

Access Agreement

Metro Trains Melbourne Pty Ltd
and

[insert Operator's name] Pty Ltd

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This Access Agreement

is made on **[insert date]** between the following parties:

- 1 **Metro Trains Melbourne Pty Ltd**
ABN 43 136 429 948
of Level 24, 1 Spring Street, Melbourne VIC 3000
(Access Provider)
- 2 **[insert Operator's name] Pty Ltd**
ABN [insert Operator's ABN]
of **[insert Operator's address]**
(Operator)

Recitals

- A. The Access Provider leases the Network from the Director pursuant to the Infrastructure Lease.
- B. The Access Provider has agreed to provide the Operator with access to the Network for the purpose of operating trains on the terms set out in this Agreement.

The parties agree

in consideration of, among other things, the mutual promises contained in this agreement:

1 Definitions and Interpretations

1.1 Definitions

In this Agreement the following definitions apply unless the context requires otherwise:

ACCC means the Australian Competition and Consumer Commission or its successor.

Acceptable Credit Rating means a minimum long term credit rating of BBB from Standard & Poor's or Baa2 from Moody's.

Access Arrangement has the meaning given in the *Rail Corporations Act*.

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Access Charge means those charges as described in Schedule 1.

Access Provider's Protocols means the protocols described in Clause 15.

Accreditation means accreditation obtained in accordance with the requirements of Part 5 of the *Rail Safety Act 2006* (Vic), including any guideline, regulation or ordinance made pursuant to that Part;

Addenda means the most up to date addenda to the Metropolitan Master Working Timetable published from time to time as contained in the document entitled "Metro Trains Working Timetable System Description [WTT Addenda] dated May 2011".

Adjustment Note has the meaning given in the GST Law.

Ancillary Movements means Train movements which are not part of a Train Path but which are necessary or reasonably required to use the Train Path, including for

Stabling purposes and movement of empty Trains and light engines for operative or maintenance purposes to workshops, locomotive depots and fuel points.

Associate means, in relation to a party; and

- (a) any Related Body Corporate of that party;
- (b) any officer, employee, agent, contractor, consultant or adviser of that party.

Book of Rules means the book of rules that applies to operations on the Network, PTC Book of Rules and Operating Procedures 1994, as those rules and operating procedures are amended or replaced from time to time with the approval of the Director, Public Transport Safety.

Business Day means a week day on which trading banks are open for the transaction of banking business in Melbourne.

Capacity Allocation Protocol means the Access Provider's protocol made pursuant to the Capacity Use Rules.

Capacity Use Rules means the rules made by the ESC under section 38T of the *Rail Corporations Act*.

Communications Protocol means the communications protocol issued by the Access Provider from time to time.

Confidential Information has the meaning given in Clause 16.

Consideration has the meaning given by the GST Law.

Corporations Act means the *Corporations Act 2001* (Cth).

Country Network means the Victorian country rail network which connects with the Network.

CPI means the Consumer Price Index (All Groups Index Number, weighted average of 8 Capital Cities) as published by the Australian Bureau of Statistics. In this definition:

- (a) the reference to the Consumer Price Index (All Groups Index Number, weighted average of 8 Capital Cities) means:
 - (i) the same number but with different names at any time;
 - (ii) the same number adjusted mathematically to take account of a change at any time in the base period provided that indices of the same base year are used throughout the calculations; and
- (b) the reference to the Australian Bureau of Statistics includes a reference to:
 - (i) the Australian Bureau of Statistics but with a different name at any time; and
 - (ii) a Governmental Agency in Australia (in the absence of the Australian Bureau of Statistics) at any time having similar functions.

CPI Multiplier ~~between any two times~~ means:

- (a) the CPI for most recent March Quarter at ~~the more recent~~ time, divided by,
- (b) the CPI for the ~~most recent~~ March Quarter ~~at the less recent time~~.

Cure Period has the meaning given in Clause 17.3.

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Cure Plan means a plan by a party to remedy a material breach of this Agreement which:

- (a) is proposed during the Cure Period; and
- (b) details:
 - (i) the reasonable time required to cure the relevant material breach; and
 - (ii) a work plan setting out each task to be undertaken in order to rectify the material breach and the time for each task to be completed.

Daily Train Plan means the timetable maintained by the Access Provider that sets out planned Train movements on the Network on a particular day.

Dangerous Goods Code means the Australian Code for the Transportation of Dangerous Goods by Road or Rail published by the National Road Transport Commission (or its successor) from time to time.

Default Notice has the meaning given in Clause 17.3.

Default Rate means the rate of interest prescribed from time to time under section 2 of the *Penalty Interest Rates Act* 1983 (Vic).

Defaulting Party has the meaning given in Clause 17.3.

Director means the Director of Public Transport under the *Transport Integration Act* 2010 (Vic) or his successor.

Effective Date means the date of execution of this Agreement.

Emergency Response Plan means the Emergency Response Plan issued from time to time by the Access Provider.

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.

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.

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.

ESC means the Essential Services Commission or its successor.

Extended Period has the meaning given in clause 2.3(b).

Force Majeure means any circumstances beyond the reasonable control of a party which occurs without the negligence of that person including (without limitation):

- (a) inevitable accident, act of God, lightning, storm, flood, landslide, fire or earthquake, peril of navigation;

- (b) high temperatures resulting in the imposition of operating restrictions pursuant to the Metropolitan Master Working Timetable or the Daily Train Plan;
- (c) strikes, lockouts or other industrial action;
- (d) act of public enemy, hostility, war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion, epidemic;
- (e) the effect of any change in applicable Laws of any government or other competent authority;
- (f) executive or administrative order or act of either general or particular application of any government, prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth of Australia), quarantine or customs restrictions;
- (g) breakdown or damage to or confiscation of property (but not including breakdown or delay of any Rolling Stock operated by the Operator); or
- (h) embargo or power or water shortage.

Franchise Agreement means the document titled “Franchise Agreement – Train” between the Director and the Access Provider dated 31 August 2009, as amended.

Freight Trains means rail services that are not passenger rail services.

Governmental Agency means any government or any governmental, semi-governmental or judicial entity or authority, including any self regulatory organisation or any stock exchange.

GST has the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of that Taxable Supply.

GST Group has the meaning given by the GST Law.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Guidelines means the guidelines made by the ESC under the *Rail Corporations Act*.

Hazardous Substance means any substance, which would or might reasonably be expected to cause injury to any person exposed to that substance.

Incident means a breakdown, accident, emergency, event or circumstance on or affecting the Network that causes, or may reasonably be expected to cause:

- (a) the safety of a Train or any persons to be jeopardised;
- (b) serious injury to or death of any person;
- (c) material damage to the property of any person;
- (d) delay or obstruction to the use of the Network; or
- (e) collision, derailment, signalling failure or serious safeworking breach,

and any other railway accident or incident that the Access Provider or the Operator is required to investigate under any applicable Law.

Incremental Costs means additional costs that are reasonably incurred by the Access Provider as a direct result of providing access to the Operator, where these costs are over and above the costs that have been taken into account in setting the Access Charge. Without limitation, Incremental Costs may be one-off costs incurred by the Access Provider in providing a requested path to the Operator.

For the avoidance of doubt, there are no such additional costs as at the commencement of this Agreement.

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

Industrial Waste means any waste arising from commercial, industrial or trade activities and any waste containing substances or materials, which are potentially harmful to human beings or the Environment.

Infrastructure Lease means the lease titled "Infrastructure Lease - Train" between the Director, VRTC and the Access Provider dated 31 August 2009, as amended.

Initial Term means the term described in clause 2.2.

Input Tax Credit has the meaning given by the GST Law.

Issuer means:

- (a) an authorised deposit-taking institution, as defined in section 5(1) of the *Banking Act 1959* (Cth); or
- (b) any other person whose usual business includes the issue of performance bonds or insurance bonds (as the case may be) and who is approved by the Access Provider.

Law means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.

Metropolitan Master Working Timetable means the timetable and Addenda showing all of the scheduled train paths for Trains on the Network, as amended from time to time.

Negotiation Guidelines means the Guidelines made by the ESC under section 38V of the *Rail Corporations Act*.

Network means the land and infrastructure leased by the Access Provider under the Infrastructure Lease from time to time, including railway track, associated track structures and works (such as cuttings, tunnels, bridges, sidings, excavations, landfill, track support earthworks and drainage works), pedestrian crossings, over-track structures, under-track structures, service roads, signalling, notices and signs and overhead electrical power supply systems, but excluding:

- (a) buildings (including stations, platforms, sheds and shelters);
- (b) car parks;
- (c) terminals, storage and receipt facilities;
- (d) workshops, depots, yards and fuel points; and
- (e) private sidings that are not leased to the Access Provider,

but includes any infrastructure leased to the Access Provider which passes through, or is immediately adjacent to, any of the infrastructure or facilities referred to in paragraphs (a) to (e) above.

Network Operating Requirements means the regulations and standards set out in the Metropolitan Master Working Timetable and Addenda, as published by the Access Provider from time to time.

Notice has the meaning given in Clause 21.

Operating Procedures means the procedures that apply to operations on the Network, as published by the Access Provider from time to time.

Operational Control means the control exercised, or which may be exercised, by the Access Provider with regard to the management, continuity and safeworking of the Network and all operational matters incidental to that control and includes procedures and requirements relating to Train control, Train and Rolling Stock movements, track restrictions, Track Occupations, safeworking practices, operating restrictions, emergency response procedures, notification of authorities, network restoration procedures, maintenance of the Network, evacuation procedures and Incident investigation procedures.

Operational Directions means the lawful instructions, directions and notifications from time to time issued by the Access Provider with regard to Operational Control.

Operational Interface Procedures means the procedures that apply to operational interfaces on the Network as published by the Access Provider from time to time.

Operational Performance Regime or **OPR** means the Operational Performance Regime established by the Franchise Agreement

Operator's Scheduled Train Path means each Train Path described in Schedule 2, as varied from time to time under this Agreement.

Operator's Unscheduled Train Path means a Train Path allocated to the Operator pursuant to Clause 3.2, as varied from time to time under this Agreement.

OPR Incentive Payment means any amount payable by the Access Provider to the Director, or reduction of an amount payable to the Access Provider by the Director, under the Operational Performance Regime.

Passenger Train means a Train used to carry passengers for reward and includes such a Train when it is empty.

Performance Bond means an irrevocable bank guarantee, letter of credit or insurance bond callable by the Access Provider in a form approved by the Access Provider.

Performance Bond Amount means, $\$[insert]$, multiplied by the CPI Multiplier between the date on which the relevant Performance Bond is provided and the Effective Date.

PWM is the Passenger Weighted Minutes (as determined within Schedule 7 for the Franchise Agreement – Train dated 31 August 2009) incurred by the Access Provider across the Network in the relevant calendar month.

Quarter means any calendar quarter commencing on 1 January, 1 April, 1 July or 1 October in any year, provided that:

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at the Effective Date $\$[insert]$; and¶
at each Trigger Date, the amount set out in paragraph (a) multiplied by the CPI Multiplier as at the Trigger Date.

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- (a) the first Quarter commences on the Effective Date and ends on the next 31 December, 31 March, 30 June or 30 September (whichever first occurs); and
- (b) the last Quarter commences on the last 1 January, 1 April, 1 July or 1 October (whichever last occurs) and ends on the termination of this Agreement.

Rail Corporations Act means the *Rail Corporations Act 1996 (Vic)*.

Reference Service has the meaning given in the Access Arrangement.

Reference Tariff means the ESC approved access charge submitted in Metro's Access Arrangement.

Related Body Corporate has the meaning given in the *Corporations Act*.

Required Rating means a credit rating of at least A (Standard & Poor's) or A2 (Moody's)

Rolling Stock means any vehicle that operates on or uses a railway track including a locomotive, light rail vehicle, 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).

Rolling Stock Standards means Australian Standard AS4292 in so far as it applies to Rolling Stock, as amended from time to time.

Safety Interface Agreement has the meaning given to that term in the Rail Safety Act 2006 (Vic).

Scheduled Train Path means a Train Path that is set out in the Metropolitan Master Working Timetable.

Service means a freight rail service provided by the Operator by utilization of rights conferred under this Agreement.

Special Event means a sporting, cultural, musical or other event which requires additional or varied services to be provided by passenger train operators.

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.

Standards means any applicable standards and codes issued from time to time by Standards Australia including, without limitation, the Rolling Stock Standards.

State means the State of Victoria.

Taxable Supply has the meaning given in the GST Law.

Third Party Operator means a person other than the Access Provider or the Operator who has the right to access the Network for the provision of rail services.

Track Occupation means access to the Network in order to carry out inspections, repairs, maintenance, up-grade work, improvements, additions or any other works, which could interfere with the Operator's Services.

Track Occupation Protocol means the Metropolitan Track Occupation protocol published by the Access Provider from time to time.

Train means Rolling Stock coupled together to operate as a single unit.

Train Manifest has the meaning given in Clause 3.8.

Train Operating Protocol means the Metropolitan Train Operating Protocol issued by the Access Provider, as amended from time to time.

Train Path means the particular time interval, including an entry time and day and an exit time and day, through which a Train may travel over a segment of the Network from an origin to a destination, including stopping points, and includes an:

- (a) Operator's Scheduled Train Path; and
- (b) Operator's Unscheduled Train Path.

Train Path Request Process and Protocol means the Access Provider's process and protocol for seeking Train Paths under the Negotiation Guidelines.

Transport Act means the *Transport Integration Act 2010 (Vic)*.

Trigger Date means the date on which a Performance Bond provided under clause **Error! Reference source not found.** expires.

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Unscheduled Train Path means a Train Path that is not a Scheduled Train Path.

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Valid Request has the meaning given in Clause 3.2.

VLP means V/Line Pty Ltd

VLP Access Agreement means the access agreement between the Access Provider and VLP.

VRTC means Victorian Rail Track Corporation.

Working Instruction means an operational or safety instruction issued by the Access Provider from time to time as a requirement under the documents listed in Clause 11.1 of this agreement.

1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural and conversely.
- (b) A gender includes all genders.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to includes or including should be construed without limitation.
- (e) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
- (f) A reference to a Clause, Schedule or Annexure is reference to a clause of, or a schedule or annexure to, this Agreement and a reference to a paragraph is to a paragraph of the same Clause or Schedule unless the context requires otherwise.
- (g) A reference to an agreement or document (including a reference to this Agreement) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by this Agreement or that other agreement or document.

- (h) A reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and assigns (and, where applicable, the party's legal personal representatives).
- (i) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (j) A reference to conduct includes an omission, statement and undertaking, whether or not in writing.
- (k) A reference to an agreement includes any undertaking, deed, agreement and legally enforceable arrangement whether or not in writing and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (l) A reference to writing includes a facsimile transmission and any means of reproducing words in a tangible and permanently visible form.
- (m) A reference to any professional body includes the successors of that body.
- (n) A reference to a year or to a month is a reference to a calendar year or a calendar month respectively.
- (o) A reference to dollars and \$ is to Australian currency.
- (p) A reference to *party* is a reference to a party to this Agreement.

1.3 Consents or approvals

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.

1.4 Payments due on Business Days

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

1.5 Inconsistency

If there is any inconsistency between this Agreement and any of the documents listed in Clause 15, this Agreement will prevail to the extent of any inconsistency and the documents listed in Clause 15 will be construed accordingly.

1.6 Good Faith

The parties must act co-operatively and in good faith with respect to performance of their obligations under this Agreement.

1.7 Trust Provision

The benefit of any release or indemnity in favour of the Access Provider's Associates contained in this Agreement is held on trust for each of them by the Access Provider and may be enforced for each of their benefit by the Access Provider.

2 Term

2.1 Commencement Date

This Agreement commences on the Effective Date.

2.2 Expiry Date

Unless otherwise terminated or extended in accordance with clause 2.3, this Agreement will expire on:

- (a) [TBC] ; or
- (b) termination or expiry of the Infrastructure Lease,

(whichever first occurs).

2.3 Option to extend term

- (a) At least 6 months prior to the expiry of the Initial Term either the Access Provider or Operator may by notice to the other require the parties to enter into good faith negotiations in relation to a possible extension of this agreement.
- (b) If a notice is given under paragraph (a) the Access Provider and the Operator must negotiate in good faith an extension to the term of this agreement and any changes to be made to this agreement during any agreed extension period, although nothing in this clause **Error! Reference source not found,** requires either party to agree to any such extension.

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<#>On receipt of the notice described in paragraph (a), the parties agree to meet to negotiate the period for which this Agreement will be renewed (**Extended Period**).¶
<#>This Agreement will continue to apply for the duration of the period of negotiation, which must not be longer than 2 months (**Negotiation Period**), and any agreed Extension Period, and this Agreement will expire on the earlier of:¶
<#>end of the Negotiation period if no agreement on the Extended Period;¶
<#>end of the Extended Period; or ¶
(iii) termination or expiry of the Infrastructure Lease. ¶
The Operator cannot exercise the option in paragraph (a) if the Initial Term is expiring because the Infrastructure Lease has been terminated or expired.

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3 Access Rights

3.1 Scheduled Train Paths

- (a) The Access Provider must allow the Operator to have access to the Network by way of the Operator's Scheduled Train Paths, subject to and on the terms and conditions of this Agreement.
- (b) The Operator's Scheduled Train Paths may only be permanently varied pursuant to Clause 5.
- (c) The Operator may only apply for additional Scheduled Train Paths pursuant to clause 5.

3.2 Unscheduled Train Paths

- (a) The Operator and the Access Provider may each request an Unscheduled Train Path in accordance with the procedure set out below. In order to be valid such a request (a **Valid Request**) must:
 - (i) be received in writing by the Access Provider or the Operator (as applicable) at least 48 hours in advance of the proposed operation of each such Unscheduled Train Path;

- (ii) specify the Train Path sought and provide details of the Train sought to be run;
 - (iii) in the case of a request by the Operator, include such evidence as the Access Provider reasonably requires of the Operator's Accreditation in respect of operation of the particular Train; and
 - (iv) be consistent with the Network Operating Requirements and the Book of Rules and Operating Procedures or other agreed specifications or procedures as determined by the Access Provider.
- (b) Subject to the Capacity Use Rules (if relevant), the Access Provider may not allocate an Unscheduled Train Path the subject of a Valid Request from itself, the Operator or any other person if that Unscheduled Train Path would conflict with:
- (i) a Scheduled Train Path of the Operator;
 - (ii) a Train Path of the Access Provider that is set out in the Metropolitan Master Working Timetable;
 - (iii) a Train Path for a Passenger Train;
 - (iv) compliance rules set out in the Addenda; or
 - (v) a Train Path that the Access Provider is contractually obliged to provide to, or reserve for, a Third Party Operator (including an "ad hoc" Train Path).

The Access Provider must make a determination as to whether Train Paths conflict in accordance with the matters set out in the Addenda to the Metropolitan Master Working Timetable.

- (c) Subject to the Capacity Use Rules, if the Access Provider receives a Valid Request for an Unscheduled Train Path from the Operator which it may allocate under paragraph (b), then the Access Provider must allocate to the Operator the Unscheduled Train Path requested by the Operator, unless the Unscheduled Train Path requested would conflict with an Unscheduled Train Path the subject of another Valid Request from the Access Provider or a Third Party Operator in which case the Access Provider must allocate an Unscheduled Train Path in accordance with the following priority rules:
- (i) first, to the Access Provider for any train movements associated with passenger trains;
 - (ii) secondly, to the Operator or a Third Party Operator wishing to run Passenger Trains (with the Access Provider to determine any conflict between such persons acting reasonably); and
 - (iii) thirdly, to the Operator or a Third Party Operator wishing to run Freight Trains (with the Access Provider to determine any conflict between such parties acting reasonably).
- (d) The Access Provider must respond to any request for an Unscheduled Train Path by the Operator at least 24 hours prior to the entry time of the Unscheduled Train Path requested.
- (e) If the Access Provider refuses to allocate the Operator an Unscheduled Train Path requested by the Operator, the Access Provider must provide

the Operator with a written statement of the Access Provider's reasons for refusing to allocate the Operator the Unscheduled Train Path requested and, if requested to do so by the Operator, offer the Operator the closest available Unscheduled Train Path (applying the priority rules in paragraph (c)).

- (f) If the Access Provider allocates the Operator an Unscheduled Train Path, the Access Provider must allow the Operator to have access to the Network by way of that Unscheduled Train Path, subject to and on the terms and conditions of this Agreement.
- (g) The Access Charge payable by the Operator will continue to be calculated in accordance with Clause 4 and as set out in Schedule 1 even if the Operator is allowed an Unscheduled Train Path pursuant to this Clause 3.2. An Unscheduled Train Path will be paid for on the basis set out in Clause 4 and Schedule 1.
- (h) The Operator must notify the Access Provider as soon as practicable after it becomes aware that it will not use an Unscheduled Train Path. The Access Provider will then be free to allocate that Unscheduled Train Path to any other person providing freight, passenger or any other services on the Network whether on the same or different terms and conditions to those offered to the Operator.
- (i) The Operator acknowledges that the allocation of an Unscheduled Train Path on any particular occasion does not represent an ongoing entitlement to that Train Path or any indication that the Train Path will be available in the future.
- (j) Nothing in this Clause 3.2 prevents the Operator from requesting more than one Unscheduled Train Path.

3.3 Ancillary Movements

- (a) The Access Provider must allow the Operator access to the Network to make Ancillary Movements that are necessary or reasonably required for the operation of Train Path allocated to the Operator subject only to Operational Directions.
- (b) Without limiting paragraph 3.3(a) the Access Provider must allow the Operator:
 - (i) to enter, with or without vehicles other than Rolling Stock; and
 - (ii) to bring and keep other equipment,on the Network subject to any conditions set by the Access Provider in the procedures and protocols listed in clause 11.1.
- (c) When accessing the Network in the manner described in paragraph (a);
 - (i) the Operator must obtain the prior consent of the Access Provider; and
 - (ii) the Operator must comply with any Operational Direction made by the Access Provider relating to the moving of any vehicle or other equipment brought onto the Network.

3.4 Use of Access Rights

- (a) The Operator may not access or use any part of the Network except for the purpose of:
 - (i) operating Freight Trains, or
 - (ii) making Ancillary Movements,as may apply to the Operator requiring access.
- (b) The Operator must not access or attempt to access the Network in any way other than is authorised by this Agreement.

3.5 Limits on Train Path Availability

The availability of a Train Path is subject to:

- (a) daily variations to a scheduled Train Path made by the Access Provider in creating a Daily Train Plan;
- (b) Operational Directions given by the Access Provider; and
- (c) the matters contained in Clause 5.

If an Operator's Train Path is varied according to this clause 3.5 the Access Provider will use reasonable endeavours to make a similar alternative Train Path available to the Operator.

3.6 Safe Network

The Access Provider must maintain the Network and exercise Operational Control so as to allow the Operator to provide its Services safely.

3.7 Non Exclusive

The Operator's right to access the Network is non-exclusive. Subject to the Access Provider providing access in accordance with this Agreement, 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 whether on the same or on different conditions to those enjoyed by the Operator.

3.8 Train Manifest

Prior to operating a Train on the Network (other than an Ancillary Movement) the Operator must provide the Access Provider with a written notice (a *Train Manifest*) specifying:

- (a) the number and type of vehicles in the Train;
- (b) the gross mass of the Train;
- (c) the length of the Train;
- (d) the motive power employed by the Train;
- (e) any disclosure required under the Dangerous Goods Code; and
- (f) such other reasonable information as the Access Provider requires,

which will be accurate in all material respects.

3.9 Updates to manifest

The Operator must notify the Access Provider in writing immediately if it wishes to alter any of the information given to the Access Provider under Clause 3.8.

4 Access Charge

4.1 Access Charge

The Operator must pay to the Access Provider the Access Charge set out in **Schedule 1** as varied in accordance with this Agreement.

4.2 Variation for Inflation

- (a) On and from 1 July each Financial Year (commencing on 1 July 2011), each dollar figure component of the Access Charge set out in Schedule 1 will be varied in accordance with the following formula:

$$A_n = A_{n-1} \times \text{CPI} \times (1-X)$$

where,

A_n = The relevant element of the Access Charge to apply from 1 July of the Financial Year 'n' (commencing on 1 July TBC).

A_{n-1} = The relevant element of the Access Charge that applied from 1 July of the Financial Year 'n-1'

X = The "x factor = 1%" as approved by the ESC for the Reference Service.

CPI = The CPI Multiplier between the date the Access Charge is varied and the date one year before that date.

- (b) If CPI is not published for any reason the parties will endeavour to agree on a substitute index. If the parties fail to agree by 30 April in any given year, either party may refer the question of an appropriate substitute index to an independent expert for resolution under Clause 19.3.

4.3 Incremental costs

- (a) The Operator must pay any Incremental Costs to the Access Provider. Where any Incremental Costs are attributable to both the Operator and any other users of the Network, the Access Provider will make a reasonable allocation of those Incremental Costs as between the Operator and the other users of the Network (based on a causal allocator).
- (b) The Access Provider must use all reasonable endeavours to ensure that the Operator is informed of the nature and likely amount of any Incremental Costs before they are incurred.
- (c) Upon request the Access Provider will provide the Operator with an explanation of both the costs incurred and the method used to allocate the Incremental Costs.

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The Access Charge may be varied for the Extended Period to reflect any change in the Reference Tariff during the Extended Period due to a new ESC approved Access Provider's Access Arrangement. ¶

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- (d) The Access Provider will take into account any additional information the Operator provides that it believes could materially change the method of allocation of the Incremental Costs.

4.4 Invoices

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- (a) The Access Provider must deliver to the Operator within a reasonable period after the end of each month (commencing on the Effective Date) a Tax Invoice setting out the Access Charge or other amounts payable by the Operator to the Access Provider under this Agreement with respect to the previous month or such other period as may be described in the invoice. The invoice must be accompanied by a statement setting out in reasonable detail the calculation of the amounts shown in the invoice so that they can be determined to be in accordance with the provisions of this Agreement.
- (b) The Operator must pay the amount invoiced in accordance with paragraph (a) within 20 Business Days after the day the invoice is delivered.
- (c) The amount claimed in the Access Provider's invoice will be conclusive in the absence of manifest error demonstrated by the Operator.

4.5 Objection to invoiced amount

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- (a) If the Operator has a bona fide objection to the amount claimed under any invoice it may notify the Access Provider of the objection in writing, but must pay the invoice in full.
- (b) 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.
- (c) If an adjustment is subsequently agreed between the parties or determined under clause 19, the Access Provider may set-off the amount of the adjustment in a subsequent invoice. Except where the amount that the Access Provider sets-off to the Operator results from incorrect information provided by the Operator to the Access Provider, the Access Provider must pay interest to the Operator at the Default Rate on that amount accrued daily from the time that the Operator paid the amount until the Access Provider allows an adjustment in a subsequent invoice.
- (d) If the Access Provider makes an error in an invoice, it may adjust a subsequent invoice to correct the error. The Access Provider must provide a reasonable explanation to the Operator of the nature of any such error.

4.6 Interest on late payment

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- (a) If the Operator fails to pay any amount payable by it under this Agreement by the due date, the Operator must, if demand is made by the Access Provider, 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.

- (b) The right to demand payment of interest under this Clause 4.6 is without prejudice to any other rights and remedies that the Access Provider may have in respect of a payment default under this Agreement.

4.7 Set Off

- (a) A party (the first party) may set off against any amount due and payable under this Agreement by the first party to the other party, any amount due and payable under this Agreement by the other party to the first party. The first party must notify the other party in writing if it exercises this right.

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4.8 Resetting of Access Charge

Subject to clause 4.2, Access Charge for the Reference Service will be reset at the expiry of the Access Arrangement and (if applicable) if the Access Arrangement is varied by the ESC pursuant to the *Rail Corporations Act*.

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4.9 Performance Bond

For the avoidance of doubt, this clause 4.10 only applies to an Operator who does not have an Acceptable Credit Rating, or who has defaulted in payment of any monies owed by it to the Access Provider under this Agreement and has not remedied that default before the expiry of seven (7) days.

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- (a) If the Operator at any time does not have or ceases to have an Acceptable Credit Rating, or has defaulted in payment of any monies owed by it to the Access Provider under this Agreement and has not remedied that default before the expiry of seven (7) days, the Access Provider may issue a notice to the Operator requesting that the Operator procure the issue to the Access provider of a Performance Bond within seven days of receiving the notice which:

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- (i) is issued by an Issuer with a Required Rating and approved by the Access Provider (which approval must not be unreasonably withheld);
- (ii) has a face amount which is no less than the Performance Bond Amount;
- (iii) expires no earlier than the second anniversary of the date of issue to the Access Provider; and
- (iv) is payable at an office of the Issuer in Melbourne.

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- (b) The Operator must, on or prior to each Trigger Date, procure the issue to the Access Provider of a replacement Performance Bond which:
- (i) complies with the requirements of Clauses 4.9(a)(i) and (iv);
 - (ii) has a face amount which is no less than the Performance Bond Amount as at the relevant Trigger Date; and
 - (iii) expires no earlier than the second anniversary of the relevant Trigger Date.

- (c) The Access Provider may make a demand under the Performance Bond on account of, and apply the Performance Bond against, any amount which the Access Provider considers is due and payable or will be due and payable by the Operator to the Access Provider due to a breach of this Agreement by the Operator.
- (d) The Access Provider must return to the Operator an existing Performance Bond once it has received a replacement Performance Bond.
- (e) The Access Provider must, subject to any rights the Access Provider may have in relation to the Performance Bond, return the Performance Bond (less any amounts drawn under Clause 4.9(c)) to the Operator within 12 months after the termination or expiry of this Agreement.
- (f) The Access Provider must as soon as practicable after it has made a demand under the Performance Bond, give a notice to the Operator specifying the Access Provider's reasons for making the demand.
- (g) The Access Provider may only make a demand under the Performance Bond in accordance with this Clause 4.9.
- (h) The Access Provider may make a demand irrespective of whether or not the amount is or the circumstances relating to the amount are:
 - (i) in dispute between the parties;
 - (ii) subject to any court or other proceedings.
- (i) The Operator must not take any steps to restrain or injunct the Access Provider from making a demand under the Performance Bond or the Issuer paying any amounts under the Performance Bond.
- (j) If at any time after the Effective Date, the Issuer of the Performance Bond ceases to have the Required Rating, the Operator must procure the issue of a replacement Performance Bond which complies with Clause 4.9(a) or 4.9(b) (whichever is applicable).
- (k) If the Operator does not comply with Clause 4.9(b) or 4.9(j), the Access Provider may call down on the full value of the Performance Bond and hold the amount so drawn as cash until:
 - (i) the Operator complies with Clause 4.9(b) or 4.9(j), (whichever is applicable); or
 - (ii) if the Operator does not comply with Clauses 4.9(b) or 4.9(j), until 4.9(e) would have applied had a Performance Bond been held.
- (l) If the Access Provider is holding the amount of the Performance Bond as cash pursuant to Clause 4.9(k) and the Operator subsequently complies with Clause 4.9(b) or 4.9(j) (whichever is applicable), the Access Provider must as soon as is practicable return the cash to the Operator (for the avoidance of doubt, without any interest being owed in respect of such cash).
- (m) If the Access Provider makes a demand under the Performance Bond and receives payment of an amount which was not actually payable by the Operator to the Access Provider, the Access Provider will repay that amount together with interest at the Default Rate on that amount.

5 Variations to Train Paths

5.1 Variation Due to the Director

- (a) If the Director approves, varies or approves the variation of the Metropolitan Master Working Timetable in accordance with section 10 of the Transport Act, the Access Provider may vary the Operator's Scheduled Train Paths to the extent necessary to accommodate the variation to the Metropolitan Master Working Timetable.
- (b) In exercising its rights under clause 5.1(a) the Access Provider and the Operator must comply with the applicable requirements of the Capacity Use Rules.
- (c) If a Scheduled Train Path is cancelled by the Access Provider under clause 5.1(a), it will cease to be an Operator's Scheduled Train Path.

5.2 Permanent Variation Requested by Operator

- (a) If the Operator requests a permanent variation to an Operator's Scheduled Train Path, the Access Provider must:
 - (i) negotiate with the Operator in good faith; and
 - (ii) use all reasonable endeavours to vary the Scheduled Train Path so long as such variation does not interfere with a Train Path of the Access Provider or any Third Party Operator.
- (b) If the Operator is seeking an additional Scheduled Train Path it must make a fresh application to the Access Provider under the Train Path Request Process and Protocol.

5.3 Permanent Variations of Unscheduled Train Path

The Access Provider may, by giving not less than 30 days notice in writing to the Operator, vary an Operator's Unscheduled Train Path in order to make it available as a Scheduled Train Path for the Access Provider or any Third Party Operator.

5.4 Variation or Surrender due to Operator Breach

- (a) Without limiting clause 17 but subject to clause 5.4(b), the Access Provider may, acting reasonably, taking into account all relevant circumstances and after consultation with relevant authorities (if required), by notice in writing to the Operator permanently vary, temporarily vary or require the Operator to surrender a Train Path if the Operator:
 - (i) breaches a relevant Law;
 - (ii) breaches a relevant Standard;
 - (iii) has its Accreditation suspended or cancelled;
 - (iv) fails to comply with the Book of Rules and Operating Procedures;

- (v) breaches the Access Provider's rolling stock interface standards as contained in the Addenda or the Rolling Stock Standards;
 - (vi) fails to comply with the Access Provider's material requirements for the operation of Rolling Stock on the Network including any of the Access Provider's Protocols,
- (b) In relation to a breach by the Operator under clause 5.4(a)(iv) 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.
 - (c) If a Train Path is cancelled by the Access Provider under clause 5.4(a), it will cease to be an Operator's Scheduled Train Path or Operator's Unscheduled Train Path (as applicable).

5.5 Variation or Surrender Due to Capacity Use Issues

[Freight Only]

Subject to the Capacity Use Rules:

- (a) The Access Provider may on giving not less than 30 days notice to the Operator require variation of an Operator's Scheduled Train Path or an Operator's Unscheduled Train Path in accordance with Sections 5.5 or 5.6 of the Capacity Use Rules or the Capacity Allocation Protocols.
- (b) If a Train Path is cancelled by the Access Provider under clause 5.5(a), it will cease to be an Operator's Scheduled Train Path or an Operator's Unscheduled Train Path (as applicable) upon the expiration of the relevant notice period.

5.6 Temporary Variations by Access Provider

- (a) The Access Provider may temporarily vary an Operator's Scheduled Train Path or an Operator's Unscheduled Train Path by notice to the Operator in any of the following circumstances:
 - (i) for reasons related to safety (including, without limitation, because of an Incident, a Force Majeure Event or track speed restrictions);
 - (ii) to the extent necessary to effect the repair, maintenance, upgrading, extension, construction or alteration of the Network or rail infrastructure;
 - (iii) in order to permit a Track Occupation;
 - (iv) at the request of the Operator, where the variation does not interfere with a Train Path of the Access Provider or any Third Party Operator; or
 - (v) where the variation is for the purpose of providing Passenger Train services for a Special Event.
- (b) In exercising its powers under clause 5.6(a) the Access Provider must:
 - (i) comply with the Access Provider's Protocols (as applicable) and the terms of any contractual obligations of the Access Provider to Third Party Operators; and

- (ii) vary and re-allocate Train Paths in accordance with Section 5.7(b) of the Capacity Use Rules, taking into account any contractual obligations of the Access Provider.
- (c) Subject to complying with clause 5.6(b), the Access Provider must use all reasonable endeavours to minimise disruption to rail services on the Network, including, without limitation, the Operator's Services.
- (d) Subject to complying with clause 5.6(c), the Access Provider must use all reasonable endeavours to provide satisfactory alternative Train Paths to affected rail operators, including the Access Provider, the Operator and Third Party Operators and to provide reasonable notice to affected rail operators.

6 Operational Control

6.1 Nature of Exercise

- (a) In accordance with its Accreditation requirements, the Access Provider will:
 - (i) exercise Operational Control in accordance with the Train Operating Protocol and the Book of Rules (as amended) and Operating Procedures (as amended); and
 - (ii) maintain Operational Control over the Network in accordance with any Law from time to time applicable in Victoria with regard to such control.
- (b) The Access Provider may exercise Operational Control by issuing Operational Directions to the Operator.

6.2 Extent of Exercise

The Access Provider may in exercising Operational Control delay, add, cancel, re-route or re-schedule Train movements including any Train Path allocated under this Agreement to the extent necessary for the safety and operational efficiency of the Network. The Access Provider must use reasonable endeavours to minimise the extent of such changes and to accommodate any reasonable request made by the Operator as to the extent and nature of such changes.

6.3 Responsibility of Operator to Comply

The Operator must at all times promptly comply with all Operational Directions and the Communications Protocol.

6.4 Communication Responsibilities

- (a) In accordance with its Accreditation requirements, the Access Provider will:
 - (i) keep the Operator properly and promptly informed of any event, activity or Incident becoming known to the Access Provider that will,

or is reasonably likely to, prevent or materially limit the operation of a Service by the Operator;

- (ii) provide 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;
 - (iii) operate and maintain a train control centre;
 - (iv) 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 rail users of the Network and facilitate the Operator's access to that communications system in accordance with the Communications Protocol; and
 - (v) notify the Operator of any variations to the website which directly relate to any protocols which must be followed by or relate to other obligations of the Operator.
- (b) The Operator must:
- (i) 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 may not be in accordance with the Daily Train Plan; and
 - (ii) 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.
- (c) The Access Provider must comply with the Communications Protocol.

7 Track Standard

7.1 Fit for Purpose

The Access Provider must at all times maintain those parts of the Network to which the Operator has access pursuant to the Scheduled Train Paths so as to ensure those parts of the Network are fit for the purpose of the Operator running Freight Trains on those parts of the Network in accordance with the Addenda to the Metropolitan Master Working Timetable.

7.2 Axle Weight

- a) The Access Provider must maintain those parts of the Network to which the Operator has access pursuant to the Scheduled Train Paths so that a Freight Train can operate on the relevant part of the Network with the maximum axle weight specified in the Addenda to the Metropolitan Master Working Timetable for that part of the Network.

- b) The Access Provider will use reasonable endeavours to consult where practical with the Operator before reducing the maximum weight specified in the Addenda. Unless the reduction is required for safety reasons (as reasonably determined by the Access Provider), by a Law, a Government Agency, or the terms of Access Provider's agreement with a Government Agency.
- c) The Access Provider will notify the Operator of any reduction to the maximum axle weight.

7.3 Track Speed

- a) The Access Provider must maintain those parts of the Network to which the Operator has access pursuant to the Scheduled Train Paths so that a Freight Train can operate on the relevant parts of the Network at the maximum speed specified in the Addenda to the Metropolitan Master Working Timetable for that part of the Network.
- b) The Access Provider will use reasonable endeavours to consult where practical with the Operator before reducing the maximum speed specified in the Addenda. Unless the reduction is required for safety reasons (as reasonably determined by the Access Provider), by a Law, a Government Agency, or the terms of Access Provider's agreement with a Government Agency.
- c) The Access Provider will notify the Operator of any reduction to the maximum track speed.

8 Undertakings and Warranties

8.1 Undertakings and Warranties

In addition to and notwithstanding all other warranties express or implied in this Agreement, the Operator undertakes and warrants to the Access Provider that:

- (a) 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;
- (b) it has the resources and ability to perform all of its obligations under this Agreement;
- (c) 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;
- (d) all authorisations by any Governmental 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;

- (e) 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;
- (f) 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;
- (g) it has prior to the date of this Agreement and after reasonable enquiry and investigation 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;
- (h) it has taken all reasonable steps to ensure 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.

8.2 Time of giving undertakings and warranties

The undertakings and warranties set out in Clause 8.1 will be taken to be given and made:

- (a) on the date of execution of this Agreement;
- (b) on the date of the Operator requesting access under this Agreement; and
- (c) on each day on which the Access Provider grants any access to the Operator or the Operator operates any Service on the Network.

9 Compliance with Laws and Standards

Without limiting any of its obligations under this Agreement, the Operator must comply with all requirements of any Law or Standards from time to time applicable to its operations.

10 Accreditation

10.1 Operator Accreditation requirements

- (a) The Operator must hold Accreditation to the extent required to operate its Services and perform its obligations under this Agreement.
- (b) 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.

- (c) The Operator must keep the Access Provider promptly informed of all material variations in the Accreditation of the Operator and to the conditions of the Operator's Accreditation.
- (d) The Operator must comply with all requirements as to Accreditation, including all requirements relating to Rolling Stock.
- (e) The Operator must not operate Rolling Stock on the Network to the extent it does not hold Accreditation necessary to do so.

10.2 Information as to Accreditation

Without limiting any other provision of this Agreement, 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 Clause 10.1.

10.3 Access Provider Accreditation Requirements

The Access Provider must immediately notify the Operator if it ceases to hold the necessary Accreditation to enable it to provide access to the Network for the Operator under this Agreement.

11 Operator's obligations in using the Network

11.1 Familiarity with procedures and protocols

Before accessing the Network, the Operator must request and obtain from the Access Provider, the latest published versions of and provide to all relevant personnel the following documents:

- (a) Metropolitan Master Working Timetable;
- (b) Addenda;
- (c) Book of Rules;
- (d) Operating Procedures;
- (e) Rolling Stock Standards;
- (f) Network Operating Requirements;
- (g) Emergency Response Plan;
- (h) Train Operating Protocol;
- (i) Operational Interface Procedures;
- (j) Track Occupation Protocol;
- (k) Communications Protocol; and
- (l) such other procedures and protocols as the Access Provider publishes and makes available to operators of rail services on the Network.

11.2 Book of Rules and Operating Procedures

The Operator must, when accessing the Network, comply with the Book of Rules and the Operating Procedures.

11.3 Rolling Stock Specifications

The Operator must:

- (a) maintain all Rolling Stock used by the Operator on the Network so that it at least satisfies the Rolling Stock Standards;
- (b) ensure that all Rolling Stock used by the Operator on the Network is equipped with fully operational safety equipment, which is compatible with the safe working systems used by the Access Provider; and
- (c) comply with the Operational Interface Procedures.

11.4 Protocols

The Operator must when accessing the Network comply with the Access Provider's Protocols and any Working Instructions issued by the Access Provider.

11.5 Network Operating Requirements

- (a) The Operator must in accessing the Network pursuant to this Agreement comply with the Network Operating Requirements.
- (b) If the Operator wishes to operate Rolling Stock on the Network of a type which is not specifically dealt with in the Network Operating Requirements, the Operator may request the Access Provider to alter the Network Operating Requirements so as to specifically deal with such Rolling Stock. The Operator must also specify such requirements for the Rolling Stock as are reasonably necessary to ensure that 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.

11.6 Directions by the Access Provider

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 are in breach of the Network Operating Requirements or the Rolling Stock Standards, then the Access Provider may do one or more of the following:

- (a) direct the Operator to cease using 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
- (b) 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.

11.7 Compliance

The Operator must comply with a direction of the Access Provider given or imposed in accordance with Clause 11.6 at its own cost and expense.

11.8 No Damage to Network

The Operator must not change, alter, repair, deface or damage the Network in any way.

11.9 Inspection of Rolling Stock

- (a) The Access Provider has the right to inspect the Operator's Rolling Stock at any time while the Rolling Stock is on the Network:
 - (i) for the purpose of checking the accuracy of the Train Manifest and compliance by the Operator with the provisions of this Agreement; or
 - (ii) as directed by a rail safety regulator or inspection authority duly authorised by Law,

provided that the Access Provider will not unreasonably interfere with that Rolling Stock and will take reasonable steps to conduct an inspection in a manner that minimises any disruption to the business activities of the Operator. The Access Provider must ensure that any inspection of the Operator's Rolling Stock is carried out by a person who is qualified to carry out such an inspection.

- (b) If an inspection reveals that the Operator is in breach of this Agreement:
 - (i) the Access Provider may direct the Operator to cease providing a Service or may vary the Scheduled Train Path for that Service to the extent necessary to ensure the breach does not continue (but a direction under this sub-clause will only be issued after prior discussion between the Access Provider and the Operator unless, in all the circumstances, such discussion is impossible or impractical);
 - (ii) the Access Provider may allow the Operator to continue the Service on the condition that a vehicle or vehicles believed to be in breach of the Addenda to the Metropolitan Master Working Timetable or the Rolling Stock Standards are removed and dealt with in accordance with the reasonable and appropriate directions of the Access Provider;
 - (iii) the Access Provider may direct the Operator to change the loading in a vehicle or vehicles to ensure the vehicle or vehicles comply with the Addenda to the Metropolitan Master Working Timetable or the Rolling Stock Standards before proceeding;
 - (iv) the Access Provider will notify particulars of the breach to the Operator and will reasonably assist in identifying the steps necessary to rectify that breach; and
 - (v) all costs and expenses incurred by the Access Provider as a result of the breach and its rectification will be borne by the Operator.

11.10 Safety Interface Agreement

- (a) The Operator must enter into a Safety Interface Agreement with the Access provider as required by s34 of the Rail Safety Act 2006 (Vic).
- (b) In the event of any inconsistencies between the Safety Interface Agreement and clause 11 of this Access Agreement, the Safety Interface Agreement will take precedence.

12 Incidents

12.1 Notification

- (a) The Access Provider will notify the Operator of any Incident that may impact on Services to be operated by the Operator as soon as possible after it comes to the Access Provider's attention.
- (b) The Operator must notify the Access Provider of any Incident as soon as possible after it comes to the Operator's attention.

12.2 Emergency Response Plan

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

12.3 Dealing with Incidents

- (a) 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.
- (b) Without limiting any other provision of this Agreement, the Access Provider may move 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 equipment or Rolling Stock. The Operator must reimburse the Access Provider for any reasonable costs incurred by the Access Provider as a result of the Incident to the extent that the Incident or those costs were caused or contributed to by the Operator or the Operator's Associates. The Access Provider must use reasonable endeavours to minimise costs incurred under this paragraph (b).
- (c) The Operator acknowledges and agrees that passenger train services will have priority over the Operator's Services in the case of an Incident.
- (d) Where the Operator is required by ASX listing rules to disclose information about an Incident, the Operator must consult with the Access Provider as to the form and content of the comment prior to making any public disclosure.

12.4 Other consequences of an Incident

- (a) 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.
- (b) Subject to all applicable requirements of Law, the Operator may continue to use equipment involved in an Incident (including Rolling Stock) 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.

- (c) When requested by the Access Provider, the Operator must provide in writing, information relating to the Incident including:
1. the time and location of the Incident,
 2. available details of all loss or damage to the Train operated by the Operator or injuries to any person,
 3. any data relevant to the Incident, including on train recordings, charts or other recording devices,
 4. the primary cause of the Incident and any contributing factors,
 5. actions proposed and taken by the Operator to prevent a re-occurrence of the Incident in the future; and
 6. all other information as required by the Access Provider to meet information requests from TSV or other relevant investigating bodies or the Access Provider's reasonable internal accident investigation requirements, to enable the Access Provider to meet any of its obligations in relation to its Accreditation or under the Rail Safety Act 2006 (Vic).

Deleted:

12.5 Disablement

Without limiting the other provisions of this Clause 12, 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. Emergency recovery and rectification action must be conducted in consultation with the Operator and the Access Provider and must be carried out at the earliest practicable time in accordance with the Emergency Response Plan.

12.6 Notifications

Notifications required by this Clause 12 must be made by the quickest available means.

12.7 Rerailing

The Access Provider must take all reasonable steps to minimise overall delays on the Network arising following an Incident, including by providing to the Operator rerailing services using any available rerailing equipment of the Access Provider.

13 Environment

13.1 Environmental Requirements

- (a) The Operator must not:

- (i) abandon or dump any Industrial Waste or potentially Hazardous Substance on the Network; or
 - (ii) handle any Industrial Waste or potentially Hazardous Substance in a manner likely to create an Environmental Hazard.
- (b) 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, in connection with the Services.
- (c) To the extent that compliance by the Operator with an Environmental Law results in Incremental Costs that should reasonably be shared amongst all users of the Network, the costs will be allocated between those users in accordance with clause 4.3.
- (d) If the Access Provider prepares and provides to the Operator a plan for dealing with the environmental effects of operating trains on the Network, the Operator must within a reasonable time prepare its own plan for dealing with the environmental effects of its operation on the Network, which plan must be consistent with the Access Provider's plan, and provide a copy of its plan to the Access Provider.

Deleted: 4

13.2 Dangerous Goods

The Operator must comply with the Dangerous Goods Code at all times, including notification to the Access Provider of dangerous goods being carried by the Operator or any incident (whether or not an Incident) involving dangerous goods such as spillage, leakage or container damage associated with any Train operated by the Operator on the Network.

14 Indemnity and Insurance

14.1 Indemnity by the Operator

Subject to clause 14.3, the Operator indemnifies the Access Provider and the Access Provider's Associates against any claim, loss, liability, cost and expense that may be incurred or sustained by the Access Provider or the Access Provider's Associates to the extent that such claim, loss, liability, cost or expense is caused or contributed to by a breach of this Agreement by the Operator or any negligent act or omission of the Operator or the Operator's Associates.

14.2 Indemnity by Access Provider

Subject to clause 14.3, the Access Provider indemnifies the Operator and the Operator's Associates against any claim, loss, liability, cost and expense that may be incurred or sustained by the Operator or the Operator's Associates to the extent that such claim, loss, liability cost or expense is caused or contributed to by a breach of this Agreement by the Access Provider or any negligent act or omission of the Access Provider or the Access Provider's Associates.

14.3 Exclusion of Indirect or Consequential Loss

- (a) Neither the Access Provider nor the Operator is liable to the other in respect of any Indirect or Consequential Loss.
- (b) For the purpose of clause 14.3(a), it is agreed that the following losses do not constitute "Indirect or Consequential Loss":
 - (i) amounts payable under clause 14.5 or 14.6;
 - (ii) property damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death.

14.4 Insurance

- (a) The Operator 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 Access Provider and any third parties for:
 - (i) 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 Access Provider or the Operator under any statute relating to workers' compensation insurance); or
 - (ii) any loss, damage or destruction of any property (other than property of the Operator).
- (b) The insurance referred to in paragraph (a) must be effected with a reputable and solvent insurer.
- (c) As soon as reasonably practicable after a request is made by the Access Provider to the Operator, the Operator must produce a current insurance policy or certificate of currency in respect of its insurance conforming with the requirements of this Clause 14.4.
- (d) If the Operator fails to comply with its insurance obligations under this Clause 14.4, the Access Provider by notice may require it to do so, and, if within 5 Business Days of the request by the Access Provider, the Operator has not produced a current insurance policy or certificate of currency in respect of its insurance conforming with the requirements of this Clause 14.4, then the Access Provider may effect any insurance reasonably necessary to comply with the Operator's insurance obligations under this Clause 14.4. Any reasonable premiums due in relation to this insurance will be a debt due from the Operator to the Access Provider indemnifiable by the Operator on demand under Clause 14.1.
- (e) The requirements of this Clause 14.4 are without prejudice to and do not affect the operation of the indemnities and limitations of liability contained in this Agreement.

14.5 TAC Premiums

- (a) The parties acknowledge and agree that the Access Provider should not be responsible for increased transport accident insurance premiums resulting from an Incident caused or contributed to by the Operator.
- (b) If as a result of an Incident that is caused or contributed to by the Operator or any employee, contractor or representative of the Operator:

- (i) a payment is made to a person by the Transport Accident Commission (“**TAC**”); and
- (ii) the payment results in the Access Provider having to pay increased premiums to TAC,

the Access Provider may impose a charge on the Operator equal to the portion of the payment caused or contributed to by the Operator or contractor or representative of the Operator. The parties acknowledge that such an amount is a reasonable amount to compensate the Access Provider for increased TAC premiums.

14.6 Delay payment indemnity

- (a) Without limiting any other provision of this Agreement, if:
 - (i) the Operator or any Train or Rolling Stock operated by the Operator causes or contributes to any delay in the Network; and
 - (ii) the delay referred to in paragraph (i) results directly in an OPR Incentive Payment (“**Delay Loss**”); and
 - (iii) the Access Provider provides to the Operator written evidence of the Delay Loss,

then the Operator must reimburse the Access Provider for the Delay Loss, to the extent that the Operator or the Train or Rolling Stock caused or contributed to such delay in the Network.

- (b) All payments by the Operator to the Access Provider under clause 14.6(a) will be calculated proportionately each calendar month as follows:

$$DL = (PWMO/PWM) \times OPRIP$$

where:

DL is the Delay Loss payable by the Operator;

PWM is the Passenger Weighted Minutes (as determined within Schedule 7 for the Franchise Agreement – Train dated 31 August 2009) incurred by the Access Provider across the Network in the relevant calendar month;

PWMO is the PWMs attributed to the Operator in the relevant calendar month; and

OPRIP is the OPR Incentive Payment payable by the Access Provider.

15 Variation of Protocols

- (a) The Access Provider may amend or replace the following protocols from time to time:
 - (i) the Train Operating Protocol;
 - (ii) the Track Occupation Protocol;
 - (iii) the Network Operating Requirements;
 - (iv) the Emergency Response Plan;
 - (v) the Capacity Allocation Protocol;
 - (vi) the Operational Interface Procedures;
 - (vii) the Communications Protocol; and
 - (viii) the Train Path Request Process and Protocol.
- (b) In preparing any amendment or replacement of a protocol referred to in clause 15(a), the Access Provider must:
 - (i) provide reasonable notice to the Operator of the amendment or replacement;
 - (ii) where the amendment or replacement is reasonably likely to have a significant impact on Services or operations of the Operator, consult with the Operator regarding the amendment; and

this paragraph (b) does not prevent the Access Provider from amending or replacing the protocols if a failure to make such amendment or replacements would compromise the safety, operational or commercial requirements of the Network or the Access Provider, provided it has otherwise complied with this paragraph (b).
- (c) The Access Provider must promptly make available on its website updated copies of any amended or replaced protocols.

16 Confidentiality

16.1 Confidential Information

The terms and conditions of this Agreement and all information provided under or in connection with this Agreement (the *Confidential Information*) are confidential.

16.2 Prohibition of disclosure of Confidential Information

Each party undertakes to the other that it, its officers, employees, agents and subcontractors will not, without the consent (which consent will not unreasonably be withheld or delayed) of the other party, disclose Confidential Information to any person, unless the disclosure:

- (a) is of Confidential Information already within the public domain other than as a result of a breach of this Agreement;
- (b) is of Confidential Information already known to that person (as evidenced by the person's written records) at the date of disclosure;

- (c) is to be made to the professional advisers of the disclosing party (including legal and financial advisers), provided that the disclosee agrees to keep the Confidential Information confidential;
- (d) is to be made to a Related Body Corporate of the disclosing party, provided that the disclosee agrees to keep the Confidential Information confidential;
- (e) is required by Law, or any Governmental Agency acting or purporting to act within its powers and functions, or by the requirements of Accreditation;
- (f) is reasonably necessary for the purposes of any mediation, expert determination, arbitration or legal proceeding involving one of the parties to this Agreement;
- (g) is by a party to this Agreement, in connection with its sale or the sale of all or a substantial proportion of that party's assets, provided that the disclosee agrees to keep the Confidential Information confidential;
- (h) relates to information consisting of aggregate freight or aggregate passenger volume data for all operators or other aggregate usage statistics provided by the Operator to the Access Provider (but this does not permit the disclosure by the Access Provider of information relating to costs, payments, receipts or profits of the Operator);
- (i) is to the ACCC for the purposes of Part IIIA of the *Trade Practices Act 1974* (Cth) or to the ESC for the purposes of the *Rail Corporations Act* or the Guidelines; or
- (j) is by the Access Provider to the manager of the Country Network as reasonably necessary for management of the interface between the Network and the Country Network (as confirmed by the manager of the Country Network together with its promise that the Confidential Information will be kept confidential).

16.3 Disclosure for purposes of this Agreement

Each party must take all steps reasonably necessary to ensure that Confidential Information is disclosed only to such of its or its Associate's officers, employees, advisers (legal or financial), agents or subcontractors as require that knowledge:

- (a) in order to carry out their duties in relation to this Agreement; or
- (b) in connection with a purpose referred to in Clause 16.2.

16.4 Disclosure to State

Nothing in this Clause 16 prevents the disclosure of Confidential Information on a confidential basis to the Director or any minister, officer, employee, agent, adviser or consultant of the State or a Governmental Agency of the State.

16.5 Confidentiality continues

The obligation of confidentiality under this Clause 16 is a continuing obligation and remains in force during the term of this Agreement and afterwards for a period of 7 years.

17 Expiry and Termination

17.1 Preservation of other rights

If a party breaches or repudiates this Agreement, nothing in this Clause 17 will prejudice the right of the other party to recover damages or exercise any other right. The Access Providers rights under this Clause 17 are in addition to any other rights that it may have under this Agreement, including under Clause 5.

17.2 Breach of Payment Obligation

If either party commits a material breach of its payment obligations under this Agreement and fails to remedy the breach within 20 Business Days after being required to do so in writing, the other party may terminate this Agreement immediately by notice to the party in default.

17.3 Breach of Other Obligations

- (a) If a party commits a material breach of an obligation under this Agreement (not the subject of Clause 17.2) (the **Defaulting Party**) the other party may give the Defaulting Party a notice (a **Default Notice**) specifying:
 - (i) a material breach has occurred;
 - (ii) setting out reasonable details of the event or circumstances constituting the material breach; and
 - (iii) specifying a reasonable period of time in which to cure the material breach (the **Cure Period**).
- (b) Within 5 Business Days of receipt of a Default Notice, the Defaulting Party must provide to the other party a Cure Plan in respect of the material breach specified in the Default Notice.
- (c) Following receipt of a Default Notice, the Defaulting Party will be permitted to cure the material breach within the Cure Period and, if applicable, in accordance with the Cure Plan.
- (d) 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:
 - (i) a revised Cure Plan; and
 - (ii) 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.
- (e) The other party must not unreasonably refuse to grant an extension of the Cure Period.

- (f) 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.
- (g) The provisions of this Clause 17.3 do not limit or reduce the rights of a party to claim damages for breach of this Agreement or the Access Provider's rights under Clause 5.

17.4 Termination on Insolvency

A party may terminate this Agreement immediately by notice to the other party if the other party:

- (a) is insolvent within the meaning of section 95A of the *Corporations Act*;
- (b) fails to comply with a statutory demand (within the meaning of section 459F(1) of the *Corporations Act*) unless:
 - (i) the debt to which the statutory demand relates is discharged within 15 Business Days of the date of the failure; or
 - (ii) 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;
- (c) has an administrator appointed in respect of it;
- (d) 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 assets or undertaking and that controller or similar officer is not removed within 15 Business Days of the appointment;
- (e) 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;
- (f) 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
- (g) 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.

17.5 Cessation of Rights

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 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:

- (a) carry out the obligations of the Operator at the Operator's cost; and
- (b) store the Operator's Rolling Stock at the Operator's risk and cost.

17.6 Accrued Rights

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.

17.7 Continuing Clauses

Clauses 1, 4, 14, 16, 17.1-17.6, 21 and 33 and this Clause 17.7 will continue to apply after termination of this Agreement.

18 Assignment and Subcontracting

18.1 Assignment

- (a) The Operator may not assign, transfer, delegate, encumber, pledge or otherwise dispose of or deal with any of its rights or obligations under this Agreement, including any Train Path allocated to it or attempt or purport to do so, without the prior written consent of the Access Provider, which consent must not be unreasonably withheld.
- (b) The Access Provider may assign or novate its rights or obligations under this Agreement to VTRC, the Director, a nominee of the Director, a successor operator of the Network or a subsequent purchaser of the Operator's business. The Operator must, upon request, execute any documentation necessary to facilitate or assist such assignment or novation.

18.2 Sub-contracting

The Operator may not sub-contract any of its obligations under this Agreement without the prior written consent of the Access Provider, which cannot be unreasonably delayed or withheld if the sub-contracting party meets all the requirements of the Operator under this Agreement. Notwithstanding the sub-contracting of the whole or any part of the Operator's obligations under this Agreement, the sub-contracting party will not be released from its liabilities to the Access Provider under this Agreement and the rights of the Access Provider under this Agreement are expressly reserved to the Access Provider.

18.3 Change of Control

For the purposes of this Clause 18, and without limiting the meaning of the word *transfer*, a party will be taken to have transferred or to have attempted or purported to transfer its rights and obligations under this Agreement if at any time the power (whether formal or informal, whether or not having legal or equitable force and whether or not based on legal or equitable rights):

- (a) to exercise or control the right to vote attached to 50% or more of the issued shares or stock (whether fully, partly or nil paid) in the party;
- (b) to dispose of or exercise a right of disposal in respect of 50% or more of the issued voting shares or stock (whether fully, partly or nil paid) in the party;
- (c) to dominate or control the party or the financial or operating policies of the party (whether alone or in concert with others, and whether by any act or omission or otherwise),

resides with any persons other than those holding that power on the Effective Date.

19 Dispute Resolution

19.1 Procedure to settle disputes

- (a) 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.
- (b) The procedure that is to be followed to settle a dispute arising under this Agreement is as follows:
 - (i) first, negotiation of the dispute under Clause 19.2; and
 - (ii) second, determination of the dispute under Clause 19.3,
- (c) A party may not commence court proceedings in relation to a dispute arising in connection with this Agreement until it has exhausted the procedures in this Clause 19, 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.

19.2 Negotiation

If there is a dispute between the parties relating to or arising out of this Agreement 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.

19.3 Independent Expert

- (a) If the parties are unable to resolve the dispute under Clause 19.2 the parties will submit to the following procedure prior to any other course of action being taken to resolve the dispute:
 - (i) the parties will jointly choose and appoint an independent expert;
 - (ii) in the absence of agreement by the parties as to the independent expert within 2 Business Days of notice of a dispute, the independent expert will be appointed on the application of any party by the President of the Institute of Arbitrators and Mediators Australia;
 - (iii) the independent expert must make a determination or finding on the issues in dispute as soon as practicable and in any event within 20 Business Days, or such longer period as may be agreed between the parties;
 - (iv) the independent expert will act as an expert and not as an arbitrator and may adopt such procedures as he or she sees fit;
 - (v) the independent expert's decision will be final and binding on the parties; and
 - (vi) 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.

19.4 Amalgamation of Disputes

The parties may by agreement permit a dispute being dealt with under this Clause 19 to be amalgamated with any other dispute or disputes involving one or both parties.

20 Force Majeure

20.1 Notice of event of Force Majeure

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:

- (a) specify the obligations and the extent to which it cannot perform those obligations;
- (b) fully describe the event of Force Majeure;
- (c) estimate the time during which the Force Majeure will continue; and
- (d) Specify the measures proposed to be adopted to remedy or minimise the effects of the Force Majeure.

20.2 Suspension of obligations

Following a notice of Force Majeure in accordance with Clause 20.1, and while the Force Majeure continues, the obligations, which cannot be performed because of the Force Majeure, will be suspended.

20.3 Remediating or Minimising Force Majeure

The party that is prevented from carrying out its obligations under this Agreement as a result of Force Majeure must 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, including without limitation in the case of the Access Provider, by restoring any part of the Network damaged or affected by the Force Majeure event to at least the same standard as existing at the time of the Force Majeure event.

20.4 Mitigation

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.

21 Notices

- (a) Subject to paragraph (b), any notice, demand, consent or other communication (the *Notice*) given or made under this Agreement:
 - (i) must be in writing and signed by a person duly authorised by the sender;

- (ii) must be delivered to the intended recipient by hand or by prepaid post (if posted to an address in another country, by registered airmail) or fax to the address or fax number last notified by the intended recipient to the sender; and
- (iii) will be taken to be duly given or made:
 - (A) in the case of delivery in person, when delivered;
 - (B) in the case of delivery by post, two Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (C) in the case of fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number or name of recipient and indicating that the transmission has been made without error,

but if the result is that a Notice would be taken to be given or made on a day that is not a business day in the place to which the Notice is sent or is later than 4.00pm (local time) on any day it will be taken to have been duly given or made at the commencement of business on the next business day in that place.

Any Notice under this Agreement relating to an Incident, and not involving the payment of money, may be given orally where the informing party considers that the recipient party requires the information immediately and there is insufficient time to serve a written Notice. Where oral Notice is provided under this paragraph (b), the party that gives oral Notice must provide to the other party a written copy of that Notice within 3 Business Days of the oral Notice being given.

22 GST

22.1 GST to be added to amounts payable

If GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This Clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

22.2 Tax invoice and adjustment note

No payment of any amount pursuant to Clause 22.1 is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.

22.3 Liability net of GST

Any reference in the calculation of Consideration under this Agreement to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other

liability. A party will be assumed to have an entitlement to a full Input Tax Credit unless it demonstrates otherwise prior to the date on which the Consideration must be provided.

22.4 Revenue exclusive of GST

Any reference in this Agreement to price, value, sales, revenue or a similar amount (*Revenue*), will be a reference to that Revenue exclusive of GST.

22.5 Cost exclusive of GST

Any reference in this Agreement (other than in the calculation of Consideration) to cost, expense or other similar amount, will be a reference to that cost, expense or other amount exclusive of GST.

23 Entire Agreement

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.

24 Amendment

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

25 No Waiver

No failure to exercise nor any delay in exercising any right, power or remedy by a party operates as a waiver. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

26 Severability

To the extent that any part of this Agreement may be invalid, illegal or unenforceable, it is intended that the remaining parts, insofar as possible and reasonable, must be effective and enforceable.

27 Further Assurances

Each party agrees to do all things and execute all deeds, instruments, transfers or other documents as may be necessary or desirable to give full effect to the provisions of this Agreement and the transactions contemplated by it.

28 No Merger

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.

29 Rights Cumulative

Subject to any express provision in this Agreement to the contrary, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

30 Relationship

This Agreement does not constitute any partnership, trust, agency, joint venture or employment relationship between the parties.

31 Inurement

The provisions of this Agreement will inure for the benefit of and be binding upon the parties and their respective successors and permitted assigns.

32 Costs and Stamp Duty

Subject to any provision in this Agreement to the contrary, each party must bear its own legal and other costs and expenses including stamp duty relating directly or indirectly to the preparation of, and performance of its obligations under, this Agreement.

33 Governing Law

This Agreement is governed by the laws of Victoria. Each party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with matters concerning this Agreement.

34 Counterparts

This Agreement may consist of a number of counterparts and if so the counterparts taken together constitute one and the same instrument.

35 Cross-Jurisdictional Issues

- (a) If at any time the Operator intends to provide 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, the Operator acknowledges that it is the obligation of the Operator to obtain any necessary agreements from the relevant track owners or authorities.

- (b) The Access Provider will reasonably cooperate with the Operator and with the relevant track owners or authorities in other railway territories in order to assist the granting to the Operator of all agreements and approvals necessary to enable the Operator to operate the Services as part of, or in conjunction with, access by the Operator to rail tracks or rail networks in one or more rail territories.

EXECUTED as an agreement

**Executed by
Metro Trains Melbourne Pty Ltd:**

.....
Director

.....
Director/Secretary

.....
Name (please print)

.....
Name (please print)

**Executed by
[insert Operator's name] Pty Ltd**

.....
Director

.....
Director/Secretary

.....
Name (please print)

.....
Name (please print)

Schedule 1

Access Charges:

- 1 The Access Charge comprises a tonnage charge of \$ [TBC] per 1000 GTK.

- 2 In this schedule:
“GTK” means the sum of the number of kilometres each tonne of Train (including locomotive, Rolling Stock and freight) operated by Operator travels on the Network (except in relation to Ancillary Movements).

Schedule 2

Operator's Scheduled Train Paths