
Transport for NSW

and

Operator

Access Agreement

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Agreement

Date

Parties

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Name (**Operator**)

Address

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Contact

Background

- A. TfNSW is the owner of the Network.

- B. TfNSW may appoint an Agent to operate and manage the Network and to administer this Agreement on its behalf.

- C. TfNSW agrees to grant the Operator access to the Network upon the terms and conditions set out in this Agreement.

- D. The Operator acknowledges that TfNSW may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of TfNSW may be transferred to or vested in another entity.

Operative part

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement unless the context otherwise requires:

“**ACCC**” means the Australian Competition and Consumer Commission;

“**Access Charges**” means the charges for the rights of access to and use of the Network granted to the Operator under clause 2.1 as set out in Schedule 3, as reviewed from time to time in accordance with Schedule 3;

“**Access Undertaking**” means the terms of the access undertaking applicable to TfNSW pursuant to Schedule 6AA of the Transport Administration Act, varied from time to time and as published on TfNSW’s website at www.transport.nsw.gov.au (refer <http://www.transport.nsw.gov.au/content/access-nsw-government-transport-information-gipa>) (copies also available from TfNSW’s registered office);

“**Accreditation**” means to be an Accredited Operator or an Accredited Manager (as the case may be) as defined under the Rail Safety National Law and “**Accredited**” bears a corresponding meaning;

“**Accredited Operator**” means an operator (including the Operator) who is Accredited or taken to be Accredited under the Rail Safety National Law (being Accreditation in whatever named capacity may be applicable under the Rail Safety National Law);

“**Accredited Owner**” means an owner (including TfNSW) who is Accredited or taken to be Accredited under the Rail Safety National Law (being Accreditation in whatever named capacity may be applicable under the Rail Safety National Law).

“**Accredited Manager**” means a rail infrastructure manager who is Accredited or taken to be Accredited under the Rail Safety National Law (being Accreditation in whatever named capacity may be applicable under the Rail Safety National Law);

“**Accrediting Authority**” means the body responsible for issuing Accreditations under the Rail Safety National Law ;

“**Ad Hoc Train Paths**” means all ad hoc entitlements (including Train Paths arising by reason of compliance with Instructions) to access the Network which are provided by TfNSW to the Operator on the terms set out in this Agreement and otherwise on such terms as TfNSW may stipulate in accordance with this Agreement;

“**Administering Authority**” means the body which is responsible for administering the Rail Safety National Law Act;

“Agent” means a person appointed under clause 5.8(e)(2) by TfNSW as its agent in relation to this Agreement and whose appointment has not been revoked by TfNSW;

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

“Business Day” means a day in New South Wales that is not a Saturday, Sunday, public holiday or day on which banks are not generally open for business;

“Change of Control” means in relation to a corporation, where the power (whether formal or informal, whether or not having legal or equitable force, whether or not based on legal or equitable rights and whether direct or indirect (including through one or more entities):

- (A) to control more than half of the voting power of the corporation;
- (B) to control the composition of the board of directors of the corporation; or
- (C) to control more than half of the issued share capital of the corporation excluding any part thereof which carries no right to participate beyond a specified amount in the distribution of either profit or capital,

resides with persons other than those holding that power on the date of this Agreement

“Charges” means the Access Charges and the Incidental Charges;

“Claim” means any claim, demand, remedy, injury, damage, loss, cost, expense, suit, liability, action, proceeding, right of action or claim for compensation;

“Code of Practice” means the documents notified as such to the Operator from time to time by TfNSW subject to clause 1.2(m) and, as at the Commencement Date, comprises the documents specified in Schedule 4;

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

“Commercial Arbitration Act” means the Commercial Arbitration Act 2010 (NSW);

“Commodity” means a commodity to be transported by an Operator which may include:

- (a) grain;
- (b) coal;

- (c) minerals;
- (d) general freight; and
- (e) passengers.

“Communications or TMS Provider” means a third party responsible for:

- (a) building and operating telecommunications infrastructure on and adjacent to TfNSW rail corridors and providing a communications platform for TfNSW’s train management system; or
- (b) developing and providing a train management system;

“Consequential Loss” includes 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) but does not include property damage or losses arising from third party claims for property damage, personal injury, nervous shock or death;

“Consideration” has the same meaning as in the GST Legislation but does not include the GST amount payable;

“Contractor” means any contractor, subcontractor, consultant or other person contracted by or on behalf of a party to perform services or carry out duties for or on behalf of that party, and, in the case of the Operator, includes any person contracted by the Operator to operate Trains or conduct Services or visit any part of the Network;

“Customer” means the person for whom the Operator is transporting Commodities;

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

“Employee” means, in respect of a party, the employees, officers, directors, agents, licensees or Contractors of, or any other person under the control or supervision of, that party, but TfNSW’s Employees do not include the Operator or the Operator’s Employees;

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

“Environmental Damage” means any material injury or damage to persons, living organisms or property or any material pollution or

impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

“Environmental Licence” means any environment protection licence under the Protection of the Environment Operations Act 1997 (NSW) in respect of the Network that may be issued from time to time;

“EPA” means the Environment Protection Authority constituted by the Protection of the Environment Administration Act 1991 (NSW);

“Expiry Date” means 12 months from the Commencement Date;

“Force Majeure” means a circumstance beyond the reasonable control of a party which occurs without the negligence of that party or breach of this Agreement by that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth or State of New South Wales), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator;

“Governmental Agency” means either the Commonwealth or New South Wales Government or any Commonwealth or New South Wales governmental, semi-governmental, judicial, regulatory, municipal, statutory or public entity or authority but excludes such entity or authority in its capacity as an Operator;

“GST” has the same meaning as in the GST Legislation;

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

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

- (a) material damage to or interference with the Network managed by TfNSW;
- (b) material damage to property;
- (c) material personal injury to any person;
- (d) an Environmental Condition;
- (e) a Category A incident or a Category B incident as defined in the Standards;

- (f) an incident which requires notification under the relevant Rail Safety National Law to the relevant authority under that Act; or
- (g) an incident requiring notification under the Dangerous Goods Code;

“Incidental Charges” means the charges for any Incidental Use, as set out in Schedule 3, as reviewed from time to time in accordance with Schedule 3;

“Incidental Use” means any activity incidental to the Operator’s use of the Network and which is not directly related to the movement of Rolling Stock, including the activities set out in clause 2.6;

“Input Tax Credit” has the meaning given by Section 195-1 of the ANTS GST Act;

“Instructions” means all instructions and directions issued by TfNSW from time to time:

- (a) which ensure, facilitate or encourage the proper, efficient, safe and lawful:
 - (1) use of and access to the Network by all Network users; or
 - (2) management of the Network by TfNSW;
- (b) which TfNSW honestly believes upon the exercise of reasonable care are consistent with the Operations Protocol; and
- (c) which are given with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of TfNSW (as set out in paragraphs (a) and (b) of this definition of “Instructions”) in issuing the instruction or direction,

but does not include instructions and directions:

- (d) which derogate from the Train Paths;
- (e) which prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or
- (f) which are given for the purpose only of achieving TfNSW internal commercial objectives unrelated to the valid objectives of TfNSW as set out in paragraphs (a) and (b) of this definition of “Instructions”,

unless the instructions or directions:

- (g) are Train Control Directions properly given; or
- (h) in TfNSW’s opinion relate to safety; or

- (i) are given to implement or support the Operations Protocol; or
- (j) are necessary to prevent or to minimise the effect of a material breach of this Agreement; or
- (k) are otherwise authorised by this Agreement,

and a reference to TfNSW in this definition of Instructions includes also a reference to Agents;

“Interface Agreement” means the written agreement of this name required under the Rail Safety National Law and entered into between the Operator and the Agent as a condition precedent to this Agreement pursuant to clause 2.2;

“Invoice” means the invoice referred to in Schedule 3;

“IPART Act” means the Independent Pricing and Regulation Tribunal Act 1992 (NSW);

“Key Performance Indicators” means the key performance indicators to be determined in accordance with clause 2.8;

“Network” means the network of railway lines as delineated or defined in Schedule 1 (to the extent that such railway lines are owned by TfNSW);

“Obstruction” means any obstruction to the whole or any part of the Network (including debris or other objects on the Network) which causes or could cause a disruption to, or cancellation by TfNSW of a Train Path;

“Operations Protocol” means the Operations Protocol designated by TfNSW and which comprises part of the Code of Practice;

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

“Other Operator” means any entity other than the Operator that has a current access agreement for the operation of Trains over the Network.

“Passenger Priority” means reasonable priority to rail passenger services as provided for in Section 99D(5)(a) of the Transport Administration Act and includes priority in relation to:

- (a) the allocation of Train Paths;
- (b) service planning;
- (c) real time control and incident management; and
- (d) Network maintenance and other works;

“Rail Operations” means the operation or moving, by any means, of Rolling Stock on the Network under this Agreement.

“Rail Safety National Law ” means:

- (a) the Rail Safety National Law as applied (with modifications) as a law of NSW by the Rail Safety (Adoption of National Law) Act 2012; and
- (b) any such other NSW Acts which may relate to rail safety;

“Rail Safety Work” has the meaning given in the Rail Safety National Law ;

“Remediation” means the investigation, clean-up, removal, abatement, disposal, dispersal, reduction, destruction, mitigation, control, neutralisation, containment, encapsulation and other treatment of any contamination and any hazard arising from contamination, and includes without limitation the monitoring and remediation of contamination and hazards;

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

“Safeworking Rules” means all policies and notices made available by TfNSW in accordance with clause 12.3 for the purpose of ensuring the safe use of the Network, otherwise known as the **Network Rules and Procedures**;

“Scheduled Train Paths” means the entitlements of the Operator to use the Network in accordance with Schedule 2 of this Agreement as amended or varied permanently under clause 9 or under clause 22;

“Service” means a Train run by the Operator using the Network by which the Operator provides railway freight or passenger services;

“Standards” means the Australian Standard AS4292 - Railway Safety Management and any other principles and standards prepared, approved and published by the Standards Association of Australia in relation to rail safety;

“Tax Invoice” means an invoice as prescribed in the GST Legislation;

“Taxable Supply” is a Taxable Supply as defined in Section 9-5 of the ANTS GST Act;

“Term” means the term of this Agreement as determined in accordance with clause 3;

“TfNSW” means Transport for NSW (ABN 18 804 239 602) as renamed, reconstituted, replaced or restructured from time to time;

“Third Party” means:

- (a) a Governmental Agency carrying out its statutory functions;
- (b) an owner of land adjoining the Network wanting to install services across the Network to that adjoining land; or
- (c) a corporation with statutory powers to enter land or acquire an interest in or right over land (other than a Governmental Agency) wanting to install services across or on the Network to that adjoining land;

“Third Party Works” means any works, Remediation or the provision or maintenance of services which a Third Party undertakes or requires to be undertaken on, over or under the Network (including design, construction, testing and commissioning) by or on behalf of a Third Party but does not include works by or on behalf of TfNSW or its contractors;

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

“Train Control” means the control of Trains by TfNSW on the Network;

“Train Control Centre” means the facility or facilities maintained and operated by TfNSW for the purposes of Train Control;

“Train Control Direction” means all Instructions issued by TfNSW relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains, but only to the extent such Instructions:

- (a) are honestly believed by TfNSW to be consistent with the Operations Protocol; and
- (b) are made with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of TfNSW in issuing the Instruction,

which must be complied with by the Operator immediately;

“Train Control Entity” means the person or entity who conducts the Train Control functions for or on behalf of TfNSW;

“Train Manifest” means a notice in a form specified by TfNSW prepared by the Operator in relation to a Service and containing the following details in relation to that Service:

- (a) the number of vehicles in the Train;
- (b) the gross mass of the Train;
- (c) the length of the Train;

- (d) the motive power employed by the Train; and
- (e) for each vehicle in the Train in the order in which they will be placed, leading end first, the following information:
 - (1) vehicle number;
 - (2) vehicle classification;
 - (3) vehicle type; and
 - (4) gross mass of vehicle;

“Train Paths” means:

- (a) the Scheduled Train Paths; and
- (b) the Ad Hoc Train Paths;

“Transport Administration Act” means the Transport Administration Act 1988 (NSW).

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to one gender includes all genders;
- (c) a reference to a person includes companies and associations;
- (d) a reference to a party includes a person to whom any right or obligation under this Agreement is transferred;
- (e) a reference to the consent of a party means the prior written consent of that party;
- (f) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (g) a reference to a clause or a Schedule is a reference to a clause or Schedule of this Agreement;
- (h) where any party comprises more than one person then all of those persons together as well as each of them individually must comply with that party’s obligations under this Agreement;
- (i) notices that are required to be given in writing by one party to the other, may, if so agreed by the parties, be provided in electronic form;

- (j) a reference to any Act includes all statutes, regulations, codes, by-laws or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments, or replacements from time to time of that Act and a reference to “law” includes a reference to any Act and the common law;
- (k) a reference to \$ and dollars is to Australian currency;
- (l) a reference to the Operations Protocol and the Safeworking Rules includes all amendments or replacements of those documents from time to time, provided the Operator is notified of the relevant amendment or replacement;
- (m) a reference to the Code of Practice includes all amendments or replacements of the relevant documents from time to time and whenever such amendments have a material impact on the Operator’s business activities TfNSW will consult with the Operator and use all reasonable endeavours to minimise the impact of any amendments on the Operator’s business operations.
- (n) to the extent of any inconsistency between the terms of this Agreement and any document comprising the Code of Practice, the terms of the document comprising the Code of Practice will prevail; and
- (o) a reference to a time and date is a reference to the time and date in Newcastle, New South Wales.

1.3 Payment Due on Business Day

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.

1.4 Trustee

If the Operator is a trustee, it enters this Agreement personally and in its capacity as trustee and has the power to enter into and perform its obligations under this Agreement.

2 TRACK ACCESS RIGHTS

2.1 Grant to Operator of Train Paths

- (a) TfNSW grants to the Operator, during the Term, the use and availability of the Train Paths and the use of the Network for the purpose of conducting a Service, upon the terms and conditions set out in this Agreement.

- (b) Notwithstanding clause 2.1(a), the availability of a Train Path is subject to:
- (1) presentation by the Operator to the Train Control Entity of a Train which is ready in all things for departure within 15 minutes of the scheduled time for departure of that Train according to the relevant Scheduled Train Path;
 - (2) emergencies or genuine safety considerations;
 - (3) matters outside of the reasonable control of TfNSW (except for matters which arise due to TfNSW's negligence or breach of its obligations under this Agreement);
 - (4) failure of the Operator's Service;
 - (5) the Operations Protocol;
 - (6) without limiting any other clause of this Agreement, any lawful order, direction or requirement given to TfNSW by a Governmental Agency; and
 - (7) Third Party Works.
- (c) The Operator agrees at all times during the Term not to access or attempt to access the Network in any way other than is authorised by this Agreement.

2.2 Condition Precedent

The Operator is not entitled to exercise any right under clause 2.1 unless an Interface Agreement has been entered into and a copy of this Interface Agreement provided to TfNSW.

2.3 Use of a Train Path is not Exclusive

The Operator's rights to the Train Paths do not give the Operator an exclusive right to any Train Path. TfNSW will ensure that, notwithstanding the foregoing, no two Trains (whether the Operator's Trains or the Trains of another user of the Network) will be allotted scheduled arrival or departure times such that there are conflicts in arrival or departure times.

2.4 Restrictions on Access

The Operator's rights to the Train Paths under this Agreement:

- (a) despite anything else in this Agreement, are subject to the requirements of Passenger Priority;
- (b) are non-exclusive contractual rights and do not give the Operator any right, title or interest of any proprietary nature in the Network;

- (c) do not include any other right or entitlement to access the Network or premises owned or controlled by TfNSW;
- (d) are subject to any safety interface protocols and any safety interface obligations set out in any safety interface plan included within or forming part of the Safety Interface Agreement; and

are otherwise granted on the terms and conditions of this Agreement.

2.5 Warranty of Accuracy of Information

Each party represents and warrants to the other that all material written information provided by the first-mentioned party to the other pursuant to this Agreement and relating to use of the Network is, to the first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.

2.6 Matters Excluded from Rights of Access

The Operator's rights to Scheduled Train Paths exclude, without limitation, any rights:

- (a) to access or use the Network for the purpose of the Operator's light engine movements; and
- (b) any right to access or use:
 - (1) the Network for the purpose of:
 - (A) loading and unloading of Trains;
 - (B) Train queuing and staging;
 - (C) Train marshalling;
 - (D) stowage or stabling of Rolling Stock; or
 - (E) services other than as expressly agreed by TfNSW and on such terms as TfNSW determines; and
 - (2) yards on the Network;

other than on such terms as TfNSW may stipulate in accordance with this Agreement.

2.7 Renewal of this Agreement

- (a) Not less than 120 days before the Expiry Date, the Operator may give notice in writing to TfNSW that the Operator wishes to enter into a new agreement with TfNSW to access the Network, specifying also the desired term of such agreement.

- (b) If, at the time the Operator has given notice under clause 2.7(a), it:
- (1) has paid to TfNSW all monies due to it under this Agreement; and
 - (2) is not otherwise in breach of this Agreement,
- TfNSW will commence good faith negotiations for a new access agreement with the Operator.
- (c) If, at the time the Operator has given notice under clause 2.7(a), TfNSW has an Access Undertaking in force, the terms and conditions of any new agreement between the parties (including the Charges) will be determined in accordance with the Access Undertaking in force at the Expiry Date.
- (d) The Operator does not have any automatic or enforceable rights of renewal or extension of any Scheduled Train Paths under this Agreement.

2.8 Key Performance Indicators

- (a) The parties must develop, agree and document key performance indicators (“Key Performance Indicators”) within 3 months of the Commencement Date. If the parties fail to agree on the Key Performance Indicators within the required timeframe, the Key Performance Indicators will be developed at the sole discretion of TfNSW acting reasonably.
- (b) The Key Performance Indicators will be monitored from the Commencement Date.
- (c) The parties will meet regularly for the purpose of discussing actual performance against the Key Performance Indicators.

2.9 No Trading in Rights of Access

The parties acknowledge that the primary intention of the Operator in entering into this Agreement is to conduct Services on the Network and not to trade in rights to conduct such Services. The Operator will only be entitled to the Train Paths under this Agreement where, in the opinion of TfNSW, such rights are being exercised in accordance with this intention.

3 TERM OF AGREEMENT

This Agreement commences on the Commencement Date and, unless terminated earlier under clause 7.3 or clause 14, will continue until 23:59 hours on the Expiry Date (“Term”).

4 CHARGES AND PAYMENT

4.1 Payment of Charges

The Operator must pay TfNSW:

- (a) the Access Charges for the use of, and access to, the Network; and
- (b) the Incidental Charges, if any are applicable;

at the times and in the manner set out in Schedule 3.

4.2 Determination of Charges

The Charges are calculated by reference to Schedule 3 and are subject to adjustment and review in accordance with Schedule 3.

4.3 Invoices and Monthly Statement

TfNSW will issue the Operator with invoices and monthly statements in accordance with Schedule 3.

4.4 Charges and Payment of Disputed Amounts

- (a) If a bona fide dispute arises concerning the correct amount owing under an invoice issued under clause 4.3, the Operator will notify TfNSW of the nature of the dispute and the disputed amount and pay any amount not in dispute in accordance with Schedule 3.
- (b) Any disputed amount subsequently found to be payable by the Operator is payable 14 days after the resolution of the dispute, including any interest that would have been payable on the disputed amount under clause 4.5 but for the operation of this clause 4.4.

4.5 Interest

- (a) If the Operator defaults in the payment of any amount due to TfNSW under this Agreement (including all amounts in an Invoice), the Operator may be required to pay interest on that amount, or the outstanding balance, until it is paid in full. The interest rate will be:
 - (1) 2 percentage points above the prime lending rate charged on overdrafts of \$100,000 or more by the National Australia Bank or its successor, as published within the Australian Financial Review at the time of such default; or
 - (2) in the event that such a rate is not so quoted or published in respect of any relevant date, as advised in writing by the Senior Manager responsible for Business Services at the head office of the National Australia Bank.

- (b) Subject to clause 4.4, the interest referred to in clause 4.5(a) will accrue and be recoverable from day to day.

4.6 Obligation to Grant Security

- (a) Subject to clause 4.6(b), the Operator must deliver to TfNSW, and keep current at all times during the Term, security for the Operator's obligations under this Agreement in the form of an unconditional and irrevocable bank guarantee, ("Security") issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by TfNSW in the amount of 3 months Charges or \$15,000, whichever is greater and containing such other terms and conditions acceptable to TfNSW.
- (b) The Security referred to in clause 4.6(a) must be provided by the Operator to TfNSW prior to the Commencement Date.
- (c) The Security referred to in clause 4.6(a) is in addition to and without derogation from any other rights TfNSW may exercise against the Operator by reason of the breach of the Agreement. Subject to clause 4.6(d), the continuance of the Security (or any replacement thereof under clause 4.7(b)) is a condition of the performance by TfNSW of its obligations under this Agreement.
- (d) NOT USED.
- (e) If the security has been granted under this clause 4.6 the amount of the Security will be updated every 12 months from the Commencement Date to reflect the then current amount of the 3 months Charges or \$15,000, whichever is greater.
- (f) The term of the Security must be for the same or a greater period than the Term. The term of the Security must be extended to at least match any extension of the Term.
- (g) Upon expiry or termination of the Agreement, TfNSW shall release the Security to the Operator provided that at such time the Operator is not in default in the payment of any monies owed by it to TfNSW under this Agreement or in breach of any of its obligations under this Agreement.

4.7 Exercise of Security

- (a) The Security shall be held by TfNSW as security for the performance of the obligations of the Operator under this Agreement and may be called upon by TfNSW in any circumstances in which TfNSW suffers any loss as a result of default by the Operator under this Agreement.
- (b) If TfNSW exercises or draws on the Security, the Operator must promptly provide a replacement bank guarantee for the amount

drawn or exercised by TfNSW against the Security and otherwise on the same terms as the Security.

4.8 Goods and Services Tax

- (a) The parties agree
 - (1) all payments due under this Agreement have been set or determined without regard to the impact of GST;
 - (2) if the whole or any part of a payment is the Consideration for a Taxable Supply in respect of which GST is payable, the GST amount in respect of the payment must be paid to the payee as an additional amount, either concurrently with the payment or as otherwise agreed in writing; and
 - (3) the payee must provide to the payer a Tax Invoice at the same time at which any GST amount is payable.
- (b) Despite any other provision of this Agreement, if a payment due under this Agreement is a reimbursement or indemnification by one party of an expense, loss or liability incurred or to be incurred by the other party, the payment shall exclude any GST forming part of the amount to be reimbursed or indemnified for which the other party can claim an Input Tax Credit.

4.9 Costs

- (a) The Operator agrees, as between the parties, to pay, if payable, any legal costs of execution (including without limitation any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on this Agreement and any document contemplated or allowed by this Agreement, excluding any of TfNSW's internal costs relating to the execution of this Agreement.

4.10 No Set Off

The Operator is not entitled to set off any monies:

- (a) payable by it under this Agreement against any monies claimed by it or owing to it whether under this Agreement, or any other agreement with TfNSW or otherwise; or
- (b) claimed by it or owing to it whether under this Agreement, or any other agreement with TfNSW or otherwise against any monies payable by it under this Agreement.

5 CONTROL AND MANAGEMENT OF ACCESS TO THE NETWORK

5.1 TfNSW to Control

As between the parties control of the Network and, subject to this Agreement, management of access to the Network remains at all times with TfNSW.

5.2 Warranty of Entitlement to Grant Access

TfNSW warrants that as at the Commencement Date it is entitled to grant access to the Network.

5.3 Network Access Provider's Obligations

TfNSW agrees at all times during the Term:

- (a) to undertake or procure the function of Train Control;
- (b) to comply with the Operations Protocol;
- (c) to receive, record and collate information from the Operator and other users of the Network for the purposes of generating the Invoices and exercising the functions referred to in clauses 5.3(a) and (b);
- (d) to provide access to one or more Train Control Centres and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system;
- (e) to use its reasonable endeavours to provide the Operator with details, as soon as reasonably practicable, of all operating incidents (including an Incident) which has affected or which is reasonably likely to affect the ability of any Operator's Train to retain its Train Path, or else affect the Operator's Train's security or safety or the security and safety of the freight or passengers on an Operator's Train; and
- (f) to comply with all applicable Acts of the Commonwealth and New South Wales, subordinate legislation, municipal by-laws and other laws in any way applicable to TfNSW's management, control and ownership of the Network.

5.4 Operator's Rolling Stock

The Operator agrees as at the Commencement Date and at all material times during the Term to maintain each Train operated by the Operator on the Network in a good and safe operational condition and to at least the

minimum standard required for Accreditation, throughout the whole of its journey from the point of entry to the point of exit from the Network.

5.5 Operator's Obligations

The Operator agrees at all times during the Term:

- (a) to use its best endeavours to ensure that its use of the Network complies with the Train Paths applicable to each Service;
- (b) to comply with the Code of Practice;
- (c) to notify the Train Control Entity immediately if it becomes aware that a Service is unlikely to comply with or has not complied with the applicable Train Path;
- (d) to ensure that its use of the Network is carried out in such a way as to minimise Obstruction of the Network and so that use of the Network by any other user authorised by TfNSW is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an Instruction validly given);
- (e) to comply with all applicable Acts of the Commonwealth and New South Wales, subordinate legislation, municipal by-laws and other laws in any way applicable to operation of the Services or its use of the Network;
- (f) not to change, alter, repair, deface or otherwise affect any part of the Network, TfNSW's property or property of third parties provided that the obligation of the Operator in this clause extends only to such matters to the extent that they were caused or contributed to by the Operator or Train operations it conducts and does not include normal wear and tear of the Network where the Operator is accessing the Network in accordance with the terms of this Agreement;
- (g) not to damage the Network, TfNSW's property or property of third parties. For the purpose of this clause "damage" does not include normal wear and tear where the Operator is accessing the Network in accordance with the terms of this Agreement;
- (h) to provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre and to use such equipment to communicate with the Train Control Entity;
- (i) where TfNSW proposes to change communications equipment in the Train Control Centre:

- (1) each party agrees to share information and cooperate with the other party and any Communications or TMS Provider to the extent that may be required to ensure that the parties' obligations in clauses 5.3 and 5.5 are achieved; and
 - (2) where such proposal will result in the Operator having to replace or upgrade its communications equipment, TfNSW will consult with the Operator and the Operator will, after such consultation and after reasonable notice from TfNSW to the Operator, replace or upgrade the communications equipment, at the Operator's cost, TfNSW using reasonable endeavours to minimise such costs, to be compatible with the equipment used in the Train Control Centre;
- (j) subject to clause 18, to provide to TfNSW such information related to the operation of the Services (excluding commercial information) as TfNSW reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator, other operators and the public;
 - (k) to provide to TfNSW a Train Manifest in a format acceptable to TfNSW for each Service not less than 15 minutes prior to that Service commencing use of the Network and to provide notice in a form specified by TfNSW of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network;
 - (l) to inform TfNSW as soon as reasonably practicable of any cancellation or intended cancellation by the Operator of any Service;
 - (m) to provide promptly to TfNSW a copy of any notice, order or direction received by the Operator from a Governmental Agency which affects or relates to the use of the Network;
 - (n) to ensure that any item of freight or material, including but not limited to, minerals, bulk goods or commodities (in whatever form), being hauled on or in a Train operated by the Operator does not fall, leak, spill, escape or become deposited on or adjacent to the Network; and
 - (o) to inform TfNSW as soon as reasonably practicable upon becoming aware that a Scheduled Train Path will not be used for the purposes of either transporting the Commodity or providing services to the Customer specified in Schedule 2.

5.6 No hindrance to third party access

The parties must not engage in any conduct aimed at hindering use of the Network by a third party.

5.7 Removal of Rolling Stock from Network - General

- (a) If TfNSW reasonably considers that Rolling Stock operated by the Operator is causing an Obstruction on the Network, the Operator will, upon being notified in writing or by electronic mail of that Obstruction, arrange for the Rolling Stock operated by the Operator to be moved by or at the time specified in such notice off or to another part or parts of the Network nominated by TfNSW.
- (b) Subject to clause 5.7(c), if the Operator does not move the Rolling Stock in accordance with clause 5.7(a), the Operator will irrevocably appoint TfNSW as its agent for the purposes of TfNSW arranging for the Rolling Stock to be moved to another part or parts of the Network, at the cost and expense of the Operator in all things.
- (c) Notwithstanding any other provision of this Agreement, the Operator will release and indemnify TfNSW and its Employees for all and any Claims arising from or related to the movement arranged by TfNSW under clause 5.7(b), including without limitation where such Claim is caused by the negligence of TfNSW or its Employees.

5.8 Provision of Assistance following an Incident

- (a) TfNSW may clear or, by issuing an Instruction, require the Operator to clear or assist in the clearance of, any Incident or Obstruction which occurs on or near the Network.
- (b) If the Operator does not comply with an Instruction under clause 5.8(a) the Operator will irrevocably appoint TfNSW as its agent for the purposes of clearing any Incident or Obstruction on the Network where any such Incident involves the Operator's Rolling Stock.
- (c) The Operator is responsible for and must reimburse TfNSW all costs and expenses incurred by TfNSW in clearing any Incident or Obstruction involving the Operator's Rolling Stock.
- (d) Where TfNSW issues an Instruction requiring the Operator to assist in the clearance of Rolling Stock of an Other Operator in relation to any Incident or Obstruction on or near the Network:
 - (1) TfNSW will pay to the Operator the Operator's actual direct costs provided that the Operator uses reasonable endeavours to minimise the costs incurred; and
 - (2) TfNSW indemnifies the assisting Operator against any claim that arises in complying with the Instruction except to the extent that the claim is caused or contributed to by the Operator's wilful, dishonest, negligent or unlawful conduct.
- (e) Where TfNSW issues an Instruction requiring an Other Operator to assist in the clearance of the Operator's Rolling Stock involved in

any Incident or Obstruction which occurs on or near the Network, the Operator will indemnify TfNSW against:

- (1) the actual direct costs incurred in providing the assistance, provided that the Other Operator uses reasonable endeavours to minimise the costs incurred; and
- (2) any claim that arises from TfNSW arranging assistance and the Other Operator complying with the Instruction except to the extent that the claim is caused or contributed to by TfNSW or the Other Operator's wilful, dishonest, negligent or unlawful conduct.

5.9 Appointment of an Agent to manage the Network

The Operator acknowledges and agrees that TfNSW may appoint Agents to manage the Network on its behalf and to administer this Agreement on its behalf, provided that TfNSW gives the Operator prompt written notice of the appointment of each Agent. The Operator agrees that in these circumstances:

- (a) each Agent is empowered to act on behalf of TfNSW as its agent with respect to TfNSW's rights and obligations under this Agreement within the scope of its appointment (as notified to the Operator by TfNSW) but not otherwise; and
- (b) no Agent is liable to the Operator for any of its acts or omissions and that the Operator is not entitled to make any Claim against an Agent except where the Agent is acting outside the scope of its authority.

In particular, the Operator acknowledges and agrees that TfNSW may engage an Agent to carry out all or any part of its Train Control functions or its rights and obligations under this Agreement, in which case the Operator agrees to comply with any exercise of such delegated functions by the Agent, provided always that:

- (c) no Agent can amend this Agreement or any Schedule to it; and
- (d) TfNSW is liable to the Operator for the acts and omissions of an Agent acting within the scope of its appointment as notified by TfNSW under clause 5.8(e)(2)9(a) as if they were the acts or omissions of TfNSW.

The Operator agrees that copies of all documentation provided by the Operator to TfNSW under this Agreement can be provided by TfNSW to any Agent.

5.10 Revocation of Appointment of an Agent

TfNSW must give the Operator prompt written notice of revocation of the appointment of any Agent or of any change to the scope of an Agent's appointment.

6 REPAIRS AND MAINTENANCE OF THE NETWORK

6.1 TfNSW to Repair and Maintain the Network

Subject to clauses 6.2, 6.3, 9.4, 9.5, 9.11 and 15.12 and any direction by a Governmental Agency to the contrary, TfNSW agrees at all times during the Term to maintain the Network (but only in so far as the Network is relevant to the Operator's Scheduled Train Paths) in a condition which is fit for use by the Operator to provide rail transport services including the Services, consistent with this Agreement.

6.2 Wear and tear

Without limiting clause 15.12, TfNSW shall not be in breach of its obligation under clause 6.1 of this Agreement where the Network is not fit for use due to damage to or wear and tear of the Network which could not reasonably have been ascertained by and repaired by TfNSW prior to the passage of any Train operated by the Operator on the Network.

6.3 Operating Restrictions

When required by the condition of the Network or any part of the Network, TfNSW may (to the extent of such requirement only) give notice of speed and weight restrictions and the Operator must comply with such a notice.

7 ACCREDITATION

7.1 Accreditation Warranty

- (a) Each party warrants that during the Term each such party has and will maintain Accreditation to the extent required by law, including, in the case of the Operator, all accreditation required by law in relation to Rolling Stock used by the Operator on the Network.
- (b) The parties will notify each other of any notice received from any Governmental Agency affecting Accreditation.
- (c) The Operator must not run Rolling Stock on the Network in breach of clause 7.1(a) or if it does not have in place all approvals required under the Rail Safety National Law.
- (d) Where a third party audit of equipment or maintenance practices is requested by the Accrediting Authority with respect to the maintenance of the Operator's Accreditation, the Operator will

provide a copy of that audit to TfNSW at the same time such audit report is given to the Accrediting Authority.

- (e) Subject to clause 7.4, if a party loses part or all of its Accreditation or has part or all of its Accreditation suspended, and such Accreditation is relevant to the Operator's obligations under this Agreement, that party must use its best endeavours to regain or have restored its full Accreditation as soon as is reasonably practicable.

7.2 Evidence of Accreditation

Subject to clause 7.4, each party must on or before the Commencement Date (and in the case of Accreditation which is obtained for the first time after the Commencement Date, then as soon as practicable after such Accreditation is obtained) provide to the other party evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation relevant to the Operator's obligations under this Agreement must be provided by a party to the other party on the written request of the other party.

7.3 Termination of this Agreement by Reason of Suspension or Cancellation of Accreditation

Subject to clause 7.4, if either party's Accreditation relevant to the Operator's obligations under this Agreement is:

- (a) suspended for a continuous period of longer than 6 months; or
- (b) cancelled for a continuous period of longer than 1 month,

the other party has the right to terminate this Agreement by notice in writing to the Party that has had its Accreditation so suspended or cancelled. This clause does not derogate from the parties' rights under clause 14 in respect of termination of this Agreement.

7.4 Accreditation not required by law

Clauses 7.1(a), 7.1(e), 7.2 and 7.3 do not apply to a party if the party is not required to be Accredited by law.

8 COMPLIANCE

8.1 Issue of Instructions by TfNSW

- (a) TfNSW may issue Instructions to the Operator.
- (b) Instructions may include, but are not limited to, instructions or directions:

- (1) to cease use of a Train Path by the Service and for the Service to proceed over such path on the Network as TfNSW nominates;
 - (2) to continue use by the Service of the Network subject to such variation of the applicable Train Path or the Service or the composition or quality of Trains as TfNSW nominates;
 - (3) to cause the Service to proceed to a point on the Network and stand there until TfNSW issues a further instruction or direction in relation to the Service;
 - (4) without limiting the generality of clauses 8.1(b)(1) to (3), if the Service operates outside of its Train Path, to delay or redirect the Service to allow access to the Network by an Other Operator of a Train (including, if relevant, TfNSW) whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed; or
 - (5) to clear or assist in the clearance if any Incident or Obstruction on or near the Network, pursuant to clause 5.8.
- (c) TfNSW must:
- (1) in giving any Instruction use reasonable endeavours to minimise the disruption to the Operator's Services; and
 - (2) other than in an emergency, consult with the Operator in giving an Instruction concerning the use of an Operator's locomotive and its crew for the purpose of assisting in the clearing of an Obstruction.
- (d) If an Instruction which varies the Operator's Train Paths is intended by TfNSW to be permanent, such permanent effect of the Instruction will not take effect until the procedure in clause 9.2 for permanent variation of a Train Path has been satisfied. Until the clause 9.2 procedure has been satisfied such Instruction will nevertheless have a temporary effect.
- (e) As soon as is reasonably practicable and in any event before an Instruction becomes effective, TfNSW must give to the Operator a written copy of the Instruction if such Instruction is ordinarily advised in writing by TfNSW to operators.

8.2 Compliance by the Operator with Instructions and Train Control Directions

- (a) Subject to clause 8.2(c), the Operator will comply with all Instructions and will promptly advise all relevant Employees of any changes to or the making or giving of Instructions.

- (b) If an Instruction is a Train Control Direction, it must be complied with immediately.
- (c) Unless the Train Control Entity gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance.
- (d) The Operator must comply with all Instructions in such a way as to reasonably minimise disruption to any other person's use of the Network.
- (e) Subject to clause 15, TfNSW is not responsible for any delay suffered or cost incurred by the Operator in complying with a proper Instruction of TfNSW, and the Operator releases TfNSW from any Claim arising from such compliance.
- (f) Subject to clauses 5.7(c) and 15, the Operator is not responsible for any delay suffered or cost incurred by TfNSW in the Operator complying with a proper Instruction of TfNSW, and TfNSW releases the Operator from any such Claim arising from such compliance.

8.3 Compliance

The Operator must at its own cost during the Term:

- (a) comply with all laws which affect or relate to the use of Train Paths and the Services;
- (b) comply with all notices, orders and directions lawfully issued or given by or agreements with a Governmental Agency which affect or relate to the use of Train Paths and the Services; and
- (c) obtain, maintain and comply with all approvals, licences or permits which from time to time may be necessary or appropriate for the use by the Operator of Train Paths or for the Services or required by the Code of Practice; and
- (d) comply with and/or not cause TfNSW not to comply with all approvals, licences or permits obtained by TfNSW with respect to the Network, provided TfNSW has given the Operator notice of such approval, licence or permit.

9 VARIATION OR CANCELLATION OF TRAIN PATHS

9.1 Examples of Temporary Variations of Train Paths by the giving of Instructions by TfNSW

- (a) For the avoidance of doubt, and without limiting the generality of clause 8.1(a), the Operator's Train Paths may be temporarily varied by the giving of Instructions:
- (1) for the purpose of preventing any actual or potential:
 - (A) breach of the Safeworking Rules or of clause 12 by the Operator or of similar safety requirements by other operators on the Network;
 - (B) material damage to the Network or TfNSW's property;
 - (C) injury to any person or damage to any property;
 - (D) delay to the progress of Trains on the Network (but only insofar as any Trains operated by a third party have priority over the Operator's Trains having regard to the Operations Protocol); or
 - (E) terrorism or security matters; or
 - (2) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its material obligations under this Agreement.
- (b) The Instructions referred to in clause 9.1(a) may comprise, but need not be confined to, Instructions in one or more of the following terms:
- (1) to cease use of a Train Path by the Service and for the Service to proceed over such path on the Network as TfNSW nominates;
 - (2) to continue use by the Service of the Network subject to such variation of the applicable Train Path or the Service or the composition or quality of Trains as TfNSW nominates;
 - (3) to cause the Service to proceed to a point on the Network and stand there until TfNSW issues a further Instruction in relation to the Service; or
 - (4) if the Service operates outside of its Train Paths, to delay or redirect the Service to allow access to the Network by another operator of a Train whose service would, but for the

delay or redirection of the Operator's Service, be delayed or further delayed.

9.2 Permanent Variations to Scheduled Train Paths

- (a) This clause 9.2 sets out the procedure to be followed by the parties if it is intended that a Scheduled Train Path is to be permanently varied.
- (b) A Scheduled Train Path may be varied for the remainder of the Term (or for such other duration as may be agreed) if:
 - (1) one party to this Agreement ("Requesting Party") sends a notice to the other party ("Notified Party") stating:
 - (A) that the Requesting Party wishes to vary the use by the Operator of a Scheduled Train Path;
 - (B) the length of time such variation will be in force; and
 - (C) the reason or reasons for the proposal by the Requesting Party; and
 - (2) subject to the qualifications set out in clauses 9.4, 9.5, 9.6, 9.11 and 19.2, the Notified Party consents to the Requesting Party's proposed variation, such consent to be withheld only upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required:
 - (A) by reason of TfNSW's obligations relating to safety of the Network;
 - (B) for the purpose of Passenger Priority; and
 - (C) for the purpose of maximising the use and reliability of the Network).
- (c) Subject to clauses 9.4, 9.5, 9.6, 9.11 and 19.2, the Requesting Party must give not less than 30 days notice of a variation request under clause 9.2(b)(1).
- (d) The Notified Party's response as to whether it consents or not under clause 9.2(b)(2) to the Requesting Party's notice given under clause 9.2(b)(1) must be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party's response is to refuse consent, the Notified Party must within such time also provide full reasons in writing to the Requesting Party.

9.3 Requests for new Scheduled Train Paths and Ad Hoc Train Paths

- (a) At any time during the Term the Operator may request a new Scheduled Train Path or an Ad Hoc Train Path by submitting an application in accordance with the Operations Protocol.
- (b) TfNSW must deal with the application in accordance with the procedures set out in the Operations Protocol.
- (c) TfNSW must use its reasonable endeavours to provide the Operator with any new or varied Scheduled Train Path or Ad Hoc Train Path requested by the Operator subject to:
 - (1) availability and capacity on the Network;
 - (2) the reliability of the Network;
 - (3) the bona fide requirements of existing and/or prospective users of the Network for the requested Train Path;
 - (4) the agreement or determination of the revised Access Charges in accordance with clause 4.2;
 - (5) the requirements of Passenger Priority; and
 - (6) compliance with the Operations Protocol.
- (d) Any request for a new Scheduled Train Path must be in writing and include the information set out in Schedule 2.

9.4 Repairs, Maintenance and Upgrading of the Network

- (a) Notwithstanding any other provisions to the contrary in this clause 9, but subject only to clauses 9.4(b), 9.4(c) and 9.5, TfNSW may, without notice to the Operator, perform repairs, maintenance or upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network, the carrying out of any new work on the Network or taking possession of the Network are reasonably likely to materially affect the Scheduled Train Paths, TfNSW must, prior to commencement of the works:
 - (1) take all reasonable steps to minimise any disruption to the Scheduled Train Paths;
 - (2) notify the Operator of the works as soon as reasonably practicable; and
 - (3) use its reasonable endeavours to provide an alternative Train Path,

but need not obtain the Operator's consent to such repairs, maintenance or upgrading, or possession of the Network.

- (c) Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. When planning a possession of the Network TfNSW will use its reasonable endeavours to minimise disruption to Services. TfNSW will consult with the Operator a reasonable time before taking possession of the Network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to Services.

9.5 Third Party Works

- (a) The Operator acknowledges that:
 - (1) Third Parties (some of whom have statutory rights) may wish to carry out or require to be carried out Third Party Works on the Network during the Term; and
 - (2) notwithstanding any other provision of this Agreement, TfNSW reserves the right to permit Third Parties to carry out Third Party Works.
- (b) Notwithstanding any other clause of this Agreement, the parties agree TfNSW has no liability to the Operator nor will the Operator make a claim against TfNSW for any costs, expenses, losses or damages incurred by the Operator in relation to or as a consequence of Third Party Works.

9.6 Removal of Train Path for Under Utilisation

- (a) TfNSW has the right, by notice in writing to the Operator, to either:
 - (1) delete any Scheduled Train Path from Schedule 2 (upon which deletion Schedule 2 is deemed to be amended accordingly); or
 - (2) suspend an Operator's right to use a Scheduled Train Path for a period of time determined by TfNSW,

upon the first of either of the following occurring:

- (3) the Service using that Scheduled Train Path is not operated 7 or more times (whether consecutively or not) out of any 12 such Services which are consecutively scheduled. Such notice may only be given within 14 days after the seventh occasion of not operating; or
- (4) the Service using that Scheduled Train Path is not operated for a consecutive period of 30 days.

- (b) Other than if the parties agree to substitute an alternative Train Path, a Service has not been operated within the meaning of clause 9.6(a) if the Operator has failed:
 - (1) to present a Train at the scheduled entry point onto the Network; or
 - (2) to operate the relevant Train so that it completes its full journey,

in conformance with the locations, days and times, or for the purposes of transporting the Commodity for the Customer set out in the Scheduled Train Paths applicable to such Service.

9.7 Review of Scheduled Train Paths

- (a) Scheduled Train Paths will be subject to a review in accordance with this clause 9.7.
- (b) TfNSW may at its discretion by written notice given to the Operator cause a Scheduled Train Path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the Scheduled Train Path with the performance during the preceding continuous 3 month period of the actual Trains using or purporting to use that reviewable entitlement (“3 month history”).
- (c) If, on such comparison of the Scheduled Train Path with the 3 month history, the departure or arrival times for a Train using or purporting to use the Scheduled Train Path differ in material respects, the parties will negotiate in good faith to amend the Scheduled Train Path so that the Scheduled Train Path reflects, as closely as is reasonably practicable, the 3 month history.
- (d) Nothing in this clause 9.7 compels TfNSW to offer a Train Path to the Operator under clause 9.7(c) if:
 - (1) such Train Path is unavailable by reason of contractual obligations owed by TfNSW to any person (including the Operator);
 - (2) to do so would adversely impact on TfNSW’s ability or opportunity to efficiently and safely manage the Network; or
 - (3) the Operator does not agree to pay all fees and Charges applicable to such offered Train Path.
- (e) Nothing in this clause 9.7 compels the Operator to accept a Train Path offered by TfNSW under clause 9.7(c) if contractual obligations owed by the Operator to any person (including TfNSW) would prevent it from doing so.

9.8 Cost of Variation

Subject to clauses 5.7(c), 9.5(b), 9.11 and 15, any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under clauses 9, 19.2 and 22 will be borne between the parties to this Agreement in such proportions as the parties agree (based on negotiations carried on in good faith) or, in the absence of such agreement, and subject to a party's obligations under clauses 5.7(c) and 15 to indemnify the other in the circumstances set out in those clauses, by the party which incurs such losses, additional costs or other damages.

9.9 Effect of Variations to Train Paths on Schedule 2

- (a) A temporary variation pursuant to clauses 8.1, 9.1, 9.4, 9.5 or 9.6 of the Scheduled Train Paths has the effect of suspending all contrary or inconsistent Scheduled Train Paths in Schedule 2 for the duration of such temporary variation.
- (b) Only permanent variations pursuant to clauses 8.1, 9.2, 9.5, 9.6, 9.7, 19.2 or 22 of the Operator's Scheduled Train Paths will be and are hereby deemed to be an amendment to Schedule 2.

9.10 Cancellation of Scheduled Train Paths by the Operator

- (a) The Operator may, upon 24 hours prior written notice to TfNSW, cancel in any 12 month period, with the first 12 month period commencing on the Commencement Date, such number of Services per Scheduled Train Path as specified in Schedule 2, if any, with no liability to TfNSW to pay for the Charges in respect of the Services so cancelled. For the purpose of this clause, each one way journey is deemed to be a separate Service.
- (b) The Operator may permanently cancel a Scheduled Train Path at will by serving a written notice on TfNSW.
- (c) Subject to clause 9.10(a), where the Operator permanently cancels a Scheduled Train Path, the Operator remains liable for the flagfall component or applicable cancellation charge, as specified in Schedule 3, for the next 10 Business Days after the Operator notifies TfNSW of its intention to cancel the Scheduled Train Path, whether or not the Operator operates a Service.
- (d) Nothing in clauses 9.10(b) and 9.10(c) prevents the Operator from operating a Service during the 10 Business Day period and paying TfNSW the full Charges payable under this Agreement in respect of that Service.
- (e) A notice given by the Operator in accordance with this clause 9.10 will be and is hereby deemed to be an amendment to Schedule 2 upon the expiry of the 10 Business Day period referred to in clause

9.10(c) and from that date the Operator must cease using the Scheduled Train Path.

9.11 Cancellation of Scheduled Train Paths by TfNSW

- (a) TfNSW may at any time during the Term determine that part of the Network cannot be used for the provision of freight or passenger services (“Service Withdrawn Line”).
- (b) If a Train Path is partially or wholly located on a Service Withdrawn Line:
 - (1) TfNSW will provide the Operator with written notice of the date on which the Operator must cease using the relevant Train Path (“Cancellation Date”);
 - (2) the Operator's rights to use the relevant Train Path under this Agreement will cease on the Cancellation Date and the Operator must cease using the Train Path from that date; and
 - (3) if the Train Path is a Scheduled Train Path, a notice given by TfNSW under clause 9.1(b)(1) will be and is hereby deemed to be an amendment to Schedule 2 effective from the Cancellation Date.
- (c) If an Operator ceases to use a Scheduled Train Path or TfNSW becomes aware that an Operator will cease to use a Scheduled Train Path on either a permanent or temporary basis for the purposes of either:
 - (1) transporting the Commodity; or
 - (2) providing services to the Customer,

set out in Schedule 2 of this Agreement TfNSW may, by notice in writing to the Operator and in addition to any other right TfNSW has to deal with an Operator’s right to use a Train Path, either permanently revoke or temporarily suspend the Operator’s right to use the relevant Scheduled Train Path.
- (d) The revocation or suspension by TfNSW under clause 9.11(c) may be specified by TfNSW in the notice provided under clause 9.11(c) to take effect immediately or after a period of time specified by TfNSW and from the applicable date the Operator must cease to use the relevant Train Path.
- (e) If a Scheduled Train Path is revoked by TfNSW under clause 9.11(c), a notice given by TfNSW under that clause will be, and is hereby deemed to be, an amendment to Schedule 2 effective from the date specified by TfNSW under clause 9.11(d).

- (f) Notwithstanding any other clause in this Agreement, the parties agree TfNSW has no liability to the Operator nor will the Operator make any claim against TfNSW for any expense, loss or damage suffered by the Operator due to a Train Path becoming unavailable under this clause 9.11.

10 INSPECTION AND AUDIT BY NETWORK ACCESS PROVIDER

10.1 Audit Obligations

- (a) Subject to clause 10.2, TfNSW may at any time, by Instruction from TfNSW to the Operator, require the Operator at its own cost and risk to appoint an auditor who is independent of the Operator (“Independent Auditor”) to carry out an audit in relation to Services of the Operator for the purpose of assessing:
- (1) the Operator’s safety management system;
 - (2) the Operator’s compliance with its safety management system; and
 - (3) the Operator’s compliance with the terms and conditions of this Agreement.
- (b) For the avoidance of doubt, the audit referred to in clause 10.1(a) will include assessment of:
- (1) whether any one or more of the individual wagons used by the Operator in the provision of a Service is loaded in excess of its rated carrying capacity; or
 - (2) whether any one or more of the individual wagons used by the Operator in the provision of the Service is loaded in an unsafe or potentially unsafe manner.
- (c) The Operator will provide TfNSW promptly with a copy of the audit findings of any audit carried out pursuant to clause 10.1(a).

10.2 Limitations on Audit

TfNSW will instruct the Operator to carry out not more than such number of audits under clause 10.1 as are reasonably necessary in all the circumstances.

10.3 Instructions

TfNSW may give an Instruction to the Operator to divert or delay a Service or make any part of a Train engaged in providing a Service available for inspection or weighing.

10.4 Monitoring Equipment

- (a) TfNSW may place on or about its Network, but is under no obligation to, monitoring equipment which will take readings or measurements with the purpose of monitoring the operation of Rolling Stock. The Operator hereby authorises and consents to TfNSW undertaking such monitoring and the collection of data from such monitoring equipment. The Operator accepts that reasonable delays to its Service will be experienced whilst monitoring is being carried out.
- (b) The readings or measurements which TfNSW may take from TfNSW's equipment used for the monitoring of the operation of Rolling Stock will constitute Confidential Information of TfNSW as defined in clause 18 and shall not be disclosed to any other party without the prior written consent of the Operator, or as required by law.
- (c) TfNSW is not required or obliged to provide access to such readings or measurements and the Operator has no rights to access such readings or measurements under this Agreement.
- (d) If the Operator wishes to obtain access to such readings or measurements, TfNSW may grant such access at TfNSW's absolute discretion on terms and conditions required by TfNSW.

10.5 Audit by Operator

- (a) Subject to clause 10.5(b), the Operator may at any time, at its cost and risk, appoint an Independent Auditor to audit any of the railway track and lines comprising the Network for the purpose of monitoring TfNSW's compliance with clause 6.1.
- (b) The Operator's audit under clause 10.5(a) shall:
 - (1) provide TfNSW with 60 days written notice of the proposed inspection;
 - (2) if required by TfNSW, be conducted under the supervision of TfNSW or its nominee and at a time that a representative of TfNSW or its nominee is available to conduct the inspection provided that TfNSW uses reasonable endeavours to make the representative available at a time that is reasonable and convenient to the Operator;
 - (3) be subject to the ability of TfNSW to issue an Instruction to the Operator at any time during the audit to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and Other Operators; and

- (4) be conducted in such a manner so that it does not cause any disruption to any service of any Other Operator granted access to the Network by TfNSW or the provision of services by TfNSW to such operators.
- (c) The Operator will provide TfNSW promptly with a copy of the audit findings of any audit carried out pursuant to clause 10.5(a).

11 EMERGENCIES AND INCIDENTS

11.1 Plans for Dealing with Incidents

- (a) In consultation with the Operator, TfNSW will formulate and periodically review and update plans for dealing with Incidents which are consistent with Accreditation requirements (if any).
- (b) The Operator will formulate a plan for dealing with Incidents and provide the plan to TfNSW or its Agent prior to or on the Commencement Date and will provide an updated plan to TfNSW or its Agent on an annual basis on the anniversary of the Commencement Date. The Operator's plan for dealing with Incidents must be consistent with any plan prepared by TfNSW under this clause 11.1 and is subject to the approval of TfNSW, such approval not to be unreasonably withheld.

11.2 Compliance with Plans and Directions and with Rail Safety National Law

The Operator and TfNSW will follow any plan of the type referred to in clause 11.1 and will comply with their respective obligations under the Rail Safety National Law.

11.3 Notification of Incidents

The Operator and TfNSW each agree to notify the other party to this Agreement of any Incident as soon as possible after becoming aware of the occurrence of the Incident and in accordance with their obligations at law.

11.4 Investigation of Incidents

- (a) Incidents will be investigated as required by law.
- (b) Each party will co-operate with an investigation under this clause 11.4 and, subject to any claims of legal professional privilege, will make available records and personnel relevant to the Incident.
- (c) The Operator agrees to make available applicable records and personnel referred to under clause 11.4(b) to TfNSW and/or the Agent.

- (d) The parties will consult with each other to determine any action to be taken as a result of any investigation under this clause 11.4.

11.5 Operator's Report

Without limiting clause 11.3, if an Incident occurs which involves the Operator and in relation to which TfNSW has given written notice to the Operator that a report is required, the Operator must promptly prepare and submit to TfNSW a written report which must include the following (to the extent relevant to the Incident and reasonably possible for the Operator to ascertain):

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Train operated by the Operator and to the Network;
- (c) the factors which may have contributed to the cause of the loss or damage to the Train operated by the Operator and to the Network (the parties acknowledging that such statement will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary));
- (d) names of the Operator's staff including volunteers in any way involved in the Incident either as principals or as witnesses;
- (e) an analysis in printed format of speed recorder charts for the Train operated by the Operator;
- (f) such other information which is required to be disclosed in a report to the Administering Authority under the Rail Safety National Law; and
- (g) such other information which is required to be disclosed in a report under the Dangerous Goods Code.

11.6 No Disposal of Equipment

Subject to any contrary requirement at law or a pre-existing contract to which the Operator or TfNSW is a party, the Operator and TfNSW:

- (a) must take steps to preserve any property or thing which may be required as evidence as to the cause of any Incident and will, on reasonable notice, give access to the other party to such property or thing for the purposes of inspecting, photographing or testing such property or thing;
- (b) must not engage in conduct which would prejudice an investigation into an Incident, including the disposal of any equipment involved

in such Incident (but only to the extent that such non-disposal is necessary to such investigation); and

- (c) agree that they will be responsible for their own costs of inspecting, photographing or testing any property or thing in relation to such an Incident.

11.7 Interim Responsibility for Recovery Costs

Until responsibility can be properly determined or agreed in relation to an Incident, TfNSW will be responsible for recovery costs in relation to the Network and the Operator will be responsible for recovery costs in relation to all above-rail matters (including the Train operated by the Operator).

12 SAFETY STANDARDS

12.1 Compliance by the Parties

- (a) The parties will, in relation to their respective responsibilities and rights under this Agreement:
 - (1) comply with all applicable safety standards and laws dealing with safety;
 - (2) comply with the Safeworking Rules;
 - (3) comply with the Dangerous Goods Code;
 - (4) comply with the Standards (including any codes of practice developed under the Standards) to the extent not inconsistent with clauses 12.1(a)(1), 12.1(a)(2) and 12.1(a)(3);
 - (5) in addition to the Accreditation (which must be obtained and maintained only if required by law), obtain and maintain such additional accreditation, licences and approvals, and maintain such additional standards, which are required by law;
 - (6) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in clause 7, and subject to clause 12.1(b), ensure that their respective employees, agents and contractors engaged by the parties in or in connection with the Services are competent and appropriately qualified and hold appropriate certificates of competency and obtain and maintain any applicable or appropriate Accreditation and training, and (to the extent permitted by law) to provide to the other party evidence of any such matters upon reasonable request; and

- (7) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in clause 7, and subject to clause 12.1(b), ensure (to the extent permitted by law) that their respective employees and contractors of the parties engaged in or in connection with the use by the Operator of the Network submit to drug and alcohol tests.
- (b) The obligations of the parties under clauses 12.1(a)(6) and 12.1(a)(7) only apply to the extent that the parties' relevant employees, agents or contractors are engaged in Rail Safety Work.

12.2 Notification of Breach

- (a) As soon as practicable after becoming aware of a breach by the Operator of any Safeworking Rules which occurs during or as a result of the use by the Operator of the Network ("Breach") TfNSW may give written notice to the Operator setting out:
 - (1) the time, place and a general description of the Breach;
 - (2) what, in TfNSW's opinion, caused the Breach and which person or persons were responsible for the Breach;
 - (3) the consequences, if any, of the Breach for operation of the Services or the use by other users of the Network;
 - (4) any proposed modification of its procedures which TfNSW intends to make; and
 - (5) any Instruction requiring modification to the Operator's procedures which TfNSW considers that the Operator must make.
- (b) The Operator must comply with any Instruction issued by TfNSW under clause 12.2(a).

12.3 Provision of Safeworking Rules

TfNSW will make an electronic copy of the Safeworking Rules available to the Operator on the Commencement Date, and must thereafter notify the Operator of all amendments to the Safeworking Rules.

12.4 Interface Agreement

- (a) The Operator must not commence using the Train Paths or the Network until the Interface Agreement has been executed by the Operator and the Agent.
- (b) The Operator must comply and must ensure the Operator's Employees comply with the Interface Agreement.

13 ENVIRONMENTAL REQUIREMENTS; DANGEROUS GOODS

13.1 Compliance with Environmental Requirements

Each party must comply with all environmental laws and with their respective environmental policies (insofar as they comply with the law), including all applicable laws and lawful policies dealing with dangerous goods.

13.2 Environmental Management Plans

After TfNSW has given to the Operator a copy of a plan for dealing with environmental effects of operating Trains on the Network, the Operator must, within a reasonable time, and in any case no later than 1 month after the Commencement Date, prepare its own plan for dealing with environmental effects of its operations on the Network, the plan to be consistent with the plan provided by TfNSW under this clause, and give a copy of its plan to TfNSW and its Agent.

13.3 Notification of Carriage of Certain Materials

Other than in the case of Trains which are wholly passenger Trains, the Operator must include in all Train Manifests such detail in relation to the identification of dangerous goods as is required by the Dangerous Goods Code and as is otherwise reasonably required by TfNSW (on terms not inconsistent with the Dangerous Goods Code).

13.4 Notification of Incident involving Dangerous Goods

Other than in the case of Trains which are wholly passenger Trains, the Operator will provide to TfNSW and its Agent details, immediately after the Operator becomes aware, of all incidents (including non-compliance with relevant codes, regulations, bylaws or other statutory provisions, whether or not an Incident) involving dangerous goods including but not limited to any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

13.5 Notification of Environmental Condition

Where:

- (a) TfNSW becomes aware that, as a result of the activities of the Operator under this Agreement, an Environmental Condition exists or has occurred and TfNSW reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or
- (b) TfNSW is given a direction by a competent authority that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition resulting from the activities of the Operator under this Agreement,

then TfNSW may inform the Operator of the relevant requirements and, where practicable, any steps which TfNSW reasonably considers will be necessary to prevent, mitigate or remedy the situation, and the Operator must immediately, or as soon as reasonably practicable after receiving such notice, implement such requirements, Remediation, and any other necessary action so that the Environmental Condition is no longer present or the Environmental Damage is rectified.

13.6 Environmental Licence

The Operator must implement and comply with the conditions of the Environmental Licence (“Licence Conditions”) to the extent that:

- (a) TfNSW has notified the Operator of the Licence Conditions; and
- (b) the Licence Conditions apply to the Operator’s operations and Rolling Stock used or operated by the Operator on the Network.

13.7 Operator Compliance

The Operator agrees that in order to facilitate such implementation and compliance the Operator will, without limiting the Operator’s obligations under clause 13.6:

- (a) ensure that any Trains operated by the Operator comply with the Licence Conditions;
- (b) not operate any Trains on the Network until EPA approval has been obtained; and
- (c) comply with the terms of any applicable EPA approval.

13.8 Environmental Manual

The Operator must implement and comply with the environmental management system manual designated by TfNSW and applying to the Network or as otherwise specified in writing by TfNSW, as amended from time to time (“Manual”) and must also maintain, implement and comply with the Operator’s own environmental management plan (which must not be inconsistent with the Manual).

14 TERMINATION

14.1 Termination for Breach

- (a) If a party (“aggrieved party”) considers the other party (“defaulting party”) has defaulted in the performance of any of its material obligations under this Agreement, the aggrieved party may give notice in writing (“Rectification Notice”) to the defaulting party requiring the defaulting party to:

- (1) rectify the default within a reasonable time; and
 - (2) respond in writing to the aggrieved party, within 48 hours of the receipt of the Rectification Notice indicating either:
 - (A) the steps to be taken to rectify the default and a reasonable timetable for the completion of such steps and confirming that the performance of the steps has commenced (“Rectification Response”); or
 - (B) that it is not in default of the Agreement. This notice will constitute a Dispute Notice under clause 17.1(a).
- (b) If the defaulting party:
- (1) provides a Rectification Response but does not rectify the default within the timetable set out in the Rectification Response;
 - (2) does not provide a notice under clause 14.1(a)(2) within the time specified in that clause; or
 - (3) does not provide a satisfactory Rectification Response meeting the requirements of clause 14.1(a)(2)(A),
- the aggrieved party may, at any time thereafter, terminate this Agreement by giving not less than:
- (4) 7 days written notice to the defaulting party in relation to a default relating to safety; or
 - (5) 14 days written notice to the defaulting party in relation to defaults other than relating to safety.

14.2 Immediate Termination

A party has the right to terminate this Agreement immediately by notice in writing to the other party upon the occurrence of any of the following events:

- (a) the other party assigns or attempts to assign this Agreement in breach of clause 19;
- (b) if any execution is levied against the assets of the other party which are necessary or material for the conduct of the Operator’s business of running the Services or if any such assets of the other party are taken or sold by an encumbrancer or if the other party ceases to carry on business, stops payment or fails to maintain normal and continuous operation of its business for a period of in excess of 14 continuous days except for reasons wholly beyond its control;

- (c) if the other party:
- (1) goes into liquidation otherwise than for the purpose of reconstruction or a meeting was called for the purpose of considering liquidation;
 - (2) has a receiver or a receiver and manager appointed over any of its property;
 - (3) proposes or enters into any scheme of arrangement or a composition with its creditor; or
 - (4) has an official manager, receiver, inspector, administrator or controller appointed pursuant to the provisions of the Corporations Act 2001 (Cwth).

14.3 Suspension

- (a) Without in any way limiting TfNSW's rights under clause 14.1 or clause 14.2, if TfNSW is entitled to terminate this Agreement it may elect to:
- (1) suspend the rights of the Operator under this Agreement until such time as the cause giving rise to the right to terminate is remedied; or
 - (2) permanently remove from this Agreement any or all of the Scheduled Train Paths.
- (b) An election referred to in clause 14.3(a) is revocable at any time by TfNSW and has no effect upon obligations, debts or liabilities which have accrued before the election to suspend this Agreement.

14.4 Effect of Termination or Suspension

- (a) Upon termination or suspension of this Agreement all rights of the Operator to use the Network (to the extent of the termination or suspension) will cease immediately.
- (b) Termination or suspension of this Agreement under any circumstances shall not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement including without limitation any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (c) Upon termination or suspension of this Agreement under any circumstances all covenants and agreements of TfNSW and the Operator (to the extent of the termination or suspension) which by their terms or reasonable implication are to be performed in whole

or in part after the termination or suspension of this Agreement shall survive such termination or suspension.

14.5 Approval of an ACCC Undertaking

- (a) If TfNSW enters into an access undertaking approved by the ACCC to replace the Access Undertaking, either TfNSW or the Operator may, subject to clause 14.5(b), give the other 60 days written notice that it wishes to terminate this Agreement for the purpose of adopting the terms and conditions of the access agreement attached to TfNSW's ACCC approved access undertaking.
- (b) Written notice under clause 14.5(a) of this Agreement may not be given within the period 60 days prior to the Expiry Date.
- (c) Upon the receipt of a notice specified in clause 14.5(a), the parties agree to negotiate in good faith amendment of this agreement to be consistent with the ACCC approved access undertaking. If the parties fail to agree on amendments, this agreement remains in force notwithstanding that it may be inconsistent with the ACCC approved access undertaking.

14.6 Removal of Property from Network

- (a) Within 7 days of the Expiry Date or any earlier date on which this Agreement is terminated, the Operator must remove all of its property (including any Rolling Stock) it owns or uses from the Network.
- (b) If the Operator fails to remove any of its property from the Network within the time specified in clause 14.6(a), TfNSW may cause the property to be removed and stored or sold by TfNSW at the cost of the Operator. If TfNSW sells any of the Operator's property pursuant to this clause, TfNSW must do so by public tender and must pay the proceeds of sale of the property (after deduction of TfNSW's costs of removal and sale, and any other outstanding amounts owed to TfNSW) to the Operator.

15 INDEMNITIES, DETERMINATION OF LIABILITY AND LIMITATIONS

15.1 General indemnities

- (a) Subject to clauses 15.8 to 15.13, the Operator shall indemnify TfNSW and TfNSW's Employees (each a TfNSW Party) in respect of all Claims for which TfNSW or any TfNSW Party will or may be or become liable, whether during or after the Term, in respect of or arising from any loss, damage or injury to property or person, in or near the Network caused or contributed to (but only to the extent of the contribution) by:

- (1) any negligent or wrongful act or omission;
- (2) any default under this Agreement; or
- (3) the use of the Network other than as contemplated by this Agreement,

by or on the part of the Operator or the Operator's Employees.

(b) TfNSW receives the benefit, and is the agent of its Employees for the purpose of receiving on their behalf the benefits of the indemnity given by the Operator in clause 15.1(a) in favour of TfNSW's Employees.

(c) Subject to clauses 15.2 and 15.8 to 15.13, TfNSW shall indemnify the Operator and the Operator's Employees (each an Operator Party) in respect of all Claims for which the Operator or any Operator Party will or may be or become liable, whether during or after the Term, in respect of or arising from any loss, damage or injury to property or person, in or near the Network to the extent caused or contributed to (but only to the extent of the contribution) by:

- (1) any negligent or wrongful act or omission; or
- (2) any default under this Agreement,

by or on the part of TfNSW or TfNSW's Employees.

(d) The Operator receives the benefit, and is the agent of its Employees for the purpose of receiving on their behalf the benefits of the indemnity given by TfNSW in clause 15.1(c) in favour of the Operator's Employees.

15.2 Indemnity – Third Party

Notwithstanding clauses 15.1(a), 15.1(b), 15.1(c) or 15.1(d) the Operator is solely liable for and releases, indemnifies and will keep indemnified TfNSW and TfNSW's Employees against all Claims in respect of or arising out of this Agreement in relation to damage to or loss of any property or personal injury to or death of any person where such person or property is being transported on a Train operated by, for or on behalf of the Operator except to the extent that such damage, loss, injury or death is caused by or contributed to (but only to the extent of the contribution) by the wilful default or any negligent act or omission of TfNSW.

15.3 Defence of Claims

The parties shall render each other all reasonable assistance in the defence of any Claim made against a party by a third party arising out of any Incident or other event giving rise to a Claim. To the extent that a Claim is

subject to an indemnity, the indemnifier has the right, at its own expense, to conduct and settle any third party claim.

15.4 Continuance of Indemnities

The releases and indemnities contained in clause 5.7(c) and this clause 15 for the benefit of either party continue in full force and effect as to any Claims relating to any event, act, omission or default occurring during the Term.

15.5 Determination of Liability

- (a) In the event of an Incident involving the Operator or any other event which results or could result in a Claim by or against the Operator or TfNSW, liability as between the Operator and TfNSW shall be determined:
 - (1) as agreed between the parties;
 - (2) failing such agreement and within one (1) month of either party giving notice to the other requiring agreement on liability, by a loss adjuster appointed pursuant to clause 15.6; or
 - (3) where the amount of the Claim exceeds the sum of \$300,000 and either party is dissatisfied with the report of the loss adjuster, by a court of competent jurisdiction.
- (b) Clause 17 does not apply to any dispute in relation to liability.

15.6 Loss Adjuster

Where a matter is to be referred to a loss adjuster in accordance with clause 15.5 then the following provisions of this clause shall apply:

- (a) the loss adjuster shall be appointed by the parties or, in default of such appointment, within 10 Business Days after the need to appoint a loss adjuster, by the President of the Australasian Institute of Chartered Loss Adjusters;
- (b) the loss adjuster shall:
 - (1) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (2) have no interest or duty which conflicts or may conflict with his function as a loss adjuster, he being required to give full disclosure of any such interest or duty before his appointment; and

- (3) not be an employee of the Operator or TfNSW or of a related body corporate of either party;
- (c) any loss adjuster appointed pursuant to this clause 15.6 shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and the performance of his duties;
- (d) any person nominated as a loss adjuster hereunder shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the Commercial Arbitration Act, shall not apply to him or his determination or the procedures by which he may reach his determination;
- (e) each party must ensure to the best of its ability that the loss adjuster is given the opportunity to interview any Employee involved in or with knowledge of the Incident or event resulting in the Claim or with any other relevant information that may be of use to the loss adjuster;
- (f) subject to any claims for legal professional privilege, each party must promptly make available to the loss adjuster any files, documents, data, recording or other information that may be of use to, or is requested by, the loss adjuster for the purposes of his investigation;
- (g) the loss adjuster will determine the quantum of the relevant Claim and the liability of the Operator and/or TfNSW in respect of such Claim and shall provide a copy of his report on such matters to each of the parties within a reasonable time after his appointment;
- (h) in the absence of manifest error, the decision of the loss adjuster shall be final and binding on the parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than the sum of \$300,000.

15.7 Costs

The costs of a loss adjuster appointed pursuant to this clause 15 shall be borne by the parties in such proportions as liability is determined by the loss adjuster or, where the liability is determined by a court, in such proportions as liability is determined by the court.

15.8 Limited Liability

Notwithstanding any other provisions of this Agreement, neither party is liable for any Consequential Loss suffered by the other party or for which the other party becomes liable.

15.9 Limitation on Claims

Notwithstanding any other provision of this Agreement, neither party shall make any Claim against the other under or in connection with this Agreement, including in relation to the indemnities in clauses 15.1(a), 15.1(c) and 15.2, unless:

- (a) notice of the Claim has been given to the other:
 - (1) within 12 months of the occurrence of the event out of which such Claim arises; or
 - (2) in the case of a Claim for contribution in respect of a third party claim, within:
 - (A) 12 months of the occurrence of the event out of which such Claim arises; or
 - (B) 3 months of receiving the third party claim,

whichever is the later; and

- (b) the amount of the Claim exceeds \$50,000 in respect of:
 - (1) any one occurrence; or
 - (2) a series of related occurrences which are consequent upon or attributable to one source or original cause,

provided that if this condition is satisfied then the party may proceed for the full amount of the Claim and is not limited to only so much of the Claim as exceeds the required threshold of \$50,000.

15.10 Exclusion to Limitation

- (a) The limitation on Claims provided for in clause 15.9(a) shall not apply to a Claim against a party to the extent that the Claim has arisen from any fraud or wilful default of that party.
- (b) In this clause 15.10, wilful default means a wanton or reckless:
 - (1) act;
 - (2) omission; or
 - (3) breach of this Agreement,

which reasonably evidences that the perpetrator wilfully and utterly disregarded the harmful and avoidable consequences to the other party arising from the relevant act, omission or breach of this Agreement.

15.11 Limitation on Liability

- (a) The limitation in clause 15.9(a) will not apply to a Claim if the amount of that Claim, when aggregated with the amounts of any other Claims made (including Claims for loss, damage, costs or expenses which, but for clause 15.9(a), would be recovered under clauses 15.1(a), 15.1(c) and 0 or otherwise) in the same year (a year being the period commencing on the Commencement Date or the anniversary of the same and ending one year later) exceeds the sum of \$200,000. For the purposes of clarification, once the aggregation of Claims under this clause exceeds \$200,000 in any one year, the limitation in clause 15.9(a) does not apply to any further Claims made during that year.
- (b) The limitation in clause 15.9(a) does not apply to Claims made by one party against the other for monies presently due and payable under the terms of this Agreement including, without limitation, payment by the Operator of the Charges.

15.12 Liability – Network Standard

Notwithstanding any other provision of this Agreement, TfNSW will not be liable to the Operator and the Operator will not have or make any Claim against TfNSW in respect of any loss of or damage to real or personal property, including property of the Operator, or personal injury to or death of any person or any other damage, expense, injury, cost or loss whatsoever arising out of or in connection with:

- (a) the standard of the Network or any infrastructure related to the Network; or
- (b) any failure of or defect in the Network or in any infrastructure related to the Network,

except to the extent that such loss, damage, injury, cost or expense results directly from the failure of TfNSW to maintain the Network to the minimum standard required by the Agent's Accreditation as a manager of the Network.

15.13 Obligation to Mitigate/Betterment

- (a) Each party to this Agreement must take reasonable steps to mitigate that party's losses, damage, liabilities, costs and expenses, and a party's entitlement to recover losses, damages, liabilities, costs and expenses will be determined on the basis that the party should have observed the obligation to mitigate.
- (b) Where a party restores or repairs a damaged asset and that repair or restoration results in improved functionality of an asset, such improved functionality shall not be regarded as a betterment and no

reduction or adjustment of the costs of repair or restoration shall be made on that account.

16 INSURANCE

16.1 Operator's Insurance Policies

The Operator must during the Term:

- (a) take out and maintain:
 - (1) a public liability insurance policy in the name of the Operator which also covers the Operator's Employees for their respective rights, interests, and obligations and covering all matters referred to in this Agreement and which includes a principal's indemnity endorsement noting TfNSW and any notified Agent as an interested party in respect of its rights, interests and obligations and covering all matters referred to in this Agreement;
 - (2) a policy of insurance with respect to the Operator's liability to TfNSW pursuant to the indemnity provisions contained in clause 15 to the extent coverable by insurance with a reputable and solvent insurer authorised by the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission or as otherwise approved by TfNSW, for the amount specified in clause 16.2(d)(1) in respect of each and every claim and containing provisions which are standard industry terms for railway operators (it being acknowledged that the Operator is not exempted from any liability in excess of the sum insured nor from any liability to which such insurance does not apply);
 - (3) a policy of insurance against liability for death of, or injury to, persons employed (or deemed to be employed) by the Operator in relation to its rail operations, including liability ensuing under any statute or at common law, to at least the minimum cover prescribed by any statute or otherwise and the Operator will ensure that its contractors have the same type of insurances in place in relation to their employees (including deemed employees); and
 - (4) a policy of insurance covering liability arising from:
 - (A) damage caused by goods transported by the Operator in a sum insured of not less than \$100 million PROVIDED that the Operator will give TfNSW prompt and timely advance notice of any Dangerous Goods (as defined by the Dangerous Goods Code or other relevant law) to be transported by the Operator

in which case TfNSW will be entitled to require a higher level of such insurance not exceeding \$250 million as a condition of the transport of such Dangerous Goods; and

- (B) damage caused to goods transported by the Operator in a sum insured of not less than \$50 million.
- (b) deliver to TfNSW prior to or upon the Commencement Date and annually thereafter on the anniversary of the Commencement Date, copies of such parts of the insurance policies as are relevant to the insurances required under this Agreement and the Certificates of Currency in relation to the policies referred to in clause 16.1(a)(1) and (2) subject to the details of such policies being kept confidential by TfNSW (other than for the purpose of seeking indemnification thereunder).

In relation to any of the Operator's activities conducted wholly outside the State of NSW, the limit of insurance required under clause 16.2(d)(1) may at TfNSW's absolute discretion be reduced to such other amount as TfNSW expressly authorises in writing from time to time.

16.2 Minimum Terms of Policies

Each of the policies of insurance required under clause 16.1 must, to the extent relevant:

- (a) include a principal's indemnity endorsement which notes TfNSW interests arising out of or under this Agreement;
- (b) cover the respective interests of the Operator's Employees;
- (c) be effected with a reputable and solvent insurer authorised by the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission in the area of cover required by TfNSW or as otherwise approved by TfNSW;
- (d) in the case of the public liability insurance policy:
 - (1) be for an amount in respect of any one occurrence of not less than \$250 million or such other amount as is specified by TfNSW from time to time; and
 - (2) cover, at least, any Service conducted by the Operator (and activities connected with them);
- (e) be on such terms and with such excesses as may be approved in writing by TfNSW (such approval not to be unreasonably withheld);

- (f) contain only those exclusions, endorsements or alterations which have been approved by TfNSW in writing prior to their inclusion; and
- (g) contain provisions, acceptable to TfNSW, that require the insurer to give at least 30 Business Days' notice to the Operator and TfNSW of any proposed cancellation or change to the terms of the insurance cover.

16.3 Effect of Insurance

The effecting of insurance does not limit any liability or obligations of a party under this Agreement.

16.4 Proof of insurance

Whenever any policy is taken out or renewed and whenever reasonably requested in writing by TfNSW, the Operator must produce evidence to the satisfaction of TfNSW that the insurance required by this clause 16 is being effected and maintained.

16.5 Failure to produce proof of insurance

- (a) If, after being requested in writing by TfNSW to do so, the Operator fails to produce evidence of compliance with its insurance obligations to the satisfaction of TfNSW, TfNSW may:
 - (1) effect and maintain the insurance and pay the premiums and any amount so paid will be a debt due from the Operator to TfNSW; and/or
 - (2) treat the failure as a breach of a material obligation under this Agreement.
- (b) The rights given by this clause 16.5 are in addition to any other right.

16.6 Notices of potential claims

In addition to any other obligation on the Operator pursuant to this Agreement, the Operator must:

- (a) as soon as practicable after the occurrence of any event that may give rise to a claim under any insurance policy required by this Agreement, notify TfNSW of that event in reasonable detail; and
- (b) thereafter keep TfNSW informed of subsequent developments concerning any claim.

16.7 Settlement of claims

Upon settlement of a claim under any policy required under clause 16.1 covering damage to the Network, including any rail infrastructure facilities, the monies received must be paid to TfNSW and applied by TfNSW towards recovering any loss suffered by it in relation to the relevant event, whereupon the balance of any insurance proceeds shall belong to the Operator.

16.8 Payment of Insurance Excesses

The Operator will be responsible for the payment of any excess or deductible relating to the insurances effected by the Operator under this Agreement and the Operator will not be entitled to recover from TfNSW any excess or deductible so paid by the Operator.

17 RESOLUTION OF DISPUTES

17.1 Procedure to settle disputes

- (a) If there is a dispute between the parties relating to or arising out of this Agreement (“Dispute”) then, unless otherwise expressly agreed to the contrary by both parties or unless otherwise contemplated by this Agreement, such Dispute shall be resolved in accordance with this clause 17. Either party may give to the other party to the Dispute notice in writing (“Dispute Notice”) specifying the Dispute and requiring it to be dealt with under this clause 17. The parties must use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
- (b) The procedure that is to be followed to settle a Dispute arising under this Agreement is as follows:
 - (1) first, negotiation of the Dispute under clause 17.2;
 - (2) second, mediation of the Dispute under clause 17.3; and
 - (3) third, determination of the Dispute under clause 17.4.

17.2 Negotiation

If there is a Dispute between the parties relating to or arising out of this Agreement, then within 7 days after the date of a Dispute Notice, senior representatives from each party must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

17.3 Mediation

- (a) If the Dispute is not resolved under clause 17.2 within 21 days after the date of the Dispute Notice then:

- (1) if the parties agree, they shall attempt to resolve the Dispute by mediation pursuant to clauses 17.3(b), (c), (d) and (e); or
 - (2) if the parties do not wish to resolve the Dispute by mediation under clauses 17.3(b), (c), (d) and (e), either party may by notice in writing to the other, refer the Dispute to be determined by arbitration under clause 17.4(b).
- (b) If this clause applies to the Dispute, the Dispute will be referred to the chief executive officers of both parties or their nominees or delegates who will attempt to resolve the Dispute, including by informal mediation.
- (c) If the Dispute is not resolved within 14 days after being referred to the chief executive officers or their nominees or delegates under clause 17.3(b), the Dispute will be referred to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within 14 days, a mediator appointed by the President of the Law Society of New South Wales acting on the request of either party.
- (d) Unless the parties otherwise agree:
- (1) the mediation shall be conducted by a mediator in accordance with any guidelines for mediation issued by the Law Society of New South Wales (whether or not the mediator is a legal practitioner);
 - (2) the parties may appoint a person, including a legally qualified person to represent it or assist it in the meditations;
 - (3) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
 - (4) the costs of the mediator will be borne equally by the parties.
- (e) Nothing in this clause 17 prohibits a party from seeking and obtaining appropriate injunctive relief.

17.4 Arbitration

- (a) If the Dispute is not resolved within 1 month of the appointment of the mediator (if any) under clause 17.3(c), either party may by notice in writing to the other terminate the mediation proceedings and refer the Dispute to be determined by arbitration under clause 17.4(b).
- (b) Where a Dispute is referred to arbitration under this clause 17.4(b) (whether under clauses 17.3(a)(2) or 17.4(a)), the following shall apply:

- (1) the parties shall appoint as arbitrator the Independent Pricing and Regulatory Tribunal (or an alternative arbitrator appointed by the Tribunal in accordance with Section 24B of the IPART Act);
- (2) the arbitrator so appointed:
 - (A) shall have no interest or duty which conflicts or may conflict with his or her functions as an arbitrator, he or she being required to fully disclose any such interest or duty before his or her appointment; and
 - (B) cannot be an employee of the Operator, TfNSW, the Agent or a related party of either of them;
- (3) the arbitration will be governed by Part 4A of the IPART Act and conducted in accordance with the IPART Act and the Commercial Arbitration Act;
- (4) in the absence of manifest error, the decision of the arbitrator shall be final and binding on the parties subject to any rights of appeal; and
- (5) the costs of the arbitrator and any advisers shall be borne by the parties in such proportions as determined by the arbitrator.

17.5 Other Issues in relation to Disputes

- (a) Subject to clauses 15.5, 15.6, 17.3(e) and 17.5(b), pending completion of the procedure set out in this clause 17, a Dispute must not be the subject of legal proceedings between the parties. If legal proceedings are initiated or continued in breach of this clause 17.5(a), a party to the Dispute is entitled to apply for and be granted an order of the court adjourning those proceedings pending completion of the procedure set out in this clause 17.
- (b) This clause 17 does not prejudice the right of a party:
 - (1) to require the continuing observance and performance of this Agreement by all parties;
 - (2) to institute proceedings to enforce payment due under this Agreement where the requirement for payment is not in dispute; and
 - (3) to seek urgent interlocutory relief or to terminate the Agreement where the basis for doing so is not in dispute.

18 CONFIDENTIALITY

18.1 Acknowledgment of Confidentiality

Each party acknowledges, subject to clause 18.2, that the terms of this Agreement and all information provided by one party (“Provider”) to the other (“Receiver”) under this Agreement (“Confidential Information”) is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider and not use that Confidential Information for any purpose other than the provisions of this Agreement allow.

18.2 Exclusions from Confidential Information

For the purposes of this clause 18 Confidential Information does not include information which is:

- (a) in the public domain at the time of disclosure other than through the fault of the Receiver or of anyone to whom the Receiver has disclosed it;
- (b) obtained lawfully from a third party without restriction on use or disclosure;
- (c) required to be made public by operation of law (subject to the Receiver claiming any immunity, privilege or restriction on or from disclosure that it can reasonably claim), including without limitation information required by any stock exchange, order of any court or any Governmental Agency;
- (d) the amount of the Charges disclosed by the Operator to its Customers or potential Customers;
- (e) information reasonably necessary to be disclosed;
- (f) disclosed by the Operator to Customers or potential Customers in the course of and for the purposes of furthering its business; or
- (g) disclosed by TfNSW in connection with any of the matters described in clause 19.1.

19 ASSIGNMENT OR NOVATION

19.1 By TfNSW

- (a) Subject to clause 19.1(b), TfNSW may not assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement without the prior written consent of the Operator which consent will not be unreasonably withheld.

- (b) TfNSW may assign, novate or otherwise transfer this Agreement, its interest in the subject matter of this Agreement, or any right under this Agreement to a successor of TfNSW or to any other person which takes over responsibility for the management of the Network or any relevant part of it.
- (c) The Operator agrees:
 - (1) to undertake all actions reasonably requested by TfNSW to effect such a novation, assignment or transfer; as set out in clause 19.1(b); and
 - (2) that it is not entitled to make, and TfNSW and any novatee, assignee or transferee will not be liable upon, any claim arising from or in connection with any novation, assignment or transfer contemplated by clause 19.1(b).
- (d) Nothing in this clause 19.1 prevents TfNSW from entering into any sub-contracting or agency agreements or arrangements in relation to any of its functions.

19.2 By the Operator

- (a) Subject to the following provisions of this clause 19.2, the Operator may not license, assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement (collectively described in this clause 19.2 as “assign”):
 - (1) without the prior written consent of TfNSW, which consent is not to be unreasonably withheld; and
 - (2) unless on or before such assignment the assignee enters into a deed of assumption or other agreement with TfNSW on such terms not inconsistent with this Agreement as TfNSW may reasonably determine.
- (b) The Operator may assign, transfer, part with possession, mortgage, charge, encumber or otherwise deal with its rights and interests in this Agreement at any time without the prior written consent of TfNSW if:
 - (1) it gives prior written notice to TfNSW of the assignment, transfer or other dealing;
 - (2) in the case of a mortgage, encumbrance or other similar dealing, the proposed mortgagee or chargee executes a deed with TfNSW which includes an acknowledgment by the mortgagee of TfNSW’s rights under this Agreement and any other terms reasonably required by TfNSW; and

- (3) in the case of an assignment, transfer or other similar dealing, the proposed assignee or transferee:
 - (A) is solvent and capable of performing the obligations of the Operator under this Agreement; and
 - (B) provides Security to TfNSW in accordance with clause 4.6; and
 - (C) is Accredited (or has engaged sub-contractors who are Accredited) to operate on the Network; and
 - (D) executes a direct covenant with TfNSW in a form reasonably satisfactory to TfNSW to perform and observe the terms of this Agreement including an acknowledgment that the track access right conferred under this Agreement are limited to the usage of the Network for the specified Rail Operations.

- (c) If there is or proposed to be a Change of Control of the Operator:
 - (1) the Operator must give prior notice to TfNSW of the Change of Control or proposed Change of Control and provide details of the Change of Control or the proposed Change of Control; and
 - (2) the Operator must:
 - (A) provide evidence (satisfactory to TfNSW) that it is solvent and capable of performing the obligations of the Operator under this Agreement;
 - (B) provide Security to TfNSW in accordance with clause 4.6; and
 - (C) provide evidence (satisfactory to TfNSW) that it is Accredited or that its Accreditation is unaffected or will be unaffected by any Change of Control (or has engaged sub-contractors who are Accredited) to operate on the Network.

19.3 The effect of Assignment

Assignment of this Agreement will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement prior to the date of such an assignment.

20 FORCE MAJEURE

20.1 Suspension of Obligations

The obligations of a party are suspended during the time and to the extent that a party is prevented from or delayed in complying with its obligations for reasons of Force Majeure.

20.2 Obligations of a Party

If a party is unable to perform its obligations due to Force Majeure it will:

- (a) as soon as possible after being affected, give to the other party full particulars of the Force Majeure and the manner in which its performance is thereby prevented or delayed; and
- (b) promptly and diligently take all reasonable and appropriate action to enable it to perform the obligations prevented or delayed by Force Majeure, except that the other party is not obliged to settle a strike, lockout or other industrial dispute.

20.3 Termination for Force Majeure

If a party is prevented or hindered from complying with its obligations under this Agreement as a result of Force Majeure for a period of 1 month then:

- (a) the parties must negotiate in good faith and seek to agree a mutually satisfactory resolution to issues arising from the Force Majeure; and
- (b) if after a further period of 1 month the parties are unable to agree a resolution either party may terminate this Agreement on giving 14 days written notice to the other. The Agreement will terminate on expiry of that notice.

21 GOVERNING LAW

21.1 Law of the Agreement

The law of this Agreement is the law of New South Wales.

21.2 Jurisdiction

The parties submit themselves to the jurisdiction of the courts of New South Wales for all proceedings arising from this Agreement.

22 VARIATION

22.1 Variation to be in Writing

The variation or waiver of a provision of this Agreement, or a party's consent to a departure from a provision by another party, will be ineffective unless in writing, signed by the parties.

22.2 Change of Circumstances

The parties agree that if:

- (a) circumstances relevant to this Agreement materially change, the parties will meet in good faith and consider the future arrangements between the parties under this Agreement; or
- (b) if there is a change in law or a direction by a Governmental Agency which affects the ability of the parties to comply with their obligations under this Agreement, the parties will negotiate in good faith any amendments to the Agreement required to comply with the change in law or the direction.

23 SEVERABILITY

If any provision of this Agreement is voidable, illegal, or unenforceable, or if the Agreement would, if a particular provision were not omitted be void, voidable, illegal or unenforceable, that provision shall (without in any way affecting the validity, legality and enforceability of the remainder of the Agreement) be severed from the Agreement and the Agreement must be read and construed and take effect for all purposes as if that provision were not contained in this Agreement.

24 NOTICES

24.1 Notice

Apart from an Instruction and other communications between the Operator and the Train Control Entity, a notice or other communication required or permitted to be given by a party to another must be in writing and be:

- (a) delivered personally;
- (b) sent to an address in Australia by security post or certified mail, postage prepaid; or
- (c) sent by facsimile transmission, to the facsimile number described below.

24.2 Deemed Notice

A notice or other communication is deemed given if:

- (a) personally delivered, upon delivery;
- (b) mailed to an address in Australia, on actual delivery to the addressee, as evidenced by Australia Post documentation; or
- (c) sent by facsimile (and is other than a notice of termination or suspension of this entire Agreement), on the next Business Day after being sent if following transmission the sender receives a transmission confirmation report or if the sender's machine is not so equipped to issue a transmission confirmation report then upon the sender receiving acknowledgment of receipt.

24.3 Addresses for Service

Each party's address for service is:

- (a) in the case of TfNSW:

Name: Transport for NSW

Address: Level 3
237 Wharf Road
NEWCASTLE NSW 2300

Attention: Principal Manager, Country Rail Contracts, Transport for NSW

Facsimile: (02) 4962 6449

- (b) and in the case of the Operator:

Name: #

Address: #

Attention: #

Facsimile: #

24.4 Change of Address

A party may change its address for service by giving written notice of that change to the other party.

24.5 Twenty-four hour contact details

Each party must provide to the other party, and maintain as current, the name and full details of one or more persons who, together, are available at any time on any day for emergency contact by the other party.

25 RISK AND COST OF PERFORMING OBLIGATIONS

Subject to this Agreement:

- (a) whenever the Operator is obliged or required hereunder to do or effect any act, matter or thing then the doing of such act, matter or thing will, unless this Agreement otherwise provides, be at the sole risk and expense of the Operator; and
- (b) whenever TfNSW is obliged or required hereunder to do or effect any act, matter or thing then the doing of such act, matter or thing will unless this Agreement otherwise provides, be at the sole risk and expense of TfNSW.

26 NO PARTNERSHIP OR AGENCY

Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the parties or be deemed to constitute the Operator as agent of TfNSW for any purpose whatever and the Operator has no authority or power to bind TfNSW or to contract in its name or to create a liability against it in any way or for any purpose.

27 OTHER AGREEMENTS

In the case of any inconsistency between this Agreement and the Access Undertaking, the Access Undertaking will prevail.

28 COUNTERPARTS

This Agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument. The parties agree that copies provided to the other party by facsimile transmission evidence signing by the party sending such facsimile.

29 TRANSFER OF FUNCTIONS OR ASSETS

The Operator acknowledges and agrees that:

- (a) TfNSW may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, liabilities or responsibilities of TfNSW may be transferred to or vested in another entity;

- (b) TfNSW may, or may be required to (including as a result of changes to New South Wales Government policy or directions) add to, or dispose of, any property or assets forming part of TfNSW's assets at its absolute discretion;
- (c) any such change to TfNSW's assets may involve amendment to the Operator's rights and obligations under this Agreement; and
- (d) the Operator will not have, and TfNSW will not be liable for, any Claim as a result of the changes to TfNSW's assets referred to in this clause.

30 SURVIVAL AFTER TERMINATION

Clauses 5.7(c), 15, 16, 17, 18, 21, 23, 24, 25, 26, 27, 28, 29 and 30 continue to apply after the expiration of the Agreement.

LIST OF SCHEDULES

Number	Description
1	Country Regional Network
2	Scheduled Train Paths
3	Charges
4	Code of Practice

SCHEDULE 1 COUNTRY REGIONAL NETWORK

As at April 2013

Schedule of Operational Corridors

Region	Line Name
North	Werris Creek - Armidale
North	Narrabri Junction - Burren Junction
North	Burren Junction - Walgett
North	Camurra - Weemalah
North	Burren Junction - Merrywinebone
South	Joppa Junction - Queanbeyan
South	Queanbeyan - Canberra
South	Junee - Yanco
South	Yanco - Griffith
South	Stockinbingal - Temora
South	Temora - Griffith
South	Temora - Barmedman
South	Barmedman - West Wyalong
South	The Rock - Boree Creek
South	West Wyalong - Ungarie
South	Ungarie - Lake Cargelligo
South	Ungarie - Naradhan
South	Griffith - Hilston
West	Bowenfels - Wallerawang
West	Wallerawang - Orange
West	Orange Junction - Goobang (Parkes)
West	Orange Junction - Dubbo
West	Dubbo - Coonamble
West	Narromine - Nevertire
West	Nevertire - Cobar
West	Wallerawang - Kandos
West	Bogan Gate - Tottenham
West	Nevertire To Warren

Railway track boundaries of Operational Corridors

Location	Interface to	Defined Point
Werris Creek	ARTC	At 411.201km on the Armidale Branch Line adjacent to 1552 signal.
Dubbo (Troy Junction)	ARTC	At 466.231km on the Coonamble Branch Line adjacent to TJ23 signal.
Dubbo	ARTC	At 460.890km adjacent DO1 signal at Dubbo on the Orange Line.
Narromine	ARTC	At 497.809km at Narromine on the Main West Line.
Parkes	ARTC	At 446.950km on the Orange to Broken Hill Main Line adjacent to GJ127 signal
Parkes	ARTC	At 627.491km (via Stockinbingal) on the Forbes to Parkes line adjacent to GJ120 signal.
Bogan Gate	ARTC	At 486.050km on the Tottenham Branch Line
Stockinbingal	ARTC	At 454.906km adjacent SL20 signal on the Temora Branch Line.
The Rock	ARTC	At 551.075km adjacent No. 12 signal on the Boree Creek Branch Line
Junee	ARTC	South Fork at 486.021km at Junee North (via Branch line). North Fork at 484.730km (via Main Line).
Joppa Junction	ARTC	At 232.025km adjacent G6 signal on the Queanbeyan Branch Line
Bowenfels	RailCorp	At 158.800km on the Wallerawang side of the last OHWS No. SL158+768A's.
Narrabri Junction (Walgett Line)	ARTC	At 564.799km on the South Fork and 565.361km on the North Fork.
Camurra	ARTC	679.040km on the Branch line.

SCHEDULE 2 SCHEDULED TRAIN PATHS

Refer to the following _____ (__) pages, as amended from time to time.

SCHEDULED TRAIN PATH ENTITLEMENTS

OPERATOR

Train No	Days of Operation	Commodity	Operator's Customer	No. of Allowed Cancellations per Year	ORIGIN*			DESTINATION*		
					Location	Depart Time	Day	Location	Arrive Time	Day

* It should be noted that the Origin and/or Destination of a Scheduled Train Path may be located outside the Network and therefore the obligations and rights under this Agreement only extends to that part of the Scheduled Train Path that is within the Network.

SCHEDULE 3 CHARGES

1 INTRODUCTION

1.1 Access Charges

Access Charges are payable in relation to all Train Paths and this Schedule sets out how Access Charges are applied.

1.2 Incidental Charges

Incidental Charges apply to Incidental Use and this Schedule sets out how Incidental Charges are applied.

1.3 Basis for Negotiation of Charges

Charges are negotiated with the Operator relative to the commodities and services which are involved in the Operator's access to and use of the Network.

2 CHARGES

2.1 Access Charges for General Freight and Grain

(a) The Access Charges for the carriage of general freight and grain comprises:

- (1) the flagfall component set out in Table 1;
- (2) the usage component set out in Table 1;
- (3) the line grain rate component set out in Table 1; and
- (4) if applicable, charges payable in respect to cancellation of any:
 - (A) Scheduled Train Path in accordance with sub-clause (b) of this clause 2.1; or
 - (B) Ad Hoc Train Path in accordance with sub-clause (c) of this clause 2.1.

(b) The flagfall component of an Access Charge is payable on the Operator's Scheduled Train Path used or allocated for the carriage of general freight or grain, regardless of whether the Service occurs. For a Scheduled Train Path that does not have a relevant flagfall component, if the Service does not occur then

the Operator must pay a Scheduled Train Path cancellation charge of \$250.

- (c) Access Charges, at the rates set within this clause 2.1, are payable by the Operator for every Ad Hoc Train Path used for the carriage for general freight and grain. Where the Operator requests, but does not use an Ad Hoc Train Path, the Operator is not required to pay any Access Charge other than a cancellation charge of \$250.
- (d) The Operator is not required to pay the flagfall component of the Access Charge for a Service that is cancelled as a result of a Force Majeure event, a track possession on the Network, or Train Control Directions (other than a Train Control Direction issued as a result of a failure by the Operator to comply with an obligation under the Agreement) where the Service is unable to be rescheduled as a result.

2.2 Additional Commodities

If the Operator intends to operate passenger services or haul goods not covered by this Schedule it shall negotiate and determine with TfNSW individual Access Charges for the haulage, prior to the commencement of the relevant Service. Any Dispute as to the amount charged or to be charged for such additional haulage will be determined in accordance with the procedures in clause 17.

3 REVIEW AND ADJUSTMENT

- (a) All Charges (comprising Access Charges and Incidental Charges) shall be reviewed in accordance with this clause.
- (b) TfNSW may at any time after the Commencement Date vary the Charges, by giving the Operator at least 60 days notice of any proposed increase of the Charges (“TfNSW’s Notice”).
- (c) The Operator may within the period of 60 days from the date of TfNSW’s Notice, make written submissions to TfNSW on the proposed increase in Charges.
- (d) Any Dispute as to any increase to the Charges will be determined in accordance with the procedures in clause 17.
- (e) If the variation to the Charges is not finalised by the date specified within TfNSW’s Notice, the Operator must continue to pay the Charges payable by it immediately before TfNSW’s Notice.
- (f) Upon finalising the variation of Charges the Operator must, within the following invoice period, pay to TfNSW any

outstanding portion of the Charges due retrospectively from the date specified within the notice or agreed between the parties.

4 INCIDENTAL CHARGES

The Access Charges set in clauses 2.1 and 2.2 of this Schedule do not include charges for Incidental Use of the Network. Charges for Incidental Use of the Network comprise those set out in Table 2 and such other charges as are agreed from time to time by the parties in writing.

5 INVOICES AND MONTHLY STATEMENTS

- (a) TfNSW will issue the Operator with an invoice relating to each period from Sunday to the next Saturday (both inclusive), itemising the Charges payable for each Scheduled Train Path, Ad Hoc Train Path and any Incidental Charges, in accordance with this Agreement.
- (b) The Operator will pay TfNSW in full that amount shown in the monthly statement issued by TfNSW, such payment to be received by TfNSW within 21 days of the date of issue of the statement.

TABLE 1 – GENERAL FREIGHT AND GRAIN ACCESS CHARGES

Line Section	Flagfall \$/Trainkm	Usage \$/'000 GTK	Line Grain Rate \$/Net Tonne
Camurra to Weemelah Narrabri Junction to Burren Junction Burren Junction to Walgett Burren Junction to Merrywinebone Temora to Barmedman Barmedman to West Wyalong West Wyalong to Ungarie Ungarie to Lake Cargelligo Ungarie to Naradhan Griffith to Hillston Dubbo to Coonamble Nevertire to Warren The Rock to Boree Creek Bogan Gate to Tottenham		5.43	

All Other CRN Lines	0.50	2.40	0
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TABLE 2 – INCIDENTAL CHARGES *[Include charge for loading/unloading operations]*

Item	Rate	Value

SCHEDULE 4 CODE OF PRACTICE

1 Documents comprising the Code of Practice

1.1 Documents comprising the Code of Practice are as follows:

- (a) Access Agreement (especially clauses 5.3, 5.4, 5.5, 6, 11 & 12)
- (b) Network Rules & Procedures, incorporating:
 - (1) General rules;
 - (2) Work on track;
 - (3) Train working;
 - (4) Safeworking systems;
 - (5) Signal and signs; and
 - (6) Procedures & forms.
- (c) Train Operating Conditions (**TOC**) Manual, incorporating:
 - (1) Route standards;
 - (2) Locomotive operations;
 - (3) Train operations;
 - (4) Train marshalling restrictions;
 - (5) Loading restrictions;
 - (6) Train inspection;
 - (7) Train numbering;
 - (8) Disabled trains;
 - (9) Operation of track maintenance vehicles;
 - (10) Locomotive and rolling stock data;
 - (11) Track maintenance vehicle data;
 - (12) Section pages; and
 - (13) Track diagrams

- (d) TOC Waivers;
- (e) Local Appendices (CNLAs);
- (f) Safe Notices;
- (g) Country Train Notices (CTNs);
- (h) CRN Master Emergency Response Management Plan (CRN-SQE-SMS-NE-PLA-0022);
- (i) Curve & Gradient diagrams;
- (j) Minimum Operating Standards for Rolling Stock Manual; and
- (k) Operations Protocol.

1.2 Availability of the Code of Practice

Copies of the documents comprising the Code of Practice can be accessed on the website of the Agent, John Holland Rail Pty Ltd (www.jhrcrn.com.au), as amended, varied or updated from time to time, unless otherwise notified by TfNSW.

Signing page

Executed as an agreement

Signed by a duly authorised delegate)
of Transport for NSW and in the)
presence of:)
)
)
)
)
)
)

.....
Signature of Witness

.....
Signature of Delegate

.....
Print name of Witness

.....
Print name of Delegate

.....
Office Held

Signed for or on behalf of [Insert)
corporation name] ACN [Insert ACN)
number] in accordance with)
Section 127 of the *Corporations Act*)
2001 (Cth) by:)

.....
Signature of Director

.....
Signature of Director/Secretary

.....
Print name of Director

.....
Print name of Director/Secretary