

Annexure B

Essential Services Commission Victorian Rail Access Regime Ring Fencing Rules

1. Background

1.1 Legislative Background

Section 38S of the *Rail Corporations Act 1996* provides for the Commission to make ring fencing rules in accordance with the procedures set out in section 38N. Section 38S provides:

38S. Ring fencing rules

The Commission must make rules for or with respect to—

- (a) *requiring an access provider to separate its access activities from its other activities as if the access activities are being carried out by a different entity; and*
- (b) *the manner in which the access provider is to effect the separation of its access activities from its other activities as provided for by paragraph (a); and*
- (c) *requiring an access provider that provides declared rail transport services to itself or related bodies corporate, to provide those services on an arm's length basis.*

Note: The procedure for making of the ring fencing rules is set out in section 38N.

These ring fencing rules are made pursuant to section 38S.

1.2 Purpose

These **ring fencing rules** establish a set of requirements with which an **access provider** must comply.

The purpose of these **ring fencing rules** is to facilitate competitively neutral access to regulated below rail services by requiring an **access provider** to:

- (a) establish an internal organisational structure in which the **business unit** responsible for providing regulated below rail services is separate from the **access provider's** above rail business and **other activities**; and
- (b) ensure that the below rail **business unit** conducts its business activities at arm's length to the above rail businesses, including with respect to the provision of services to the above rail businesses.

1.3 Overview

- (a) Rules governing the separation of **access activities** from **other activities**, required under section 38S(a) of the **Act**, are set out in section 2 of these **ring fencing rules**.
- (b) Rules requiring the provision of **declared rail transport services** by an **access provider** to itself or a **related body corporate** on an arm's length basis, required under section 38S(c) of the **Act**, are set out in section 3 of these **ring fencing rules**.

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- (c) Rules requiring an **access provider** to establish and maintain policies, procedures and systems to ensure compliance by the **access provider** with these **ring fencing rules** are set out in section 4 of these **ring fencing rules**.
 - (d) Rules governing the manner in which the separation of **access activities** from **other activities** is to be effected, required under section 38S(b) of the **Act**, are set out in section 5 of these **ring fencing rules**.
 - (e) Section 6 of these **ring fencing rules** deals with the application of these **ring fencing rules** to joint ventures and with waiver of some or all of these rules.
 - (f) Section 7 of these **ring fencing rules** contains definitions.
 - (g) Sections 38ZZZ, 38ZZZA and 38ZZZB of the **Act** place obligations on an **access provider**, an **access seeker** and a **user** in relation to confidential information.
 - (h) The **account keeping rules** contain obligations on an **access provider** in relation to accounting separation and cost allocation.

1.4 Application

Subject to section 6.2, these **ring fencing rules** apply:

- (a) in their entirety to an **access provider** that is the lessee from time to time under the **Primary Infrastructure Lease**; and
- (b) in whole or in part to any other **access provider**, as notified by the **Commission** to the relevant **access provider** in writing.

1.5 Commencement

These **ring fencing rules** commence with effect from 1 January 2006.

2. Obligation to separate access activities from other activities

2.1 General obligation to separate activities

- (a) An **access provider** must separate its **access activities** and its **related access activities** from its **other activities** as if the **access activities** and **related access activities** are being carried out by a different entity.
- (b) Without limiting paragraph (a), an **access provider** must:
 - (i) establish a functionally and organisationally separate **access activities business unit** and **other activities business units** in accordance with section 2.2;
 - (ii) establish and maintain separate work areas for **staff** of the **access activities business unit** and the **other activities business units** in accordance with section 2.3;
 - (iii) ensure that the **access activities business unit** and the **other activities business units** have separate **staff** in accordance with section 2.4;

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- (iv) establish and maintain information technology access controls between the **access activities business unit** and the **other activities business units** in accordance with section 2.5;
 - (v) comply with rules governing the outsourcing of functions of the **access activities business unit** to any **other activities business unit** and the provision of services (other than **shared services**) by an **other activities business unit** to the **access activities business unit** (sections 2.6 and 2.7);
 - (vi) comply with rules governing outsourcing of **access activities** and **other activities** (section 2.8); and
 - (vii) comply with rules governing information sharing (section 2.9).

2.2 Separation of business units

An **access provider** must:

- (a) establish and maintain a single **business unit** for the conduct of its **access activities** and **related access activities** that is organisationally and functionally separate from its **business units** that carry out **other activities**;
- (b) subject to section 2.7, ensure that the **access activities business unit** does not carry out **other activities**; and
- (c) subject to section 2.6, ensure that a **business unit** that carries out **other activities** does not carry out **access activities** and **related access activities**.

2.3 Separation of work areas

An **access provider** must ensure that any **access activities business unit** and any **business unit** conducting **other activities** have separate work areas with access controls that prevent:

- (a) **staff** of the **access provider's access activities business unit** (other than **shared services staff**) from entering a work area of a **business unit** that carries out **other activities**; and
- (b) **staff** of a **business unit** that carries out **other activities** (other than **shared services staff**) from entering the work area of the **access provider's access activities business unit**,

except where such access is for the purpose of arm's length dealings in relation to the provision of a **declared rail transport service**.

Note: An **access provider** is required to prepare and maintain policies, procedures and systems for the conduct of day-to-day business between its **access activities business unit** and any **other activities business unit**.

2.4 Separation of staff

- (a) Subject to sections 2.6 and 2.7, an **access provider** must ensure that its **staff** other than **shared services staff** who are involved in the conduct of:

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- (i) **access activities** and **related access activities** are not also involved in the conduct of **other activities**; and
 - (ii) **other activities** are not also involved in the conduct of **access activities** and **related access activities**.
- (b) An **access provider** must not permit any temporary or permanent transfer of **staff** (other than **shared services staff**) from the **access activities business unit** to an **other activities business unit** or from an **other activities business unit** to the **access activities business unit** to take place in the period commencing at the time when the **access provider** receives a request for access from an **access seeker** pursuant to section 3 of the **negotiation guidelines** and ending either:
- (i) if the access request is withdrawn, three months after the date of such withdrawal; or
 - (ii) if the access request is not withdrawn on the later to occur of:
 - (A) the execution of an access agreement with that **access seeker**; or
 - (B) in the event of an **access regime dispute** in relation to that request for access, the final determination or resolution or settlement of that **access regime dispute**.

2.5 Information technology access controls

An **access provider** must establish, maintain and enforce appropriate information technology systems access controls such that information about the **access provider's access activities** and **related access activities** may be accessed only by:

- (a) **staff** involved in the conduct of **the access provider's access activities** and **related access activities**; and
- (b) **shared services staff**.

2.6 Provision of services to the access activities business unit

- (a) An **access provider** must not arrange for an **other activities business unit** or a **related body corporate** of the **access provider** to provide services to the **access activities business unit** (other than **shared services**) unless:
 - (i) to do so is more cost effective (having regard, amongst other things, to cost, risk, quality and safety) than the **access activities business unit** providing that service itself or arranging for another entity to provide that service; and
 - (ii) the relevant service is provided pursuant to a written and executed agreement which contains a description of the service provided and sets out the terms and conditions, including the price, on which the service is provided.
- (b) Where an **other activities business unit** or a **related body corporate** of the **access provider** provides services to the **access activities business unit** in accordance with paragraph (a), the **access provider** must ensure that:

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- (i) those services are provided on an arm's length basis; and
 - (ii) the arrangement referred to in paragraph (a) complies with the requirements of these *ring fencing rules*.

2.7 Provision of services to an other activities business unit

- (a) An **access provider** must not arrange for the **access activities business unit** to provide services to an **other activities business unit** or a **related body corporate** of the **access provider** (other than **shared services**) unless:
 - (i) to do so is more cost effective (having regard, amongst other things, to cost, risk, quality and safety) than the **other activities business unit** providing that service itself or arranging for another entity to provide that service; and
 - (ii) the relevant service is provided pursuant to a written and executed agreement which contains a description of the service provided and sets out the terms and conditions, including the price, on which the service is provided.
- (b) Where the **access activities business unit** provides services to an **other activities business unit** or a **related body corporate** of the **access provider** in accordance with paragraph (a), the **access provider** must ensure that:
 - (i) those services are provided on an arm's length basis; and
 - (ii) the arrangement referred to in paragraph (a) complies with the requirements of these *ring fencing rules*.

2.8 Outsourcing

If an **access provider** arranges for another entity to perform any of its **access activities**, **related access activities** or its **other activities**, it must ensure that the entity complies with these *ring fencing rules* as if it were the **access provider**.

2.9 Information sharing

- (a) An **access provider** must ensure that any **access provider information** that is provided or made available by the **access activities business unit** to an **other activities business unit** or to a **related body corporate**, and which may assist a **user** to provide freight services or passenger services to end users, is also made available on request to an **access seeker** or **user**, other than:
 - (i) where to do so is prohibited by any applicable **legislation** or any **Commission instrument** made under the **Act**; or
 - (ii) where to do so would reveal **confidential access seeker and user information** that has been provided to it by another **access seeker** or **user**; or
 - (iii) where the **access provider information** has been provided to **shared services staff** for the purpose of providing **shared services**.

If an **access seeker** or **user** requests **access provider information** under this section that is of a confidential or commercially sensitive nature, the **access provider** may require the **access seeker** or **user** to enter into a confidentiality agreement prior to its disclosure.

- (b) An **access provider** may require the **access seeker** or **user** referred to in paragraph (a) to pay the same price for the same information as the price paid by the **other activities business unit**, but must not require the **access seeker** or **user** to pay a price for that information that exceeds the cost reasonably incurred by the **access provider** of producing and providing that information.

3. Obligation to provide declared rail transport services on arm's length basis

- (a) An **access provider** that provides **declared rail transport services** to itself or to **related bodies corporate** must provide those services on an arm's length basis.
- (b) Without limiting paragraph (a), an **access provider** that provides **declared rail transport services** to itself or to **related bodies corporate** must:
- (i) not make decisions or act in a manner that unreasonably favours itself or any **related body corporate** over any other person;
 - (ii) document any contract, agreement, arrangement or understanding for the provision of such services in a written access agreement or memorandum of understanding and provide a copy of the executed access agreement or documented memorandum of understanding to the **Commission** within five business days of execution of the agreement; or within five business days of the completion of the memorandum of understanding (as relevant); and
 - (iii) conduct any business between the **access activities business unit** and the **other activities business unit** in relation to the provision of **declared rail transport services** in accordance with the **account keeping rules**, **capacity use rules**, **network management rules**, **negotiation guidelines** and these **ring fencing rules**.

4. Establishment and maintenance of policies, procedures and systems

- (a) An **access provider** must establish, maintain and comply with auditable policies, procedures and systems for the purpose of ensuring compliance with the **access provider's** obligations under these **ring fencing rules**.
- (b) The policies, procedures and systems referred to in paragraph (a) must include, without limitation, policies, procedures and systems:
- (i) for the maintenance of a register and records of the **access provider's staff**, which register must identify, in respect of each member of **staff** (including the executive officer or officers to whom all **staff** report either directly or indirectly), the name and position of that person and whether

that person is **shared services staff**, **staff** involved in the conduct of **access activities** and **related access activities** or **staff** involved in the conduct of **other activities**;

- (ii) for the transfer of **staff** between **business units**, which must require that no transfer of the **access provider's staff** (other than **shared services staff**) from the **access activities business unit** to an **other activities business unit** or from an **other activities business unit** to the **access activities business unit** occurs during the period of time specified in section 2.4(b)(i);
 - (iii) including security control and access control systems, that govern access:
 - (A) between the **access activities business unit** and **other activities business units**; and
 - (B) to the information technology systems of and information about the **access activities business unit**;
 - (iv) for the conduct of day-to-day business between the **access activities business unit** and **other activities business units**, which must require that all such dealings be at arm's length;
 - (v) for the flow of information between the **access activities business unit** and **other activities business units** and from the **access activities business unit** to the directors, officers and senior management of the **access provider**;
- Note:** To illustrate, the **Commission** expects that the **access provider** will need to identify (in policies, procedures and systems) the type of information that its management will need to receive to discharge overarching corporate responsibilities and duties (eg, aggregated financial information about the performance of the different **business units**).
- (vi) for the treatment of information supplied by an **access seeker** or **user** to the **access provider's access activities business unit** in confidence, which must be consistent with the **access provider's** system and business rules for the handling of confidential information established under section 38ZZZB;
 - (vii) for the outsourcing of any **access activities** and **related access activities** of the **access provider**;
 - (viii) for the training of **staff** about the obligations imposed on the **access provider** under these **ring fencing rules**;
 - (ix) for dealing with any complaints made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with:
 - (A) these ring fencing rules; or
 - (B) a **separation arrangement**; or

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- (C) the **access provider's** obligations under the **Act** with respect to **information** supplied by the **access seeker** or **user** to the **access provider** in confidence; and
 - (x) for reporting to the **Commission** any breach of a policy, procedure or system.

Note: An **access provider** is required under section 5.8(c) to report to the **Commission** any breach of these **ring fencing rules**.

5. Manner in which separation is to be effected

5.1 Submission of separation arrangement to Commission for approval

An **access provider** must prepare and submit to the **Commission** for approval a proposed separation arrangement at the same time as it is required to submit a draft **access arrangement**.

5.2 Contents of proposed separation arrangement

- (a) A proposed separation arrangement must specify in detail how the **access provider** will ensure that it complies with the requirements of these **ring fencing rules** and must include:
 - (i) a description of how the **access provider** will structure its organisation and businesses in order to comply with these **ring fencing rules**, including:
 - (A) a description of the organisational structure and **business units** of the **access provider**; and
 - (B) a description of the activities and functions of each **business unit**, including the structure, staffing, responsibilities, functions of and activities conducted by each **business unit**;
 - (ii) a statement confirming the establishment of each of:
 - (A) a register of the names and positions of the **access provider's staff**, which register must identify, in respect of each member of **staff** (including the executive officer or officers to whom all **staff** report either directly or indirectly), the name and position of that person and whether that person is **shared services staff**, **staff** involved in the conduct of **access activities** and **related access activities** or **staff** involved in the conduct of **other activities**; and
 - (B) the policies, procedures and systems referred to in section 4 that the **access provider** is required to prepare and maintain under these **ring fencing rules** or, in the circumstances referred to in section 5.3(a), a copy of the plan referred to in section 5.3(b) for establishing any **outstanding policy**;
 - (iii) a complete listing and description of any services provided under section 2.6 to the **access activities business unit**, other than **shared services**, by an **other activities business unit** or a **related body corporate** of the

access provider, and services provided under section 2.7 by the **access activities business unit** to an **other activities business unit** or a **related body corporate** of the **access provider**, in addition to an explanation of how each such arrangement complies with the requirements of section 2.6 and section 2.7;

- (iv) a description of how the proposed separation arrangement, if approved as a **separation arrangement**, will be consistent with and will ensure that the **access provider** complies with its obligations under the **account keeping rules** and the **access provider's** system and business rules for the handling of confidential information established under section 38ZZZB; and
- (v) any additional information:
 - (A) that the **access provider** considers will be necessary; or
 - (B) that the **Commission** reasonably requests the **access provider** to provide,

in order to provide the **Commission** with sufficient assurance that the **access provider** will comply with its obligations under these **ring fencing rules**.

- (b) The statement referred to in paragraph (a)(ii) must be signed by a director of the **access provider** and must certify that any **outstanding policy** will be established in accordance with these **ring fencing rules**.

5.3 Plan for establishing policies, procedures and systems

- (a) If, at the time of submitting a proposed separation arrangement to the **Commission** for approval under section 5.1, the **access provider** has not established all of the policies, procedures and systems referred to in section 4 that the **access provider** is required to establish and maintain under these **ring fencing rules**, the **access provider** must, at the time of submitting the proposed separation arrangement, submit to the **Commission** a plan for establishing any **outstanding policy**.
- (b) The plan referred to in paragraph (a) must require an **access provider** to have established each **outstanding policy** no later than six months after the making of the **access arrangement** referred to in section 5.1.
- (c) No later than six months after the making of the **access arrangement** referred to in section 5.1, an **access provider** must provide a statement to the **Commission** confirming the establishment of each **outstanding policy**, which statement must be signed by a director of the **access provider** and must certify that each **outstanding policy** has been established.

5.4 Decision on proposed separation arrangement

- (a) The **Commission** must make a decision whether or not to approve a proposed separation arrangement provided to it under section 5.1 as a **separation arrangement**.

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- (b) If the **Commission** makes a decision to approve a proposed separation arrangement, it will be a **separation arrangement** for the purposes of these **ring fencing rules**.
- (c) If the **Commission** is not satisfied that the proposed separation arrangement:
- (i) provides for the matters listed in section 5.2; and
 - (ii) is consistent with the objectives set out in section 38F of the **Act**,
- the **Commission** may reject the proposed separation arrangement.
- (d) If the **Commission** rejects the proposed separation arrangement:
- (i) the **Commission** must return the proposed separation arrangement to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed separation arrangement as a **separation arrangement**;
 - (ii) the **access provider** must amend the proposed separation arrangement to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed separation arrangement to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).
- (e) Subject to paragraph (f), if the **Commission** decides to reject the amended proposed separation arrangement submitted to the **Commission** in accordance with paragraph (d)(iii), the process in this section 5.4 will continue to apply until the proposed separation arrangement is accepted as a **separation arrangement**:
- (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed separation arrangement were a proposed separation arrangement submitted for approval under section 5.1.
- (f) If the **Commission** has rejected the amended proposed separation arrangement (as described in paragraph (d)(iii)) twice on the basis that it is not satisfied with the description provided for the purpose of section 5.2(a)(i) or section 5.2(a)(iii) or both, then following the second rejection the **Commission** may either:
- (i) return the amended proposed separation arrangement to the **access provider** for reconsideration (in which case the process in paragraph (e) above will apply); or
 - (ii) amend the amended proposed separation arrangement so that it provides for the matters listed in section 5.2 and is consistent with the objectives set out in section 38F of the **Act**.

5.5 Compliance with separation arrangement

On and from the date the **Commission** approves a proposed separation arrangement as a **separation arrangement** with respect to an **access provider** the **access provider** must comply with the **separation arrangement**.

5.6 Commission to approve variation to separation arrangement

- (a) An **access provider** may apply to the **Commission** to vary a **separation arrangement**.
- (b) The variation must be consistent with these **ring fencing rules**.
- (c) An application must;
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **separation arrangement**.
- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 5.4 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed separation arrangement submitted for approval under section 5.1; and
 - (B) a decision under this section were a decision under section 5.4.
- (f) If the **Commission** decides to approve a variation to a **separation arrangement**, the variation takes effect on and from the date of the decision.
- (g) If an **access provider** alters its organisational structure as described in the **separation arrangement** in a manner that affects the **access activities business unit** it must notify the **Commission** in writing. The **Commission** may, by notice in writing, require the **access provider** to submit an application for variation of the **separation arrangement** in consequence of this change.

5.7 Effect of approval of separation arrangement

Any approval by the **Commission** of a **separation arrangement** or a variation to a **separation arrangement** does not relieve the **access provider** from any of its obligations to comply with these **ring fencing rules**.

5.8 Compliance procedures and compliance reporting

- (a) (i) An **access provider** must provide to the **Commission** annually:
 - (A) a report by a qualified auditor that states that the auditor has audited the matters referred to in paragraph (ii) and expresses the auditor's opinion as to whether the **access provider** is in compliance with these **ring fencing rules**; and
 - (B) a report describing the measures taken by the **access provider** to ensure compliance with its obligations under these **ring fencing rules**, and providing an accurate assessment of the effect of those measures.

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- (ii) For the purposes of paragraph (a)(i)(A), the matters include:
- (A) the measures taken by the **access provider** to ensure compliance with its obligations under these **ring fencing rules**, including, without limitation, the matters set out in sub-paragraphs (B)-(J);
 - (B) the **separation arrangement** and the measures taken by the **access provider** to ensure compliance with the **separation arrangement**;
 - (C) the **access provider's** policies, procedures and systems that the **access provider** is required to establish and maintain under section 4 and the measures taken by the **access provider** to ensure compliance with those policies, procedures and systems;
 - (D) any contract, agreement, arrangement or understanding for the provision of **declared rail transport services** by the **access provider** to itself or to a **related body corporate**;
 - (E) any contract, agreement, arrangement or understanding for the provision of any services by an **other activities business unit** or a **related body corporate** of the **access provider** to the **access activities business unit**;
 - (F) any contract, agreement, arrangement or understanding for the provision of any services by the **access activities business unit** to an **other activities business unit** or a **related body corporate** of the **access provider**;
 - (G) any dealings between the **access activities business unit** and an **other activities business unit** or a **related body corporate** of the **access provider** other than those described in sub-paragraphs (D), (E) and (F);
 - (H) any arrangement under which the **access provider** outsources any **access activity** or **other activity**;
 - (I) instances of any complaint made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with these **ring fencing rules**, a **separation arrangement** or the **access provider's** obligations under the **Act** with respect to information supplied by the **access seeker** or **user** to the **access provider** in confidence, and the measures taken by the **access provider** in response to such complaint; and
 - (J) instances of non-compliance by the **access provider** with these **ring fencing rules** or a **separation arrangement** and any correction or rectification measures taken by the **access provider** in respect of each instance of non-compliance.

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- (iii) The auditor's report referred to in paragraph (a)(i)(A) must be conducted under **Australian Auditing and Assurance Standards** and the appointment of the auditor must be consistent with **Australian Auditing and Assurance Standards**.
- (iv) A report submitted under paragraph (a)(i)(B) must include:
- (A) details of all instances of non-compliance with each of:
 - (1) these **ring fencing rules**; and
 - (2) the **separation arrangement**;
 - (B) details of correction or rectification measures taken in respect of each instance of non-compliance;
 - (C) details of any complaints made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with:
 - (1) these **ring fencing rules**; or
 - (2) a **separation arrangement**; or
 - (3) the **access provider's** obligations under the **Act** with respect to information supplied by the **access seeker** or **user** to the **access provider** in confidence;
 - (D) details of all measures taken by the **access provider** in response to a complaint reported to the **Commission** under sub-paragraph (iv)(C); and
 - (E) a **director's responsibility statement**, specifying the date on which the statement is made and stating that in the directors' opinion, other than the instances described in sub-paragraph (iv)(C), the **access provider** has complied with its obligations under these **ring fencing rules** and any binding **separation arrangement**.
- (b) The **access provider** must provide a copy of these **ring fencing rules** and the **separation arrangement** to all directors, officers and **staff** of the **access provider** (including all new **staff**) who are required to comply with these **ring fencing rules** and the **separation arrangement**.
- (c) If an **access provider** becomes aware of any possible breach of any of its obligations under these **ring fencing rules** or a **separation arrangement**, the **access provider** must:
- (i) notify the **Commission** in writing immediately upon becoming aware that the breach may have occurred; and
 - (ii) within five business days after the date on which the **access provider** becomes so aware, provide the **Commission** with a report detailing that possible breach and the corrective measures taken or to be taken by the **access provider** in respect of that possible breach.

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- (d) The **Commission** may by notice in writing direct the **access provider** to take any measures necessary to correct any possible breaches and to ensure compliance with these **ring fencing rules** and any **separation arrangement**.
 - (e) The first audit that is conducted under this section 5.8 must occur within three months of the approval of the **separation arrangement**.

5.9 Commission may require access provider to conduct audit

- (a) The **Commission** may at any time require the **access provider** to obtain and provide to the **Commission** a report by a qualified and independent auditor that states that the auditor has audited the matters referred to in section 5.8(a)(ii) and expresses the auditor's opinion as to whether the **access provider** is in compliance with these **ring fencing rules**.
- (b) The auditor selected by the **access provider** must be approved by the **Commission** prior to the conduct of an audit, and the **Commission** must approve the scope of the audit.
- (c) The **access provider** must ensure that the auditor has a primary duty of care to the **Commission** to conduct the audit independently and objectively, which duty of care must be formalised in a tripartite deed between the **Commission**, the **access provider** and the auditor that is directly enforceable by the **Commission**.
- (d) The auditor's report referred to in paragraph (a) must be conducted under **Australian Auditing and Assurance Standards** and the appointment of the auditor must be consistent with **Australian Auditing and Assurance Standards**.

6. Application of ring fencing rules to joint ventures and waiver of rules

6.1 Application of ring fencing rules to joint ventures

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
 - (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.

In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a **participant**.

- (b) If these **ring fencing rules** require or permit something to be done by the **access provider**, that thing may be done by one of the **participants** on behalf of all the **participants**.
- (c) If a provision of these **ring fencing rules** refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the **participants** bearing any costs.

6.2 Waiver of ring fencing rules

The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these **ring fencing rules** where the **Commission** considers this would be consistent with the **Commission's** statutory objectives and that compliance with the obligation would not be necessary to achieve the purpose of these **ring fencing rules** as set out in section 1.2.

7. Definitions

In these **ring fencing rules**, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these **ring fencing rules** have the same meaning as in the **Act**, and
- (b) **access activity** means any of the following activities carried out by an **access provider**:
 - (i) the management or maintenance of, or investment in, **rail infrastructure** used in the provision of **declared rail transport services**;
 - (ii) negotiation or management of agreements for the provision of **declared rail transport services**;
 - (iii) the assessment, allocation and management of capacity;
 - (iv) the provision, scheduling and management of **train control services**;
 - (v) an activity that is incidental to an activity referred to in paragraphs (i) to (iv);
- (c) **access activities business unit** means the **business unit** of an **access provider** that conducts **access activities** and **related access activities**;
- (d) **access provider** has the meaning set out in the **Act**;
- (e) **access provider information** means any information in the possession or control of an **access provider**, including information relating to the **access provider's access activities** and **related access activities**;
- (f) **access seeker** means a person seeking to be provided a **declared rail transport service** by an **access provider** or seeking **interconnection**;
- (g) **Act** means the *Rail Corporations Act 1996* (Vic);
- (h) **Australian Auditing and Assurance Standards** means the Australian Auditing and Assurance Standards issued by the Australian Auditing and Assurance Standards Board from time to time;
- (i) **business unit** means a distinct division, department, branch, group, team or unit of an **access provider**, or a **related body corporate** of an **access provider**;
- (j) **Commission** means the Essential Services Commission of Victoria, as established under Part 2 of the *Essential Services Commission Act 2001*;
- (k) **confidential access seeker and user information** means:

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- (i) any information given to the **access provider** by an **access seeker** or **user** in confidence; and
 - (ii) any information collected by an **access provider** about an **access seeker** or **user** that is of a confidential nature (including, for example, aggregate delay information);
 - (l) **declared rail transport service** means a rail transport service declared by an Order under section 38I of the **Act**;
 - (m) **director's responsibility statement** means a statement signed by the Chief Executive Officer and a non-executive director of an **access provider**;
 - (n) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
 - (o) **other activity** means any activity carried out by an **access provider** other than an **access activity** or a **related access activity**;
 - (p) **other activities business unit** means a **business unit** of an **access provider** that conducts **other activities**;
 - (q) **outstanding policy** means any policy, procedure or system that the **access provider** is required to establish and maintain under section 4 of these **ring fencing rules** but which the **access provider** has not established at the date of submission of a proposed separation arrangement to the **Commission** for approval in accordance with section 5.1;
 - (r) **Primary Infrastructure Lease** means the agreement entitled the "Primary Infrastructure Lease", entered into between the Director and Freight Victoria Limited (ACN 075 295 644) on or about 30 April 1999, as restated on or about 31 August 2004, as amended from time to time;
 - (s) **related access activity** means:
 - (i) managing and implementing government projects upgrading or investing in **rail infrastructure**;
 - (ii) providing **rail infrastructure** maintenance services to third parties; and
 - (iii) any other activity approved by the **Commission** in writing;
 - (t) **related body corporate** has the meaning set out in the *Corporations Act 2001* (Cth);
 - (u) **shared services** means corporate administrative functions or services, human resources, accounting, finance, information technology and information technology support services, and includes the functions carried out by the executive officer or officers identified in a **separation arrangement** to whom all **staff** report either directly or indirectly;
 - (v) **shared services staff** means:
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- (i) **staff** involved only in corporate administrative functions or services, human resources, accounting, corporate finance, information technology support or information technology support services; and
 - (ii) the executive officer or officers identified in a **separation arrangement** to whom all **staff** report either directly or indirectly;
- (w) **staff** of an **access provider** means employees, servants, consultants, independent contractors or agents of the **access provider**;
- (x) **separation arrangement** means, with respect to an **access provider**, a separation arrangement that the Commission has approved under section 5.4, as amended from time to time in accordance with section 5.6; and
- (y) **user** means a person who:
- (i) is a party to an agreement under which they acquire a **declared rail transport service**; or
 - (ii) has a right to be provided a **declared rail transport service** under a **dispute resolution decision**.