator must do so without delay.

Non-exclusive Access

- 4.7 The Operator's right to access the Network is non-exclusive. Subject to the Access Provider providing access in accordance with this Agreement, including access to Approved Train Paths, nothing contained or implied in this Agreement prevents or limits the Access Provider or any other person from conducting freight, passenger or other services on the Network.

Future scope of the Network

- 4.8 The Operator acknowledges that any part of the Network may from time to time be removed from the Access Provider's management or operation or cease to be declared under Part 2A of the Rail Corporations Act.
- 4.9 If either of the circumstance referred to in clause 4.8 arises, the relevant track will no longer form part of the Network under this Agreement.

5 Access Charges and Access Fees

Access Fee

- 5.1 The Operator must pay to the Access Provider the applicable Access Fees. The Access Fee:
- 5.1.1 shall be calculated in accordance with Schedule 2, by reference to whether the relevant Train Path is to be provided in Normal Hours or Out of Hours (as defined in the Access Arrangement), and will include a flagfall component and a variable charge, subject to clause 5.1.3;
 - 5.1.2 shall be adjusted to reflect any changes to the prices in Schedule 2 that occur in accordance with Schedule 3; and
 - 5.1.3 shall be, in respect of Trip Trains, only the relevant variable charge set out in Schedule 2, and no flagfall component.

Access Charge

- 5.2 In addition to the Access Fees payable under clause 5.1, the Operator must pay any other charges under clauses 2.10, 3.5, 3.6 and 5.3 (together with the Access Fees, **the Access Charges**).

Other charges

- 5.3 The Operator must pay to the Access Provider any net effect of any new taxes or charges, or increases in taxes or charges (other than income tax) which is a tax, royalty, rate, duty, levy or impost of general application imposed on the Access Provider by any Government Agency, as notified in writing to the Operator, attributable to the provision by the Access Provider to the Operator of access to the Network.

Invoices

- 5.4 The Access Provider must deliver to the Operator within 14 days after the end of each month a tax invoice setting out the Access Charges payable by the Operator with respect to the previous month. The invoice must be accompanied by a statement

setting out in reasonable detail the calculation of the amounts shown in the invoice so that the Operator can verify that the calculation is in accordance with this Agreement.

- 5.5 Subject to clause 5.8, the Operator must pay the amount invoiced in accordance with clause 5.4 within 14 days after the day the invoice is received.
- 5.6 A failure by the Access Provider to invoice for payment on a particular occasion will not prejudice the Access Provider's right to invoice for that payment.
- 5.7 The Access Provider must do all things, including providing any information referred to in the invoices or providing other documentation, that may be necessary or desirable to enable or assist the Operator to claim any input tax credit, credit, set off, rebate or refund in relation to the amount attributable to any GST included in the amount invoiced.

Objection to invoiced amount

- 5.8 If the Operator has a bona fide objection to the amount claimed under any invoice it may notify the Access Provider of the objection and either:
 - 5.8.1 pay the amount in full and, if an adjustment is subsequently agreed between the parties, the Operator may deduct the amount of the adjustment from the next invoice following the agreement or determination, together with interest at the Default Rate on that amount accrued daily from the due date for payment of the disputed invoice until the due date for payment of that next invoice; or
 - 5.8.2 pay the amount of the invoice less the amount in dispute and, if it is subsequently agreed between the parties, the Operator must add that amount to the next invoice following the agreement or determination, together with interest at the Default Rate on that amount accrued daily from the due date for payment of the disputed invoice until the due date for payment of that next invoice.
- 5.9 The failure by the Operator to object to an invoice prior to the due date for payment or actual payment will not prejudice the Operator's right to dispute the amount of the invoice.

Interest on late payment

- 5.10 Subject to clause 5.8, if either party fails to pay any amount payable by it by the due date, that party must, if demand is made by the other party, pay interest at the Default Rate on the unpaid amount accrued daily from the time it falls due until the amount has been paid in full.
- 5.11 The right to demand payment of interest under clause 5.10 is without prejudice to any other rights and remedies that a party may have in respect of a payment default under this Agreement.

Set off

- 5.12 Either party may set off against any amount due and payable under this Agreement by it to the other party, any amount due and payable under this Agreement by the other party to it.

Access Charges and GST

- 5.13 The Access Charges are calculated without provision for GST. However, the Access Charges will be invoiced including the amount of the GST payable by the Operator and the invoice must conform to the requirements of a tax invoice within the meaning of the GST Law.

Train Manifest information and audit

- 5.14 For the purpose of allowing the Access Provider to correctly invoice the Access Charges due, the Operator, its servants and agents must make available to the Access Provider promptly upon request all records and information of the Operator (and its servants or agents) which relate to:

- 5.14.1 the make up and movements of Trains operated by or on behalf of the Operator under this Agreement (including train manifests or consolidated data compiled from train manifests);
- 5.14.2 train operating information including individual locomotive and wagon movements, Stabling and storage; and
- 5.14.3 train loading and weighbridge information sufficient to determine actual gross and tare weight of wagons,

and the Access Provider must only use the information for the purpose for which it is disclosed and not disclose the information to any person without the prior written consent of the Operator.

The information provided by the Operator to the Access Provider under this clause 5.14 will be deemed to be information provided in confidence for the purpose of section 38ZZZ of the Rail Corporations Act. The Access Provider's handling of information provided under this clause 5.14 must also be consistent with the policies, procedures and systems developed by the Access Provider under clause 4 of the Ring Fencing Rules.

- 5.15 The Operator its servants and agents must allow an auditor appointed by the Access Provider to access all records and information set out in clause 5.14 and the rights of the Access Provider and any auditor it appoints to review records and information include the right to review and to copy the records and information. The Access Provider shall not carry out more than two audits per year, unless an audit detects a manifest error.
- 5.16 Where an error in an invoice is identified as a result of an audit under clause 5.14 (or as a result of an audit of other related records or information) the Access Provider may

issue an amended invoice. If it is identified that any information provided by or on behalf of the Operator is incorrect and has led to an understatement of the Access Fee invoiced the Access Provider may also invoice the Operator for and the Operator must pay interest at the Default Rate calculated from the due date for payment of the invoice containing the understated Access Fees to the date of payment of the correctly stated Access Fees. If it is identified that an error in an invoice has been caused as a result of an error on the part of the Access Provider (whether as the result of the audit or otherwise), and results in overpayment by the Operator, the Access Provider must pay interest at the Default Rate calculated from the date that the Operator paid the invoice containing the overstated Access Fees.

6 Network maintenance and variation to service

General maintenance

- 6.1 The Access Provider will maintain those parts of the Network over which the Operator has Approved Train Paths so as to ensure that those parts of the Network are fit for the purpose of the Operator operating a Freight Train on those parts of the Network in accordance with the Performance Standard set out in Appendix 6 of the Access Arrangement.

Variation to service

- 6.2 Notwithstanding anything in this Access Agreement, the Operator acknowledges that, the Access Provider may apply to the ESC under section 38ZO of the Rail Corporations Act for variation of the Performance Standard.
- 6.3 For the avoidance of doubt, the Access Provider may temporarily vary the Performance Standard or book a Line out of service for safety reasons at any time as contemplated by clause 4.1.f of the Access Arrangement.
- 6.4 For the avoidance of doubt, access to a Line that is booked out of service is not available during any period during which that Line is booked out of service.
- 6.5 The Operator acknowledges that nothing in clauses 6.2 to 6.5 requires the Access Provider to pay for or carry out any works in relation to any railway infrastructure.

7 Operator's obligations in using the Network

Familiarity and compliance with procedures and protocols

- 7.1 The Access Provider must provide the Operator with:
- 7.1.1 the Operating Handbook;

- 7.1.2 the Network Service Plan, including the Network Operating Requirements, and the Rolling Stock Standards;
 - 7.1.3 the Emergency Management Plan; and
 - 7.1.4 such other procedures and protocols as the Access Provider publishes from time to time.
- 7.2 Subject to clause 7.3, the Access Provider:
- 7.2.1 may make changes to any of the documents listed in clause 7.1 at any time;
 - 7.2.2 will consult with the Operator prior to making any changes; and
 - 7.2.3 will notify the Operator in writing of changes to the documents listed in clause 7.1, at least 14 days prior to those changes becoming effective.
- 7.3 If a document listed in clause 7.1 contains a protocol or procedure that is required under an instrument made by the Victorian Essential Services Commission under the Rail Corporations Act (**Commission Instrument**), such document may be varied only in accordance with the relevant Commission Instrument.

Weighbridge requirements

- 7.4 The Operator must comply with all reasonable requirements of the Access Provider to weigh Rolling Stock to determine gross and tare weight and axle loadings.
- 7.5 The Access Provider must use its best endeavours to minimise inconvenience caused to the Operator from weighing the Rolling Stock.
- 7.6 The Access Provider is not liable for any costs or Loss that may be incurred by the Operator or any other person (whether arising from delay or otherwise) arising from the weighing of Rolling Stock under clause 7.4.

Operator's obligations

- 7.7 Without limiting any of its other obligations under this Agreement, the Operator agrees at all times during the term of this Agreement:
- 7.7.1 to comply with the procedures and protocols listed in clause 7.1 and with the Book of Rules;
 - 7.7.2 to notify the Access Provider immediately if it becomes aware that any of its Trains has become Unhealthy;
 - 7.7.3 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 the Access Provider is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an instruction or directions validly given);
 - 7.7.4 to comply with all Laws applicable to the operation of the Services or its use of the Network;

- 7.7.5 not to materially change, alter, repair, deface, damage or otherwise affect any part of the Network; and
- 7.7.6 to provide to the Access Provider such information related to the operation of the Services as the Access Provider reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator, other operators, and the public.

8 Train Manifest

Train Manifest

- 8.1 At least 30 minutes prior to entry on to the Network, the Operator must provide the Access Provider with a notice (a “**Train Manifest**”) specifying:
 - 8.1.1 the number and type of each item of Rolling Stock in the consist of the Train;
 - 8.1.2 the type, identification number of each item of Rolling Stock and each point of arrival or departure on the Approved Train Path;
 - 8.1.3 the gross mass of the Train;
 - 8.1.4 the length of the Train;
 - 8.1.5 the motive power employed by the Train;
 - 8.1.6 the maximum axle load of the Train;
 - 8.1.7 the location, type and quantity of any Dangerous Goods on the Train; and
 - 8.1.8 any other information as may be required to be provided in the Train Manifest by the Safety Regulator from time to time,and this information must be, to the best of the Operator’s knowledge, accurate in all material respects.
- 8.2 The Operator must notify the Access Provider immediately if it wishes to alter any of the information given to the Access Provider under clause 8.1.
- 8.3 The Train Manifest and any alteration of it must be provided in writing.

Rolling Stock Standards

- 8.4 The Operator must:
 - 8.4.1 maintain all Rolling Stock used by the Operator on the Network so that it satisfies the Rolling Stock Standards;
 - 8.4.2 ensure that all Rolling Stock used by the Operator on the Network is approved for operation by the Safety Regulator;
 - 8.4.3 ensure that all Rolling Stock used by the Operator on the Network is equipped with fully operational safety and safe working equipment which is compatible with the safe working systems used by the Access Provider;

- 8.4.4 ensure that the axle load of the Rolling Stock (including load) does not exceed the axle loading weight set out in the Rolling Stock Standards prescribed for that part of the Network on which a Service is operated;
 - 8.4.5 ensure that no Rolling Stock or load exceeds the prescribed dimensional outline for safe operation set out in the Rolling Stock Standards; and
 - 8.4.6 ensure that no Train exceeds the maximum Train length prescribed for that part of the Network on which a Service is operated, set out in the Rolling Stock Standards.
- 8.5 If the Operator wishes to operate Rolling Stock on the Network of a type which does not fully, but at least substantially, meets the Rolling Stock Standards, the Operator may request the Access Provider to alter the Rolling Stock Standards so as to specifically deal with such Rolling Stock and to specify such requirements for such Rolling Stock as are reasonably necessary to ensure the operation of such Rolling Stock on the Network does not have a material adverse effect on the Network or on the operation of Trains on the Network. The Access Provider must respond promptly to a request by the Operator for amendments to the Rolling Stock Standards.

Network Operating Requirements

- 8.6 The Operator must in accessing the Network pursuant to this Agreement strictly comply with the Network Operating Requirements.

Directions by the Access Provider

- 8.7 If the Access Provider believes on reasonable grounds that any one or more individual vehicles comprised in the Rolling Stock used by the Operator on the Network is in breach of the Network Operating Requirements or the Rolling Stock Standards, then the Access Provider may do one or both of the following:
- 8.7.1 direct the Operator to cease to use the vehicle or vehicles concerned on the Network and provide a statement of the grounds for such direction as soon as practicable after the direction has been given; or
 - 8.7.2 direct the Operator to ensure the vehicle or vehicles concerned comply with the Network Operating Requirements and the Rolling Stock Standards prior to continuing to use the vehicle or vehicles on the Network.
- 8.8 The Operator must, at its own expense, comply with a direction of the Access Provider given in accordance with clause 8.7.

Inspection and audit by Access Provider

- 8.9 The Access Provider may at any time require the Operator to undergo an audit by giving the Operator at least 24 hours written notice, for the purpose of assessing:
- 8.9.1 the Operator's compliance with the terms and conditions of this Agreement;

- 8.9.2 whether any one or more of the wagons used by the Operator in the provision of a Service is loaded in excess of its rated carrying capacity; or
- 8.9.3 whether any one or more of the wagons used by the Operator in the provision of a Service is loaded in an unsafe or potentially unsafe manner.
- 8.10 The Access Provider must not carry out more than two audits per year, unless an audit detects a material breach of this Agreement, or an audit undertaken in accordance with clause 8.9 demonstrates that the Access Seeker has been using or loading wagons in an unsafe manner. In such circumstances, additional audits may be conducted by the Access Provider, acting reasonably.
- 8.11 The Access Provider must use reasonable endeavours to conduct audits under clauses 8.9 or 8.10 in a manner that minimises disruptions to the Operator.

Instructions

- 8.12 In conducting an audit under clause 8.9, the Access Provider may give an instruction to the Operator, including an instruction to divert or delay a Train or make any part of a Train engaged in providing a Service available for inspection or weighing.

Monitoring equipment

- 8.13 The Access Provider or its agent may place, on or about the Network, monitoring equipment which will take readings or measurements to monitor the operation of Rolling Stock. The Operator hereby authorises and consents to the Access Provider undertaking such monitoring and the collection of data from such monitoring equipment with respect to the Operator's Rolling Stock. The Access Provider:
 - 8.13.1 will treat such data as Confidential Information; and
 - 8.13.2 may only use such information for the purpose of:
 - (a) the assessment under clause 8.9;
 - (b) the safe and efficient operation of the Network; and
 - (c) calculation of Access Fees.
- 8.14 If:
 - 8.14.1 the Operator's Rolling Stock used to operate a Service on the Network continues to travel on a connecting rail network as part of that Service;
 - 8.14.2 the Operator obtains data with respect to such Rolling Stock from monitoring equipment on the connecting rail network, and
 - 8.14.3 such data is reasonably required by the Access Provider for the safe and reliable operation of the Network,the Operator must use reasonable endeavours to provide such data to the Access Provider upon request.

9 Operational Control

Nature of exercise

- 9.1 The Access Provider will:
 - 9.1.1 exercise Operational Control in accordance with the Book of Rules and the Operating Handbook; and
 - 9.1.2 maintain Operational Control over the Network in accordance with any Law from time to time applicable in Victoria with regard to such control.
- 9.2 The Access Provider may exercise Operational Control by issuing Operational Directions to the Operator.
- 9.3 An Operational Direction may include any direction or requirement that the Access Provider considers necessary for the safe and efficient operation of the Network including, without limitation, a direction regarding Train speed and weight restrictions.
- 9.4 The Access Provider is not liable to the Operator, or any other person, for any Loss that is directly or indirectly related to the giving of an Operational Direction except to the extent that the Loss is caused by:
 - 9.4.1 the Access Provider's negligence;
 - 9.4.2 breach of this Agreement by the Access Provider; or
 - 9.4.3 breach of the Access Provider's Accreditation.

Extent of exercise

- 9.5 In exercising Operational Control under clause 9.1, the Access Provider:
 - 9.5.1 may delay, add, cancel, re-route or re-schedule Train movements including any Service; and
 - 9.5.2 will use reasonable endeavours to minimise disruption to the Operator's use of Approved Train Paths.

Responsibility of Operator to comply

- 9.6 The Operator must at all times promptly comply with all Operational Directions.

Communication responsibilities

- 9.7 The Access Provider will:
 - 9.7.1 keep the Operator properly and promptly informed of any event, activity or Incident known to the Access Provider that will, or is reasonably likely to, prevent or materially limit the operation of a Service by the Operator;

- 9.7.2 make available to the Operator in a timely manner (which it may do through publication on a website or other electronic means) all published regulations, standards, practices, instructions, directions and notifications from time to time applicable in Victoria relating to Operational Control or the Network Operating Requirements to the extent that those regulations, standards, practices, instructions, directions and notifications are relevant to the operation of the Services;
 - 9.7.3 operate and maintain a train control centre; and
 - 9.7.4 operate and maintain, or cause another person to do so, a communications system in respect of the Network for the purposes of communications with the Operator and other Train operators on the Network and facilitate the Operator's access to that communications system.
- 9.8 The Access Seeker must:
- 9.8.1 notify the Access Provider promptly after the Operator becomes aware of any actual or potential changes to the Operator's Train movements which are not or which might not be in accordance with any Approved Train Path or any Ancillary Movement allowed under clause 4.2 and all Operational Directions; and
 - 9.8.2 ensure that all Trains under the control of the Operator are equipped with fully operational and compatible communications equipment to enable immediate communications between the Access Provider and the Trains of the Operator on the Network; and
 - 9.8.3 if the Train Path connects with a train path on another network:
 - (a) upon request by the Access Provider, provide evidence that the Operator has agreement to enter the connecting network;
 - (b) notify the Access Provider as soon as the Operator becomes aware that it is unable to enter the connecting network; and
 - (c) place the Train in the nearest convenient storage location until an alternative pathway is agreed, if directed to do so by the Access Provider in circumstances where the Operator is unable to access the connecting network.

10 Time for Services traversing the Network

- 10.1 Without limiting any of the Operator's obligations under this Agreement, the Operator must:
- 10.1.1 ensure that each Service is available for departure to enter the Network at the Entry Time;
 - 10.1.2 apply sufficient motive power to each Service to ensure that each individual item of Rolling Stock arrives or departs, as the case may be, at the scheduled points and times along the Approved Train Path; and

- 10.1.3 ensure that each Service is resourced with appropriate Rolling Stock and Train crew to enable the Service to depart the Network at the Exit Time for that Service.
- 10.2 If the Operator does not strictly comply with the requirements set out in clause 10.1, the Access Provider has no obligation to provide the Approved Train Paths, but will use reasonable endeavours to accommodate the Operator's Trains, by:
 - 10.2.1 allowing the Operator to use Approved Train Paths; or
 - 10.2.2 offering the next Available Train Paths that most closely resembles the Approved Train Path to the Operator.

11 Undertakings and warranties

Undertakings and warranties

- 11.1 In addition to and notwithstanding all other warranties express or implied in this Agreement, the Operator undertakes and warrants to the Access Provider that:
 - 11.1.1 it is duly incorporated and is empowered to enter into this Agreement and to do all things that it is required to do by this Agreement;
 - 11.1.2 it has the resources and ability to perform all of its obligations under this Agreement;
 - 11.1.3 all things have been done or will be done as may be necessary to render this Agreement legally enforceable in accordance with its terms and fully valid and binding on it;
 - 11.1.4 all authorisations by any Government Agency that are required or will be required in connection with the execution and delivery of the performance of obligations under, or the validity or enforceability of, this Agreement, including the Accreditation, have been obtained or effected and are fully operative and in full force and effect;
 - 11.1.5 there is no litigation, arbitration or administrative proceedings taking place, pending or, to its knowledge, threatened against it which could have a material adverse effect on its ability to perform its obligations under this Agreement;
 - 11.1.6 it will as soon as practicable notify the Access Provider of the occurrence of, or pending or threatened occurrence of, any event that may cause or constitute a material breach of any of the acknowledgments, representations, warranties or covenants of the Operator under this Agreement and any event that could have a material adverse effect on its ability to perform its obligations under this Agreement;
 - 11.1.7 it has disclosed to the Access Provider all information that the Access Provider has requested under clause 3(b) of the Negotiation Guidelines, being information that could reasonably be regarded as affecting to a substantial extent the decision of the Access Provider to enter into this Agreement or to allocate a Train Path to the Operator; and

- 11.1.8 all information provided to the Access Provider is true and correct and that no statement or representation made by it or on its behalf to the Access Provider in negotiations antecedent to this Agreement or to the allocation of a Train Path is misleading or deceptive in any material respect.

Time of giving undertakings and warranties

- 11.2 The undertakings and warranties set out in this clause 11 will be taken to be given and made:
- 11.2.1 on the date of execution of this Agreement; and
- 11.2.2 on each day on which the Access Provider grants any access or the Operator operates any Service on the Network.

12 Accreditation

Accreditation requirements

- 12.1 During the term of this Agreement, each party must hold Accreditation.
- 12.2 The Operator must to the extent required by Law ensure that its employees, agents and contractors engaged in or in connection with the operation of the Services are acceptable to or approved by the agency or authority from time to time responsible for Accreditation.
- 12.3 Each party must keep the other party informed of all material variations in its Accreditation that impact on the other party's rights or obligations under this Agreement.
- 12.4 The Operator must not operate Rolling Stock on the Network to the extent it does not hold Accreditation necessary to do so.

Information as to Accreditation

- 12.5 Without limiting any other provision of this Agreement, prior to operating any Rolling Stock on the Network the Operator must give the Access Provider such evidence as the Access Provider reasonably requires to demonstrate that the Operator meets the requirements set out in clauses 12.1 to 12.4.

13 Compliance with other laws and standards

- 13.1 Without limiting any of its obligations under this Agreement, the Operator must comply with all requirements of any Law from time to time applicable to its business, operations, and Services.

14 Incidents

Notification

- 14.1 The Access Provider must notify the Operator of any Incident that may affect Services to be operated by the Operator as soon as possible after the Incident comes to the Access Provider's attention.
- 14.2 The Operator must notify the Access Provider of any Incident as soon as possible after it comes to the Operator's attention.

Emergency Management Plan

- 14.3 In the event of an Incident, the Operator must comply with the Emergency Management Plan where relevant.

Dealing with Incidents

- 14.4 The Access Provider may take such steps as it considers appropriate to deal with an Incident. The Operator must comply with any directions of the Access Provider in connection with the Incident, including in relation to clearing tracks.
- 14.5 Without limiting any other provision of this Agreement and in order to carry out its rights in clause 14.4, the Access Provider may move materials, goods, equipment or Rolling Stock of the Operator or require the Operator to do so, and may engage third party contractors for the purposes of moving or re-railing such materials, goods, equipment or Rolling Stock.
- 14.6 The Operator must comply with any reasonable directions given to the Operator by a person authorised to give such directions in relation to the Incident, as specified in the Operating Handbook and the Emergency Management Plan.

Other consequences of an Incident

- 14.7 The Operator must fully cooperate with any investigator (whether employed by the Access Provider or otherwise) or board of enquiry authorised to investigate the Incident and must, without limitation, procure that its employees, contractors and agents provide formal statements within 7 Business Days on any matter related to an Incident if required to do so by such an investigator or board of enquiry.
- 14.8 The Operator must not dispose of or part with possession of any Rolling Stock or equipment involved in an Incident unless given written permission to do so by the Access Provider (which written permission must be given by the Access Provider as soon as investigations in relation to the Incident are completed) or, if in the reasonable opinion of the Access Provider, the Incident will not be subject to an ongoing investigation by any investigator or board of enquiry authorised to investigate the Incident.

- 14.9 Subject to all applicable Laws, the Operator may continue to use equipment (including Rolling Stock) involved in an Incident which still meets the Rolling Stock Standards on the condition that the Operator allows access to the equipment (including Rolling Stock) by any investigator or board of enquiry authorised to investigate the Incident.
- 14.10 Subject to any agreement reached or determination made allocating responsibility for payment of costs arising out of an Incident, the Access Provider is responsible, on an interim basis, for payment of costs in relation to remediation or repair of the Network and the Operator is responsible, on an interim basis, for payment of costs in relation to recovery of the Operator's Trains.

Disablement

- 14.11 Without limiting the other provisions of this clause 14, if any Rolling Stock of the Operator is disabled (whether through derailment, collision, locomotive failure or otherwise) while on the Network, the Operator must notify the Access Provider, as a matter of urgency, of the circumstances and other details relating to the disablement. The Operator must carry out emergency recovery and rectification action in consultation with the Access Provider at the earliest practicable time, and in accordance with the Emergency Management Plan.

Notifications

- 14.12 Notifications required by this clause 14 must be made by the quickest available means.

15 Environment

- 15.1 Subject to clause 16.1, the Operator must not:
- 15.1.1 bring, store, abandon or dump any Industrial Waste or potentially Hazardous Substance on the Network in a way that contravenes any applicable Environmental Law;
 - 15.1.2 discharge any Industrial Waste, Hazardous Substance, garbage or any offensive matter on to the Network; or
 - 15.1.3 handle any Industrial Waste or potentially Hazardous Substance in a manner likely to create an Environmental Hazard.
- 15.2 In operating its Services or carrying out Ancillary Movements on the Network, the Operator must comply with all Environmental Laws and obtain and maintain in full force and effect and comply with the terms of all permits and licences required in order to release or emit anything into the air or water or on to the ground or otherwise into the Environment or to emit any substantial noise.
- 15.3 Within 14 days of the date of this Agreement, the Operator must provide the Access Provider with an Environmental Management Plan.
- 15.4 Without prejudice to clause 15.1 and 15.2, the Operator must comply with the Environmental Management Plan.

16 Dangerous Goods

- 16.1 The Operator must at all times comply with the Dangerous Goods Code in respect of all Dangerous Goods carried on the Operator's Services.

17 Indemnity and Insurance

Operator's indemnity

- 17.1 Subject to clause 17.7, the Operator will indemnify the Access Provider against any liability, loss, damage, costs or expenses (including, but not limited to, legal costs and expenses on a full indemnity basis) suffered or incurred by, or any Claim made or brought against, the Access Provider caused by, or to the extent contributed to by, a breach of this Agreement by the Operator or any negligent act or omission by the Operator or anyone acting on its behalf in the performance of this Agreement.

Access Provider's indemnity

- 17.2 Subject to clause 17.7, the Access Provider will indemnify the Operator against any liability, loss, damage, costs or expenses (including, but not limited to, legal costs and expenses on a full indemnity basis) suffered or incurred by, or any Claim made or brought against, the Operator caused by, or to the extent contributed to by, a breach of this Agreement by the Access Provider or any negligent act or omission by the Access Provider or anyone acting on its behalf in the performance of this Agreement.

Defence of Claims

- 17.3 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 of any Incident or other event giving rise to a Claim.
- 17.4 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.
- 17.5 The responsible party must not enter into any settlement or compromise of a Claim that involves a remedy other than the payment of money by the responsible party without the prior written consent of the indemnified party, which shall not be unreasonably withheld.
- 17.6 For the purposes of the indemnities given in this clause 17, 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.

Limitation on liability

- 17.7 Subject to clause 17.16, neither party is liable (under the indemnities in clauses 17.1 or 17.2 or otherwise) for any Consequential Loss suffered by the other for which the other becomes liable.
- 17.8 Each party agrees that, subject to clauses 17.9 and 17.10, it will not make a Claim against the other under clause 17.1 or 17.2 (as the case may be) or otherwise if the total amount 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.
- 17.9 In the event that either party proposes making a Claim against the other under clause 17.1 or 17.2 (as the case may be) or otherwise to recover loss or damages in respect of any one event or cause of action or series of related events or causes of action, the party making the Claim must give notice of a dispute under clause 24 and otherwise comply with the terms of clause 24 before taking any other action to prosecute its Claim. Nothing in this clause 17.9 prohibits a party from seeking and obtaining appropriate injunctive relief.
- 17.10 The limitation in clause 17.8 does not apply to Claims made by one party against the other for monies presently due and payable under the terms of this Agreement including, without limitation, payment by the Operator of the Access Charges.

Insurance

- 17.11 Each party must take out and maintain a public liability insurance policy for an amount not less than \$250 million for any one event with respect to any liabilities to the other party and any third parties, for:
- 17.11.1 the death or injury of any person (except a person who at the time of the injury or death is defined as a worker of the other party under any law relating to workers' compensation insurance);
 - 17.11.2 any amounts for which it is liable to the other party, and must indemnify the other party, under clause 17.1 or 17.2; and
 - 17.11.3 any loss, damage or destruction of any property (other than its own property).
- 17.12 The insurance referred to in clause 17.11 must be effected with a reputable and solvent insurer.
- 17.13 Each party must notify the other party immediately upon receipt of notification of cancellation of the insurance required under clause 17.11.
- 17.14 Each party must produce a current certificate of currency in respect of its insurance conforming with the requirements of clause 17.11 as soon as reasonably practicable after a request is made by the other party.
- 17.15 The requirements of this clause 17 are without prejudice to and do not affect the operation of the indemnities and limitations of liability contained in this Agreement.

Delay indemnity

- 17.16 Without limiting any provision of this Agreement, if the Operator causes or contributes to any delay in the Network, and that results in either:
- 17.16.1 the Access Provider being liable to pay a greater amount to a Passenger Franchisee under the Passenger Franchisee's access agreement or any related agreement; or
 - 17.16.2 a Passenger Franchisee paying a lesser amount to the Access Provider under the Passenger Franchisee's access agreement or any related agreement,
- (in either case as a "**Lateness Payment**" as defined in the relevant Passenger Franchisee's access agreement with the Access Provider) than would otherwise be the case ("**Delay Loss**"), the Access Provider must provide the Operator with a delay loss certificate, which indicates the amount of any Delay Loss and the cause of the Delay Loss, together with documentary evidence of the amounts under clause 17.16.1 and 17.16.2. The Operator must reimburse the Access Provider for the Delay Loss to the extent that the Operator caused or contributed to it.
- 17.17 The delay loss certificate referred to in clause 17.16 will be conclusive evidence of the amount of any Delay Loss incurred by the Access Provider and the cause of such Delay Loss in the absence of manifest error.
- 17.18 The parties acknowledge that any Lateness Payment is payable irrespective of whether or not the cause of the Lateness Payment is a breach of this Agreement.

18 Assignment and sub-contracting

Assignment

- 18.1 The Operator must not assign or transfer, or attempt or purport to assign or transfer, any of its rights or obligations under this Agreement, including any Approved Train Path, without the prior written consent of the Access Provider (not to be unreasonably withheld).
- 18.2 Subject to the obligations on the Access Provider in clause 19, the Access Provider must not assign or transfer any of its rights or obligations under this Agreement, without the prior written consent of the Operator (not to be unreasonably withheld).

Sub-contracting

- 18.3 Neither party may sub-contract any of its obligations under this Agreement without the prior written consent of the other party (not to be unreasonably withheld).
- 18.4 Sub-contracting shall not release a party from, or reduce the extent of, any of its obligations or liabilities under this Agreement.

19 Term and termination

Term

- 19.1 Subject to this clause 19, this Agreement commences on the Commencement Date and unless otherwise terminated will expire on the Expiry Date.
- 19.2 This Agreement is subject to the Operator providing to the Access Provider:
- 19.2.1 evidence of the Operator's Accreditation;
 - 19.2.2 the Environmental Management Plan; and
 - 19.2.3 the Emergency Management Compliance Plan.
- 19.3 If the conditions precedent in clause 19.2 have not been fulfilled at the Commencement Date, the Operator will not be entitled to use any Approved Train Path until they have been fulfilled.
- 19.4 Notwithstanding clause 19.3, if the conditions precedent in clause 19.2 have not been fulfilled by the date which is 30 days after the Commencement Date, either party may terminate this Agreement immediately on notice to the other party.
- 19.5 If this Agreement is terminated under clause 19.4 each party:
- 19.5.1 is released from its obligations to further perform this Agreement except those obligations imposing on it obligations of confidentiality; and
 - 19.5.2 retains the rights it has against the other party in respect of any past breach.

Preservation of other rights

- 19.6 If a party breaches or repudiates this Agreement, nothing in this clause 19 will prejudice the right of the other party to recover damages or exercise any other right.

Breach of payment obligation

- 19.7 If either party commits a material breach of its payment obligations under this Agreement and fails to remedy the breach within 30 days after being required to do so in writing, the other party may terminate this Agreement by giving 7 days' written notice to the party in default and this Agreement will terminate on expiry of that 7 day notice period.
- 19.8 For the purpose of clause 19.7, a material breach is a failure by a party to comply with its payment obligations with respect to an amount or amounts exceeding a total sum of \$20,000.

Breach of other obligations

- 19.9 If a party commits a material breach of an obligation under this Agreement (other than a breach referred to in clause 19.7) ("**Defaulting Party**") the other party may give the Defaulting Party a notice ("**Default Notice**") within a reasonable time:

- 19.9.1 stating that a material breach has occurred;
 - 19.9.2 setting out reasonable details of the event or circumstances constituting the material breach; and
 - 19.9.3 specifying a reasonable period of time in which to cure the material breach ("**Cure Period**").
- 19.10 Within seven days of receipt of a Default Notice, the Defaulting Party must provide to the other party a plan designed to cure the material breach specified in the Default Notice ("**Cure Plan**").
- 19.11 The Defaulting Party will be permitted to cure the material breach within the Cure Period and in accordance with the Cure Plan.
- 19.12 If the Defaulting Party requires an extension to the Cure Period it may, not later than the expiration of the current Cure Period, provide to the other party:
- 19.12.1 a revised Cure Plan; and
 - 19.12.2 evidence that:
 - (a) the Defaulting Party has diligently pursued and is continuing to diligently pursue a feasible and practicable programme of rectification; and
 - (b) the material breach cannot, with reasonable diligence, be cured within the current Cure Period.
- 19.13 The other party must not unreasonably refuse to grant an extension of the Cure Period.
- 19.14 If the Defaulting Party commits a material breach and the material breach is not cured within the Cure Period then, the other party may terminate this Agreement immediately by notice to the Defaulting Party.
- 19.15 Clauses 19.9 to 19.14 do not limit or reduce the rights of a party to claim damages for breach of this Agreement.

Termination on insolvency

- 19.16 A party may terminate this Agreement immediately by notice to the other party if the other party:
- 19.16.1 stops or suspends payment of either all or a class of its debts (other than debts owed to the Access Provider);
 - 19.16.2 is insolvent within the meaning of section 95A of the Corporations Act;
 - 19.16.3 fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act) unless:
 - (a) the debt to which the statutory demand relates is discharged within 15 Business Days of the date of the failure; or
 - (b) the party demonstrates to the satisfaction of the other party (acting reasonably) that it is able to pay all its debts as and when they become due and payable;

- 19.16.4 has an administrator appointed in respect of it;
- 19.16.5 has a controller within the meaning of section 9 of the Corporations Act or similar officer appointed to the whole or a substantial part of its assets or undertaking and that controller or similar officer is not removed within 15 Business Days of the appointment;
- 19.16.6 has an order made or a resolution passed for its winding up or dissolution or it enters an arrangement, compromise, or composition with or assignment for the benefit of its creditors or a class of them;
- 19.16.7 has any security enforced over, or a distress, execution or other similar process levied or served against, the whole or a substantial part of its assets or undertaking; or
- 19.16.8 is subject to any event which, under the Law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above.

Termination for Change of Control

- 19.17 The Access Provider may terminate this Agreement immediately if a Change of Control Event occurs in relation to the Operator without the Access Provider's prior written consent and as a result of the Change of Control Event, the Access Provider is satisfied (acting reasonably) that there is a real risk that the Operator will not be able to carry out its obligations under this Agreement.

Cessation of rights

- 19.18 Upon expiry or termination of this Agreement, all rights of the Operator to use the Network will cease. The Operator must at the cost of the Operator on or prior to expiry or termination remove all of the Operator's Rolling Stock from the Network. If the Operator does not remove all Rolling Stock, the Access Provider may:
 - 19.18.1 carry out the obligations of the Operator at the Operator's cost; and
 - 19.18.2 store the Operator's Rolling Stock at the Operator's risk and cost.

Accrued rights

- 19.19 Expiry or termination of this Agreement is without prejudice to and does not affect the accrued rights or remedies of any of the parties arising in any way out of this Agreement up to the date of expiry or termination of this Agreement.

Rail Corporations Act

- 19.20 The Operator acknowledges that its rights under this Agreement have been granted having regard to the obligations of the Access Provider under the Rail Corporations Act.

- 19.21 If a Material Change occurs in relation to the Access Provider, the Access Provider must notify the Operator of its occurrence.
- 19.22 If a notice is issued under clause 19.21, the parties must enter into good faith negotiations to determine whether any amendments to this Agreement are necessary, taking into account the circumstances surrounding the Material Change.
- 19.23 Where the parties are able to reach agreement in relation to the consequences of a Material Change for this Agreement, the agreement may include, or result in:
- 19.23.1 an amendment to the terms of this Agreement;
 - 19.23.2 a waiver of each or either party's obligations under this Agreement; or
 - 19.23.3 agreement to terminate this Agreement.
- 19.24 Where the parties are unable to reach agreement in relation to the consequences of the Material Change for this Agreement, the dispute resolution procedures set out in clause 24 of this Agreement will apply.
- 19.25 The Access Provider will be liable to the Operator for any loss or damage incurred by the Operator as a result of the Access Provider breaching the Regional Infrastructure Lease or failing to comply with clause 1.1.

20 Exception and exemption clauses

- 20.1 A provision of this Agreement must not be construed to the disadvantage of a party merely because the provision is an exception or exemption clause for the benefit of that party.

21 Notices

- 21.1 Unless expressly provided otherwise, a notice or other communication connected with this Agreement ("**Notice**") has no legal effect unless it is in writing.
- 21.2 In addition to any other method of service provided by law, the Notice may be:
- 21.2.1 sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified;
 - 21.2.2 sent by facsimile to the facsimile number of the addressee; or
 - 21.2.3 delivered at the address for service of the addressee.
- 21.3 If the Notice is sent or delivered in a manner provided by clause 21.2, it must be treated as given to and received by the party to which it is addressed:
- 21.3.1 if sent by post, on the 2nd Business Day (at the address to which it is posted) after posting;
 - 21.3.2 if sent by facsimile before 5 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
 - 21.3.3 if otherwise delivered before 5 p.m. on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

- 21.4 Despite clause 21.3.2:
- 21.4.1 a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission of the number of pages in the Notice;
 - 21.4.2 a facsimile is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 3 hours after the transmission ends or by 12 noon on the Business Day on which it would otherwise be treated as given and received, whichever is later.
- 21.5 A Notice sent or delivered in a manner provided by clause 21.2 must be treated as validly given to and received by the party to which it is addressed even if:
- 21.5.1 the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
 - 21.5.2 the Notice is returned unclaimed.
- 21.6 Any Notice by a party may be given and may be signed by its solicitor.
- 21.7 Any Notice to a party may be given to its solicitor by any of the means listed in clause 21.2 to the solicitor's business address or facsimile number.
- 21.8 Any:
- 21.8.1 Notice with respect to an Incident; or
 - 21.8.2 Operational Direction,
- may be given orally where the informing party considers that:
- 21.8.3 the recipient requires the information contained in the Notice urgently; and
 - 21.8.4 there is insufficient time to serve a written Notice.

22 Confidential Information

- 22.1 Except as permitted by this clause 22, each party must:
- 22.1.1 hold the Confidential Information in strict confidence and not disclose the Confidential Information to any person;
 - 22.1.2 take all steps reasonably necessary to safeguard the confidentiality of the Confidential Information; and
 - 22.1.3 immediately notify the disclosing party of any potential, suspected or actual disclosure of the Confidential Information not permitted by this Agreement.
- 22.2 A party ("**Receiving Party**") in receipt of the other party's ("**Disclosing Party**") Confidential Information may disclose Confidential Information:
- 22.2.1 to its officers, employees and legal, financial or economic advisers (on a need to know basis);
 - 22.2.2 to the extent required by:
 - (a) any Law or the requirements of the Receiving Party's Accreditation;
 - (b) the Safety Regulator;

- (c) any Government Agency; or
 - (d) the rules of any stock exchange;
- 22.2.3 to the ACCC for the purpose of Part IIIA of the *Trade Practices Act 1974* (Cth) or to the Victorian Essential Services Commission for the purpose of the Rail Corporations Act or any of the instruments made by the Victorian Essential Services Commission under the Rail Corporations Act;
- 22.2.4 to the extent required for the purpose of any mediation, expert determination, arbitration or legal proceeding involving the Receiving Party; or
- 22.2.5 with the consent of the Disclosing Party, which will not be unreasonably withheld.
- 22.3 The provisions of this clause 22 survive termination of this Agreement for a period of three years.
- 22.4 Each party acknowledges that:
 - 22.4.1 the other party may suffer financial and other loss and damage if any unauthorised act occurs in relation to Confidential Information and that monetary damages would be an insufficient remedy; and
 - 22.4.2 in addition to any other remedy available at law or in equity, the other party is entitled to injunctive relief to prevent a breach of and to compel specific performance of this clause.
- 22.5 For clarification, the confidentiality obligations under this Agreement apply in addition to the obligations under sections 38ZZZ and 38ZZZA of the Rail Corporations Act, and in addition to the Access Provider's obligations to handle confidential information in accordance with the system and business rules approved by the Victorian Essential Services Commission under section 38ZZZB of the Rail Corporations Act.

23 Connecting networks

- 23.1 If at any time the Operator intends to provide Services as part of or in conjunction with rail services conducted, or to be conducted, by the Operator on railways which do not constitute part of the Network, the Operator acknowledges that the Operator is solely responsible for obtaining any rail access rights from other owners or authorities.
- 23.2 The Access Provider will cooperate to a reasonable extent with the Operator and with other track owners or authorities in order to assist the granting to the Operator of access rights necessary to enable the Operator to operate the Services as part of, or in conjunction with, rail services conducted, or to be conducted, by the Operator on railways which do not constitute part of the Network.

24 Dispute Resolution

Procedure to settle disputes

- 24.1 If there is a dispute between any of 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.
- 24.2 The parties must try to settle a dispute using the following steps:
- 24.2.1 first, formal notification of the dispute in writing by either party;
 - 24.2.2 second, negotiation of the dispute under clause 24.4;
 - 24.2.3 third, mediation of the dispute under clause 24.5 (if agreed); and
 - 24.2.4 fourth, determination of the dispute under clause 24.6,
- unless the parties agree that the dispute is best resolved by an independent expert in accordance with clauses 24.7 and 24.8, or clauses 24.7 and 24.8 otherwise apply.
- 24.3 A party must not commence Court proceedings in relation to a dispute arising in connection with this Agreement until it has exhausted the procedures in clauses 24.1 and 24.2, unless the party seeks appropriate injunctive or other interlocutory relief to preserve property or rights or to avoid losses that are not compensable in damages.

Negotiation

- 24.4 If there is a dispute between any of the parties relating to or arising out of this Agreement (other than a dispute to which clause 24.7 applies), then within 10 Business Days of a party notifying the other party 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.

Mediation

- 24.5 If the negotiation of the dispute under clause 24.4 is not resolved within 10 Business Days from its commencement, the parties will submit the matter to mediation on the following terms:
- 24.5.1 the mediator will be chosen by the parties within 25 Business Days of notification of the dispute under clause 24.2.1 and appointed within a further 10 Business Days;
 - 24.5.2 in the absence of agreement by the parties as to the mediator within 35 Business Days of notification of the dispute under clause 24.2.1, the mediator will be appointed on the application of any party by the President of LEADR (Association of Dispute Resolvers) within 10 Business Days of the application;
 - 24.5.3 the parties must endeavour to procure that a mediator appointed under clauses 24.5.1 or 24.5.2:

- (a) assists the parties to reach a resolution of the dispute by agreement;
 - (b) acts impartially and ensures that each party has a clear understanding of the other party's points of view to enable proposals to be formulated for settlement of the dispute;
 - (c) does not make his or her personal or professional views known to the parties or give any professional advice to a party;
 - (d) is entitled to terminate the mediation if, after consultation with the parties, the mediator forms the view that the mediation process is exhausted; and
 - (e) does not to impose a solution on the parties and any suggestion made during the course of the mediation by the mediator will not be binding on a party;
- 24.5.4 each party to the mediation may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
- 24.5.5 each party will bear its own costs relating to the preparation for and attendance at the mediation;
- 24.5.6 the costs of the mediator will be borne equally between the parties; and
- 24.5.7 the mediation process will cease if the dispute has not been settled within 20 Business Days of the mediator being appointed, or such longer time as may be agreed by the parties.

Arbitration

- 24.6 Subject to clauses 24.7 and 24.8, if a dispute between any of the parties relating to or arising out of this Agreement is not settled under clause 24.4 (or if no agreement is reached to refer the dispute to mediation within 20 Business Days of notification of the dispute), either party may by written notice to the other refer the dispute to arbitration for determination on the following terms:
- 24.6.1 the arbitrator will be chosen by the parties but in the absence of an agreement by the parties as to the arbitrator within 10 Business Days of the notice referring the matter to arbitration, the arbitrator will be appointed on the application of either party by the President of the Institute of Arbitrators Australia;
 - 24.6.2 the arbitrator must have appropriate qualifications necessary to understand and resolve the issues in dispute and have no interest or duty which conflicts or may conflict with his or her functions as an arbitrator;
 - 24.6.3 the *Commercial Arbitration Act 1984* (Vic) will apply to the arbitration and the arbitration will be conducted and held in accordance with, and subject to, the Institute of Arbitrators Australia Expedited Commercial Arbitration Rules except that Rule 19 will not apply;
 - 24.6.4 each party may be represented at the arbitration by a qualified legal practitioner;

- 24.6.5 the arbitrator must hand down a decision within two months after notice referring the dispute to arbitration or such longer period as may be mutually agreed between the parties or in the absence of agreement such longer period as is reasonably considered appropriate by the arbitrator in all the circumstances;
- 24.6.6 the decision of the arbitrator with regard to the dispute will be binding upon the parties; and
- 24.6.7 if the parties have referred or agreed to refer a dispute to an arbitrator under this clause 24.6, the arbitrator must determine all the issues comprised in or relating to the dispute, and no such issue can be referred to an independent expert under clauses 24.7 and 24.8 unless both parties so agree.

Independent Expert

- 24.7 If either party notifies the other of a dispute which the parties agree is best resolved by an independent expert, the parties will submit to the following procedure prior to any other course of action being taken to resolve the dispute:
 - 24.7.1 the parties will jointly choose and appoint an independent expert;
 - 24.7.2 the independent expert must have appropriate qualifications necessary to understand and resolve the issues in dispute and have no interest or duty which conflicts or may conflict with his or her functions as an independent expert;
 - 24.7.3 in the absence of agreement by the parties as to the independent expert within 2 Business Days of notice of the dispute, the independent expert will be appointed on the application of any party by the President of the Institute of Arbitrators Australia;
 - 24.7.4 the independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within 15 Business Days after being appointed, or such longer period as may be agreed between the parties;
 - 24.7.5 the independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit;
 - 24.7.6 the independent expert's decision will be final and binding on the parties; and
 - 24.7.7 the costs of the independent expert will be borne by the parties equally or as the independent expert may otherwise determine and each party will bear its own costs relating to the independent expert's decision.
- 24.8 If the parties have referred or agreed to refer a dispute to an independent expert under clause 24.7, the expert must determine all the issues comprised in or relating to the dispute, and no such issue can be referred to arbitration.

Amalgamation of disputes

- 24.9 The parties may by agreement permit a dispute being dealt with under this clause 24 to be amalgamated with any other dispute or disputes involving one or both parties.

25 Force Majeure

Notice of event of Force Majeure

- 25.1 If a party is prevented in whole or in part from carrying out its obligations under this Agreement as a result of Force Majeure, it will promptly notify the other party accordingly. The notice must:
- 25.1.1 fully describe the event of Force Majeure;
 - 25.1.2 specify the obligations and the extent to which it cannot perform those obligations;
 - 25.1.3 estimate the time during which the Force Majeure will continue; and
 - 25.1.4 specify the measures it proposes to adopt to remedy or minimise the effects of the Force Majeure.

Suspension of obligations

- 25.2 Following a notice of Force Majeure in accordance with clause 25.1, and while the Force Majeure continues, the obligations which cannot be performed because of the Force Majeure will be suspended, other than obligations to pay money.

Remedying or minimising Force Majeure

- 25.3 The party that is prevented from carrying out its obligations under this Agreement as a result of Force Majeure must take reasonable steps to remedy or minimise the effects of the Force Majeure to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible.
- 25.4 Without limiting clause 25.3, the Access Provider must take reasonable steps to restore any part of the Network damaged or affected by the Force Majeure event to a standard which permits the Operator to operate its Services unless the Access Provider, acting reasonably, determines that it would not be economically feasible to do so.
- 25.5 If the Access Provider determines that it would not be economically feasible to restore the part of the Network affected by the Force Majeure Event, it must take reasonable steps to make available to the Operator an alternative Train Path which allows the Operator to operate its Services. The Operator accepts that this will be the only relief to which is entitled if this clause 25.5 applies, and releases the Access Provider from any other liability.

Mitigation

- 25.6 Subject to clauses 25.3 to 25.5, the party that is prevented from carrying out its obligations under this Agreement as a result of Force Majeure must take all action reasonably practicable to mitigate any loss suffered by the other party as a result of the party's failure to carry out its obligations under this Agreement.

26 Severability

- 26.1 If anything in this Agreement is illegal, unenforceable or void, then it is severed and the rest of this Agreement continues in force.

27 No merger

- 27.1 The rights and obligations of the parties will not merge on the completion of any transaction contemplated by this Agreement. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

28 Entire Agreement

- 28.1 This Agreement contains the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with it.

29 Amendment

- 29.1 No amendment or variation of this Agreement is valid or binding on a party unless made in writing and executed by both parties.

30 Waiver

- 30.1 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 30.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- 30.3 A waiver is not effective unless it is in writing.
- 30.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

31 Further assurance

- 31.1 Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

32 Governing Law and jurisdiction

- 32.1 The law of Victoria governs this Agreement.
- 32.2 The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

33 Interpretation

- 33.1 Reference to:
- 33.1.1 one gender includes the others;
 - 33.1.2 the singular includes the plural and the plural includes the singular;
 - 33.1.3 a person includes a body corporate;
 - 33.1.4 a party includes the party's executors, administrators, successors and permitted assigns;
 - 33.1.5 a statute, regulation or provision of a statute or regulation ("**Statutory Provision**") includes:
 - (a) that Statutory Provision as amended or re-enacted from time to time;
 - (b) a statute, regulation or provision enacted in replacement of that Statutory Provision; and
 - (c) another regulation or other statutory instrument made or issued under that Statutory Provision, as amended or re-made or re-issued from time to time;
 - 33.1.6 money is to Australian dollars, unless otherwise stated.
- 33.2 "Including" and similar expressions are not words of limitation.
- 33.3 Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- 33.4 Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.
- 33.5 A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.
- 33.6 If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

Parties

- 33.7 If a party consists of more than 1 person, this Agreement binds each of them separately and any 2 or more of them jointly.
- 33.8 An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.
- 33.9 A party which is a trustee is bound both personally and in its capacity as a trustee.

Consents or approvals

- 33.10 If the doing of any act, matter or thing under this Agreement is dependent on the consent or approval of a party or is within the discretion of a party, the consent or approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by the party in its absolute discretion unless express provision to the contrary has been made.

Executed as an agreement

Executed by **V/Line Pty. Ltd.** by its duly appointed officer in the presence of:)
)
)

.....
Witness

.....
Rob Barnett
Chief Executive Officer

.....
Name of Witness (print)

EXECUTED by **Operator** or in the presence of:

.....
Signature of Director

.....
Signature of Director / Secretary

.....
Name of Director
(BLOCK LETTERS)

.....
Name of Director / Secretary
(BLOCK LETTERS)

Schedule 1

1 Access Provider

Name	V/Line Pty. Ltd.
ABN	29 087 425 269
Address	Level 23, 570 Bourke Street Melbourne VIC 3000
Fax (for notices)	(03) 9619 5000
Attention (for notices)	Commercial Manager

2 Operator

Name
ABN
Address
Fax (for notices)
Attention (for notices)

3 Expiry Date

- 3.1 (a) 2400 hours on the _____ of _____ ; or
(b) On the giving of 30 days notice by either party
whichever is the later.

4 Parts of the Network to which this Agreement applies:

- (a) Whole of Network _____ Strike out A or B
(b) ***[detail limited operation here]***

Schedule 2

Pricing

Introduction

In this Schedule, Normal Hours and Out of Hours have the following meanings:

Normal Hours: The proposed operation of a Train on the Network on the basis that it is consistent with the normal signal box operating hours (block working hours) for the relevant corridor of the Network. The normal signal box operating hours are available from the NSP. The normal signal box operating hours are only changed when changes are made to Scheduled Train Paths for passenger and/or freight trains in the MTT, in accordance with the provisions of the Access Arrangement and the Operating Handbook. Normal signal box hours as at the date of the Access Arrangement are contained in Appendix 9, and changes will be published in the Network Service Plan.

Out of Hours: All times outside Normal Hours.

1 Normal Hours Pricing

The Access Fee for an Operator's Scheduled Train Path and an Operator's Unscheduled Train Path in Normal Hours will be calculated according to the prices set out in Parts A, B and C below.

2 Out of Hours Pricing

The Access Fee for an Operator's Unscheduled Train Path in Out of Hours will be calculated according to the methodology set out in clauses 4.2.e and 4.2.h of the Access Arrangement. For clarification, Out of Hours pricing will reflect the "Operator pays incremental costs" principle as set out in the Access Arrangement. When applying the methodology in clauses 4.2.e and 4.2.h of the Access Arrangement, references to an Unscheduled Service shall be read as a reference to an Operator's Unscheduled Train Path.

A. Grain Freight Access

The Access Provider will charge Operators the sum of:

- (1) the flagfall rate as shown below, and
- (2) the variable rate,

in each case as set out below for the financial year in question.

Year	Flagfall rate, \$/km	Variable rate, \$/1000 GTK
2010/11	0	3.99
2011/12	(B)	(B)

(A) Based on 2009/10 price, as adjusted according to the mechanism in Schedule 3.

(B) Based on 2010/11 price, as adjusted according to the mechanism in Schedule 3.

B. All Other Freight Access

The Access Provider will charge Operators the sum of:

- (1) the flagfall rate as shown below, and
- (2) the variable rate,

in each case as set out below for the financial year in question.

Year	Flagfall rate, \$/km	Variable rate, \$/1000 GTK
2010/11	0.846	1.591
2011/12	(B)	(B)

(A) Based on 2010/11 price, as adjusted according to the mechanism in Schedule 3.

(B) Based on 2011/12 price, as adjusted according to the mechanism in Schedule 3.

C. Geelong Grain Loop

The Access Provider will charge Operators the sum of \$77.52 for each instance of access to the Geelong Grain Loop.

Schedule 3

Annual variation of Access Fees

Definitions:

In this Schedule:

“**Bureau**” means the Australian Bureau of Statistics and includes a reference to the Bureau but with a different name at any time;

“**Consumer Price: All Groups Index Number Melbourne**” means:

the same index number but with a different name at any time; and

the same numbers adjusted mathematically to take account of a change at any time in the base year provided that indices of the same base year are used throughout the calculation;

“**CPI**” means for a particular Review Date:

- (a) Consumer Price: All Groups Index Number Melbourne published by Bureau for the March quarter immediately preceding the start of the relevant Review Date,

divided by:

Consumer Price: All Groups Index Number Melbourne published by the Bureau for the March Quarter immediately preceding the March quarter referred to in paragraph (a); and

“**Review Date**” means 1 July each year. For the avoidance of doubt, the first Review Date (to determine prices for 2010/11) will be 1 July 2010.

Access Fee variation formula

On each Review Date during the term of this Agreement, the Access Fees will be varied in accordance with the following formula:

$$A(n) = A(n-1) \times \text{CPI}$$

where

$A(n)$ = The Access Fees to apply from the year from the relevant Review Date; and

$A(n-1)$ = The Access Fees that applied in the year prior to the relevant Review Date.

Schedule 4

Scheduled Train Path Group

Operator's Scheduled Train Path:

Train path number:

Date of commencement of first Operator's Scheduled Train Path: / /

Date of commencement of final Operator's Scheduled Train Path: / /

Entry Point:

Entry Time: [insert reference to day of week, and time of day]

Exit Point:

Exit Time: [insert reference to day of week, and time of day]