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# Commercial Track Access Agreement

*[End User]*

*[Nominated Route(s)]*

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**Arc Infrastructure Pty Ltd**  
ABN 42 094 721 301

**[insert Company name]**  
ABN [insert ABN]

**Note:** *This Agreement comprises, for the purposes of section 47A of the Rail Access Code, the standard access provisions applicable where access rights are to be provided to, and held directly by, an end user (who will then nominate one or more Accredited rolling stock operators to use the access rights to provide services to the end user under their separate transport agreement). This Agreement is based on the following assumptions:*

- *No conditions precedent are necessary; and*
- *There is a common commencement date / expiry date for all Nominated Routes/Scheduled Train Paths.*

*If any of the above assumptions are not true, then the parties will need to seek to negotiate amendments.]*

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# Commercial Track Access Agreement ([End User] [Nominated Route(s)])

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Date ►

Between the parties

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Arc **Arc Infrastructure Pty Ltd**  
ABN 42 094 721 301  
of Level 3, 1 George Wiencke Drive, Perth Airport, Western Australia  
6105

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Customer **[Insert Customer's name]**  
ABN [Insert Customer's ABN]  
of [Insert Customer's address].

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Background

- 1 This Agreement is an arrangement for access based on standard terms pursuant to the Rail Access Code.
- 2 Arc is entitled to grant access rights in respect of the Network.
- 3 The Customer wishes to secure rights to access the Nominated Routes for the operation of Services by one or more Operators appointed by the Customer.
- 4 Arc has agreed to grant rights to the Customer for the operation of Services over Nominated Routes by one or more Operators in accordance with one or more Operational Track Access Agreements on the terms and conditions of this Agreement.

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The parties agree as follows:

# 1 Definitions and interpretation

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## 1.1 Definitions

The meanings of the terms used in this Agreement are set out below.

<b>Term</b>	<b>Meaning</b>
<b>Acceptable Credit Rating</b>	a minimum long term credit rating of either BBB from Standard & Poors or Baa2 from Moody's.
<b>Access Rates</b>	the Fixed Rate and the Variable Rate as set out in or calculated in accordance with item 3, Schedule 2.
<b>Access Term</b>	has the meaning given in clause 2.
<b>Access Year</b>	means each twelve (12) Month period during the Access Term commencing on 1 July and ending on 30 June provided that the initial Access Year begins on the Commencement Date and ends of the next subsequent 30 June and the final Access Year ends on the Expiry Date.
<b>Accreditation</b>	has the meaning given to it under the Rail Safety National Law. Accredited means to hold Accreditation.
<b>Actual Net Tonnes</b>	the aggregate Net Tonnes for all Services during a relevant period, measured in accordance with an industry standard method of weighing that is acceptable to Arc (acting reasonably) and that can be verified by Arc.
<b>Affected Nominated Route</b>	has the meaning given in clause 11.1(k).
<b>Agreement</b>	this document and its schedules, annexures and attachments.
<b>Anti-Corruption Laws</b>	has the meaning given in clause 21.1(a)(2).
<b>Applicable Part 5 Instrument</b>	a 'Part 5 instrument' (as defined in Rail Access Code, section 40(3)) that is applicable to Arc, including the Train Management Guidelines, the Train Path Policy and the Over-payment Rules.
<b>Arc Indemnified Parties</b>	(a) Arc and its Personnel; and (b) each Related Body Corporate of Arc and their Personnel.

<b>Term</b>	<b>Meaning</b>
<b>Arc's Network Rules</b>	the Arc Network Safeworking Rules and Procedures issued in accordance with Arc's safety management system approved under Part 3 Division 6 of the Rail Safety National Law together with any amendments, deletions or additional made in accordance with the safety management system and all policies and notices issued by Arc for the purpose of ensuring the safe use of the Network.
<b>Associated Persons</b>	has the meaning given in clause 21.1(a)(4).
<b>Business Day</b>	a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
<b>Change in Law</b>	<ul style="list-style-type: none"> <li>(a) any amendment, repeal or enactment of any Law;</li> <li>(b) any legally binding change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Government Agency;</li> <li>(c) the making of any new directive, or any change in an existing directive, of any Government Agency that is legally binding;</li> <li>(d) the imposition of a legally binding requirement for authorisations not required as at the Commencement Date;</li> <li>(e) after the date of grant of any authorisation, a change in the terms and conditions attaching to that authorisation or the attachment of any new terms or conditions that are legally binding; or</li> <li>(f) any such authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application being duly made, or being renewed on conditions that are legally binding and which are materially less favourable than those attached to the original authorisation; or</li> <li>(g) any amendment or replacement of any Applicable Part 5 Instrument, or the standard access provisions applicable to Arc, as approved or determined by the Economic Regulator (including where the amendment or replacement was sought or requested by Arc).</li> </ul>
<b>Change in Relevant Tax</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) the imposition of a new Relevant Tax;</li> <li>(b) an increase in the rate of existing Relevant Tax; or</li> <li>(c) a change in the basis of calculation of a Relevant Tax.</li> </ul>
<b>Charges</b>	the Fixed Charge, Variable Charge and Over-payment Charge and any other amount payable by the Customer as set out in or calculated in accordance with Schedule 2, as varied from time to time in accordance with this Agreement.
<b>Claim</b>	a claim, demand, action or proceeding of any nature, whether actual or threatened and includes any claim for payment of money (including damages) arising otherwise in Law or in equity including by statute, in tort for negligence or otherwise.

<b>Term</b>	<b>Meaning</b>
<b>Commencement Date</b>	[insert]
<b>Confidential Information</b>	<p>in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:</p> <ul style="list-style-type: none"> <li>(a) is by its nature confidential;</li> <li>(b) is stated in this Agreement to be confidential;</li> <li>(c) is designated by a party in writing as being confidential; or</li> <li>(d) the receiving party knows or ought to know is confidential,</li> </ul> <p>but excludes information which:</p> <ul style="list-style-type: none"> <li>(e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it;</li> <li>(f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or</li> <li>(g) has been independently developed or acquired by the receiving party.</li> </ul>
<b>Consequential Loss</b>	<ul style="list-style-type: none"> <li>(a) any loss of or damage to any product (including Customer Product), loss of business, loss of profit, economic loss, loss of use, loss of business reputation, loss of opportunities, loss of anticipated savings or wasted overheads, loss of production, loss of revenue, any port, shipping or demurrage costs or fees, or any special damages (except to the limited extent set out below in this definition) or damage to credit rating, howsoever arising and whether in any action in contract, tort (including negligence), equity, or product liability, under statute or any other basis.</li> </ul> <p>The following are expressly excluded from paragraph 1 of this definition:</p> <ul style="list-style-type: none"> <li>(b) in respect of any personal injury claim or claim in respect of the death of any person, special loss or economic loss as those terms are used in the context of such claims;</li> <li>(c) the Customer's liability to pay Arc any amount expressly provided for in this Agreement (including any Charges or other amount payable by the Customer as a debt due);</li> <li>(d) any loss, damage or cost arising out of or in connection with fraud or Wilful Default;</li> <li>(e) without limiting subclause (f) below in this of this definition, the cost of repairing, replacing or reinstating any real or personal property of any person (including Arc and the Customer) other than Customer Product; and</li> <li>(f) any loss, damage or cost arising out of or in connection with damage to third party property other than Customer Product.</li> </ul>
<b>Corporations Act</b>	the Corporations Act 2001 (Cth).

<b>Term</b>	<b>Meaning</b>
<b>Customer Indemnified Parties</b>	the Customer and its Personnel, but excluding any Operator.
<b>Customer Product</b>	means [insert product type] or any other product approved by Arc in writing which is transported by the Operator on a Train Path.
<b>Dangerous Goods Code</b>	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.
<b>Deemed Weight</b>	the deemed weight of Rolling Stock as set out in Schedule 4.
<b>Default Rate</b>	at the relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ( <a href="http://www.rba.gov.au">www.rba.gov.au</a> ) plus 5% per annum.
<b>Destination</b>	(a) for the Scheduled Train Paths, means the destination of the relevant Train Path as specified in Schedule 1;  (b) for all other temporary or ad hoc entitlements (including train paths arising by reason of compliance with instruction from Arc to an Operator) to access the Network which are provided by Arc to an Operator on the terms set out in the relevant Operational Track Access Agreement, means the point on the Network specified in the instruction issued by Arc to the relevant Operator in accordance with the relevant Operational Track Access Agreement.
<b>Dollars, A\$ and \$</b>	the lawful currency of the Commonwealth of Australia.
<b>Economic Regulator</b>	means the Economic Regulation Authority Western Australia.
<b>Environment</b>	has the meaning given the <i>Environmental Protection Act 1986</i> (WA) and 'Environmental' has a corresponding meaning.
<b>Environmental Condition</b>	any Environmental Harm or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Harm and which in Arc's opinion (acting reasonably) may result in Arc or any other person incurring any material liability or being subjected to a direction of any Government Agency.
<b>Environmental Harm</b>	any actual or threatened adverse impact or damage to the Environment and includes 'environmental harm' as defined in the <i>Environmental Protection Act 1986</i> (WA).

Term	Meaning
<b>Environmental Law</b>	all present and future Laws concerning Environmental matters including the Environmental Protection Act 1986 (WA), Conservation and Land Management Act 1984 (WA), Rights in Water and Irrigation Act 1913 (WA), Dangerous Goods Safety Act 2004 (WA), Contaminated Sites Act 2003 (WA), Planning and Development Act 2005 (WA), relevant local and regional planning schemes, Aboriginal Heritage Act 1972 (WA) and Environmental Protection and Biodiversity Conservation Act 1999 (Cth).
<b>Expiry Date</b>	23:59 hours on [insert].
<b>Fixed Charge</b>	means a fixed charge payable in respect of a Scheduled Train Path, as set out in and calculated in accordance with Schedule 2 and varied in accordance with Schedule 3.
<b>Force Majeure</b>	<p>any cause, event or circumstance (or combination of causes, events and circumstances) which:</p> <ul style="list-style-type: none"> <li>(a) is beyond the reasonable control of the party claiming force majeure;</li> <li>(b) prevents the affected party from performing its obligations under this Agreement; and</li> <li>(c) cannot be prevented, overcome or remedied by the exercise by the party affected of a reasonable standard of care and diligence,</li> </ul> <p>including:</p> <ul style="list-style-type: none"> <li>(d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide, heat (including speed restrictions due to the impact of heat or other atmospheric conditions) or adverse weather conditions;</li> <li>(e) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic;</li> <li>(f) the effect of any applicable Australian Laws or enforcement actions of any court or Australian Government Agency in response to an epidemic or pandemic which occurs after the Commencement Date and which could not reasonably have been foreseen by the party claiming force majeure; or</li> <li>(g) Industrial Action provided that, in the case of the Customer being the affected party, only if the Industrial Action affects the logistics industry on a national or state-wide basis, is not specific to the Customer's or Operator's Personnel and lasts for longer than 28 days;</li> </ul> <p>but does not include:</p> <ul style="list-style-type: none"> <li>(h) loss of customers or loss of market share;</li> <li>(i) if the Customer is the affected party, the failure of, or the breakdown of or other damage to plant, machinery or infrastructure other than as a direct result of a cause, event or circumstance set out in paragraphs 4 or 5 of this definition; or</li> <li>(j) wet or otherwise inclement weather other than as described in paragraph 4 of this definition;</li> <li>(k) if the Customer is the affected party, any acts or omissions by the Customer's Personnel; or</li> </ul>

Term	Meaning
	(l) any event that results in the affected party having a lack of funds, including money, or inability to use, obtain or access funds, including money, for any reason.
<b>Government Agency</b>	any government, parliament or any governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.
<b>GST</b>	any tax calculated by reference to the value of goods or services provided, calculated and levied at the point of sale or supply of the goods or services and includes GST as that term is used in the GST Act.
<b>GST Act</b>	<i>A New Tax System (Goods and Services Tax) Act 1999 (Cth)</i> and includes other GST related legislation.
<b>GTK</b>	<p>a unit of measure representing the movement of 1 tonne of Rolling Stock or of Customer Product travelling over a distance of 1 kilometre.</p> <p><i>By way of example:</i></p> <p>(a) 1 tonne of unloaded Rolling Stock travelling over a distance of 1 kilometre is equal to 1 GTK.</p> <p>(b) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 1 kilometre is equal to 2 GTK's.</p> <p>(c) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 5 kilometres is equal to 10 GTK's.</p>
<b>Incident</b>	<p>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:</p> <p>(a) material damage to or interference with the Network;</p> <p>(b) material damage to property;</p> <p>(c) material personal injury to any person;</p> <p>(d) an Environmental Condition;</p> <p>(e) a Category A or a Category B notifiable occurrence as defined in the regulations to the Rail Safety National Law;</p> <p>(f) an incident requiring notification under the Standards (as defined in the Operational Track Access Agreement) and/or the Dangerous Goods Code; or</p> <p>(g) an incident not already described in paragraphs (a)-(f) above and requiring notification under any Law relating to safety or the environment.</p>
<b>Industrial Action</b>	A strike, lockout, stoppage, go slow, labour disturbance, demarcation, industrial dispute or other industrial action.

Term	Meaning
<b>Insolvency Event</b>	<p>the occurrence of any of the following events in relation to a person:</p> <ul style="list-style-type: none"> <li>(a) a judgment in an amount exceeding \$1,000,000 is obtained against the person, or any distress, attachment, execution in an amount exceeding \$1,000,000 is issued against, levied or enforced on any of the person's assets, and is not set aside or satisfied within 20 Business Days or appealed against within the period permitted by the rules of the relevant court;</li> <li>(b) the person suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act;</li> <li>(c) the person enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them other than for purpose of a bona fide reconstruction or amalgamation;</li> <li>(d) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a person or over any of the person's assets or undertakings;</li> <li>(e) an application or order is made for the winding up or dissolution of the person (other than an application which is stayed, withdrawn or dismissed within 10 Business Days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the person, except for the purpose of an amalgamation or reconstruction;</li> <li>(f) the person is deregistered or any steps are taken to deregister the person under the Corporations Act;</li> <li>(g) the person ceases to carry on business; or</li> <li>(h) any event analogous or having a substantially similar effect to any of the events described above happens in connection with that person.</li> </ul>
<b>Law</b>	<ul style="list-style-type: none"> <li>(a) Commonwealth, state and local government legislation, including regulations, by-laws, orders, awards and proclamations;</li> <li>(b) legislation of any other jurisdiction with which the relevant party must comply;</li> <li>(c) common law and equity;</li> <li>(d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and</li> <li>(e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.</li> </ul>
<b>Liability</b>	<ul style="list-style-type: none"> <li>(a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (on a full indemnity basis) and interest; and</li> <li>(b) if the context permits, also includes any claim or demand for the payment of money, whether liquidated or not.</li> </ul>
<b>Major Periodic Maintenance</b>	<p>activities that renovate the Network to retain it in a functional condition which are normally completed on track sections at intervals of more than one year or more frequently if reasonably required and includes re-railing, rail grinding, resurfacing,</p>

<b>Term</b>	<b>Meaning</b>
	re-signalling, communications upgrades, renovating structures, ballast cleaning and re-sleepering. For clarity, routine maintenance is not Major Periodic Maintenance.
<b>Material Change</b>	a Change in Relevant Tax or a Change in Law.
<b>Maximum Track Axle Load</b>	the axle load limit for the relevant parts of the Network that Trains will travel on, as set out in Schedule 1.
<b>Maximum Train Length</b>	the train length limit for relevant parts of the Network that Trains will travel on, as set out in Schedule 1.
<b>Modern Slavery</b>	has the meaning given to it in the <i>Modern Slavery Act 2018</i> (Cth).
<b>Modern Slavery Laws</b>	means all applicable Laws concerning Modern Slavery or similar matters including but not limited to the <i>Modern Slavery Act 2018</i> (Cth).
<b>Month</b>	a calendar month.
<b>Net Financial Effect</b>	the net effect, on a party of an event or circumstance, in financial terms, of the occurrence of the event or circumstance on the party in relation to performing its obligations and exercising its rights under this Agreement including any increases in costs (whether capital or operating, fixed or variable) and other detriments incurred, or to be incurred, by the party but deducting the amount of any savings or other benefits or advantages received, or to be received, by the party on the basis that the party uses reasonable endeavours to mitigate the net effect of the event or circumstance.
<b>Net Tonne</b>	a tonne of Customer Product carried by a Service (excluding the tare weight of the Train) operated on a Train Path.
<b>Network</b>	the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies Corporate from time to time.
<b>Network Lease</b>	any lease or sublease to Arc or its Related Bodies Corporate of any infrastructure which forms part of the Network.
<b>Network Lessor</b>	a lessor or sublessor (as applicable) under a Network Lease.

<b>Term</b>	<b>Meaning</b>
<b>Nominated Route</b>	that part of the Network in respect of which this Agreement provides access, being that comprised in the routes as listed in Schedule 1.
<b>Operational Track Access Agreement</b>	an operational track access agreement between Arc and an Operator, pursuant to which Arc agrees that the Operator may utilise Train Paths granted to the Customer in accordance with this Agreement for the purposes of operating Services.
<b>Operator</b>	an Accredited above rail operator nominated by the Customer to Arc in writing to operate some or all of the Train Paths, and described as the Operator in an Operational Track Access Agreement, and, where the Customer engages multiple Operators, includes all Operators where the context permits.
<b>Origin</b>	<p>(a) for the Scheduled Train Paths, means the origin of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for all other temporary or ad hoc entitlements (including train paths arising by reason of compliance with instruction from Arc to an Operator) to access the Network which are provided by Arc to an Operator on the terms set out in the relevant Operational Track Access Agreement, means the point on the Network specified in the instruction issued by Arc to the relevant Operator in accordance with the relevant Operational Track Access Agreement.</p>
<b>Over-payment Charge</b>	A charge for an over-payment or an under-payment as set out in Schedule 2 and calculated pursuant to the Over-payment Rules.
<b>Over-payment Rules</b>	Arc's over-payment rules approved under the Rail Access Code and including any amendments to, or replacement of, those rules approved by the Economic Regulator from time to time.
<b>Personnel</b>	the directors, officers, employees, agents, contractors and licensees provided that Arc's Personnel excludes the Customer, any Operator and their respective contractors.
<b>Possession of the Network</b>	closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading.
<b>Rail Access Code</b>	the <i>Railways (Access) Code 2000</i> (WA).
<b>Rail Safety National Law</b>	the <i>Rail Safety National Law</i> (WA) as applied by the <i>Rail Safety National Law Application Act 2024</i> , including the <i>Rail Safety National Regulations</i> (WA) 2024 and the <i>Rail Safety National Law</i> (WA) ( <i>Alcohol and Drug Testing</i> ) <i>Regulations</i> 2024.
<b>Reasonable Grounds</b>	reasonable grounds and, where Arc's consent is being sought, includes:

Term	Meaning
	<ul style="list-style-type: none"> <li>(a) the Varied Train Path not being available because it is already allocated to another operator or customer;</li> <li>(b) the Varied Train Path not being available because in Arc's opinion there is not sufficient capacity available on the Network to accommodate the Varied Train Path;</li> <li>(c) the Customer being unable to demonstrate to Arc's reasonable satisfaction a bona fide requirement for the Varied Train Path;</li> <li>(d) the Varied Train Path not being able to be operated safely or effectively or efficiently in the opinion of Arc (acting reasonably);</li> <li>(e) the Varied Train Path being exactly the same or similar to a train path that has already been removed pursuant to clause 8.4; or</li> <li>(f) where to consent to the proposal would, or is likely to, result in Arc breaching: <ul style="list-style-type: none"> <li>(1) any obligations imposed by Law, including any Law relating to safety;</li> <li>(2) the <i>Railways (Access) Act 1998 (WA)</i> or the Rail Access Code; or</li> <li>(3) any agreement to which it is a party.</li> </ul> </li> </ul>
<b>Related Body Corporate</b>	has the meaning given to that expression in the Corporations Act.
<b>Relevant Tax</b>	any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on Arc by, or payable by Arc to, any Government Agency but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.
<b>Rolling Stock</b>	a locomotive or wagon permitted for use on the Network, as set out in Schedule 4 (as amended from time to time in accordance with clause 3.2(d)).
<b>Safety Interface Agreement</b>	has the meaning given in clause 6.3.
<b>Scheduled Train Paths</b>	an entitlement to access the Nominated Route by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and departure, transit and arrival times between the Origin and Destination, as set out in Schedule 1, and as may be amended from time to time in accordance with clause 7 of this Agreement and clause 9 of an Operational Track Access Agreement.
<b>Secured Sum</b>	[insert].
<b>Security</b>	means an unconditional and irrevocable bank guarantee for the Secured Sum, on terms as are acceptable to Arc (acting reasonably), issued by a bank holding an Australian banking licence with an Acceptable Credit Rating secures the obligations of the Customer (including the obligations to pay money) under this Agreement.

<b>Term</b>	<b>Meaning</b>
<b>Security Provider</b>	any person that has issued or provided any Security held by Arc.
<b>Service</b>	The operation of a Train on the Network by an Operator: <ul style="list-style-type: none"> <li>(a) utilising a train Path for the purpose of transporting Customer Product for the Customer under a Transport Agreement; or</li> <li>(a) for any temporary or ad hoc entitlement to operate a Train granted pursuant to an Operational Track Access Agreement.</li> </ul>
<b>Train</b>	the combination of Rolling Stock used to operate Services.
<b>Train Management Guidelines</b>	Arc's train management guidelines approved under the Rail Access Code and includes any amendments to, or replacement of, those approved by the Economic Regulator from time to time.
<b>Train Path</b>	an entitlement to operate a Train on the Network in one direction from Origin to Destination, by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and to departure, transit and arrival times and includes the following types: <ul style="list-style-type: none"> <li>(a) the Scheduled Train Paths;</li> <li>(b) train paths provided pursuant to clauses 3.6 and 3.7 of an Operational Track Access Agreement; and</li> <li>(c) where the context permits, all other ad hoc or temporary entitlements to access the Network in accordance with this Agreement or an Operational Track Access Agreement or as otherwise agreed between the parties,</li> </ul> as granted, amended or varied in accordance with this Agreement or an Operational Track Access Agreement.
<b>Train Path Policy</b>	means the Train Path Policy applicable to Arc, approved or determined pursuant to the Rail Access Code including any amendments to or replacements of that policy approved by the Economic Regulator from time to time.
<b>Transport Agreement</b>	an agreement between the Customer and an Operator for the provision of rail haulage services to transport Customer Product utilising the Scheduled Train Paths set out in Schedule 1.
<b>Variable Charge</b>	means a variable charge payable per GTK transported on a Train Path calculated in accordance with Schedule 2.
<b>Variable Rate</b>	means the unit rate for calculating the Variable Charge applied to each GTK as set out in Schedule 2, as varied from time to time in accordance with Schedule 3.

<b>Term</b>	<b>Meaning</b>
<b>Variation Date</b>	the agreed date from which the Customer's entitlement to a Varied Train Path is to take effect.
<b>Varied Train Path</b>	a variation to a Scheduled Train Path requested or offered by a party pursuant to clause 7.
<b>Wilful Default</b>	any wilful, intentional, wanton or reckless wrongful act or omission carried out or omitted to be done with: <ul style="list-style-type: none"> <li>(a) knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or</li> <li>(b) a reckless disregard for, wanton indifference to, or knowledge of, the harmful consequences of the act or omission.</li> </ul>

## 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 a natural person, firm, body corporate, unincorporated association, partnership, joint venture and Government Agencies;
- (d) an obligation, liability, representation or warranty:
  - (1) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (2) on the part of two or more persons binds them jointly and severally;
- (e) a reference to a party to a document include that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) a reference to the consent of a party means the prior written consent of that party;
- (g) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (h) a reference to a clause, annexure or a schedule is a reference to a clause, annexure or schedule of this Agreement;
- (i) a thing (including any amount) is a reference to the whole and each part of it;
- (j) 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;
- (k) a reference to any Law includes:
  - (1) that Law as amended or re- enacted;
  - (2) a statute, regulation or provision enacted in replacement of that Law;

- (3) any regulation or other statutory instrument made or issued under that Law; and
- (4) any amendment made to a statute, regulation or provision as a consequence of another statute, regulation or provision;
- (l) a reference to a clause, a schedule, an agreement or any other document, instrument, publication or code is a reference to the clause, schedule, agreement, document, instrument, publication or code as varied or replaced from time to time;
- (m) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (n) a reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not:
  - (1) which ceases to exist; or
  - (2) whose powers or functions are transferred to another body,
 is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (o) a reference to 'includes' or 'including' must be construed without limitation;
- (p) a reference to termination of this Agreement includes the expiry of the term of this Agreement;
- (q) where time is to be reckoned by reference to a day or event, that day or the day of the event will be excluded;
- (r) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day; and
- (s) where a word or expression is defined, cognate words and expressions will be construed accordingly.

### **1.3 Inconsistencies**

Notwithstanding anything to the contrary in an Operational Track Access Agreement, this Agreement takes precedence over an Operational Track Access Agreement to the extent of any inconsistency.

### **1.4 Exclusion of the contra proferentem rule**

A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.

### **1.5 Rail Access Code**

- (a) Nothing in this Agreement requires Arc to do (or omit to do) anything contrary to the Rail Access Code or any Applicable Part 5 Instrument.
- (b) The parties acknowledge and agree that, except where directed by the Economic Regulator in accordance with the Rail Access Code, it is in Arc's sole discretion if and when it may seek approval of the Economic Regulator for any amendment or replacement of any Applicable Part 5 Instrument and, without limitation:
  - (1) Arc's discretion continues unchanged at all times, irrespective of any previous amendments or replacements; and

- (2) nothing in this Agreement prevents or limits Arc from requesting any such amendment or replacement (nor, having taken any preliminary steps with respect to any proposal), requires Arc to proceed to seek approval for any amendment or replacement.
- (c) If there is a change to the standard access provisions for the Network approved or determined by the Economic Regulator (whether or not the change is at the instigation or request of Arc) (**New Standard Access Provisions**):
  - (1) firstly, to the extent any changes in the New Standard Access Provisions affect the financial position of Arc or the costs of Arc of performing its obligations under this Agreement, Schedule 3 (item 2. **Material Change**) will apply;
  - (2) secondly and only to the extent of any changes not addressed (or to be addressed) in accordance with Schedule 3 (item 2. **Material Change**), the following will apply (provided that, in no circumstances shall this clause 1.5(c)(2) result in duplication of any recovery of costs effected pursuant to Schedule 3 (item 2. **Material Change**)):
    - (A) to the extent that any changes in the New Standard Access Provisions are otherwise inconsistent with this Agreement, the parties will negotiate in good faith to modify this Agreement to reflect the amendments in the New Standard Access Provisions which are necessary or desirable for Arc to safely and efficiently manage the Network while retaining, to the extent possible, the commercial and economic position of both parties arising from this Agreement (including the application of Schedule 3), and if the parties cannot agree, then the matter will be referred for resolution pursuant to clause 14; and
    - (B) if this Agreement contains a provision that is not contained in the New Standard Access Provisions and is not inconsistent with any provision of the New Standard Access Provisions, that provision will be retained unless the parties otherwise agree.

## 2 Access Term

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This Agreement commences on the Commencement Date and, unless terminated earlier in accordance with the terms of this Agreement, expires on the Expiry Date (**Access Term**).

## 3 Train Paths

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### 3.1 Grant to Customer of Scheduled Train Paths

Arc grants to the Customer the right to nominate one or more Operators to utilise, at all times during the Access Term and pursuant to an Operational Track Access Agreement, the Scheduled Train Paths for the sole purpose of transporting Customer Product under a Transport Agreement on the terms set out in this Agreement.

### 3.2 Nature and scope of rights

- (a) Nothing in this Agreement gives the Customer any right, title or interest of any proprietary nature in the Network.

- (b) The Customer's right to have an Operator utilise a Train Path is non-exclusive, however, no train of another user of the Network (other than the Customer's relevant Operator) will be allotted a train path which conflicts with a Scheduled Train Path other than on an ad hoc basis where an Operator does not utilise that Scheduled Train Path on a given day.
- (c) Notwithstanding clause 3.1, the Customer's right to a Train Path (and to have a nominated Operator utilise a Train Path) is subject to:
  - (1) the terms of this Agreement (including clauses 6.3, 8.3, 10 and 11.3), including the exercise, or operation, of rights, entitlements, limitations or exclusions under any of them;
  - (2) the Operational Track Access Agreement being effective (and not being suspended in accordance with its terms), and a Safety Interface Agreement being effective, at all times during the Access Term;
  - (3) the Operator satisfying its obligations under the Operational Track Access Agreement and the relevant Safety Interface Agreement;
  - (4) the Customer complying, and being in compliance, with this Agreement including the obligation to pay all Charges within the time required, as specified in Schedule 2, including its warranties given under this Agreement and clauses 9 and (if applicable) 15;
  - (5) subject to clause 3.2(d), the Trains utilising the Train Paths being comprised of Rolling Stock (or such other combination of locomotives and wagons agreed to in writing by Arc);
  - (6) emergencies or material safety considerations;
  - (7) the Train Management Guidelines and Arc's Network Rules; and
  - (8) all applicable Laws.
- (d) The Customer acknowledges that the Rolling Stock used to provide the Services may be varied under the Operational Track Access Agreement and agrees that if the 'Rolling Stock' (as defined in the Operational Track Access Agreement) is varied under the Operational Track Access Agreement, Schedule 4 of this Agreement will be taken to be varied accordingly.

## 4 Operational Track Access Agreement and Transport Agreement

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### 4.1 Operational Track Access Agreement

The Customer acknowledges and agrees that:

- (a) the grant of Train Paths to the Customer in accordance with this Agreement does not entitle the Customer to itself operate Services or run Trains on the Network;
- (b) it may only utilise the Train Paths by nominating one or more Operators to use the Train Paths allocated to that Operator by the Customer, under the terms of an Operational Track Access Agreement; and
- (c) it will use best endeavours to procure that an Operator executes an Operational Track Access Agreement in the same terms as the draft agreement annexed to this Agreement as Annexure A within 1 Month after the date of this Agreement.

## 4.2 Benefit of Operational Track Access Agreement

- (a) The parties acknowledge that the access rights granted by Arc to an Operator under an Operational Track Access Agreement are granted for the purpose of enabling the Operator to provide haulage services to the Customer under a Transport Agreement and accordingly the Customer derives a benefit from and has an interest in the access rights granted to an Operator under an Operational Track Access Agreement.
- (b) In order to recognise and allow the Customer to protect the benefit and interest of the Customer in an Operational Track Access Agreement, Arc acknowledges and agrees the following in favour of the Customer:
- (1) Arc must comply with its obligations under each Operational Track Access Agreement;
  - (2) subject to clause 4.3, Arc must not agree any variation of an Operational Track Access Agreement (and will not agree to any changes in accordance with the Operational Track Access Agreement):
    - (A) relating to the 'Commencement Date' or the 'Expiry Date' (as those terms are defined under the Operational Track Access Agreement); or
    - (B) which reduces the number of Train Paths (other than on a temporary basis, as permitted under the Operational Track Access Agreement in relation to those matters described in clause 8.1) or which reduces or is likely to reduce the ability of an Operator to perform the services contemplated by the Transport Agreement,  
without the prior written consent of the Customer;
  - (3) Arc must provide the Customer with full details of any variation to an Operational Track Access Agreement as soon as reasonably practicable after the variation is made; and
  - (4) the Customer may seek specific performance by Arc of Arc's obligations under any Operational Track Access Agreement if Arc is in default of those obligations and Arc must not object to that action solely on the ground that the Customer is not a party to the Operational Track Access Agreement.
- (c) Arc must:
- (1) provide to the Customer a copy of any notice given by Arc under an Operational Track Access Agreement promptly following the giving of that notice by Arc (and in any event, within 2 Business Days of Arc giving the notice); and
  - (2) notify the Customer of any other circumstance concerning an Operational Track Access Agreement promptly on becoming aware of any such circumstance (and in any event, within 2 Business Days of Arc becoming aware of the circumstance),

where the subject matter of the notice or the circumstance relates to any:

- (3) default or alleged default by an Operator under an Operational Track Access Agreement;
- (4) repudiation or alleged repudiation of an Operational Track Access Agreement by an Operator; or
- (5) 'Force Majeure Event' (as defined in an Operational Track Access Agreement) affecting an Operator or the Customer under an Operational Track Access Agreement.

### **4.3 Permitted changes to Operational Track Access Agreement**

The parties acknowledge and agree that Arc may, without limiting Arc's other rights under an Operational Track Access Agreement, make any change, variation or adjustment in accordance with the Operational Track Access Agreement where that change, variation or adjustment is one which may be unilaterally made by Arc in accordance with the terms of the Operational Track Access Agreement.

### **4.4 Multiple Operators**

The parties agree and acknowledge that:

- (a) the Customer may, at its discretion but subject to clause 4.4(b) engage multiple operators (each an Operator under this Agreement) to transport Customer Product by rail utilising the Train Paths; and
- (b) if the Customer engages multiple Operators to transport Customer Product:
  - (1) the Customer must, as a condition precedent to the relevant Operator gaining access to the Network and the Train Paths, procure that each Operator enters into an Operational Track Access Agreement with Arc;
  - (2) Arc must do all things reasonably within its power to enter into an Operational Track Access Agreement with each Operator on the same terms as the draft operational track access agreement in Annexure A or substantially similar terms as agreed by Arc; and
  - (3) the Train Paths allocated to each Operator must be clearly set out in Schedule 1 to each Operator's Operational Track Access Agreement.

### **4.5 Replacement Operational Track Access Agreement**

If any Operational Track Access Agreement expires or terminates for any reason:

- (a) Arc must give notice in writing to the Customer as soon as practicable;
- (b) the Customer must nominate an alternate Accredited operator to enter into an Operational Track Access Agreement with Arc within 1 Month of receipt of the written notice from Arc under clause 4.5(a); and
- (c) Arc must use all reasonable endeavours to enter into a substitute Operational Track Access Agreement with the alternate Accredited operator (on the same terms as the draft operational track access agreement in Annexure A or on substantially similar terms as agreed by Arc) for all of the Train Paths previously allocated in the expired or terminated (as applicable) Operational Track Access Agreement within 1 Month of receiving the Customer's nomination in accordance with clause 4.5(b).

### **4.6 Transport Agreement**

- (a) The Customer must enter into a Transport Agreement with one or more Operators to transport Customer Product by rail utilising all of the Scheduled Train Paths by no later than 1 Month after the date of this Agreement.
- (b) The Customer must immediately notify Arc in writing when it has entered into a Transport Agreement which complies with clause 4.6(a) and must include the following information in that notice:
  - (1) the name and details of the Operator;
  - (2) the term of the Transport Agreement; and
  - (3) the Train Paths included in the Transport Agreement.

- (c) If a Transport Agreement terminates or expires for any reason, the Customer must:
  - (1) immediately give written notice of this fact to Arc; and
  - (2) enter into a substitute transport agreement with an alternate operator for all of the Scheduled Train Paths previously utilised by the terminated Transport Agreement within 1 Month of the date of termination or expiry of the terminated Transport Agreement.
- (d) Where the Customer:
  - (1) considers that it will be unable to enter into a substitute transport agreement by the date required by clause 4.6(c); and
  - (2) can demonstrate to Arc's reasonable satisfaction that it has made significant progress toward entering into a Transport Agreement,
 then Arc will extend the date set out in clause 4.6(c) by 1 Month.
- (e) The Customer must:
  - (1) provide to Arc a copy of any notice given by the Customer under a Transport Agreement promptly following the giving of that notice by the Customer (and in any event, within 2 Business Days of the Customer giving the notice); and
  - (2) notify Arc of any other circumstance concerning a Transport Agreement promptly on becoming aware of any such circumstance (and in any event, within 2 Business Days of the Customer becoming aware of the circumstance),
 where the subject matter of the notice or the circumstance relates to any:
  - (3) default or alleged default by an Operator under the Transport Agreement;
  - (4) repudiation or alleged repudiation of the Transport Agreement by an Operator; or
  - (5) 'Force Majeure' (as defined in a Transport Agreement) affecting an Operator or the Customer under the Transport Agreement.

## 5 Charges, invoices and payment

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### 5.1 Invoices and payment of Charges

- (a) Arc will invoice the Customer for the Charges, and any other amounts which are payable under this Agreement, at the times, and in the manner, provided for in Schedule 2.
- (b) The Customer must pay the Charges and all other amounts which are payable under this Agreement:
  - (1) at the times otherwise specified in this Agreement;
  - (2) in immediately available funds;
  - (3) to Arc;
  - (4) at the place and in the manner reasonably required by Arc; and
  - (5) no later than 5pm local time in the place where payment is to be made.
- (c) Without limitation to clause 11.1(e), a party does not need to make a demand for payment of any amount required to be paid by the other party under this Agreement unless required by Law.

- (d) If:
  - (1) any notice requesting payment for any amount; or
  - (2) this Agreement,does not specify when a payment is due, it is due within 15 Business Days after the notice requesting payment is given.
- (e) If the Customer does not make a payment by the time that it is due under this Agreement (excluding any payments in dispute pursuant to clause 5.3), then Arc will give notice in writing requiring the non-payment be remedied, if the Customer fails to remedy the default within the time specified (which shall not be less than 21 days) Arc may immediately suspend the Customer's rights to access the Network pursuant to this Agreement.

## **5.2 Review and Variation of Charges**

The Charges payable under this Agreement will be reviewed and varied in accordance with Schedule 3.

## **5.3 Disputes regarding amounts payable under this Agreement**

- (a) Where there exists a bona fide dispute in relation to any amount set out in an invoice issued pursuant to this Agreement, a party must, within the time required for payment:
  - (1) pay the amount that is not in dispute; and
  - (2) refer the dispute in respect of the disputed amount for resolution in accordance with clause 14.
- (b) If the resolution of the dispute determines that a party must pay an amount to the other party, the amount must be paid to the other party within 5 Business Days after resolution of that dispute together with interest calculated in accordance with clause 5.5 (provided that for the purposes of calculating that interest, the due date for payment is deemed to be the date when the amount in dispute would have been due and payable but for the dispute).

## **5.4 No Set Off**

All payments which a party is required to make under this Agreement must be made without any set off, counterclaim, condition or deduction.

## **5.5 Interest**

- (a) A party must pay interest on any amounts due to the other party under this Agreement (including all amounts properly included in an invoice) which are not paid when due.
- (b) Interest:
  - (1) will accrue daily at the rate per annum equal to the Default Rate;
  - (2) will be computed from and including the day when the money on which interest is payable becomes owing until but excluding the day of payment of that money;
  - (3) will be calculated on the actual days elapsed; and
  - (4) must be paid on demand.

## 5.6 GST

- (a) Except where the context suggests otherwise, terms used in this clause 5.6 have the meanings ascribed to those terms by the GST Act.
- (b) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 5.6.
- (c) Unless otherwise expressly stated, all Charges and other amounts due and payable under this Agreement are exclusive of GST. Any amounts that are specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 5.6.
- (d) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (e) Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- (f) If GST is payable on a supply made by a party (**Supplier**) under or in connection with this Agreement, the party providing consideration for that supply (**Recipient**) must pay an additional amount to the Supplier equal to the GST payable in relation to the supply.
- (g) Any additional amount referred to in clause 5.6(f) must be paid by the Recipient at the same time as any other consideration is to be first provided for that supply and the Supplier must promptly provide to the Recipient a tax invoice complying with the relevant Law relating to that GST.
- (h) Where this Agreement requires the Recipient to reimburse the Supplier for any loss, cost or expense, the Recipient must also at the same time pay and indemnify the Supplier against all GST incurred by the Supplier in respect of that loss, cost or expense to the extent the Supplier reasonably determines that it is not entitled to repayment or credit in respect of the GST.
- (i) If the GST payable on a supply made under or in connection with this Agreement (not taking into account any consideration that is inclusive of GST) varies from the additional amount paid by the Recipient under clause 5.6(f) in respect of that supply (as adjusted to take account of any previous payment made pursuant to this paragraph), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any amount payable under this clause 5.6(i) must be paid no later than 10 Business Days after the Supplier provides an adjustment note to the other party.

## 6 Loading system

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### 6.1 No overloading

The Customer must ensure that the axle load for any wagon comprised in a Train operated, or likely to be operated, by an Operator under the Operational Track Access Agreement does not exceed the lowest of:

- (a) the Maximum Track Axle Load; or
- (b) the rated carrying capacity of the relevant Rolling Stock.

## 6.2 Loading system

- (a) The Customer must:
- (1) prior to commencement of the Access Term, commission or procure the commissioning of; and
  - (2) at all times during the Access Term, maintain or procure the maintenance of,  
a loading system that is capable of evenly loading all wagons comprised in a Train:
    - (3) below or up to the rated carrying capacity of the wagon;
    - (4) below or up to the Maximum Track Axle Load; and
    - (5) so that not more than inconsequential amounts of Customer Product, freight or material being loaded into or hauled on or in a Train operated by the Operator falls, leaks, spills, emits or escapes from the Train or become deposited on or adjacent to the Network.
- (b) For the purposes of clause 6.2(a)(5), “**inconsequential amount**” means an amount that does not result in or lead to:
- (1) damage to the Network;
  - (2) an injury, or the potential for injury, suffered by people on or adjacent to the Network, whether Arc Personnel or members of the public;
  - (3) a breach, contravention or offence of any Environmental Law; or
  - (4) a breach, contravention or offence of any Environmental Condition.

## 6.3 Entry into Safety Interface Agreement(s)

Arc and the Customer acknowledge and agree that prior to a Service being operated by an Operator, Arc and the relevant Operator must enter into a safety interface agreement for the purpose of identifying any risks to safety in relation to railway operations pursuant to section 105 of the Rail Safety National Law (**Safety Interface Agreement**).

# 7 Repairs and maintenance of the Network

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## 7.1 Maintenance Standards

- (a) Arc must at all times maintain the Network (but only in so far as the Network is relevant to the Scheduled Train Paths provided) to the highest of:
- (1) the standard existing as at the Commencement Date of this Agreement;
  - (2) the minimum standard required to maintain its Accreditation as an Accredited Owner; or
  - (3) any other standards as the parties may agree in writing from time to time.

## 7.2 Operating Restrictions

Arc may impose operating restrictions where required by the condition of the Network (but only so far as the Network is relevant to the Scheduled Train Paths provided) giving notice of speed and weight restrictions, to the Operator, and the Operator must comply with such notice.

## 8 Variations or cancellations of Train Paths

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### 8.1 Temporary variations to Train Paths

The Customer acknowledges and agrees that:

- (a) the Train Paths may be temporarily varied under an Operational Track Access Agreement by instruction from Arc to the relevant Operator and without prior notice to the Customer:
  - (1) for the purpose of preventing any actual or reasonably likely:
    - (A) breach of Arc's Network Rules or of clause 12 of an Operational Track Access Agreement by an Operator or of similar safety requirements by other operators on the Network;
    - (B) damage to the Network;
    - (C) injury to any person or material damage to any property; or
    - (D) delay to the progress of trains on the Network (but only insofar as any trains operated by an operator pursuant to a separate agreement have priority over the Operator's trains, under the Operational Track Access Agreement, having regard to the Train Management Guidelines); or
  - (2) for the purpose of preventing, or in response to, any actual or threatened breach by an Operator of any of its material obligations under an Operational Track Access Agreement;
- (b) the Train Paths may be temporarily varied under an Operational Track Access Agreement by instruction from Arc to the relevant Operator for the purpose of giving effect to an agreement for a temporary variation between Arc and the Customer, where the variation does not comprise:
  - (1) any change to the origin or destination of a Train Path;
  - (2) any additional distance across the Network upon which the Train Path is intended to traverse; or
  - (3) in effect a new Train Path, including an Additional Train Path (as reasonably determined by Arc);
- (c) a temporary variation, change or adjustment of the Train Paths in accordance with an Operational Track Access Agreement has the effect of suspending the Customer's entitlement to all corresponding Train Paths in this Agreement for the duration of such temporary variation, change or adjustment; and
- (d) Arc is not liable to the Customer for any Claim, and the Customer must not make any Claim against Arc, in respect of any loss suffered or incurred by the Customer in connection with any temporary variation, change or adjustment of the Train Paths under an Operational Track Access Agreement or this Agreement.

### 8.2 Permanent variations to Train Paths by agreement between the parties

- (a) This clause 8.2 sets out the procedure to be followed by the parties if it is intended that a Scheduled Train Path be permanently varied.
- (b) A party (**Requesting Party**) may give a written notice (**Variation Request**) to the other party (**Notified Party**) stating:
  - (1) that the Requesting Party wishes to vary a Scheduled Train Path;
  - (2) the length of time the variation is proposed to be in force;

- (3) the proposed date for commencement of the Customer's entitlements to the Varied Train Path; and
  - (4) the reason or reasons for the proposed variation.
- (c) Promptly following receipt by the Notified Party of the Variation Request, the parties (each acting reasonably) will attempt to agree the following:
  - (1) any changes that must be made to the Train Paths to accommodate the Varied Train Path;
  - (2) the Variation Date; and
  - (3) any other amendments to this Agreement required as a consequence of varying that Train Path.
- (d) A party may only withhold its consent to a Variation Request on Reasonable Grounds.
- (e) Notwithstanding clause 8.2(d), the Customer must not withhold its consent to a Variation Request where the Variation Request is required by reason of Arc's obligations relating to a material issue affecting the safety of the Network.
- (f) If the parties are able to agree the matters set out in clause 8.2(c), then:
  - (1) this Agreement will be amended in accordance with clause 22.5 to reflect the agreed matters;
  - (2) the variations to this Agreement will become effective from the Variation Date; and
  - (3) from the Variation Date:
    - (A) the relevant Operator will be entitled to utilise each Varied Train Path and for the avoidance of doubt each Varied Train Path will be a Scheduled Train Path; and
    - (B) Arc will charge the Customer for each Varied Train Path in accordance with Schedule 2 and Arc will invoice the Customer for the Varied Train Path in accordance with clause 5.1.
- (g) If Schedule 1 of this Agreement is amended in accordance with this clause 8.2, Arc must give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.
- (h) If the parties are unable to agree any of the matters set out in clause 8.2(c), then:
  - (1) Arc is not obliged to make the Varied Train Path available to the Customer; and
  - (2) this Agreement will remain unchanged.
- (i) The parties acknowledge and agree that, where a Variation Request does not comprise:
  - (1) any change to the origin or destination of a Train Path;
  - (2) any additional distance across the Network upon which a Train Path is intended to traverse; or
  - (3) in effect any new Train Path, including an Additional Train Path (as reasonably determined by Arc),

then this Agreement will be deemed to be varied to accommodate that Variation Request by way of Arc issuing instructions to the relevant Operator and clause 8.2(f)(1) will not apply.

### 8.3 Repairs, maintenance and upgrading of the Network and temporary variation to Train Paths

- (a) Arc may perform repairs, maintenance or upgrading of the Network (including Major Periodic Maintenance) and take Possession of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network, or taking Possession of the Network, are reasonably likely to materially affect the Train Paths and are required other than because of emergencies related to safety or natural events, Arc must, prior to commencement of the works:
  - (1) take all reasonable steps to minimise any disruption to the Train Paths; and
  - (2) use reasonable endeavours to provide alternative Train Paths,but Arc is not required to obtain the Customer's consent to such repairs, maintenance or upgrading, or Possession of the Network.
- (c) If the repairs, maintenance or upgrading activities:
  - (1) can be carried out without affecting the use of Train Paths, Arc is not obliged to give prior notice to the Customer;
  - (2) are required because of emergencies related to safety or natural events, Arc is not obliged to give prior notice to the Customer but Arc must advise the Customer as soon as practicable of:
    - (A) the circumstances;
    - (B) the likely impact on Train Paths; and
    - (C) the likely duration of the Possession of the Network; or
  - (3) are required other than because of emergencies related to safety or natural events and will affect Train Paths, Arc must give notice in accordance with the timeframes set out in the Train Management Guidelines.
- (d) Any notice given under clause 8.4(d)(3) must describe:
  - (1) the extent and nature of the works;
  - (2) the potential effect on Train Paths; and
  - (3) what alternative arrangements are proposed by Arc.
- (e) If any repair, maintenance or upgrading activity notified by Arc is not achievable within the anticipated timeframe Arc must:
  - (1) as soon as is reasonably practicable notify the Customer; and
  - (2) provide a revised and continuing estimate of the anticipated completion time of the works.
- (f) Arc and the Customer agree that they will work together in the scheduling of repairs, maintenance and upgrades to the Network and to the Customer's plant to minimise the disruption to one another. The Customer further agrees that it will invite Arc to participate in the Customer's regular maintenance planning meetings to assist Arc to plan repairs, maintenance or upgrades, where practicable, during the Customer's maintenance shutdowns.

### 8.4 Cancellation of Train Paths for under-utilisation

- (a) Arc will monitor utilisation of Scheduled Train Paths over a 3 month period (**Monitoring Period**).

- (b) If a Scheduled Train Path has not been utilised during the Monitoring Period, Arc may give written notice to the Customer that the Scheduled Train Path has been identified as under utilised.
- (c) If the Scheduled Train Path has not been utilised as prescribed in this Agreement more than 6 times in aggregate in a six month period from the date of the notice referred to in clause 8.4(b), then Arc may issue the Customer with a written notice confirming the Scheduled Train Paths as under utilised at the end of that period (**Under- utilisation Notice**).
- (d) A Scheduled Train Path has not been utilised within the meaning of clauses 8.4(a) and 8.4(b) if the Operator has failed to:
- (1) present a Train at the scheduled entry point onto the Network;
  - (2) operate the relevant Train so that it completes its full journey; or
  - (3) operate a Train of the length and weight of a Train that would usually run in the Scheduled Train Path, set out in Schedule 1.
- (e) If the Scheduled Train Path has not been utilised during the relevant time periods described in clause 8.4(b) or 8.4(c) due to:
- (1) Force Majeure affecting Arc, the Customer or the Operator;
  - (2) the failure of Arc to make the relevant Train Path available where each of the Customer and the Operator are able to demonstrate that it was ready, willing and able to make use of the relevant Train Path; or
  - (3) temporary changes or variations to the Scheduled Train Paths agreed by the parties in writing,
- then the relevant time period will be extended by such period as is required for Arc to make available to the relevant Operator the Train Paths that were not utilised for any of the above reasons.
- (f) Once a Scheduled Train Path has been confirmed as being under utilised pursuant to clause 8.4(c), Arc may give notice in writing to the Customer deleting the Scheduled Train Path (and the Customer is deemed to have consented to this deletion) and:
- (1) Schedule 1 will be taken to be amended accordingly; and
  - (2) Arc will give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.
- (g) Prior to Arc issuing a notice pursuant to clause 8.4(f), Arc will provide the Customer with an opportunity to:
- (1) provide any relevant evidence in relation to the under utilisation, or
  - (2) demonstrate to Arc's reasonable satisfaction a bona fide future requirement for that Train Path
- provided that nothing in this Agreement requires Arc to reserve rights in favour of the Customer (or any Accredited operator it has nominated, or may in future wish to nominate) to operate a future train path.
- (h) Arc may terminate this Agreement on 5 Business Days' written notice to the Customer if, upon deletion of Scheduled Train Paths for under utilisation pursuant to this clause 8.4, there are no remaining Scheduled Train Paths.
- (i) This clause 8.4 does not limit Arc's rights under clause 11.

## 8.5 Review of Train Paths

- (a) Train Paths will be subject to review and variation in accordance with this clause 8.5.
- (b) Arc may at its discretion by written notice to the Customer cause a Train Path to be reviewed by the parties by comparing the stated departure and arrival times for the Train Path with the performance during the preceding continuous 3 Month period of the actual Trains using or purporting to use that Train Path (**3-Month History**).
- (c) If on such comparison, the departure or arrival times for Trains using or purporting to use the Train Path differ in material respects, the parties must negotiate in good faith to vary the Train Path so that the Train Path reflects, as closely as is reasonably practicable, the 3-Month History.
- (d) In clause 8.5(c), “**differ in material respects**” means, in relation to a Train Path, that the Service regularly fails to:
  - (1) be ready for entry to the Network at the scheduled departure time; and/ or
  - (2) the Service fails to regularly enter and exit the Network on time,where the Train Path was available.
- (e) Arc is not required to agree any Varied Train Path under clause 8.5(c) if there are Reasonable Grounds for withholding its consent.
- (f) The Customer is not required to accept a Varied Train Path offered by Arc under clause 8.5(c) if contractual obligations owed by the Customer to any person (including Arc) would prevent it from doing so.
- (g) In relation to any review under this clause 8.5, no account will be taken of performance which is affected by Force Majeure or the failure by Arc to make the Train Path available, temporary variations to the Train Path agreed by Arc and the Operator under the Operational Track Access Agreement or the mechanical failure of an Operator’s equipment.
- (h) If the parties agree under clause 8.5(c) to vary a Train Path, then:
  - (1) this Agreement must be amended in accordance with clause 22.5 to reflect the agreed matters;
  - (2) the variation to this Agreement will become effective from the Variation Date; and
  - (3) from the Variation Date:
    - (A) the relevant Operator will be entitled to utilise each Varied Train Path and for the avoidance of doubt each Varied Train Path will be a Scheduled Train Path; and
    - (B) Arc will charge the Customer for each Varied Train Paths in accordance with Schedule 2 and Arc will invoice the Customer for the Varied Train Path in accordance with clause 5.1.
- (i) If Schedule 1 of this Agreement is amended in accordance with this clause 8.5, Arc must give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.

## 8.6 Customer or Operator Cancellation of Services

- (a) The Customer or Operator may cancel a Train Path without penalty if the Scheduled Train Path is unable to be used due to:
  - (1) the Scheduled Train Path being unavailable due to Arc undertaking repair, maintenance or upgrade works on the Network;

- (2) a derailment, collision or other emergency event, unless that event is caused by an act or omission of the Customer or the relevant Operator; or
  - (3) late- running trains, unless the late-running is caused by an act or omission of the Customer or the relevant Operator.
- (b) Arc may use a Train Path which becomes available because of the cancellation of a Service by the Customer or Operator for any purpose, including the giving of access to the Network to any other customer or operator pursuant to a separate agreement.

## 8.7 Fixed Charges remain payable

Cancellation of a Scheduled Train Path pursuant to clause 8.6 or for any reason does not relieve the Customer of the obligation to pay Fixed Charges in respect of the cancelled Scheduled Train Path.

# 9 Insurances

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## 9.1 Customer's insurance policies

The Customer must, at its expense, take out and maintain current at all times during the Access Term, on terms consistent with the standard industry terms for railway operators:

- (a) a public liability insurance policy which:
  - (1) covers the liability of the Customer and its Personnel to any person arising out of or in connection with this Agreement, with a sum insured of not less than \$250,000,000 for any one occurrence or series of occurrences arising from one originating cause;
  - (2) includes cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs at a specific time and place with a sum insured of not less than a total of \$250,000,000 in respect of all occurrences during any one period of insurance; and
  - (3) covers the Customer's rail operations and associated activities on the Network;
- (b) a policy or policies of insurance with respect to the Customer's liability to Arc pursuant to the indemnities given under this Agreement, including in clause 12 to the extent coverable by insurance, which includes insurance against any Claim in respect of any personal injury to, or death of, any person employed or engaged by the Customer which arises out of, or is caused or contributed to by, the performance or non-performance of this Agreement by the Customer which insurance must provide cover:
  - (1) in respect of common law claims, for an amount not less than \$50,000,000;
  - (2) for compulsory statutory workers' compensation insurance claims, for such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981* (WA) or any other applicable Law; and
  - (3) all other insurances that the Customer or its Personnel are required by Law to hold in relation to or in connection with the exercise of rights or the performance of obligations under this Agreement.

## 9.2 Arc's insurance policies

Arc must, at its expense, take out and maintain current at all times during the Access Term, on terms consistent with the standard industry terms for railway track owners:

- (a) a public liability insurance policy which:
  - (1) covers the liability of Arc and its Personnel to any person arising out of or in connection with this Agreement, with a sum insured of not less than \$250,000,000 for any one occurrence or series of occurrences arising from one originating cause;
  - (2) includes cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs at a specific time and place with a sum insured of not less than a total of \$250,000,000 in respect of all occurrences during any one period of insurance; and
  - (3) covers Arc's activities as operator of the Network; and
- (b) a policy or policies of insurance with respect to Arc's liability to the Customer pursuant to the indemnities in clause 12 to the extent coverable by insurance, which includes insurance against any Claim in respect of any personal injury to, or death of, any person employed or engaged by Arc which arises out of, or is caused or contributed to by, the performance or non-performance of this Agreement by Arc which insurances must provide cover:
  - (1) in respect of common law claims, for an amount not less than \$50,000,000; and
  - (2) for compulsory statutory workers' compensation insurance, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981* (WA) or any other applicable Law.

## 9.3 Approved insurance companies

The policies of insurance required to be taken out by the Customer and Arc under clause 9.1 and clause 9.1(b)(3) must be placed with an insurance company or companies approved by the Australian Prudential Regulation Authority to underwrite insurance business in Australia and must have a credit rating of at least "A-" by Standard & Poors Rating Group or such other reputable rating agency which is equivalent to a rating "A-" by Standard & Poors Rating Group.

## 9.4 Evidence of insurances

Each party must, when reasonably requested by the other party, provide the other party with copies of the certificates of currency for each insurance policy required to be taken out by it under clause 9.1 or clause 9.1(b)(3) (as relevant).

## 9.5 Insurance not a limit on a party's liability

A party's compliance with their obligations under this clause 9 does not limit that party's liabilities or obligations under this Agreement.

## 10 Force Majeure

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### 10.1 Suspension of obligations

The obligations of a party (**Affected Party**) under this Agreement are suspended during the time and to the extent that:

- (a) if Arc is the Affected Party, it is prevented from or delayed in complying with its obligations (other than the obligation to pay money, including Charges) under:
  - (1) this Agreement;
  - (2) an Operational Track Access Agreement, or
  - (3) a Safety Interface Agreement,for any reason of Force Majeure; or
- (b) if the Customer is the Affected Party, it is prevented from or delayed in complying with its obligations (other than the obligation to pay money, including Charges) under this Agreement for any reason of Force Majeure,

provided the Affected Party complies with this clause 10.

### 10.2 Obligations of an Affected Party

The Affected Party must:

- (a) as soon as possible after the Affected Party first has knowledge of the Force Majeure, and in any event within 10 Business Days after the date on which the Affected Party first had knowledge or ought reasonably to have had knowledge of the Force Majeure, give to the other party full particulars of:
  - (1) the Force Majeure (including particulars of the date that the Force Majeure commenced);
  - (2) the manner in which its performance is thereby prevented or delayed;
  - (3) the anticipated period of delay; and
  - (4) the action (if any) the Affected Party intends to take to mitigate or remove the Force Majeure and its effect;
- (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 Affected Party is not obliged to settle a strike, lockout or other industrial dispute; and
- (c) as soon as possible after the Affected Party first had knowledge of the cessation of the relevant Force Majeure, and in any event within 10 Business Days of the date that the Affected Party first had knowledge or ought reasonably to have had knowledge of the cessation of the Force Majeure, notify the other party of the date that the Force Majeure has ceased.

### 10.3 Heat Speed Restrictions

Where Arc issues an Instruction to the Operator under the Operational Track Access Agreement for speed restrictions due to the impact of heat or other atmospheric conditions, Arc will be deemed to have complied with the obligations of this clause 10.

## 10.4 Force Majeure and obligations to pay

- (a) The obligations of a party to pay any Charges and all other amounts due and payable under this Agreement continue to apply irrespective of whether a Force Majeure affecting a party or an Operator has occurred.
- (b) For the avoidance of doubt, any Charges which are in the nature of a fixed charge (including for the avoidance of doubt the Fixed Charges) must be paid and the Customer's liability arises irrespective of whether a Force Majeure affecting a party or an Operator has occurred during the Year.

## 11 Suspension or termination

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### 11.1 Termination by Arc

Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, Arc may immediately terminate this Agreement by written notice to the Customer if:

- (a) one or more Operational Track Access Agreements utilising (in aggregate) all of the Scheduled Train Paths are not executed by Arc and one or more Operators by the date set out in clause 4.1(c);
- (b) the Customer fails to comply with clause 4.5(b) and does not remedy such failure within 20 Business Days of Arc giving notice to the Customer of the failure;
- (c) the Customer is not party to a valid and binding Transport Agreement with one or more Operators to transport Customer Product by rail utilising (in aggregate) all of the Scheduled Train Paths by the date set out in clause 4.6(a);
- (d) the Customer has not entered into a substitute transport agreement by the date set out in clause 4.6(c)(2) (as may have been extended in accordance with clause 4.6(d)) and does not remedy such failure within 20 Business Days of Arc giving notice to the Customer of the failure;
- (e) the Customer fails to pay when due:
  - (1) any Charges;
  - (2) any amount due to Arc in accordance with clause 5.5; or
  - (3) any other amount due to Arc in accordance with this Agreement,(other than any amount for which the Customer has, before the relevant due date for payment, given Arc Notice of Dispute) and such failure is not remedied within 10 Business Days of Arc giving notice to the Customer of the failure;
- (f) the Customer fails to establish, maintain or replace any Security as required under clause 15 and such failure is not remedied within 10 Business Days of Arc giving notice to the Customer of the failure;
- (g) the Customer fails to effect or maintain the insurances required to be taken out by it under clause 9.1;
- (h) the Customer fails to comply with its obligations under clause 17;
- (i) the Customer breaches any of its material obligations under this Agreement (other than as described in any of clauses 11.1(a) - 11.1(h)) and, in the reasonable opinion of Arc, the breach cannot be remedied;
- (j) the Customer breaches any of its material obligations under this Agreement (other than as described in any of clauses 11.1(a) - 11.1(h)) and, if in the reasonable opinion of Arc the breach can be remedied, the Customer has not remedied the

default within 10 Business Days of Arc giving notice to the Customer requiring the failure to be remedied.

- (k) If, for any reason (whether or not within Arc's control and including where a Network Lease is terminated or expires, without prompt replacement, or is varied or replaced on different terms) Arc ceases to have sufficient rights under one or more Network Leases enabling it to grant or provide the access contemplated by this Agreement (including where Arc ceases to have rights enabling it to grant or provide access to any Nominated Route, or part thereof) provided that if Arc's rights to one or some, but not all, Nominated Routes so cease, in whole or in part, (**Affected Nominated Routes**), Arc may (in its sole discretion), instead of terminating the whole of this Agreement, elect by giving written notice to the Operator to remove the Affected Nominated Routes from this Agreement and on and from Arc electing to do so, the Affected Nominated Routes as specified in Arc's notice will cease to be a "Nominated Route" for the purposes of this Agreement; or
- (l) an Insolvency Event occurs in relation to the Customer or any Security Provider.

## 11.2 Termination by the Customer

Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, the Customer may immediately terminate this Agreement by written notice to Arc if:

- (a) an Insolvency Event occurs in relation to Arc and, as a result of the Insolvency Event, Arc is unable or unwilling to provide access to the Network in accordance with this Agreement for a continuous period of 3 Months from the date of the Insolvency Event;
- (b) Arc fails to comply with its obligations under clause 17; or
- (c) Arc fails to pay when due:
  - (1) any Over-payment Charge;
  - (2) any amount due to the Operator in accordance with clause 5.5; or
  - (3) any other amount due to the Operator in accordance with this Agreement, (other than any amount for which Arc has, before the relevant due date for payment, given the Operator Notice of Dispute) and such failure is not remedied within 10 Business Days of the Operator giving notice to Arc of the failure;
- (d) Arc breaches any of its other material obligations under this Agreement and:
  - (1) where such breach is capable of being remedied, such breach is not remedied within 2 Months of the Customer giving notice to Arc of the breach; or
  - (2) where such breach is not capable of being remedied, Arc has not paid to the Customer reasonable compensation in respect of the breach.

## 11.3 Suspension by Arc

- (a) Without limiting in any way Arc's rights under clause 11.1, if
  - (1) Arc is entitled to terminate this Agreement under clause 11.1;
  - (2) an event or circumstance referred to in clause 11.1(b), 11.1(d), 11.1(f) or 11.1(j) has occurred and, but for the effluxion of the relevant time referred to therein, Arc would be entitled to terminate this Agreement under clause 11.1; or
  - (3) notwithstanding clause 8.4, no Services have been run for the Customer for a continuous period of 4 Months,

Arc may elect instead, or as a preliminary course of action, to suspend the obligations of both parties under this Agreement (subject to clause 11.3(b)) until the earlier of such time as the cause giving rise to the right to suspend has ceased to exist, the Agreement is terminated or such earlier time as Arc (in its absolute discretion) by notice in writing lifts the suspension.

- (b) An election referred to in clause 11.3(a) is revocable at any time by Arc and has no effect upon the obligations, debts or liabilities which have accrued before or after the election to suspend this Agreement and, for the avoidance of doubt, does not affect or suspend the Customer's obligation to pay any Charges under this Agreement (including with respect to the period of suspension) and is without prejudice to Arc's other rights and remedies in respect of that or any other default.

#### **11.4 Effect of termination or suspension**

- (a) Without limitation to the other provisions of this clause 11.4, if this Agreement is terminated by either party for any reason (including pursuant to any common law right to terminate for repudiatory or fundamental breach), then:
  - (1) Arc may issue an invoice for, and will be entitled to payment by the Customer of, and the Charges up to the date that termination takes effect; and
  - (2) the Customer must, within 10 Business Days of receiving the invoice under this clause 11.4, pay the amount set out in the invoice.
- (b) Subject to clause 11.4(c), if a party validly terminates this Agreement pursuant to this clause 11, it will be entitled to damages as if the other party had repudiated this Agreement and that repudiation had been accepted.
- (c) If Arc terminates this Agreement pursuant to clause 11.1(k) then:
  - (1) if Arc ceasing to have the sufficient rights under its Network Lease(s) as referred to in clause 11.1(k) is the result (directly or indirectly) of Customer's breach of this Agreement or an Operator's breach of its Operational Track Access Agreement, Arc will be entitled to damages as if the Customer had repudiated this Agreement and that repudiation had been accepted; alternatively
  - (2) if Arc ceasing to have the sufficient rights under its Network Lease(s) as referred to in that clause is the direct result of Arc's breach of the Network Lease(s) (such breach not being the direct or indirect result of an act or omission of Operator or Customer or any of their personnel), the Customer will be entitled to damages as if Arc had repudiated this Agreement and that repudiation had been accepted,
  - (3) except where clause 11.4(c)(2) applies, Arc will not have any Liability, and the Customer must not make any Claim, for or in respect of termination of this Agreement pursuant to clause 11.1(k).
- (d) Upon termination or suspension of this Agreement all rights of the Customer in relation to the Train Paths or to otherwise access the Network in accordance with this Agreement will cease or be suspended (as relevant) immediately.
- (e) Termination or suspension of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (f) Upon termination or suspension of this Agreement under any circumstances, all covenants and agreements of Arc and the Customer which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement will survive such termination or suspension.
- (g) Notwithstanding clause 14, upon termination of this Agreement (including any purported termination) a party may not issue a Notice of Dispute under clause 14.1

in respect of the termination, purported termination or matter that has given rise to the notice of termination and, in respect of there being any Dispute with respect to any of the foregoing, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

- (h) If Arc removes one or some, but not all, Nominated Routes from this Agreement pursuant to clause 11.1(k):
- (1) Schedule 1 will be taken to be amended accordingly;
  - (2) Arc will give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement;
  - (3) the provisions of this clause 11.4 shall apply (with all necessary changes) as and to the extent appropriate with respect to the Nominated Routes that are so removed and so as to determine the parties' respective Liabilities with respect to them and their removal from the Agreement; and
  - (4) otherwise, this Agreement shall continue unaffected, including with respect to all remaining Nominated Routes.

## 12 Indemnities

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### 12.1 Indemnity by the Customer

Subject to the other provisions of this clause 12 and clause 13, the Customer must promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against an Arc Indemnified Party in respect of:

- (a) the death of or injury to any person; or
- (b) any loss of, or damage to or destruction of any real or personal property (including the Network),

arising out of or as a consequence of:

- (c) a breach or non-performance of any of the obligations of the Customer under this Agreement; or
- (d) a breach or non-performance of any of the obligations of the Operator under the Operational Track Access Agreement;
- (e) any negligent act or omission, fraud or Wilful Default of any Customer Indemnified Party; or
- (f) any negligent act or omission, fraud or Wilful Default of any "Operator Indemnified Parties" (as defined in the Operational Track Access Agreement),

but the indemnity will be reduced proportionately to the extent that fraud, a Wilful Default or negligent act or omission of an Arc Indemnified Party has contributed to the relevant loss, damage, destruction, injury or death.

### 12.2 Indemnity by Arc

Subject to the other provisions of this clause 12 and clause 13, Arc must promptly on demand, indemnify and keep indemnified each Customer Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against a Customer Indemnified Party in respect of:

- (a) the death of or injury to any person; or
  - (b) any loss of, or damage to or destruction of any real or personal property, arising out of or as a consequence of:
  - (c) a breach or non-performance of any of the obligations of Arc under this Agreement; or
  - (d) any negligent act or omission, fraud or Wilful Default of any Arc Indemnified Party,
- but the indemnity will be reduced proportionately to the extent that fraud, a Wilful Default or negligent act or omission of any Customer Indemnified Party or any Operator Indemnified Party (as defined in the Operational Track Access Agreement) has contributed to the relevant loss, damage, destruction, injury or death.

### **12.3 Duty to mitigate**

The entitlement of a party to be indemnified under clauses 12.1 or 12.2 is subject to that party taking reasonable steps to mitigate its loss.

### **12.4 Liability to third parties**

Notwithstanding clauses 12.1, 12.2 and 13.1, the Customer is solely liable for and releases, indemnifies and must keep indemnified the Arc Indemnified Parties from and against all Claims arising out of or in connection with this Agreement in respect of damage to or loss of any property (including Customer Product and Rolling Stock) where such property is being transported on or as part of a Service.

### **12.5 Cost of recovery**

For the purposes of the indemnities given in this Agreement (including this clause 12), the property of a person includes that person's costs of recovery of any property damaged or affected by the relevant loss, damage or destruction.

### **12.6 Defence of Claims**

- (a) Each party must render to the 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 or events giving rise to a Claim.
- (b) To the extent that a party (**responsible party**) is obliged to indemnify the other party (**indemnified party**) against a Claim by a third party against the indemnified party, the responsible party may, subject only to the terms of any applicable insurance which the indemnified party may have, at its own expense defend and settle any action or proceedings in the name of the indemnified party and execute such documents in the action or proceedings as the responsible party sees fit. The responsible party indemnifies the indemnified party in respect of all Liabilities which the indemnified party may incur on account of the action or proceedings.

### **12.7 Other indemnities**

For the avoidance of doubt, the releases and indemnities in this clause 12 are in addition to, and without limitation to, any other release or indemnity given under this Agreement, including under clauses 5.6(h), 13.6(c) and 21.1(b).

## **12.8 General provisions regarding releases and indemnities**

- (a) Each release and indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives the expiry or termination of this Agreement.
- (b) It is not necessary for a party to incur expense or make a payment before enforcing any indemnity in this Agreement

## **13 Limits of liability**

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### **13.1 Liability for Consequential Loss**

Except for breach of, or under an indemnity given under, to clause 12.4 but despite any other provision of this Agreement and to the extent permitted by Law, no party will in any circumstances be liable to the other party in respect of (and the indemnities in this Agreement, other than under clause 12.4, will not extend to) any Consequential Loss under or in connection with this Agreement, whether arising under this Agreement, at Law or otherwise.

### **13.2 Minimum threshold on Claims**

Except to the extent that the relevant loss or damage arises from the fraud or Wilful Default of the other party, neither party may make any Claim against the other under or in connection with this Agreement, whether under an indemnity, in contract, tort (including negligence), equity, under statute or any other basis, if the amount of all Claims by the relevant party against the other in relation to the loss of, or damage to property arising out of or in connection with one event or a series of related events does not in the aggregate exceed \$20,000.

### **13.3 Failure to pay amounts**

No exclusion or limitation of Liability, or restriction on the existence of or ability to make any Claim, in this Agreement (including clause 13) applies to liability to pay, or Claims made by a party against another party for, monies due and payable in accordance with this Agreement including under clause 4.

### **13.4 Liability for Network**

Despite any other provision of this Agreement and to the extent permitted by Law, neither Arc nor its Personnel will have any Liability, and the Customer must not make any Claim against any of them, for or in connection with any damage, expense, injury, cost or loss whatsoever (including damage to or loss or destruction of any property (including the Customer's property or Customer Product) or any injury to or death of any person) arising out of or in connection with the standard of the Network or any failure of or defect in the Network except to the extent of such Liability (if any) which Arc would have had to the Customer under an Operational Track Access Agreement had the Customer been party to, named as the Operator under, the Operational Track Access Agreement (and subject to all limitations and exclusions of Liability under this Agreement and/or the Operational Track Access Agreement).

### **13.5 Claims in respect of non-provision of access and delays**

Neither Arc nor its Personnel will have any Liability, and the Customer must not make any Claim against any of them, in respect of any:

- (a) non-provision of access or cancellation of any Service; and/or

- (b) delay or disruption to any Service (including any variation to any Train Path),  
(**Relevant Event**) unless, and only to the extent that, all of the following are satisfied (and in any case subject to clauses 13.1, 13.2, 13.4, 13.6 and 13.7, as applicable):
- (c) the Relevant Event was a result of a breach of this Agreement, or an Operational Track Access Agreement, by Arc, or the negligence of Arc; and
- (d) the Relevant Event was not attributable to:
  - (1) the Customer, an Operator or any of their respective Personnel;
  - (2) another rail transport operator who uses, or another person who holds, or uses another person's, rights of access to, any part of the Network (including any person in control, or operating any rail infrastructure not being part of the Network but which is connected to a part of the Network);
  - (3) any Possession of, or repairs, maintenance or upgrades (including any works in respect thereto) relating to, or inspections or investigations of, the Network (or any part thereof) in a manner consistent with this Agreement and the Train Management Guidelines;
  - (4) Force Majeure;
  - (5) any event, incident or circumstance on or to any rail infrastructure that that is managed or controlled by a person other than Arc;
  - (6) a breach of a Network Lease by a Network Lessor; or
  - (7) any action taken by Arc or its Personnel (acting reasonably) or by a Government Agency in response to, or as a consequence of, an emergency or a genuine safety risk (including an Incident or Environmental Harm), or any personal injury to or the death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network; and
- (e) in the case of a Relevant Event described in clause 13.5(a), Arc did not reschedule the relevant Service if required to do so under this Agreement or the Operational Track Access Agreement.

### **13.6 Limitation of Liability with respect to Operational Track Access Agreements**

Without limitation to any release in favour of, or indemnity given to, any Arc Indemnified Party in this Agreement, or any provision of this Agreement limiting or excluding Liability of (and/or the making of Claims against) any Arc Indemnified Party, but notwithstanding any other provision of this Agreement:

- (a) the obligations and the aggregate Liability of Arc to the Customer with respect to, or in connection with, any Operational Track Access Agreement shall not exceed the obligations and aggregate Liability which Arc would have had to the Customer had it been the relevant Operator under the Operational Track Access Agreement;
- (b) with respect to any Claim by the Customer against any Arc Indemnified Person with respect to any Operational Track Access Agreement (including any act or omission with respect thereto):
  - (1) the Arc Indemnified Persons shall have the benefit of all and any defences, set-offs, counterclaims, conditions or deductions which would be available to Arc in respect of any Claim by the Operator under the Operational Track Access Agreement; and
  - (2) without limitation to clause 13.6(b)(1), the releases and indemnities given by the Operator under the Operational Track Access Agreement and the provisions of the Operational Track Access Agreement limiting and

excluding Liability of (and the making of Claims against) Arc and other Arc Indemnified Persons shall also apply in the same way as if the Customer were a party to the Operational Track Access Agreement and a reference in any such provision to the Operator included a reference to the Customer; and

- (c) the Customer indemnifies and must keep indemnified the Arc Indemnified Parties (and any one or more of them) from and against Claims and Liabilities with respect to, or in connection with, any Operational Track Access Agreement in excess of, or contrary to, that expressly permitted by this clause 13.6.

### **13.7 Other limits or exclusions of liability**

For the avoidance of doubt, the limitations and exclusions of liability in this clause 13 are in addition to, and without limitation to, any other limitation or exclusions of liability specified in this Agreement, including clause 8.1.

### **13.8 Civil Liability Act**

The parties agree that to the extent permitted by Law, the operation of Part 1F of the *Civil Liability Act 2002* (WA) is excluded in relation to all and any rights, obligations and liabilities arising out of or in connection with this Agreement whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or on the basis of quantum meruit, quasi contract or of any other principle of Law.

## **14 Resolution of disputes**

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### **14.1 Procedure to settle disputes**

- (a) If a dispute arises between the parties in connection with this Agreement (**Dispute**) then, unless expressly provided to the contrary in this Agreement, the Dispute must be resolved in accordance with this clause 14 and either party may give a notice to the other party specifying the Dispute and requiring its resolution in accordance with this clause 14 (**Notice of Dispute**).
- (b) Subject to clause 14.1(c), the procedure that the parties must strictly follow to settle a Dispute is as follows:
  - (1) first, negotiation of the Dispute in accordance with clause 14.2;
  - (2) second, mediation of the Dispute in accordance with clause 14.3; and
  - (3) third, litigation of the Dispute in accordance with clause 14.4.
- (c) Nothing in this clause 14:
  - (1) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 14; or
  - (2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (d) The parties' obligations under this Agreement will continue notwithstanding any:
  - (1) Dispute between the parties;
  - (2) submission of a Dispute to mediation; or
  - (3) referral of a Dispute to litigation.

- (e) This clause 14 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (f) This clause 14 applies even where this Agreement is otherwise void or voidable.

## 14.2 Negotiation

- (a) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.
- (b) If the Dispute is not resolved within 10 Business Days after the Notice of Dispute is given, the Dispute must be referred to the chief executive officers of the parties (or their nominees) who must meet, within 15 Business Days after the Notice of Dispute is given, and try to resolve the Dispute by joint discussions.

## 14.3 Mediation

- (a) If the Dispute is not resolved within 1 Month after the Notice of Dispute is given, either party may refer the Dispute to mediation by written notice to the other party (**Mediation Notice**).
- (b) The mediation must be conducted in Perth, Western Australia by a single mediator.
- (c) The Institute of Arbitrators and Mediators Australia Mediation Rules (at the date of this Agreement), as amended by this clause 14, apply to the mediation, except where they conflict with this clause 14.
- (d) If the parties have not agreed upon the mediator and the mediator's remuneration within 5 Business Days of the Mediation Notice being given:
  - (1) the mediator is the person appointed by; and
  - (2) the remuneration of the mediator is the amount or rate determined by, the President of the Law Society of Western Australia (**Principal Appointor**) or the Principal Appointor's nominee, acting on the request of either party.
- (e) Unless the parties otherwise agree:
  - (1) each party may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
  - (2) each party must bear its own costs relating to the preparation for and attendance at the mediation; and
  - (3) the costs of the mediator will be borne equally by the parties.

## 14.4 Litigation

Irrespective of whether a Mediation Notice has been issued, if the Dispute is not resolved within 2 Months after the Notice of Dispute is given, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

## 14.5 Joinder

- (a) The Customer acknowledges and agrees that Arc may direct the Customer to participate in any dispute resolution process under the Operational Track Access Agreement if Arc considers that it is necessary or appropriate for the Customer to join such a dispute.
- (b) The Customer must comply with any direction given by Arc under clause 14.5(a).

- (c) The Customer acknowledges and agrees to the Operator participating in any dispute resolution process under this Agreement if Arc considers that it is necessary or appropriate for the Operator to join such a dispute.

## 15 Security

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### 15.1 Customer to provide Security

- (a) Arc may require the Customer to provide Security.
- (b) Subject to clause 15.1(a):
  - (1) the Customer must deliver to Arc Security for the Secured Sum prior to the commencement of Services by an Operator or, when Security has been requested after Services have commenced, within 5 Business Days of written request by Arc.
  - (2) the Customer must keep the Security for the Secured Sum current (and from a Security Provider with an Acceptable Credit Rating) at all times during the Access Term.
- (c) Upon expiry or earlier termination of this Agreement, Arc shall release the Security to the Customer provided that at the time of expiry or earlier termination the Customer is not in default of its obligations under this Agreement and there are no amounts owed by it to Arc.

### 15.2 Exercise of Security

- (a) Arc will hold the Security to secure the performance of the Customer's obligations under this Agreement (including the obligation to pay money).
- (b) Arc may call upon the Security to satisfy any Liability suffered or incurred by Arc due to a failure of the Customer to comply with the terms of this Agreement.
- (c) If Arc exercises or draws on the Security, the Customer must promptly provide an additional Security for the amount drawn (otherwise on the same terms and conditions as the original Security).

## 16 Confidentiality

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### 16.1 Acknowledgment of confidentiality and confidentiality obligation

Each party acknowledges and agrees that:

- (a) subject to clause 16.2:
  - (1) it must keep confidential and must not disclose any Confidential Information disclosed to it by the other party;
  - (2) it must not use Confidential Information for any purpose other than as necessary for the purposes of this Agreement; and
  - (3) it must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media release or other publicity relating to the other party's Confidential Information; and
- (b) any Confidential Information provided by the other party remains the property of the other party.

## 16.2 Permitted disclosure

- (a) Subject to compliance with clauses 16.2(b) and 16.2(c), a party may disclose Confidential Information of the other party:
- (1) where the other party has given its prior written consent to such disclosure;
  - (2) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
  - (3) if required by Law (other than section 275(1) of the *Personal Property Securities Act 2009 (Cth)*) or the rules of any stock exchange or by any Government Agency;
  - (4) as required or permitted by this Agreement;
  - (5) to a ratings agency;
  - (6) to its insurers, auditors, legal advisors or other advisors or consultants under a duty of confidence;
  - (7) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
  - (8) to enable a party to exercise its rights, or perform its obligations under or in connection with this Agreement;
  - (9) in relation to the enforcement of its rights under or in connection with this Agreement;
  - (10) to its Related Bodies Corporate and its and their respective directors, officers and employees;
  - (11) to its Personnel (but excluding the Operator) to enable a party to perform its obligations under this Agreement or to make or defend any claim under this Agreement; or
  - (12) in any proceeding arising out of or in connection with this Agreement;
- (b) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (1) otherwise keep the Confidential Information confidential; and
  - (2) except in respect of disclosure pursuant to clause 16.2(a)(3), use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 16.
- (c) Before making any disclosure pursuant to clause 16.2(a)(3), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (1) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
  - (2) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.
- (d) Nothing in this clause 16 prevents a party from disclosing to the Operator Confidential Information relating solely to:
- (1) supply chain management; or
  - (2) any actual or proposed variation to Schedule 1.

## 17 Assignment, transfers and encumbrances

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### 17.1 Assignment or transfer of this Agreement

A party (**Transferor**) must not:

- (a) assign, or attempt to assign, any of its rights; or
- (b) novate, otherwise transfer or attempt to transfer, any of its rights or obligations, under this Agreement to another person (**Proposed Transferee**) without the prior written consent of the other party (**Other Party**), which consent must not be withheld if:
  - (c) the Other Party is satisfied, acting reasonably, that the Proposed Transferee is financially, technically and operationally capable of complying with the Transferor's obligations under this Agreement (the onus of proving which rests on the Transferor);
  - (d) the Proposed Transferee is a Related Body Corporate of the Transferor; or
  - (e) the Transferor is Arc and the Proposed Transferee is entitled to and willing and able to grant access to the Network in accordance with this Agreement,

and:

- (f) in the case of an assignment, on or before such assignment the Proposed Transferee executes such documents, on terms acceptable to the Other Party (acting reasonably), whereby the Proposed Transferee agrees to be bound by, and is obliged to adhere to, the provisions of this Agreement; or
- (g) in the case of a novation or other transfer, on or before such transfer the Proposed Transferee executes such documents on terms acceptable to the Other Party (acting reasonably) which would have the effect as if the Proposed Transferee was named in place of the Transferor in this Agreement.

### 17.2 Effect of assignment or transfer

Any assignment, novation or other transfer 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 assignment, novation or transfer.

### 17.3 Encumbrance over this Agreement

The Customer must not grant or allow to exist a mortgage, charge or other security interest over any of its right, title and interest in this Agreement without the prior written consent of Arc.

## 18 Governing Law

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### 18.1 Law of this Agreement

This Agreement takes effect, is governed by and is to be construed in accordance with the Laws for the time being of the State of Western Australia.

### 18.2 Jurisdiction

- (a) The parties submit to the exclusive jurisdiction of the courts exercising jurisdiction in the State of Western Australia.

- (b) Arc and the Customer irrevocably waive any objection to the venue of any legal process brought in the courts exercising jurisdiction in the State of Western Australia, and any courts which have jurisdiction to hear appeals from any of those courts, on the basis that the process has been brought in an inconvenient forum.

## 19 Notices

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### 19.1 Notices in connection with this Agreement

- (a) Any notice, demand, invoice or other communication (**Notice**) required or permitted to be given to or by a party to this Agreement:
- (1) must be in legible writing and in English addressed as shown below:
- (A) in the case of Arc:
- Attention: Chief Executive Officer  
Address: Level 3, 1 George Wiencke Drive, Perth Airport,  
Western Australia 6105  
Email: [commercial@arcinfra.com](mailto:commercial@arcinfra.com)  
and with a copy sent to: [legal@arcinfra.com](mailto:legal@arcinfra.com)
- (B) in the case of the Customer:
- Attention: [insert]  
Address: [insert]  
Email: [Insert]
- or as specified to the sender by a party by notice;
- (2) may be given by:
- (A) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee; or
- (B) email (sent as an attachment), in which case the Notice is regarded as given by the sender and received by the addressee on the first to occur of:
- (i) the time shown in the delivery confirmation report generated by the sender's email system; or
- (ii) if the sender's email system does not generate a delivery confirmation report within 12 hours of the time the email is sent, unless the sender receives a return email notification that the email was not delivered, undeliverable or similar, at the time which is 12 hours from the time the email was sent,
- but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and
- (3) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (b) In this clause 19, a reference to an addressee includes a reference to an addressee's Personnel.

## 19.2 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.

## 20 Risk and cost of performing obligations and agents and contractors

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### 20.1 Risk and cost

Unless otherwise expressly stated in this Agreement, each party bears the sole risk and must pay the costs and expenses of performing or complying with all of its obligations under this Agreement.

### 20.2 Agents and contractors

- (a) Arc may appoint or engage any third party as its agent or contractor in relation to the exercise of any rights or the performance of any obligations under this Agreement as long as the third party complies with the requirements of this Agreement, including obtaining any Accreditation or other authorisation, approval, consent, permit or licence required by this Agreement.
- (b) The appointment of a third party as agent or contractor in accordance with clause 20.2(a) does not operate to relieve Arc of any of its obligations or liabilities under this Agreement and Arc is liable to the other as if the acts and omissions of any agent or contractor it appoints or engages were its own acts or omissions.

## 21 Anti-corruption and modern slavery

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### 21.1 Anti-corruption

- (a) The Customer represents, warrants and undertakes to Arc that:
  - (1) it has not offered, promised, given or agreed to give and shall not during the term of this Agreement offer, promise, give or agree to give to any person any bribe, whether on behalf of Arc or otherwise, with the object of obtaining a business advantage;
  - (2) it will not engage in any activity or practice which would constitute an offence under any applicable anti-bribery laws, including but not limited to the Criminal Code Act 1995 (Cth), United States Foreign Corrupt Practices Act of 1977, the United Kingdom's Bribery Act 2010 and Canada's Corruption of Public Officials Act (**Anti-Corruption Laws**);
  - (3) it has and during the Access Term will maintain in place its own policies and procedures to ensure compliance with any applicable Anti-Corruption Laws;
  - (4) it will procure that any person who performs or has performed services for or on its behalf in connection with this Agreement (**Associated Persons**) complies with this clause 21.1(a);
  - (5) it will not enter into any agreement with any Associated Person in connection with this Agreement unless such agreement contains undertakings on the same terms as contained in this clause 21.1(a);

- (6) it has and will maintain in place effective accounting procedures and internal controls necessary to record all expenditure in connection with this Agreement;
  - (7) from time to time during the Access Term, at the reasonable request of Arc, it will confirm in writing that it has complied with its undertakings under this clause 21.1(a) and will provide any information reasonably requested by Arc in support of such compliance;
  - (8) it will report to Arc as soon as practicable any request or demand for any improper payments or other improper advantage of any kind received by the Customer from Arc or any other person in connection with the performance of this Agreement; and
  - (9) it shall notify Arc as soon as practicable of any breach of any of the undertakings contained in this clause 21.1(a) of which it becomes aware.
- (b) To the fullest extent permitted by Law, the Customer shall indemnify and hold harmless the Arc Indemnified Parties and their directors, officers, employees, and agents from and against any and all Claims that the Arc Indemnified Parties incur or suffer that arise out of or in connection with the Customer's breach of any representation, warranty or other obligation in clause 21.1(a).

## **21.2 Modern slavery**

- (a) The Customer must, and must ensure that all of its Personnel:
- (1) comply with Modern Slavery Laws;
  - (2) not engage in any conduct which may breach, or put Arc in breach, of any Modern Slavery Laws;
  - (3) comply with all policies, procedures, guidelines, codes (including codes of conduct) of Arc relating to Modern Slavery;
  - (4) do all things required or necessary to mitigate or reduce risks of Modern Slavery within its operations or supply chain; and
  - (5) comply with all reasonable directions of Arc, and otherwise provide all assistance, records and information and do all things necessary to assist the Arc to comply with its obligations under the Modern Slavery Laws and to verify compliance with this clause 21.2(a).
- (b) The Customer warrants and represents that it (and its directors and/or employees):
- (1) have not been convicted of any offence involving Modern Slavery; and
  - (2) have not been and is/are not the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of any Modern Slavery Laws.
- (c) The Customer must notify Arc immediately (and in any case within 24 hours) in writing if it becomes aware or has reason to believe that it, its Personnel or any other participants in its supply chain in connection with this Agreement have breached, or potentially breached, any Modern Slavery Laws.

## **21.3 Representations and warranties continue**

Each representation and warranty in this clause 21 is given as at the date of this Agreement and is repeated at all times thereafter for the duration of the Access Term.

## 22 General

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### 22.1 Certificate

A certificate signed by any duly authorised officer of Arc as to a matter or as to a sum payable to Arc in connection with this Agreement is prima facie evidence of the matters stated in it or the sum payable.

### 22.2 Exercise of rights

- (a) A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy.
- (b) A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy.
- (c) Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

### 22.3 Remedies cumulative

The rights, powers and remedies provided in this Agreement are cumulative with and not exclusive of the rights, powers or remedies provided by Law independently of this Agreement.

### 22.4 Further assurances

Each party agrees, at its own expense, on the request of the other party, to do everything reasonably necessary to give effect to this Agreement and the transactions contemplated by it, including, but not limited to, the signing of documents.

### 22.5 Variation

This Agreement may not be varied except in writing signed by all parties.

### 22.6 Severability

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

### 22.7 No partnership or agency

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

### 22.8 Counterparts

This Agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument.

## **22.9 Execution by attorney**

If an attorney executes this Agreement, the attorney declares that the attorney has no notice of revocation, termination or suspension of the power of attorney under which the attorney executes this Agreement.

## **22.10 Costs and expenses**

- (a) Each party must pay its own legal and other costs and expenses in relation to the negotiation, preparation and execution of this Agreement.
- (b) A party in default must pay all costs (including solicitor/client costs on a full indemnity basis) incurred by the other party in respect of that default and any notice relating to that default.
- (c) The Customer must pay all duty and other government imposts payable in connection with this Agreement and all other documents referred to in this Agreement when due or earlier if required in writing by Arc.

## **22.11 Suspension**

Except as expressly provided for in this Agreement, neither party has a right to suspend its obligations under this Agreement for any reason.

## **22.12 Survival**

Each indemnity in this Agreement and clauses 1, 10, 11, 11.4(h), 13, 14 and 21 and any rights or obligations which accrued in respect of a prior breach of this Agreement, survive termination or expiry of this Agreement.

## **23 No implied representations or warranties**

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Except for:

- (a) the express terms and warranties set out in this Agreement; and
- (b) those implied terms and warranties that are imposed by Law that are mandatory and cannot be excluded,

neither party gives any warranties to the other party and all other terms, conditions, warranties, stipulations or other statements whatsoever, whether express or implied, by Law, or otherwise howsoever, are expressly excluded.

## **24 Entire understanding**

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This Agreement:

- (a) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and
- (b) supersedes any prior agreement or understanding on anything connected with that subject matter.

# Schedule 1

## Scheduled Train Paths

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### Item 1 Nominated Routes

Nominated Route <b>(Origin to Destination)</b>	Maximum Track Axle Load (tonnes)	Maximum Train Length (metres)
[insert]	[insert]	[insert]

### Item 2 Scheduled Train Paths

	[Insert Origin] <b>(Origin)</b>		[Insert Destination] <b>(Destination)</b>	
Train ID	Departure Day	Departure Time	Arrival Day	Arrival Time

[Include train path schedule for each Nominated Route]

### Charges

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#### 1. Monthly Payments

- (a) Within three (3) Business Days after the end of each Month, commencing from the Commencement Date, the Customer must provide Arc with a statement of the Actual Net Tonnes transported on each Service during the previous Month including the following information for each Service:
  - (1) Train ID;
  - (2) Date of departure; and
  - (3) Origin.
- (b) The Customer may send the statement of Actual Net Tonnes to Arc by email or post but for the purpose of this item 1, the Customer's notification to Arc will include notification by email to [commercial@arcinfra.com](mailto:commercial@arcinfra.com), or as otherwise advised by Arc to the Customer from time to time, and will be taken to be received by Arc when the Customer receives confirmation on its server that the message has been transmitted.
- (c) At the end of each Month, and upon expiry of the Access Term, Arc will calculate:
  - (1) the Fixed Charges in accordance with item 4 below;
  - (2) the Variable Charges in accordance with item 5 below; and
  - (3) issue an invoice for the Fixed Charges and Variable Charges to the Customer.
- (d) The Customer must pay the amount invoiced under this item 1 within 21 days from the date the invoice is given by Arc to the Customer.
- (e) For the avoidance of doubt, Arc's failure to issue an invoice does not forgo the Customer's obligation to pay a sum due and payable under this Agreement.

#### 2. Over-payments and Under-payments

- (a) In respect of each Access Year during which Charges are received, Arc will calculate:
  - (1) under payments; and
  - (2) over payments;in a manner consistent with the Over-payment Rules (**Over-payment Charge**).
- (b) Within 90 days of the end of each relevant Access Year, Arc will issue a statement to the Customer specifying the amount of any under-payment or over-payment for the preceding Access Year of the Access Term.
- (c) If an over-payment exists, Arc must pay the amount specified in the statement to the Customer within 21 days from the date the statement is given by Arc to the Customer.
- (d) If an under-payment exists, the Customer must pay the amount specified in the statement within 21 days from the date the statement is given by Arc to the Customer.

- (e) The obligation to calculate under payments and over payments continues until:
- (1) this Agreement expires or is terminated; and
  - (2) no Charges are received during an Access Year.

### 3. Access Rates

	Rate in 20XX (\$)
Fixed Rate [Insert]	[X]
Variable Rate (cents per GTK)	[X]

The Access Rates set out above will be used to calculate the Charges, subject to adjustment in accordance with Schedule 3.

### 4. Fixed Charge Calculation

The Fixed Charge shall be payable by the Customer each Month (or part thereof) during the Access Term as calculated by Arc in accordance with the following formula:

[insert]

### 5. Variable Charge Calculation

- (a) The Variable Charge shall be payable by the Customer each Month (or part thereof) during the Access Term as calculated by Arc in accordance with the following formula:

$$VC = VR \times GTK$$

Where:

VC = the Variable Charge

VR = the Variable Rate

GTK = the number of GTK's for all Services utilising a Train Path for the relevant Month (or part thereof).

- (b) GTK's will be calculated by Arc by aggregating the GTK's of each movement of Rolling Stock on a Service in accordance with the following formula:

$$GTK = D \times K$$

Where:

GTK = the aggregate of the GTK's per unit of Rolling Stock

D = the gross weight per unit of Rolling Stock (including Customer Product)

K = the total distance (in kilometres) per movement.

## Variation of Charges

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### 1. Annual Variation of Access Rates

On 1 July of each year (commencing from 1 July 20[XX]), the Access Rates as set out in Schedule 2 will be increased in accordance with the following formula:

$$R_n = R_b \times (CPI_n \div CPI_b)$$

where:

R<sub>n</sub> = The Access Rate to apply from 1 July of the applicable year.

R<sub>b</sub> = The Access Rate applying at the Commencement Date.

CPI<sub>n</sub> = the Australian Bureau of Statistics catalogue number 6401.0 Consumer Price Index All Groups – Australia, available from www.abs.gov.au for 31 March in the applicable year.

CPI<sub>b</sub> = the Australian Bureau of Statistics catalogue number 6401.0 Consumer Price Index All Groups – Australia, available from www.abs.gov.au for 31 March 20[XX]

If, at any given time throughout the Access Term, CPI<sub>n</sub> is less than CPI<sub>b</sub>, CPI<sub>n</sub> will be deemed to be equal to CPI<sub>b</sub> for the purpose of the above calculation.

For the avoidance of doubt, the Access Rate for each year shall not be less than the Access Rate payable for the immediately preceding period.

### 2. Material Change

- (a) If at any time after the date of this Agreement a Material Change occurs which affects the financial position of Arc or the costs to Arc of performing its obligations under this Agreement, Arc may notify the Customer giving details of the Net Financial Effect.
- (b) Within 10 Business Days after receipt of a notice under item 0(a) above, Arc and the Customer must meet and negotiate in good faith any appropriate adjustments to the Charges and any other amounts payable under this Agreement in order to remove, as far as practicable, the Net Financial Effect of the Material Change and return Arc to the position it would have been in had the Material Change not occurred.
- (c) If the parties do not reach agreement within 15 Business Days of Arc's notice, the matter will be referred to dispute resolution under clause 14.

### 3. Rounding

Any amount calculated under this Agreement (including the Charges calculated in Schedule 2 or any interest in clause 5.5) which exceeds four decimal places will be rounded to four decimal places. For the purposes of such rounding, if the digit at the fifth decimal place is:

- (a) between zero and four (inclusive), the number is to be rounded down to the nearest fourth decimal place; or
- (b) between five and nine (inclusive), the number is to be rounded up to the nearest fourth decimal place.

Rolling Stock

---

**1. Locomotives**

Locomotive Class		
Locomotive Power (gross)		
Locomotive Power (traction type)		
Locomotive tractive effort (continuous)		
Maximum Operating Speed		
Number of axles		
Locomotive axle load (tonnes)		
Bogie axle Configuration		
Tare Weight (tonnes)		
Locomotive length over coupling (mm)		
Dynamic Brake		
Gauge		
Radio Equipment Compatible with Arc Train Control (that is capable of exchanging voice and data)		

**2. Wagons**

Wagon Class	
Wagon type	
Lids	
Gross Weight (tonnes)	
Tare Weight (tonnes)	
Wagon length (mm)	
Maximum speed	
Number of axles per wagon	
Gauge	
Bogie wheelbase (mm)	
Carrying Capacity (Gross minus Tare) (tonnes)	

Note: All Rolling Stock must comply with any operating restrictions or instructions, and be registered for use on the Network prior to accessing the Network and at all times during access.

# Signing Page

Executed as an agreement

---

Executed by  
**Arc Infrastructure Pty Ltd**  
**ABN 42 094 721 301**  
in accordance with section 127 of the *Corporations Act 2001*

sign here ► \_\_\_\_\_  
Director

print name \_\_\_\_\_

sign here ► \_\_\_\_\_  
Director/Company Secretary

print name \_\_\_\_\_

Executed by  
**[insert]**  
**ABN [insert]**  
in accordance with section 127 of the *Corporations Act 2001*

sign here ► \_\_\_\_\_  
Director

print name \_\_\_\_\_

sign here ► \_\_\_\_\_  
Director/Company Secretary

print name \_\_\_\_\_

# Annexure

## Annexure A – Form of Operational Track Access Agreement

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# Operational Track Access Agreement

*([Operator] for [End User])*

*[Nominated Route(s)]*

---

**Arc Infrastructure Pty Ltd**  
ABN 42 094 721 301

[Insert Company Name]  
ABN [insert ABN]

**Note:** *This Agreement comprises, for the purposes of section 47A of the Rail Access Code, part of the standard access provisions (being the part applicable to the arrangements between Arc and an end user's nominated Accredited rolling stock operator) where access rights are to be provided to, and held directly by, an end user (who will then nominate one or more Accredited rolling stock operators to use the access rights to provide services to the end user under their separate transport agreement). This Agreement is based on the following assumptions:*

- *No conditions precedent are necessary; and*
- *There is a common commencement date / expiry date for all Nominated Routes/Scheduled Train Paths.*

*If any of the above assumptions are not true, then the parties will need to seek to negotiate amendments.]*

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# 1 Definitions and interpretation

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## 1.1 Definitions

The meanings of the terms used in this Agreement are set out below.

<b>Term</b>	<b>Meaning</b>
<b>Accreditation</b>	has the meaning given to it under the Rail Safety National Law. <b>Accredited</b> means to hold Accreditation.
<b>Accredited Owner</b>	an owner (or other person having management and control) of a railway who is Accredited or taken to be Accredited.
<b>Agreement</b>	this document and its schedules, annexures and attachments.
<b>Anti-Corruption Laws</b>	has the meaning given in clause 26.1(a)(2).
<b>Applicable Part 5 Instrument</b>	a 'Part 5 instrument' (as defined in Rail Access Code, section 40(3)) that is applicable to Arc, including the Train Management Guidelines, the Train Path Policy and the Overpayment Rules.
<b>Arc Indemnified Parties</b>	(a) Arc and its Personnel; and (b) each Related Body Corporate of Arc and their Personnel.
<b>Arc's Network Rules</b>	the Arc Network Safeworking Rules and Procedures issued in accordance with Arc's safety management system approved under Part 3 Division 6 of the Rail Safety National Law together with any amendments, deletions or additions made in accordance with the safety management system and all policies and notices issued by Arc for the purpose of ensuring the safe use of the Network.
<b>Associated Persons</b>	has the meaning given in clause 26.1(a)(4).
<b>Business Day</b>	a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
<b>Change in Law</b>	(a) any amendment, repeal or enactment of any Law; (b) any legally binding change in the interpretation or application, including by the exercise of delegated authority, of any Law resulting from a decision of a court or Government Agency; (c) the making of any new directive, or any change in an existing directive, of any Government Agency that is legally binding;

Term	Meaning
	<ul style="list-style-type: none"> <li>(d) the imposition of a legally binding requirement for authorisations not required as at the Commencement Date;</li> <li>(e) after the date of grant of any authorisation, a change in the terms and conditions attaching to that authorisation or the attachment of any new terms or conditions that are legally binding;</li> <li>(f) any such authorisation as has been granted ceasing to remain in full force and effect or, if granted for a limited period, not being renewed on a timely basis on application being duly made, or being renewed on conditions that are legally binding and which are materially less favourable than those attached to the original authorisation; or</li> <li>(g) any amendment or replacement of any Applicable Part 5 Instrument, or the standard access provisions applicable to Arc, as approved or determined by the Economic Regulator (including where the amendment or replacement was sought or requested by Arc).</li> </ul>
<b>Change in Relevant Tax</b>	<p>means:</p> <ul style="list-style-type: none"> <li>(a) the imposition of a new Relevant Tax;</li> <li>(b) an increase in the rate of existing Relevant Tax;</li> <li>(c) a change in the basis of calculation of a Relevant Tax.</li> </ul>
<b>Charges</b>	means the Light Engine Movement Charge and the Parking Charge, as varied from time to time in accordance with this Agreement.
<b>Claim</b>	a claim, demand, action or proceeding of any nature, whether actual or threatened and includes any claim for payment of money (including damages) arising otherwise in Law or in equity including by statute, in tort for negligence or otherwise.
<b>Commencement Date</b>	[insert]
<b>Commercial Track Access Agreement</b>	the agreement between the Customer and Arc dated on or about the date of this Agreement by which Arc grants the Customer an entitlement to access the Scheduled Train Paths.
<b>Confidential Information</b>	<p>in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:</p> <ul style="list-style-type: none"> <li>(a) is by its nature confidential;</li> <li>(b) is stated in this Agreement to be confidential;</li> <li>(c) is designated by a party in writing as being confidential; or</li> <li>(d) the receiving party knows or ought to know is confidential,</li> </ul> <p>but excludes information which:</p>

Term	Meaning
	<p>(e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it;</p> <p>(f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or</p> <p>(g) has been independently developed or acquired by the receiving party.</p>
<b>Consequential Loss</b>	<p>(a) Subject to paragraph (b) of this definition, any loss of or damage to any product (including Customer Product), loss of business, loss of profit, economic loss, loss of use, loss of business reputation, loss of opportunities, loss of anticipated savings or wasted overheads, loss of production, loss of revenue, any port, shipping or demurrage costs or fees, or any special damages (except to the limited extent set out below in this definition) or damage to credit rating, howsoever arising and whether in any action in contract, tort (including negligence), equity, or product liability, under statute or any other basis.</p> <p>(b) The following are expressly excluded from paragraph (a) of this definition:</p> <ol style="list-style-type: none"> <li>(1) in respect of any personal injury claim or claim in respect of the death of any person, special loss or economic loss as those terms are used in the context of such claims;</li> <li>(2) the Operator's liability to pay Arc any amount expressly provided for in this Agreement (including any Charges or other amount payable by the Operator as a debt due);</li> <li>(3) any loss, damage or cost arising out of or in connection with fraud or Wilful Default;</li> <li>(4) without limiting paragraph 5 of this definition, the cost of repairing, replacing or reinstating any real or personal property of any person (including Arc and the Operator) other than Customer Product; and</li> <li>(5) any loss, damage or cost arising out of or in connection with damage to third party property other than Customer Product.</li> </ol>
<b>Corporations Act</b>	the <i>Corporations Act 2001</i> (Cth).
<b>Customer</b>	[insert]
<b>Customer Indemnified Parties</b>	the Customer and its directors, officers, employees, agents and contractors, but excluding the Operator.
<b>Customer Product</b>	means [insert] or any other product approved by Arc in writing, that is transported by the Operator on a Train Path.
<b>Dangerous Goods Code</b>	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.

<b>Term</b>	<b>Meaning</b>
<b>Default Rate</b>	at the relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ( <a href="http://www.rba.gov.au">www.rba.gov.au</a> ) at that time plus 5% per annum.
<b>Destination</b>	<p>(a) for the Scheduled Train Paths, means the destination of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for all Light Engine Movements and other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement, means the point on the Network specified in an Instruction issued by Arc in accordance with this Agreement.</p>
<b>Dollars, A\$ and \$</b>	the lawful currency of the Commonwealth of Australia.
<b>Economic Regulator</b>	means the Economic Regulation Authority Western Australia.
<b>Environment</b>	has the meaning given in the <i>Environmental Protection Act 1986</i> (WA) and 'Environmental' has a corresponding meaning.
<b>Environmental Condition</b>	any Environmental Harm or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Harm and which in Arc's opinion (acting reasonably) may result in Arc or any other person incurring any material liability or being subjected to a direction of any Government Agency.
<b>Environmental Harm</b>	any actual or threatened adverse impact or damage to the Environment and includes 'environmental harm' as defined in the <i>Environmental Protection Act 1986</i> (WA).
<b>Environmental Law</b>	all present and future Laws concerning Environmental matters including the <i>Environmental Protection Act 1986</i> (WA), <i>Conservation and Land Management Act 1984</i> (WA), <i>Rights in Water and Irrigation Act 1914</i> (WA), <i>Dangerous Goods Safety Act 2004</i> (WA), <i>Contaminated Sites Act 2003</i> (WA), <i>Planning and Development Act 2005</i> (WA), relevant local and regional planning schemes, <i>Aboriginal Heritage Act 1972</i> (WA) and <i>Environmental Protection and Biodiversity Conservation Act 1999</i> (Cth).
<b>Expiry Date</b>	23:59 hours on [insert].
<b>Force Majeure</b>	<p>any cause, event or circumstance (or combination of causes, events and circumstances) which:</p> <p>(a) is beyond the reasonable control of the party claiming force majeure;</p> <p>(b) prevents the affected party from performing its obligations under this Agreement; and</p>

Term	Meaning
	<p>(c) cannot be prevented, overcome or remedied by the exercise by the party affected of a reasonable standard of care and diligence,</p> <p>including:</p> <p>(d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide or heat (including speed restrictions due to the impact of heat or other atmospheric conditions);</p> <p>(e) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic;</p> <p>(f) the effect of any applicable Australian Laws or enforcement actions of any court or Australian Government Agency in response to an epidemic or pandemic which occurs after the Commencement Date and which could not reasonably have been foreseen by the party claiming force majeure; or</p> <p>(g) Industrial Action provided that, in the case of the Operator being the affected party, only if the Industrial Action which affects the logistics industry on a national or state-wide basis, is not specific to the Operator's Personnel and lasts for longer than 28 days;</p> <p>but does not include:</p> <p>(h) loss of customers or loss of market share;</p> <p>(i) if the Operator is the affected party, the failure of, or the breakdown of or other damage to plant, machinery or infrastructure other than as a direct result of a cause, event or circumstance set out in paragraph (d) or paragraph (e) of this definition;</p> <p>(j) wet or otherwise inclement weather (other than as described in paragraph (d) of this definition);</p> <p>(k) if the Operator is the affected party, any acts or omissions by the Operator's Personnel; or</p> <p>(l) any event that results in the affected party having a lack of funds, including money, or inability to use, obtain or access funds, including money, for any reason.</p>
<b>General Operational Instructions</b>	means the online database controlled by Arc that contains operational information and instructions pertaining to the Network, as varied from time to time.
<b>Government Agency</b>	any government, parliament, governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.
<b>GPS Information</b>	<p>the following data for each locomotive set out in Schedule 5 utilising a Train Path, with each transmission of data to comprise:</p> <p>(a) date and time stamp;</p> <p>(b) GPS coordinates (latitude and longitude); and</p> <p>(c) details of the locomotive (including vehicle identifier).</p>

Term	Meaning
<b>GST</b>	any tax calculated by reference to the value of goods or services provided, calculated and levied at the point of sale or supply of the goods or services and includes GST as that term is used in the GST Act.
<b>GST Act</b>	<i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and includes other GST related legislation.
<b>GTK</b>	<p>a unit of measure representing the movement of 1 tonne of Rolling or of Customer Product travelling over a distance of 1 kilometre.</p> <p>By way of example:</p> <ul style="list-style-type: none"> <li>(a) <i>1 tonne of unloaded Rolling Stock travelling over a distance of 1 kilometre is equal to 1 GTK.</i></li> <li>(b) <i>1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 1 kilometre is equal to 2 GTK's.</i></li> <li>(c) <i>1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 5 kilometres is equal to 10 GTK's.</i></li> </ul>
<b>Incident</b>	<p>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:</p> <ul style="list-style-type: none"> <li>(a) material damage to or interference with the Network;</li> <li>(b) material damage to property;</li> <li>(c) material personal injury to any person;</li> <li>(d) an Environmental Condition;</li> <li>(e) a Category A or a Category B notifiable occurrence as defined in the regulations to the Rail Safety National Law;</li> <li>(f) an incident which requiring notification under the Standards and/or the Dangerous Goods Code; or</li> <li>(g) an incident not already described in paragraphs (a)-(f) above and requiring notification under any Law relating to safety or the environment.</li> </ul>
<b>Industrial Action</b>	a strike, lockout, stoppage, go slow, labour disturbance, demarcation or industrial dispute or other industrial action.
<b>Insolvency Event</b>	<p>the occurrence of any of the following events in relation to a person:</p> <ul style="list-style-type: none"> <li>(a) a judgment in an amount exceeding \$1,000,000 is obtained against the person, or any distress, attachment, execution in an amount exceeding \$1,000,000 is issued against, levied or enforced on any of the person's assets, and is not set aside or satisfied within 20 Business Days or appealed against within the period permitted by the rules of the relevant court;</li> <li>(b) the person suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act;</li> </ul>

Term	Meaning
	<p>(c) the person enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them, other than for purpose of a bona fide reconstruction or amalgamation;</p> <p>(d) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a person or over any of the person's assets or undertakings;</p> <p>(e) an application or order is made for the winding up or dissolution of the person (other than an application which is stayed, withdrawn or dismissed within 10 Business Days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the person, except for the purpose of an amalgamation or reconstruction;</p> <p>(f) the person is deregistered or any steps are taken to deregister the person under the Corporations Act;</p> <p>(g) the person ceases to carry on business; or</p> <p>(h) any event analogous or having a substantially similar effect to any of the events described above happens in connection with that person.</p>
<b>Instructions</b>	<p>all instructions and directions, including instructions and directions of the kind listed in Schedule 4, issued by Arc from time to time which:</p> <p>(a) ensure, facilitate or encourage the proper, efficient, safe and lawful:</p> <p style="padding-left: 20px;">(1) use of and access to the Network by all Network users; and</p> <p style="padding-left: 20px;">(2) management of the Network by Arc;</p> <p>(b) are consistent with the Train Management Guidelines; and</p> <p>(c) are given with a view to minimising the disruption to the Operator in a manner which is reasonable in the circumstances and taking into account the valid objectives of Arc (as set out in paragraphs (a) and (b) of this definition) in issuing the instruction or direction,</p> <p>but does not include instructions and directions which:</p> <p>(d) derogate from the Train Paths;</p> <p>(e) 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</p> <p>(f) are given for the purpose only of achieving Arc's internal commercial objectives unrelated to the valid objectives of Arc as set out in paragraphs (a) and (b) of this definition,</p> <p>unless the instructions or directions:</p> <p>(g) are Train Control Directions properly given;</p> <p>(h) relate to emergencies or material safety issues;</p> <p>(i) are given to implement or support the Train Management Guidelines;</p> <p>(j) are necessary to prevent or to minimise the effect of a material breach of this Agreement; or</p> <p>(k) are otherwise authorised by this Agreement,</p> <p>and a reference to Arc in this definition of Instructions includes also a reference to Arc's Personnel.</p>

Term	Meaning
<b>Law</b>	<ul style="list-style-type: none"> <li>(a) Commonwealth, state and local government legislation, including regulations, by-laws, orders, awards and proclamations;</li> <li>(b) legislation of any other jurisdiction with which the relevant party must comply;</li> <li>(c) common law and equity;</li> <li>(d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and</li> <li>(e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.</li> </ul>
<b>Liability</b>	<ul style="list-style-type: none"> <li>(a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (on a full indemnity basis) and interest; and</li> <li>(b) if the context permits also includes any claim or demand for the payment of money, whether liquidated or not.</li> </ul>
<b>Light Engine Movement</b>	<p>the movement of a Train instigated by the Operator for a primary purpose other than the transport of Customer Product, including but not limited to:</p> <ul style="list-style-type: none"> <li>(a) Rolling Stock service or repairs;</li> <li>(b) retrieval and movement of failed Rolling Stock;</li> <li>(c) movement of replacement Rolling Stock, or movement of additional required Rolling Stock;</li> <li>(d) relocation or storage of Rolling Stock; or</li> <li>(e) testing or trials of Rolling Stock,</li> </ul> <p>save that Light Engine Movements do not include Services transporting Customer Product utilising a Scheduled Train Path.</p>
<b>Light Engine Movement Charge</b>	<p>a charge for the right to operate Light Engine Movements in accordance with clause 3.7, as set out in Schedule 2.</p>
<b>Major Periodic Maintenance</b>	<p>activities that renovate the Network to retain it in a functional condition which are normally completed on track sections at intervals of more than one year or more frequently if reasonably required and includes re-railing, rail grinding, resurfacing, re-signalling, communications upgrades, renovating structures, ballast cleaning and re-sleepering. For clarity, routine maintenance is not Major Periodic Maintenance.</p>
<b>Master Control Diagram</b>	<p>a diagrammatic or electronic record covering specific parts of the Network which shows all train paths including the Scheduled Train Paths.</p>

<b>Term</b>	<b>Meaning</b>
<b>Material Change</b>	a Change in Law or Change in Relevant Tax.
<b>Maximum Track Axle Load</b>	the axle load limit for the relevant parts of the Network that Trains utilising Scheduled Train Paths will travel on, as set out in Schedule 1.
<b>Maximum Train Length</b>	the train length limit for relevant parts of the Network that Trains will travel on, as set out in Schedule 1.
<b>Modern Slavery</b>	has the meaning given to it in the <i>Modern Slavery Act 2018</i> (Cth).
<b>Modern Slavery Laws</b>	means all applicable Laws concerning Modern Slavery or similar matters including the <i>Modern Slavery Act 2018</i> (Cth).
<b>Month</b>	a calendar month.
<b>Net Financial Effect</b>	the net effect, on a party of an event or circumstance, in financial terms, of the occurrence of the event or circumstance on the party in relation to performing its obligations and exercising its rights under this Agreement including any increases in costs (whether capital or operating, fixed or variable) and other detriments incurred, or to be incurred, by the party but deducting the amount of any savings or other benefits or advantages received, or to be received, by the party on the basis that the party uses reasonable endeavours to mitigate the net effect of the event or circumstance.
<b>Network</b>	the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies Corporate from time to time.
<b>Network Lease</b>	any lease or sublease to Arc or its Related Bodies Corporate of any infrastructure which forms part of the Network.
<b>Network Lessor</b>	a lessor or sublessor (as applicable) under a Network Lease.
<b>Nominated Route</b>	that part of the Network in respect of which this Agreement provides access, being that comprised in the routes as listed in Schedule 1.
<b>Operator Indemnified Parties</b>	the Operator and its Personnel, but excluding Arc Indemnified Parties.
<b>Origin</b>	(a) for the Scheduled Train Paths, means the origin of the relevant Train Path as specified in Schedule 1;

<b>Term</b>	<b>Meaning</b>
	(b) for all Light Engine Movements and other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement, means the point on the Network specified in an Instruction issued by Arc in accordance with this Agreement.
<b>Park</b>	the exercise of the right to stand a Train or Rolling Stock on the Network for any period longer than the usual standing time allowed for under a Train Path in accordance with the Train Management Guidelines.
<b>Parking Charge</b>	a charge for the right to Park, as set out in item 3 of Schedule 2.
<b>Personnel</b>	directors, officers, employees, agents, contractors and licensees provided that Arc's Personnel excludes the Operator, the Customer and their respective personnel..
<b>Possession of the Network</b>	closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading.
<b>Rail Access Code</b>	the <i>Railways (Access) Code 2000 (WA)</i> .
<b>Rail Safety National Law</b>	the <i>Rail Safety National Law (WA)</i> as applied by the <i>Rail Safety National Law Application Act 2024</i> , including the <i>Rail Safety National Regulations (WA) 2024</i> and the <i>Rail Safety National Law (WA) (Alcohol and Drug Testing) Regulations 2024</i> .
<b>Related Body Corporate</b>	has the meaning given to that expression in the Corporations Act.
<b>Relevant Tax</b>	any tax, charge, levy, duty, impost, rate, royalty, or imposition which is imposed on Arc by, or payable by Arc to, any Government Agency but does not include any income tax, fringe benefits tax, capital gains tax or any tax that replaces any of those taxes.
<b>Rolling Stock</b>	a locomotive or wagon permitted for use on the Network, as set out in Schedule 5 (as varied from time to time in accordance with clause 5.3(c)).
<b>Safety Interface Agreement</b>	has the meaning described in clause 5.9.
<b>Scheduled Train Paths</b>	an entitlement to access the Nominated Route by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and departure, transit and arrival times between the Origin and Destination, as set out in Schedule 1, and as may be amended from time to time under the Commercial Track Access Agreement.

<b>Term</b>	<b>Meaning</b>
<b>Service</b>	<p>the operation of a Train on the Network by the Operator:</p> <ul style="list-style-type: none"> <li>(a) utilising a Train Path for the purpose of transporting Customer Product for the Customer under the Transport Agreement; or</li> <li>(a) for a Light Engine Movement or other ad-hoc entitlement for access granted pursuant to this Agreement.</li> </ul>
<b>Standards</b>	the Australian Standard AS4292- Rail Safety Management (Part 1: General and Interstate Requirements), and any other principles and standards prepared, approved and published by the Standards Australia in relation to rail safety.
<b>Term</b>	is defined in clause 2.
<b>Track Access Permit</b>	a permit issued by Arc which allows a person to enter the rail corridor within which the Network is located.
<b>Train</b>	the combination of Rolling Stock used to operate Services.
<b>Train Control</b>	the control of trains on the Network by Arc or its Personnel.
<b>Train Control Centre</b>	the facility or facilities maintained and operated by Arc or its Personnel at any geographic location for the purposes of communication with Train Crew in order to exercise Train Control.
<b>Train Control Directions</b>	all Instructions issued by Arc or its Personnel relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains.
<b>Train Crew</b>	a person or persons operating a Train.
<b>Train Management Guidelines</b>	Arc's train management guidelines approved under the Rail Access Code and includes any amendments to, or replacement of, those guidelines approved by the Economic Regulator from time to time.
<b>Train Manifest</b>	<p>a notice, in electronic form, prepared by the Operator in relation to a Service and containing the following details in relation to that Service:</p> <ul style="list-style-type: none"> <li>(a) the designated Train number for the Service and its origin and destination;</li> <li>(b) the Track Access Permit Number for each of the Train Crew;</li> <li>(c) the date the Service will commence its operation on the Network;</li> <li>(d) the identification number of the locomotive or locomotives that will operate the Service in the order in which they will form the Train;</li> <li>(e) the number of Rolling Stock in the Train;</li> </ul>

Term	Meaning
	<p>(f) the gross mass of the Train and the axle load;</p> <p>(g) the length of the Train and the number of wagons;</p> <p>(h) for all Rolling Stock in the Train in the order in which it will be placed, leading end first, the following information:</p> <ol style="list-style-type: none"> <li>(1) Rolling Stock identification number;</li> <li>(2) Rolling Stock classification;</li> <li>(3) working mode;</li> <li>(4) gross weight of the Rolling Stock (which weight must not be less than the tare weight for that Rolling Stock as set out in Schedule 4);</li> <li>(5) all data provided by the Other Weighing System; and</li> <li>(6) the class of any dangerous goods (as described in the Dangerous Goods Code) carried in the wagon.</li> </ol>
<b>Train Path</b>	<p>an entitlement to access the Network by reference to certain specifications relating to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and to departure, transit and arrival times between entry and exit points on the Network and includes the following types:</p> <ol style="list-style-type: none"> <li>(a) the Scheduled Train Paths;</li> <li>(b) train paths provided to the Operator pursuant to clauses 3.6 and 3.7; and</li> <li>(c) all other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement and otherwise on such terms as Arc may stipulate in accordance with this Agreement or as otherwise agreed between the parties, <p>as granted, amended or varied in accordance with this Agreement or the Commercial Track Access Agreement.</p> </li></ol>
<b>Train Path Policy</b>	<p>means the Train Path Policy applicable to Arc, approved or determined pursuant to the Rail Access Code including any amendments to or replacements of that policy approved by the Economic Regulator from time to time.</p>
<b>Transmission Method</b>	<p>The provision of GPS Information to Arc by one or more of the following methods:</p> <ol style="list-style-type: none"> <li>(a) FTP server hosting;</li> <li>(b) HTTP or HTTPS website hosting;</li> <li>(c) duplication of GPS streams to Arc servers;</li> <li>(a) secured VPN link; or</li> <li>(b) a method that Arc reasonably requests the Operator to use to interface with any technology that Arc implements during the Term.</li> </ol>
<b>Transport Agreement</b>	<p>an agreement between the Customer and the Operator for the provision of rail haulage services to transport Customer Product utilising the Train Paths.</p>

Term	Meaning
<b>Wagon Load</b>	the weight of an individual wagon attached to a Train, and includes the weight of the physical wagon and the weight of the product carried in that wagon.
<b>Wagon Weighing Device</b>	<p>a device or combination of devices which is:</p> <ul style="list-style-type: none"> <li>(a) calibrated, in accordance with a recognised industry standard, to measure; or</li> <li>(b) determined by an authority which provides independent assurance to be capable of measuring; or</li> <li>(c) agreed by the parties to be capable of measuring,</li> </ul> <p>Wagon Loads.</p>
<b>Weighing System</b>	<p>a system that measures Wagon Load using a Wagon Weighing Device and which:</p> <ul style="list-style-type: none"> <li>(a) is owned and operated by Arc (<b>Arc's Weighing System</b>) at a point on the Network that Trains utilising Scheduled Train Paths will traverse;</li> </ul> <p>or, where Arc's Weighing System is not available or operational:</p> <ul style="list-style-type: none"> <li>(b) is owned and operated by the Customer or the Operator (<b>Other Weighing System</b>), provided that the Other Weighing System is maintained at all times such that it meets the requirements of a Wagon Weighing Device under this Agreement.</li> </ul>
<b>Wheel Condition Monitor</b>	a system that measures the condition of the wheels on a wagon and which can also weigh that wagon, and which is owned and operated by Arc at a point on the Network that Trains utilising the Scheduled Train Paths will traverse.
<b>Wilful Default</b>	<p>any wilful, intentional, wanton or reckless wrongful act or omission carried out or omitted to be done with:</p> <ul style="list-style-type: none"> <li>(a) knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or</li> <li>(b) a reckless disregard for, wanton indifference to, or knowledge of, the harmful consequences of the act or omission.</li> </ul>
<b>Working Timetables</b>	operating data for all or part of the Network issued as part of Arc's Network Rules and as amended from time to time.
<b>Year</b>	a 12 month period commencing on 1 July and ending on 30 June.

## 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 a natural person, firm, body corporate, unincorporated association, partnership, joint venture and Government Agencies;
- (d) an obligation, liability, representation or warranty:
  - (1) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (2) on the part of two or more persons binds them jointly and severally;
- (e) a reference to a party to a document include that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) a reference to the consent of a party means the prior written consent of that party;
- (g) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (h) a reference to a clause, annexure or a schedule is a reference to a clause, annexure or schedule of this Agreement;
- (i) a thing (including any amount) is a reference to the whole and each part of it;
- (j) 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;
- (k) a reference to any Law includes:
  - (1) that Law as amended or re-enacted;
  - (2) a statute, regulation or provision enacted in replacement of that Law;
  - (3) any regulation or other statutory instrument made or issued under that Law; and
  - (4) any amendment made to a statute, regulation or provision as a consequence of another statute, regulation or provision;
- (l) a reference to a clause, a schedule, an agreement or any other document, instrument, publication or code is a reference to the clause, schedule, agreement, document, instrument, publication or code as varied or replaced from time to time;
- (m) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (n) a reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not:
  - (1) which ceases to exist; or
  - (2) whose powers or functions are transferred to another body,
 is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (o) a reference to 'includes' or 'including' must be construed without limitation;
- (p) a reference to termination of this Agreement includes the expiry of the Term of this Agreement;

- (q) where time is to be reckoned by reference to a day or event, that day or the day of the event will be excluded;
- (r) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day; and
- (s) where a word or expression is defined, cognate words and expressions will be construed accordingly.

### 1.3 Exclusion of the contra proferentem rule

A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.

### 1.4 Rail Access Code

- (a) Nothing in this Agreement requires Arc to do (or omit to do) anything contrary to the Rail Access Code or any Applicable Part 5 Instrument.
- (b) The parties acknowledge and agree that, except where directed by the Economic Regulator in accordance with the Rail Access Code, it is in Arc's sole discretion if and when it may seek approval of the Economic Regulator for any amendment or replacement of any Applicable Part 5 Instrument and, without limitation:
  - (1) Arc's discretion continues unchanged at all times, irrespective of any previous amendments or replacements; and
  - (2) nothing in this Agreement prevents or limits Arc from requesting any such amendment or replacement (nor, having taken any preliminary steps with respect to any proposal, requires Arc to proceed to seek approval for any amendment or replacement.
- (c) If there is a change to the standard access provisions for the Network approved or determined by the Economic Regulator (whether or not the change is at the instigation or request of Arc) (**New Standard Access Provisions**):
  - (1) firstly, to the extent any changes in the New Standard Access Provisions affect the financial position of Arc or the costs of Arc of performing its obligations under this Agreement, Schedule 3 (item 2 Material Change) will apply;
  - (2) secondly and only to the extent of any changes not addressed (or to be addressed) in accordance with Schedule 3 (item 2 Material Change), the following will apply (provided that, in no circumstances shall this clause 1.4(c)(2) result in duplication of any recovery of costs effected pursuant to Schedule 3 (item 2 Material Change)):
    - (A) to the extent that any changes in the New Standard Access Provisions are otherwise inconsistent with this Agreement, the parties will negotiate in good faith to modify this Agreement to reflect the amendments in the New Standard Access Provisions which are necessary or desirable for Arc to safely and efficiently manage the Network while retaining, to the extent possible, the commercial and economic position of both parties arising from this Agreement (including the application of Schedule 3), and if the parties cannot agree, then the matter will be referred for resolution pursuant to clause 20; and
    - (B) if this Agreement contains a provision that is not contained in the New Standard Access Provisions and is not inconsistent with any provision of the New Standard Access Provisions,

that provision will be retained unless the parties otherwise agree.

## 2 Term of this Agreement

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- (a) This Agreement commences on the Commencement Date and, unless terminated earlier in accordance with the terms of this Agreement, expires on the Expiry Date (the **Term**).
- (b) Subject to clause 2(c), if the term of the Transport Agreement is extended beyond the Expiry Date, the Operator may seek Arc's consent to extend the Expiry Date by the same period, such consent to not be unreasonably withheld.
- (c) Notwithstanding clause 2(b), the Term will not be extended beyond the term of the Commercial Track Access Agreement.

## 3 Track access rights

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### 3.1 Acknowledgement

Arc hereby confirms and the Operator acknowledges that:

- (a) Arc has granted the Scheduled Train Paths to the Customer pursuant to the Commercial Track Access Agreement; and
- (b) the Operator may only use the Scheduled Train Paths referred to in clause 3.1(a) to operate Services pursuant to this Agreement .

### 3.2 Grant to Operator of right to operate Services using Train Paths

Arc grants to the Operator the right to operate Services on the Nominated Routes using the Scheduled Train Paths referred to in clause 3.1(a) on the terms set out in this Agreement.

### 3.3 Nature and scope of operational rights

- (a) Nothing in this Agreement gives the Operator any right, title or interest of any proprietary nature in the Network.
- (b) Notwithstanding clauses 3.1 and 3.2, the Operator's right to operate any Service on the Network (including Services on a Nominated Route using a Scheduled Train Path referred to in clause 3.1(a)) is subject to:
  - (1) the terms of this Agreement (including clauses 6, 9.4, 16 and 17.3), including the exercise, or operation, of rights, entitlements, limitations or exclusions under any of them;
  - (2) the Operator complying, and being in compliance, with the terms and conditions of this Agreement, including its warranties given under this Agreement and clauses 7, 14 and 15 and the terms and conditions of the relevant Safety Interface Agreement;
  - (3) the Commercial Track Access Agreement being effective at all times during the Term and a Safety Interface Agreement being effective at all times during the Term;

- (4) the Trains utilising the Train Path being comprised of Rolling Stock (or such other combination of locomotives and wagons agreed to in writing by Arc);
- (5) emergencies or material safety considerations;
- (6) the Train Management Guidelines and Arc's Network Rules; and
- (7) all applicable Laws.

### **3.4 No other access**

The Operator must not access or attempt to access the Network in any way other than as expressly permitted under this Agreement or any other written agreement between the parties.

### **3.5 Extension and Renewal**

This Agreement may only be extended in accordance with clause 2(b) or by written agreement between the parties. This Agreement does not automatically renew and may not be held over.

### **3.6 Early and late services**

- (a) Notwithstanding clause 3.3, Arc must use its reasonable endeavours to accommodate a Service:
  - (1) which is running early or late;
  - (2) is presented at the point of entry to the Network late; or
  - (3) is presented at the point of entry to the Network more than 15 minutes early,
 by providing a Train Path for that Service at Arc's first available opportunity (subject to the Train Management Guidelines).
- (b) Both parties must, subject to this Agreement, use their reasonable endeavours to:
  - (1) ensure that such Services which are running or presented late, when compared with the relevant Train Path or Train Control Directions, recover the lost time;
  - (2) ensure that such Services which are presented more than 15 minutes early depart the Network no later than the scheduled time; and
  - (3) mitigate the effects of any liability, loss or damage arising out of any Services which are running or presented late.
- (c) Nothing in this clause 3.6 requires Arc to provide a Train Path where to do so would be inconsistent with the Train Management Guidelines or Arc's obligations (consistent with the Train Management Guidelines) to a user of the Network other than the Operator (where such obligations had first arisen before the first entry of the Train on the Network to which this clause 3.6 relates).

### **3.7 Light Engine Movements**

- (a) Upon request by the Operator, Arc may, in its absolute discretion and subject to the Train Management Guidelines, grant the Operator a Train Path for the operation of a Light Engine Movement by the Operator using that Train Path.

- (b) Where Arc grants the Operator a Train Path for the operation of a Light Engine Movement by the Operator then the Operator must pay to Arc the Light Engine Movement Charge in accordance with clause 4.

### 3.8 Supply chain management

The parties, together with the Customer (collectively, the **Stakeholders**), agree to work together to manage and optimise the efficiency of the supply chain as it applies to the Customer's rail operations and the Network, including, where agreed:

- (a) holding regular meetings involving senior representatives of all Stakeholders to review operational performance and to agree improvement strategies;
- (b) providing data relating to the Stakeholder's role in the supply chain, on a regular basis, to the other Stakeholders; and
- (c) the commitment of personnel and other resources by each Stakeholder to develop and maintain a common data set and reporting format which demonstrates the performance of each aspect of the supply chain.

### 3.9 Working Timetable

- (a) Arc must ensure that the Operator receives details of, or has access to, those parts of the Working Timetables relating to the Train Paths (including any updates or revisions to those parts).
- (b) Arc must as soon as reasonably practicable notify the Operator of any changes to the Working Timetables that may affect the provision of the Services. Any Instruction which relates to the provision of the Services will be deemed to be notice of a change to the Working Timetables for the purposes of this clause 3.9.

### 3.10 Master Control Diagram

- (a) As soon as reasonably practicable after the Commencement Date and thereafter following any variation to Schedule 1, Arc must incorporate the Scheduled Train Paths into the Master Control Diagram.
- (b) Arc must ensure (subject to any confidentiality or legal requirements) that the Operator and the Customer receive details of, or have access to, those parts of the Master Control Diagram relating to the Train Paths (including any updates or revisions to those parts) in accordance with Arc's standard procedures relating to access by persons other than Arc to the Master Control Diagram.

### 3.11 Parking

- (a) Unless agreed in accordance with this clause 3.11, the Operator has no right to Park on the Network.
- (b) Notwithstanding clause 3.11(a), if, at the Operator's request, Arc grants the Operator a right to Park on the Network for more than 15 minutes, then following the exercise of that right to Park, the Operator must pay to Arc the Parking Charge in accordance with clause 4.
- (c) The Operator may Park without charge:
  - (1) with Arc's consent where the Operator requests to do so and provided period Parking does not exceed 15 minutes;
  - (2) where it is required to do so pursuant to an Instruction other than an Instruction issued as a result of an act or omission of the Operator;

- (3) for reasons of Force Majeure affecting Arc or the Operator (provided that the Operator uses reasonable endeavours, consistent with applicable instructions to minimise the period of such Parking); or
  - (4) for a reasonable period in order to recover from Incidents or Rolling Stock failure.
- (d) The Operator must comply with Arc's reasonable requirements relating to the exercise of any right to Park granted by Arc under this clause 3.11.

## 4 Charges, invoices and payment

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### 4.1 Charges

The Operator must pay the Charges and all amounts due to Arc in accordance with this Agreement.

### 4.2 Invoices and payment of Charges

- (a) Arc may invoice the Operator for all Charges and any other amounts which are payable under this Agreement at any time and in the manner provided for in Schedule 2.
- (b) The Operator must pay all Charges, and all other amounts which are payable under this Agreement:
  - (1) at the times specified in this Agreement;
  - (2) in immediately available funds;
  - (3) to Arc;
  - (4) at the place and in the manner reasonably required by Arc; and
  - (5) no later than 5pm local time in the place where payment is to be made.
- (c) Without limitation to clause 17.1(a)(3), a party does not need to make a demand for payment of any amount required to be paid by the other party under this Agreement unless required by Law.
- (d) If:
  - (1) any notice requesting payment for any amount; or
  - (2) this Agreement,
 does not specify when a payment is due, it is due within 15 Business Days after the notice requesting payment is given.
- (e) If the Operator does not make a payment by the time that it is due under this Agreement, then Arc will give notice in writing requiring the non-payment be remedied, if the Operator fails to remedy the default within the time specified (which shall not be less than 21 days) Arc may immediately suspend the Operator's rights to access the Network pursuant to this Agreement.

### 4.3 Review of Charges

The Charges payable under this Agreement will be reviewed and varied in accordance with Schedule 3.

#### **4.4 Disputes regarding amounts payable under this Agreement**

- (a) Where there exists a bona fide dispute in relation to any amount set out in an invoice issued pursuant to this Agreement, a party must, within the time required for payment:
  - (1) pay the amount that is not in dispute; and
  - (2) refer the dispute in respect of the disputed amount for resolution in accordance with clause 20.
- (b) If the resolution of the dispute determines that a party must pay an amount to the other party, the amount must be paid to the other party within 5 Business Days after the resolution of the dispute together with interest in calculated accordance with clause 4.6 (provided that for the purposes of calculating that interest, the due date for payment is deemed to be the date when the amount in dispute would have been due and payable but for the dispute).

#### **4.5 No Set Off**

All payments which a party is required to make under this Agreement must be made without deductions, counterclaims, conditions, set off or withholdings.

#### **4.6 Interest**

- (a) A party must pay interest on any amounts due to the other party under this Agreement (including all amounts properly included in an invoice) which are not paid when due.
- (b) Interest:
  - (1) will accrue daily at the rate per annum equal to the Default Rate;
  - (2) will be computed from and including the day when the money on which interest is payable becomes owing until but excluding the day of payment of that money;
  - (3) will be calculated on the actual days elapsed; and
  - (4) must be paid on demand.

#### **4.7 GST**

- (a) Except where the context suggests otherwise, terms used in this clause 4.7 have the meanings ascribed to those terms by the GST Act.
- (b) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 4.7.
- (c) Unless otherwise expressly stated, all Charges and other amounts due and payable under this Agreement are exclusive of GST. Any amounts that are specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 4.7.
- (d) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (e) Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

- (f) If GST is payable on a supply made by a party (**Supplier**) under or in connection with this Agreement, the party providing consideration for that supply (**Recipient**) must pay an additional amount to the Supplier equal to the GST payable in relation to the supply.
- (g) Any additional amount referred to in clause 4.7(f) must be paid by the Recipient at the same time as any other consideration is to be first provided for that supply and the Supplier must promptly provide to the Recipient a tax invoice complying with the relevant Law relating to that GST.
- (h) Where this Agreement requires the Recipient to reimburse the Supplier for any loss, cost or expense, the Recipient must also at the same time pay and indemnify the Supplier against all GST incurred by the Supplier in respect of that loss, cost or expense to the extent the Supplier reasonably determines that it is not entitled to repayment or credit in respect of the GST.
- (i) If the GST payable on a supply made under or in connection with this Agreement (not taking into account any consideration that is inclusive of GST), varies from the additional amount paid by the Recipient under clause 4.7(f) in respect of that supply (as adjusted to take account of any previous payment made pursuant to this paragraph), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any amount payable under this clause 4.7(i) must be paid no later than 10 Business Days after the Supplier provides an adjustment note to the other party.

## 5 Control and management of access to the Network and use of the Network

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### 5.1 Arc to control

Control of the Network and management of access to the Network remains at all times with Arc.

### 5.2 Arc's obligations

Arc must at all times during the Term:

- (a) undertake the function of Train Control over the Network;
- (b) comply with the Train Management Guidelines;
- (c) make the Nominated Route available at the relevant times to enable the Operator to use the Train Paths granted by Arc to the Customer pursuant to the Commercial Track Access Agreement on the terms of this Agreement;
- (d) request, record and collate information received from the Operator and other users of the Network for the purposes of generating invoices referred to in clause 4.2 and effectively exercising the functions referred to in clauses 5.2(a) and 5.2(b);
- (e) maintain and operate the Train Control Centre and a communication system for the purpose of communication with the Operator and other users of the Network,;
- (f) provide the Operator with details, as soon as reasonably practicable of an operating incident (including an Incident) which has affected or could potentially affect the ability of any Train to retain its Train Path, or otherwise affect its security or safety or the security and safety of the freight or Train Crew; and
- (g) comply with all Laws which are applicable to Arc's obligations under this Agreement.

### 5.3 Operator's obligations in relation to Rolling Stock

- (a) The Operator must at all times during the Term ensure that:
- (1) each Train operated by the Operator on the Network is at all times in a good and safe operational condition and complies with all relevant Laws, the requirements of the Operator's Accreditation and the requirements of Arc's Network Rules; and
  - (2) all of the equipment and Rolling Stock used by the Operator on or in connection with the Network is maintained to a sufficient standard of safety and to a sufficient level of operational efficiency,
- but in any case in respect of a particular matter to standards set out in all relevant volumes as amended or superseded from time to time of:
- (3) the 'Railways of Australia Manual of Engineering Standards and Practices'; and
  - (4) the draft code of practice on rolling stock issued or published by the Australasian Railways Association or the Rail Industry Safety and Standards Board, as the case may be, and, if that draft code of practice is subsequently endorsed by the Commonwealth of Australia (including any Government Agency) for national implementation (including on the Network), then such code of practice once it is so endorsed.
- (b) The Operator may only use the Rolling Stock to provide the Services.
- (c) If the Operator proposes to change any Rolling Stock used to provide the Services, the Operator must request Arc's consent in writing for that change (such consent not to be unreasonably withheld) as soon as reasonably possible but in any event no later than 10 Business Days prior to the time the proposed change is scheduled to occur, and if consent is notified in writing by Arc, Schedule 5 will be varied accordingly. The Operator must not change any Rolling Stock used to provide the Services except with Arc's prior consent in accordance with this clause.
- (d) At all times that a Train is operated on the Network, the Operator must ensure that all wagons comprised in that Train are loaded evenly:
- (1) in a manner that will ensure the Operator can comply with clause 5.5(a)(10);
  - (2) below or up to the lower of:
    - (A) the rated carrying capacity of the relevant Rolling Stock; and
    - (B) the Maximum Track Axle Load for the relevant Train Path.
- (e) Where any wagon comprised in a Train operated, or likely to be operated, by the Operator under this Agreement is not loaded in accordance with the requirements of clause 5.3(d), as may be determined by Arc acting reasonably (including by use of a Weighing System or a Wheel Condition Monitor):
- (1) Arc may, notwithstanding any other provisions of this Agreement and without limitation to its other rights in relation to clause 5.3(d), prohibit the Train from entering onto or continuing to operate on the Network;
  - (2) Arc may, in its absolute discretion and on such conditions as it sees fit, issue an Instruction permitting the Train to enter onto or continue to operate on the Network, but is under no circumstances obliged to do so; and
  - (3) Arc is not liable to the Operator for any Claim, and the Operator must not make any Claim against Arc, in respect of any loss suffered or

incurred by the Operator in connection with any act or omission of Arc in accordance with this clause 5.3(e).

#### **5.4 Operator's obligations in relation to Train Crew**

The Operator must at all times during the Term ensure that each Train operated by the Operator on the Network will be operated by a Train Crew that:

- (a) are qualified under Arc's Network Rules and have an appropriate Track Access Permit in accordance with Arc's Network Rules;
- (b) each have knowledge of the route over which the Train Crew will operate the Train in accordance with the requirements of the Operator's Accreditation; and
- (c) are qualified in the operation of the Rolling Stock used to operate the Train in accordance with the Operator's procedures.

#### **5.5 Operator's general obligations**

- (a) The Operator must, at its own cost, at all times during the Term:
  - (1) ensure that its use of the Network complies with the Train Paths applicable to each Service;
  - (2) if it becomes aware that material non-compliance by a Service with the applicable Train Path (or any other Train Path which is provided) has occurred or is a reasonable possibility, notify the Train Control Centre immediately;
  - (3) 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 Arc 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);
  - (4) comply with all Laws which are in any way applicable to operation of the Services or its use of the Network;
  - (5) not materially change, alter, repair, deface, damage or otherwise affect any part of the Network;
  - (6) provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre and use such equipment to communicate with the Train Control Centre. If Arc proposes to change communications equipment in the Train Control Centre and the proposal will result in the Operator having to replace or upgrade its communications equipment, Arc must give reasonable notice to the Operator and the Operator must at its cost replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre;
  - (7) provide to Arc any information related to the operation of the Services (excluding commercial information) as Arc reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator, other operators, the Customer, the Network Lessor and the public;
  - (8) provide to Arc a Train Manifest in a format acceptable to Arc for each Service not less than 15 minutes prior to that Service commencing use of the Network and provide notice of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network;

- (9) inform Arc as soon as reasonably practicable of any cancellation or intended cancellation by the Operator of any Service; and
  - (10) to the standard expected of a diligent and competent above rail operator, not allow more than inconsequential amounts of Customer Product, freight or material being loaded onto or hauled on or in a Train operated by the Operator to fall, leak, spill, emit or escape from the Train or become deposited on or adjacent to the Network.
- (b) For the purposes of clause 5.5(a)(10), **inconsequential amount** means an amount that does not result in or lead to:
- (1) damage to the Network;
  - (2) an injury, or the potential for injury, suffered by people on or adjacent to the Network, whether Arc Personnel or members of the public;
  - (3) a breach, contravention or offence of any Environmental Law; or
  - (4) an Environmental Condition.

## 5.6 Operator's obligation to provide GPS Information

At all times during the operation of a Train by the Operator using any Train Path, the Operator must use best endeavours to provide GPS Information to Arc on a continuous basis at intervals of no more than 5 minutes using a Transmission Method.

## 5.7 Operator's obligations in relation to disposal of waste

- (a) The Operator must ensure that no waste is disposed of from an on-board toilet on any Train directly on to the rail track unless that waste is first chemically treated, processed and discharged as waste water to the rail track through a filtration system which complies with all relevant Environmental Laws and policies in accordance with clause 13.1.
- (b) The Operator acknowledges and agrees that if the Operator is in breach of clause 5.7(a) at any time, Arc may, without affecting any of its other rights or remedies, issue an Instruction to the Operator requiring the Operator to cease the operation of a Service until the Operator has provided evidence satisfactory to Arc that the Operator has installed in each Train operated for that Service a means of treating, processing and discharging the waste in accordance with this clause 5.7.
- (c) If the Operator has not installed in each Train operated for that Service a means of treating, processing and discharging the waste in accordance with this clause 5.7, the Operator must ensure that the waste from on-board toilets is collected, chemically treated, processed and retained for decanting at terminals in compliance with relevant Environmental Laws and policies.

## 5.8 Operator's obligations in relation to any Network blockage

- (a) A blockage of the Network which is caused by a failed train, including any train operated by the Operator, will be managed in accordance with the Train Management Guidelines.
- (b) If a train, other than a Train operated by the Operator, fails and causes a blockage of the Network, the Operator must provide reasonable assistance to Arc as necessary to facilitate the clearing of the blockage.

## 5.9 Entry into Safety Interface Agreement

The parties acknowledge and agree that prior to a Service being operated pursuant to this Agreement, the parties must enter into a safety interface agreement for the purpose of

identifying any risks to safety in relation to railway operations pursuant to section 105 of the Rail Safety National Law.

## 6 Repairs and maintenance of the Network

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### 6.1 Maintenance Standards

Arc must at all times maintain the Network (but only in so far as the Network is relevant to the Scheduled Train Paths) to the highest of:

- (a) the standard existing as at the Commencement Date of this Agreement;
- (a) the minimum standard required to maintain its Accreditation as an Accredited Owner; and
- (b) any other standards as the parties may agree in writing from time to time.

### 6.2 Operating restrictions

Arc may impose operating restrictions where required by the condition of the Network (but only so far as the Network is relevant to the Scheduled Train Paths provided) giving notice of speed and weight restrictions, and the Operator must comply with such notice.

## 7 Accreditation

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### 7.1 Accreditation warranty

- (a) Each party warrants that at all times during the Term it has and will maintain Accreditation to the extent required by Law.
- (b) The parties must promptly notify each other of any notice received from any Government Agency affecting Accreditation to the extent such notice relates to the party's rights or obligations under this Agreement.
- (c) The Operator must not operate Rolling Stock on the Network if it does not hold current Accreditation for the use of that Rolling Stock on the Network.
- (d) If a party loses part or all of its Accreditation or has part or all of its Accreditation suspended, that party must regain or have restored its full Accreditation as soon as is reasonably practicable to the extent such part of the Accreditation relates to the party's rights or obligations under this Agreement.

### 7.2 Evidence of Accreditation

- (a) Each party must on or before the Commencement Date provide to the other party evidence of its Accreditation.
- (b) A copy of all documents evidencing renewal or amendment of Accreditation must be provided by a party to the other party on the written request of the other party.

### 7.3 Suspension or cancellation of Operator's Accreditation

- (a) If at any time the Operator's Accreditation is:

- (1) suspended or cancelled and that suspension or cancellation has an effect on or relevance to the Operator's obligations under this Agreement; or
- (2) amended so that the Operator cannot perform its obligations generally under this Agreement,

the Operator must immediately notify Arc and the Customer and cease all Services until:

- (3) the Accreditation is reinstated; or
  - (4) if Accreditation is conditionally reinstated, the conditions are either complied with or apply only to the extent that they have no material effect or relevance to the Operator's obligations under this Agreement.
- (b) Nothing in this clause 7.3 derogates from the parties' rights under clause 17 in respect of suspension or termination of this Agreement.

#### **7.4 Suspension or cancellation of Arc's Accreditation**

- (a) If at any time Arc's Accreditation is:
- (1) suspended or cancelled and that suspension or cancellation has an effect on or relevance to Arc's obligations under this Agreement; or
  - (2) amended so that Arc cannot perform its obligations generally under this Agreement,
- Arc must immediately notify the Operator and the Customer and cease all Services until:
- (3) the Accreditation is reinstated; or
  - (4) if Accreditation is conditionally reinstated, the conditions are either complied with or apply only to the extent that they have no material effect or relevance to Arc's obligations under this Agreement.
- (b) Nothing in this clause 7.4 derogates from the parties' rights under clause 17 in respect of termination of this Agreement.

## **8 Instructions**

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### **8.1 Issue of Instructions by Arc**

- (a) Arc may issue Instructions to the Operator.
- (b) Arc must in giving any Instruction use reasonable endeavours to minimise disruption to the Services.
- (c) As soon as reasonably practicable must give to the Operator a written copy of an Instruction unless such Instruction is ordinarily not given in writing by Arc to operators granted access to the Network.

### **8.2 Compliance by the Operator with Instructions**

- (a) Subject to clause 8.2(c), the Operator must:
- (1) comply with all Instructions given by Arc to the Operator within a reasonable time before the required time for compliance; and
  - (2) promptly inform all relevant Train Crew of Instructions given by Arc and any changes made by Arc to the Instructions.

- (b) The Operator must:
  - (1) inform all relevant Train Crew of Arc's Network Rules and any general notices and other information notified to the Operator by Arc; and
  - (2) promptly inform the Operator's Train Crew of any changes made by Arc to the documents referred to in clause 8.2(b)(1).
- (c) If an Instruction is a Train Control Direction, the Operator must comply with it immediately.
- (d) The Operator must comply with all Instructions in such a way as to minimise disruption to any other operator's use of the Network.
- (e) Except for Liability pursuant to any indemnity given under this Agreement or for breach of clause 18.4(b):
  - (1) neither party is responsible for any delay suffered or Liability incurred by the other party in complying with a proper Instruction; and
  - (2) each party releases the other from all Claims or Liabilities arising out of or in connection with the compliance with a proper Instruction.

## 9 Variations or cancellations of Train Paths

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### 9.1 Operator and Arc consultation protocols

- (a) If the Operator becomes aware of a Network failure or potential deviation from a Train Path, such that the relevant Train will not arrive at the Destination at the scheduled time, the Operator must notify Arc as soon as reasonably practicable of the magnitude of the variance and revised time of arrival.
- (b) The parties must, at all times during the Term, have and maintain consultation and communication protocols for the purpose of facilitating the exchange of information under clause 9.1(a), including, unless otherwise agreed, establishing a 24 hour communications link.

### 9.2 Temporary variations of Train Paths by the giving of Instructions by Arc

Without limiting clause 8.1, the Train Paths may be temporarily varied by the giving of Instructions to the Operator:

- (a) for the purpose of preventing any actual or reasonably likely:
  - (1) breach of Arc's Network Rules or of clause 12 by the Operator or of similar safety requirements by other operators on the Network;
  - (2) damage to the Network;
  - (3) injury to any person or material damage to any property; or
  - (4) delay to the progress of Trains on the Network (but only insofar as any trains operated by an operator pursuant to a separate agreement have priority over the Operator's Trains under this Agreement, having regard to the Train Management Guidelines);
- (b) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its obligations under this Agreement; or
- (c) for the purpose of giving effect to a temporary variation under the Commercial Track Access Agreement.

### 9.3 Variations to Train Paths under the Commercial Track Access Agreement

The Operator acknowledges that:

- (a) the Scheduled Train Paths may be varied or removed (including where permanently cancelled for under-utilisation) under the Commercial Track Access Agreement;
- (b) if the Train Paths are varied or removed under the Commercial Track Access Agreement, then Arc will notify the Operator of the variation or removal by issuing a notice to the Operator and Schedule 1 of this Agreement will be taken to be varied accordingly and the Operator's rights under this Agreement will change in accordance with that variation.

### 9.4 Repairs, maintenance and upgrading of the Network and temporary variations to Train Paths

- (a) Arc may perform repairs, maintenance or upgrading of the Network (including Major Periodic Maintenance) and take Possession of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network or taking Possession of the Network, are reasonably likely to materially affect the Train Paths and are required other than because of emergencies related to safety or natural events, Arc must prior to commencement of the works:
  - (1) take all reasonable steps to minimise any disruption to the Train Paths; and
  - (2) use reasonable endeavours to provide alternative Train Paths,
 but Arc is not required to obtain the Operator's consent to such repairs, maintenance or upgrading, or Possession of the Network.
- (c) If the repairs, maintenance or upgrading activities:
  - (1) can be carried out without affecting the use of Train Paths, Arc is not obliged to give prior notice to the Operator;
  - (2) are required because of emergencies related to safety or natural events, Arc is not obliged to give prior notice to the Operator but Arc must advise the Operator as soon as practicable of:
    - (A) the circumstances;
    - (B) the likely impact on the Train Paths; and
    - (C) the likely duration of the Possession of the Network; or
  - (3) are required other than because of emergencies related to safety or natural events and will affect Train Paths, Arc must give notice in accordance with the timeframes set out in the Train Management Guidelines.
- (d) Any notice given under clause 9.4(c)(3) must describe:
  - (1) the extent and nature of the works;
  - (2) the potential effect on Train Paths; and
  - (3) what alternative arrangements are proposed by Arc.
- (e) If any repair, maintenance or upgrading activity notified by Arc is not achievable within the anticipated timeframe, Arc must:
  - (1) as soon as is reasonably practicable notify the Operator; and

- (2) provide a revised and continuing estimate of the anticipated completion time of the works.

## **9.5 Cancellation of Services using Train Paths and alternative use**

- (a) The Operator may cancel a Service but the Operator must give to Arc notice of the cancellation. The notice must be given as soon as is possible in the relevant circumstances.
- (b) Arc may use a Train Path which becomes available because of the cancellation of a Service by the Operator for any purpose, including the giving of access to the Network to the Operator or another operator pursuant to a separate agreement.

## **9.6 Cancellation of Train Paths by Operator**

- (a) The Operator may cancel a Train Path without penalty if the Operator is unable to use a Scheduled Train Path due to:
  - (1) the Scheduled Train Path being unavailable due to Arc undertaking repair, maintenance or upgrade works on the Network;
  - (2) a derailment, collision or other emergency event, unless that event is caused by an act or omission of the Operator; or
  - (3) late- running trains, unless the late-running is caused by an act or omission of the Operator.
- (b) Arc may use a Train Path which becomes available because of the cancellation of a Service by the Customer or Operator for any purpose, including the giving of access to the Network to any other customer or operator pursuant to a separate agreement.

## **9.7 Fixed Charges remain payable by Customer**

The Operator acknowledges that cancellation of a Scheduled Train Path pursuant to clause 9.6 or for any other reason does not relieve the Customer of the obligation to pay 'Fixed Charges' (under and as defined in the Commercial Track Agreement) in respect of the cancelled Scheduled Train Path.

# **10 Inspection and audit**

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## **10.1 Inspection and audit by Arc**

Subject to clause 10.2, Arc may at any time by Instruction to the Operator require a particular Service of the Operator which is using the Network to undergo an audit for the purpose of assessing:

- (a) the Operator's compliance with the terms and conditions of this Agreement, including whether each Train Manifest provided by the Operator under clause 5.5(a)(8) is correct;
- (b) whether the Rolling Stock comprised in a Service is maintained to the standards set out in this Agreement, for the purpose of avoiding any actual or apprehended damage to the Network;
- (c) whether any one or more of the individual wagons used by the Operator in the provision of a Service is loaded unevenly or in excess of the Maximum Track Axle Load or its rated carrying capacity; or

- (d) 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.

## 10.2 Limitations on audit

Arc must:

- (a) carry out not more than such number of audits under clause 10.1 as are reasonably necessary in the circumstances for the purposes of assessing the matters referred to in clause 10.1; and
- (b) use its reasonable endeavours in the conduct of any such audit to minimise the disruption to the Operator's Service.

## 10.3 Instructions

In conducting an audit under clause 10.1, Arc 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) Arc or its agent may place, on or about its Network, monitoring equipment which will take readings or measurements for the purpose of monitoring the operation of Rolling Stock and assessing the matters referred to in clause 10.1.
- (b) Arc must ensure that systems are put into effect whereby any data collected by it or any approved person (on behalf of Arc) using the monitoring equipment referred to in clause 10.4(a):
  - (1) is transmitted or forwarded direct to Arc;
  - (2) will constitute Confidential Information of both Arc and the Operator and is used for the sole purpose of Arc monitoring the Operator's compliance with clause 10.1; and
  - (3) may not be disclosed to any other party (other than the Customer) without the prior consent of both Arc and the Operator.

## 10.5 Inspection and audit by the Operator

- (a) Subject to clause 10.5(b), where the Operator has reasonable grounds to believe that Arc is not complying with clause 6, then the Operator may, at its cost and risk, audit or require the audit of the relevant aspect of any of the railway track and lines comprising the Network (but only in so far as the Network is relevant to the Scheduled Train Paths).
- (b) Any audit by the Operator under clause 10.5(a) is subject to:
  - (1) the Operator providing reasonable prior written notice to Arc of its requirement to audit the Network and conducting that audit at reasonable times;
  - (2) any such audit being conducted in the presence of a representative of Arc;
  - (3) the ability of Arc to issue an Instruction to the Operator, at any time during the audit and which must be complied with immediately by the Operator, to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and other operators;

- (4) such other reasonable conditions as may be imposed by Arc on such audit, including, but not limited to, compliance with Arc's Network Rules and all applicable safety standards and Laws dealing with safety; and
  - (5) any such audit being conducted in a manner that does not cause any disruption to any service of any other operator granted access to the Network by Arc or the provision of services by Arc to such operators, or otherwise impact adversely on Arc's other business activities or Arc's ability to comply with its obligations under this Agreement.
- (c) The Operator will be liable for and will indemnify Arc in respect of any Claims made against Arc by another user of the Network or party that holds rights of access to any part of the Network as a result of a delay or cancellation of a train service of that entity as a result of the exercise by the Operator of its audit rights under this this clause 10.5.
- (d) If the Operator has complied with clause 10.5(b) in exercising its audit rights and the results of the audit show that Arc is in material breach of its obligations under this Agreement, then the Operator will not be liable for, or be required to indemnify Arc in respect of, any Claim to the extent that such breach by Arc caused or contributed to the Claim.

## 11 Emergencies and Incidents

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### 11.1 Plans for dealing with Incidents

- (a) In consultation with the Operator, Arc must at all times during the Term have, and must periodically review and update, plans which are consistent with Arc's Accreditation requirements for dealing with Incidents, and make such plans available to the Operator.
- (b) The Operator must at all times during the Term have, and must periodically review and update, a plan for dealing with Incidents and make such plan available to Arc. The Operator's plan must not be inconsistent with any plan prepared by Arc under clause 11.1(a) and is subject to the prior consent of Arc, which consent is not to be unreasonably withheld.

### 11.2 Compliance with plans and directions and with Rail Safety National Law

The Operator and Arc must follow the Incident response plans referred to in clause 11.1 and must comply with their respective obligations under the Rail Safety National Law.

### 11.3 Notification of Incidents

The Operator and Arc each must notify the other of any Incident as soon as possible after it comes to their attention.

### 11.4 Investigation of Incidents

- (a) Incidents will be investigated in accordance with the Rail Safety National Law and as otherwise required by Law.
- (b) Each party must co-operate with an investigation under this clause 11.4 and make available records and personnel relevant to the Incident.
- (c) The parties must consult with each other to determine any action to be taken as a result of any investigation.

## 11.5 Operator's report

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

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Operator's Train and to the Network;
- (c) the factors which are known to have contributed to the cause of the loss or damage to the Operator's Train and to the Network;
- (d) an analysis in printed format of speed recorder charts for the Operator's Train;
- (e) such other information which is required to be disclosed in a report to the Director General of Transport under the Rail Safety National Law; and
- (f) any other information required to be disclosed in a report under the Dangerous Goods Code.

## 11.6 Arc's report

Without limiting clause 11.3, if an Incident occurs which involves the Operator, the Operator may, by written notice to Arc, request that Arc provide, and Arc must promptly prepare and submit to the Operator, a written report which must include the following (to the extent relevant to the Incident and reasonably possible for Arc to ascertain):

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Operator's Train and to the Network;
- (c) the factors which are known to have contributed to the cause of the loss or damage to the Operator's Train and to the Network;
- (d) such other information which is required to be disclosed in a report to the Director General of Transport under the Rail Safety Act; and
- (e) any other information required to be disclosed in a report under the Dangerous Goods Code.

## 11.7 No disposal of equipment

Subject to any contrary requirement at Law, the Operator and Arc must not engage in conduct which would prejudice an investigation into an Incident, including the disposal of any equipment involved in such Incident (but only to the extent that such non-disposal is necessary to such investigation).

## 11.8 Interim responsibility for recovery costs

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

## 12 Safety Standards

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### 12.1 Compliance by the parties

The parties must, in relation to their respective responsibilities and rights under this Agreement:

- (a) comply with all applicable safety standards and Laws dealing with safety, including the Rail Safety National Law;
- (b) comply with Arc's Network Rules;
- (c) comply with the Dangerous Goods Code;
- (d) comply with the Standards (including any codes of practice developed under the Standards);
- (e) in addition to the Operator's Accreditation or Arc's Accreditation (as the case may be), obtain and maintain such additional accreditation, licences, authorisations and approvals, and maintain such additional standards, which are required by Law;
- (f) irrespective of the extent that such obligations are binding by virtue of the Accreditation that each party is required by Law to maintain, and without limiting clause 5.4, ensure that their respective Personnel engaged in connection with the Services are competent and appropriately qualified and obtain and maintain any applicable or appropriate Accreditation and training, and provide to the other party evidence of any such matters upon reasonable request; and
- (g) irrespective of the extent that such obligations are binding by virtue of the Accreditation that each party is required by Law to maintain, ensure that their respective Personnel engaged in connection with the use by the Operator of the Network submit to regular and adequate drug and alcohol tests and to other tests as Arc or the Operator is in the practice of requiring of their respective Personnel.

### 12.2 Notification of Breach

Without limitation to clause 17, as soon as Arc becomes aware of a breach by the Operator of any of Arc's Network Rules which occurs during or as a result of the use by the Operator of the Network (**Breach**) it must give notice in writing to the Operator setting out:

- (a) the time, place and a general description of the Breach;
- (b) what, in Arc's reasonable opinion, caused the Breach and which person or persons were responsible for the Breach;
- (c) the consequences, if any, of the Breach for operation of the Services or the use by other users of the Network;
- (d) any proposed modification of its procedures which Arc intends to make;
- (e) any Instruction requiring that the Breach be remedied; and
- (f) any modifications to the Operator's procedures which Arc reasonably considers that the Operator should make to prevent future Breaches (however, no modification can be required which is reasonably likely to cause, or causes, the Operator to be in breach of its Accreditation).

### 12.3 Provision of Arc's Network Rules

Arc must provide a copy of Arc's Network Rules to the Operator on the Operator's request, and must promptly forward to the Operator a copy of all subsequent amendments to Arc's Network Rules.

## 13 Environmental requirements and dangerous goods

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### 13.1 Compliance with Environmental Requirements

Each party must comply with all Environmental Law and with their respective environmental policies (insofar as they are consistent with the Law), including all applicable Laws dealing with dangerous goods.

### 13.2 Notification of carriage of certain materials

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 Arc (on terms not inconsistent with the Dangerous Goods Code).

### 13.3 Notification of Incident involving dangerous goods

The Operator must provide to Arc details, at the earliest practicable time after the Operator becomes aware, of all incidents (including non-compliance with relevant Laws, 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.

### 13.4 Notification of Environmental Condition

(a) Where:

- (1) Arc becomes aware that, in connection with the activities of the Operator under this Agreement, an Environmental Condition exists or has occurred and Arc reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or
- (2) Arc is given a direction by a Government Agency that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition in connection with the activities of the Operator in connection with this Agreement,

then Arc must inform the Operator of the relevant requirements and, where practicable, any steps which Arc reasonably considers will be necessary to prevent, mitigate or remedy the situation, and, subject to clause 13.4(b), the Operator must immediately, or if that is not possible as soon as reasonably practicable after receiving such notice, implement such requirements and steps and any other necessary action so that the Environmental Condition is no longer present or the Environmental Harm is rectified.

(b) The parties agree that where the Environmental Condition relates to noise, they will meet as soon as practicable and will work together to agree:

- (1) the action required to ensure that the Environmental Condition does not continue to subsist and that any Environmental Harm is rectified; and
- (2) the division of responsibility between Arc and the Operator for undertaking the action required under clause 13.4(b)(1),

after which each party will immediately, or if that is not possible as soon as reasonably practicable, carry out the action for which it is responsible. The parties acknowledge and agree that with respect to any noise issues arising:

- (3) the Operator is responsible for maintaining and operating the Rolling Stock in accordance with good industry practices (meaning those

practices, methods and acts, as varied from time to time, that are commonly used in the railway industry by prudent persons); and

- (4) Arc is responsible for providing Train Paths and maintaining the Network in accordance with this Agreement.
- (c) If the parties are unable to reach agreement under clause 13.4(b), the matter will be referred to dispute resolution under clause 20.

## 14 Insurances

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### 14.1 Operator's insurance policies

The Operator must, at its expense, take out and maintain current at all times during the Term, on terms consistent with the standard industry terms for railway operators:

- (a) a public liability insurance policy which:
  - (1) covers the liability of the Operator and its Personnel to any person arising out of or in connection with this Agreement with a sum insured of not less than \$250,000,000 for any one occurrence or series of occurrences arising from one originating cause;
  - (2) includes cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs at a specific time and place with a sum insured of not less than a total of \$250,000,000 in respect of all occurrences during any one period of insurance ; and
  - (3) covers the Operator's rail operations and associated activities on the Network; and
- (b) a policy or policies of insurance with respect to the Operator's liability to Arc pursuant to the indemnities given under this Agreement, including in clause 18 to the extent coverable by insurance, which includes insurance against any Claim in respect of any personal injury to, or death of, any person employed or engaged by the Operator which arises out of, or is caused or contributed to by, the performance or non-performance of this Agreement by the Operator which insurance must provide cover:
  - (1) in respect of common law claims, for an amount not less than \$50,000,000; and
  - (2) for compulsory statutory workers' compensation insurance, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981 (WA)* or any other applicable Law;
- (c) carrier liability insurance in relation to the legal liability of the insured arising out of the transport of goods by Services to a sum insured of not less than \$10,000,000 per occurrence; and
- (d) all other insurances that the Operator or its Personnel are required by Law to hold in relation to or in connection with the exercise of rights or the performance of obligations under this Agreement.

## 14.2 Arc's insurance policies

Arc must, at its expense, take out and maintain current at all times during the Term, on terms consistent with the standard industry terms for railway track owners:

- (a) a public liability insurance policy which:
  - (1) covers the liability of Arc and its Personnel to any person arising out of or in connection with this Agreement, with a sum insured of not less than \$250,000,000 for any one occurrence or series of occurrences arising from one originating cause;
  - (2) includes cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs at a specific time and place with a sum insured of not less than a total of \$250,000,000 in respect of all occurrences during any one period of insurance; and
  - (3) covers Arc's activities as operator of the Network; and
- (b) a policy, or policies of insurance with respect to Arc's liability to the Operator pursuant to the indemnities in clause 18 to the extent coverable by insurance, which includes insurance against any Claim in respect of any personal injury to, or death of, any person employed or engaged by Arc which arises out of, or is caused or contributed to by, the performance or non-performance of this Agreement by Arc which insurances must provide cover:
  - (1) in respect of common law claims, for an amount not less than \$50,000,000; and
  - (2) for compulsory statutory workers' compensation insurance, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981 (WA)* or any other applicable Law.

## 14.3 Approved insurance companies

The policies of insurance required to be taken out by the Operator and Arc under clause 14.1 and clause 14.2 must be placed with an insurance company or companies approved by the Australian Prudential Regulation Authority to underwrite insurance business in Australia and must have a credit rating of at least 'A-' by Standard & Poors Rating Group or such other reputable rating agency which is equivalent to a rating 'A-' by Standard & Poors Rating Group.

## 14.4 Evidence of insurances

Each party must, when reasonably requested by the other party, deliver copies of the certificates of currency for each insurance policy required to be taken out by it under clause 14.1 or clause 14.2 (as relevant).

## 14.5 Insurance not a limit on party's liability

A party's compliance with their obligations under this clause 14 does not limit that party's liabilities or obligations under this Agreement.

## 15 Matters relating to the Transport Agreement

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- (a) The Operator must:
- (1) provide to Arc a copy of any notice given by the Operator under the Transport Agreement promptly following the giving of that notice by the Operator (and in any event, within 2 Business Days of the Operator giving the notice); and
  - (2) notify Arc of any other circumstance concerning the Transport Agreement promptly on becoming aware of any such circumstance (and in any event, within 2 Business Days of the Operator becoming aware of the circumstance),
- where the subject matter of the notice or the circumstance relates to any:
- (3) default or alleged default by the Customer or the Operator under the Transport Agreement;
  - (4) repudiation or alleged repudiation of the Transport Agreement by the Customer or the Operator; or
  - (5) event of 'Force Majeure' (as defined in the Transport Agreement) affecting the Operator or the Customer under the Transport Agreement.
- (b) Without limiting clause 15(a), the Operator must immediately notify Arc if the Transport Agreement has been terminated or expires.

## 16 Force Majeure

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### 16.1 Suspension of obligations

The obligations of a party (**Affected Party**) under this Agreement are suspended during the time and to the extent that the Affected Party is prevented from or delayed in complying with its obligations (other than the obligation to pay money, including Charges) under this Agreement for reasons of Force Majeure provided the Affected Party complies with this clause 16.

### 16.2 Obligations of an Affected Party

The Affected Party must:

- (a) as soon as possible after the Affected Party first has knowledge of the Force Majeure, and in any event within 10 Business Days after the date on which the Affected Party first had knowledge or ought reasonably to have had knowledge of the Force Majeure, give to the other party full particulars of:
- (1) the Force Majeure (including particulars of the date that the Force Majeure commenced);
  - (2) the manner in which its performance is thereby prevented or delayed;
  - (3) the anticipated period of delay; and
  - (4) the action (if any) the Affected Party intends to take to mitigate or remove the Force Majeure and its effect;
- (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 Affected Party is not obliged to settle a strike, lockout or other industrial dispute; and

- (c) as soon as possible after the Affected Party first had knowledge of the cessation of the relevant Force Majeure, and in any event within 10 Business Days of the date that the Affected Party first had knowledge or ought reasonably to have had knowledge of the cessation of the Force Majeure, notify the other party of the date that the Force Majeure has ceased.

### 16.3 Heat Speed Restrictions

Where Arc issues an Instruction to the Operator for speed restrictions due to the impact of heat or other atmospheric conditions, Arc will be deemed to have complied with the obligations of this clause 16.

### 16.4 Force Majeure and obligations to pay

- (a) The obligations of a party to pay any Charges and all other amounts due and payable under this Agreement continue to apply irrespective of whether a Force Majeure affecting a party has occurred.
- (b) For the avoidance of doubt, any Charges which are in the nature of a fixed charge must be paid and the Operator's liability arises irrespective of whether a Force Majeure affecting a party has occurred during the Year.

## 17 Suspension or termination

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### 17.1 Termination by Arc

- (a) Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, Arc may immediately terminate this Agreement by notice in writing to the Operator if:
- (1) the Commercial Track Access Agreement is terminated or expires;
  - (2) the Transport Agreement is terminated or expires;
  - (3) the Operator fails to pay when due:
    - (A) any Charges;
    - (B) any amount due to Arc under clause 4; or
    - (C) any other amount due to Arc under this Agreement,
 

(other than any amount for which the Operator has, before the relevant due date for payment, given Arc Notice of Dispute) and such failure is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure;
  - (4) the Operator fails to effect or maintain the insurances required to be taken out by it under clause 14;
  - (5) the Operator fails to comply with its obligations under clause 22;
  - (6) the Operator fails to comply with any of its material obligations under this Agreement (other than as described in any of clauses 17.1(a)(1) to 17.1(a)(5) or clauses 17.1(a)(8) to 17.1(a)(10)) and provided that, if in the reasonable opinion of Arc the breach can be remedied, the Operator has not remedied the default within 10 Business Days of Arc giving notice to the Operator requiring the failure to be remedied; or
  - (7) an Insolvency Event occurs in relation to the Operator;

- (8) the Operator's Accreditation is, for a continuous period of at least 1 Month :
- (A) suspended or cancelled and that suspension or cancellation has an effect on or relevance to the Operator's obligations under this Agreement; or
  - (B) amended so that the Operator cannot perform its obligations generally under this Agreement;
- (9) the Operator fails to comply with the requirements of a notice given by Arc (within the reasonable time specified in that notice) requiring the Operator to cease conduct which in the reasonable opinion of Arc is causing or threatening to cause Environmental Harm and such failure is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure; or
- (10) the Operator defaults:
- (A) a number of times in the performance of any of its other obligations under this Agreement such that Arc, acting reasonably, considers that the Operator is unwilling or unable to perform those obligations,
- and such default:
- (B) has caused or is likely to cause a risk to the safety of any person or material risk to property and is not remedied within 30 Business Days (or such longer time period specified in writing by Arc) of Arc giving notice to the Operator of the default; or
  - (C) does not relate to safety of any person or material risk to property but nonetheless is not remedied within 2 Months (or such longer time period specified in writing by Arc) of Arc giving notice to the Operator of the default,
- provided that for the events described in clause 17.1(a)(2) and/or clauses 17.1(a)(8) to (10) above, Arc has first exercised its corresponding right of suspension under clause 17.3.

## 17.2 Termination by the Operator

- (a) Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, the Operator may immediately terminate this Agreement by notice in writing to Arc if:
- (1) the Commercial Track Access Agreement is terminated or expires;
  - (2) the Transport Agreement is terminated or expires;
  - (3) Arc fails to comply with its obligations under clause 22;
  - (4) an Insolvency Event occurs in relation to Arc and, as a result of the Insolvency Event, Arc is unable or unwilling to provide access to the Network in accordance with this Agreement for a continuous period of 3 Months from the date of the Insolvency Event;
  - (5) Arc's Accreditation is, for a continuous period of at least 1 Month:
    - (A) suspended or cancelled and that suspension or cancellation has an effect on or relevance to the Operator's obligations under this Agreement; or
    - (B) amended so that the Operator cannot exercise its rights or perform its obligations generally under this Agreement; or

- (6) Arc defaults in the performance of any other obligation under this Agreement and such default is not remedied within 30 Business Days after the Operator gives Arc notice of the default.
- (b) Nothing in this clause 17.2 derogates from or affects Arc's rights and powers to manage the Network and any of its other rights or powers under any other agreement with any other person, including any track access agreement with any other operator.

### **17.3 Suspension by Arc**

- (a) Without limiting in any way Arc's rights under clause 17.1, if:
  - (1) Arc is entitled to terminate this Agreement under clause 17.1;
  - (2) an event or circumstance referred to in clause 17.1(a)(8) or 17.1(a)(9) has occurred and, but for the effluxion of the relevant time referred to therein, Arc would be entitled to terminate this Agreement under clause 17.1; or
  - (3) obligations under the Commercial Access Agreement are suspended,
 

Arc may elect, or as a preliminary course of action, instead to suspend the obligations of both parties under this Agreement (subject to clause 17.3(b)) until the earlier of such time as the cause giving rise to the suspension ceases to exist, termination of this Agreement or such earlier time as Arc (in its absolute discretion) by notice in writing lifts the suspension.
- (b) An election referred to in clause 17.3(a) is revocable at any time by Arc and has no effect upon the obligations, debts or liabilities which have accrued before or after the election to suspend this Agreement and, for the avoidance of doubt, does not affect or suspect the Operator's obligation to pay Charges under this Agreement (including with respect to the period of suspension) and is without prejudice to Arc's other rights and remedies in respect of that or any other default.

### **17.4 Removal of Rolling Stock following termination**

- (a) Immediately on expiration of the Term, and as soon as practicable following termination of this Agreement for any other reason, the Operator must, at the Operator's cost, remove from the Network all of the Operator's Rolling Stock used to operate the Services.
- (b) If the Operator fails to remove the Operator's Rolling Stock from the Network as required under clause 17.4(a), Arc may give written notice to the Operator demanding the removal of the relevant Rolling Stock within a specified time.
- (c) If the Operator fails to remove any of the Operator's Rolling Stock from the Network the subject of, and within the time specified in, a notice of demand issued by Arc in accordance with clause 17.4(b), Arc is entitled to remove that Rolling Stock and the Operator is liable for, and must indemnify Arc against, the reasonable costs of removal.
- (d) The Operator is liable for, and must indemnify Arc against, any Liabilities incurred by Arc in relation to any damage or obstruction caused to the Network by the Operator in removing any Rolling Stock in anticipation of, upon, or following, expiry or termination of this Agreement.
- (e) The Operator must comply with all reasonable directions, including any Instructions, issued by Arc in relation to the removal of Rolling Stock in accordance with this clause 17.4.

## 17.5 Effect of termination or suspension

- (a) Without limitation to the other provisions of this clause 17.5, if this Agreement is terminated by either party for any reason (including pursuant to any common law right to terminate for repudiatory or fundamental breach), then:
- (1) Arc may issue an invoice for, and will be entitled to payment by the Operator of, the Charges up to the date that termination takes effect; and
  - (2) the Operator must, within 10 Business Days of receiving the invoice under this clause 17.5, pay the amount set out in the invoice.
- (b) Subject to clause 17.5(c), if a party terminates this Agreement pursuant to this clause 17, it will be entitled to damages as if the other party had repudiated this Agreement and that repudiation had been accepted.
- (c) If:
- (1) Arc terminates this Agreement pursuant to clause 17.1(a)(1) then:
    - (A) if the Commercial Track Access Agreement was terminated earlier than its applicable expiry date and such early termination is the direct result of Arc breaching the Commercial Track Access Agreement or the Network Lease (such breach not being the direct or indirect result of an act or omission of Operator or Customer or any of their personnel) then the Operator will be entitled to damages as if Arc had repudiated this Agreement and that repudiation had been accepted.
    - (B) Except where clause 17.5(c)(1)(A) applies, Arc will not have any Liability, and the Operator must not make any Claim, for or in respect of termination of this Agreement pursuant to clause 17.1(a)(1).
  - (2) the Operator terminates this Agreement pursuant to clause 17.2(a)(1) or 17.2(a)(2), then except where the Commercial Track Access Agreement or the Transport Agreement (as applicable) was terminated as a direct result of breach by Arc of this Agreement or the Commercial Track Access Agreement (such breach not being the direct or indirect result of an act or omission of Operator or Customer or any of their personnel) then Arc will be entitled to damages as if the Operator had repudiated this Agreement and that repudiation had been accepted.
- (d) Upon termination or suspension of this Agreement all rights of the Operator to use the Train Paths or to otherwise access the Network in accordance with this Agreement will cease immediately.
- (e) Termination or suspension of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (f) Upon termination or suspension of this Agreement under any circumstances, all covenants and agreements of Arc and the Operator which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement will survive such termination or suspension.
- (g) Notwithstanding clause 20, upon termination of this Agreement (including any purported termination) a party may not issue a Notice of Dispute under clause 20.1(a) in respect of the termination, purported termination or matter that has

given rise to the notice of termination and, in respect of there being any Dispute with respect to any of the foregoing, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

## 18 Indemnities

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### 18.1 Indemnity by Operator

Subject to the other provisions of this clause 18 and clause 19, the Operator must promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against an Arc Indemnified Party in respect of:

- (a) the death of or injury to any person; or
- (b) any loss of, damage to or destruction of any real or personal property (including the Network),

arising out of or as a consequence of:

- (c) a breach or non-performance of any of the obligations of the Operator under this Agreement; or
- (d) any negligent act or omission, fraud or Wilful Default of any Operator Indemnified Party,

but the indemnity will be reduced proportionately to the extent that fraud, a Wilful Default, or negligent act or omission of an Arc Indemnified Party has contributed to the relevant loss, damage, destruction, injury or death.

### 18.2 Indemnity by Arc

Subject to the other provisions of this clause 18 and clause 19, Arc must promptly on demand, indemnify and keep indemnified each Operator Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against an Operator Indemnified Party in respect of:

- (a) the death of or injury to any person; or
- (b) any loss of, damage to or destruction of any real or personal property,

arising out of or as a consequence of:

- (c) a breach or non-performance of any of the obligations of Arc under this Agreement; or
- (d) any negligent act or omission, fraud or Wilful Default of any Arc Indemnified Party,

but the indemnity will be reduced proportionately to the extent that fraud, a Wilful Default or negligent act or omission of an Operator Indemnified Party or a Customer Indemnified Party has contributed to the relevant loss, damage, destruction, injury or death.

### 18.3 Duty to mitigate

The entitlement of a party to be indemnified under clauses 18.1 or 18.2 is subject to that party taking reasonable steps to mitigate its loss.

### 18.4 Liability to third parties

- (a) Notwithstanding clauses 18.1, 18.2 and 19.1, the Operator is solely liable for and releases, indemnifies and must keep indemnified the Arc Indemnified Parties

against all Claims arising out of or in connection with this Agreement in respect of damage to or loss of any third party owned property (including Customer Product and Rolling Stock) where such property is being transported as part of, or on, a Service.

- (b) Unless otherwise agreed, the Operator must ensure that Arc has the benefit of any exclusion or limit of liability afforded by the Operator's conditions of carriage with its customers and must provide to Arc details of the Operator's conditions of carriage relevant to Arc's liability in place from time to time.

## 18.5 Cost of recovery

For the purposes of the indemnities given in this Agreement (including this clause 18), the property of a person includes that person's costs of recovery of any property damaged or affected by the relevant loss, damage or destruction.

## 18.6 Defence of Claims

- (a) Each party must render to the 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 or events giving rise to a Claim.
- (b) To the extent that a party (**responsible party**) is obliged to indemnify the other party (**indemnified party**) against a Claim by a third party against the indemnified party, the responsible party may, subject only to the terms of any applicable insurance which the indemnified party may have, at its own expense defend and settle any action or proceedings in the name of the indemnified party and execute such documents in the action or proceedings as the responsible party sees fit. The responsible party indemnifies the indemnified party in respect of all Liabilities which the indemnified party may incur on account of the action or proceedings.

## 18.7 Other indemnities

For the avoidance of doubt, the releases and indemnities in this clause 18 are in addition to, and without limitation to, any other release or indemnity given under this Agreement, including under clauses 4.7(h), 10.5(c), 17.4(c), 17.4(d) and 26.1(b).

## 18.8 General provisions regarding releases and indemnities

- (a) Each release and indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives the expiry or termination of this Agreement.
- (b) It is not necessary for a party to incur expense or make a payment before enforcing any indemnity in this Agreement

## 19 Limits of Liability

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### 19.1 No Liability for Consequential Loss

Except for breach of, or under an indemnity given under, clause 18.4 but despite any other provision of this Agreement and to the extent permitted by Law, no party will in any circumstance be liable to the other party in respect of (and the indemnities in this Agreement, other than under clause 18.4, will not extend to) any Consequential Loss under or in connection with this Agreement, whether arising under this Agreement, at Law or otherwise.

## 19.2 Minimum threshold on Claims

Except to the extent that the relevant loss or damage arises from the fraud or Wilful Default of the other party, neither party may make any Claim against the other under or in connection with this Agreement, whether under an indemnity, in contract, tort (including negligence), equity, under statute or any other basis, if the amount of all Claims by the relevant party against the other in relation to the loss of, or damage to property arising out of or in connection with one event or a series of related events does not in the aggregate exceed \$20,000.

## 19.3 Failure to pay amounts

No exclusion or limitation of Liability, or restriction on the existence of or ability to make any Claim, in this Agreement (including clause 19) applies to liability to pay, or Claims made by a party against another party for, monies due and payable in accordance with this Agreement including under clause 4.

## 19.4 Liability for Network

Despite any other provision of this Agreement and to the extent permitted by Law, neither Arc nor its Personnel will have any Liability, and the Operator must not make any Claim against any of them, for or in connection with any damage, expense, injury, cost or loss whatsoever (including damage to or loss or destruction of any property (including the Operator's property or Customer Product) or any injury to or death of any person) arising out of or in connection with the standard of the Network or any failure of or defect in the Network, except to the extent that such loss, damage, injury or death, cost or expense results directly from the failure of Arc to perform its obligations under clause 6 or Arc's negligence in performing those obligations.

## 19.5 Claims in respect of non-provision of access and delays

Neither Arc nor its Personnel will have any Liability, and the Operator must not make any Claim against any of them, in respect of any:

- (a) non-provision of access or cancellation of any Service; and/or
- (b) delay or disruption to any Service (including any variation to any Train Path),

**(Relevant Event)** unless, and only to the extent that, all of the following are satisfied (and in any case subject to clauses 19.1, 19.2, 19.4 and 19.6, as applicable):

- (c) the Relevant Event was a result of a breach of this Agreement by Arc, or the negligence of Arc; and
- (d) the Relevant Event was not attributable to:
  - (1) the Operator, its customers or any of their respective Personnel;
  - (2) another rail transport operator who uses, or another person who holds, or uses another person's, rights of access to, any part of the Network (including any person in control, or operating any rail infrastructure not being part of the Network but which is connected to a part of the Network);
  - (3) any Possession of, or repairs, maintenance or upgrades (including any works in respect thereto) relating to, or inspections or investigations of, the Network (or any part thereof) in a manner consistent with this Agreement and the Train Management Guidelines;
  - (4) Force Majeure;
  - (5) any event, incident or circumstance on or to any rail infrastructure that that is managed or controlled by a person other than Arc;

- (6) a breach of a Network Lease by a Network Lessor; or
  - (7) any action taken by Arc or its Personnel (acting reasonably) or by a Government Agency in response to, or as a consequence of, an emergency or a genuine safety risk (including an Incident or Environmental Harm), or any personal injury to or the death of any person on or near the Network, any Rolling Stock or any land or other thing on or near the Network; and
- (e) in the case of a Relevant Event described in clause 19.5(a), Arc did not reschedule the relevant Service if required to do so under this Agreement.

## 19.6 Other limits or exclusions of liability

For the avoidance of doubt, the limitations and exclusions of liability in this clause 19 are in addition to, and without limitation to, any other limitation or exclusions of liability specified in this Agreement, including clauses 8.2(e), 9.2 and 10.5(d).

## 19.7 Civil Liability Act

The parties agree that to the extent permitted by Law, the operation of Part 1F of the *Civil Liability Act 2002* (WA) is excluded in relation to all and any rights, obligations and liabilities arising out of or in connection with this Agreement whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or on the basis of quantum meruit, quasi contract or of any other principle of Law.

# 20 Resolution of disputes

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## 20.1 Procedure to settle disputes

- (a) If a dispute arises between the parties in connection with this Agreement (**Dispute**) then, unless expressly provided to the contrary in this Agreement, the Dispute must be resolved in accordance with this clause 20 and either party may give a notice to the other party specifying the Dispute and requiring its resolution in accordance with this clause 20 (**Notice of Dispute**).
- (b) Nothing in this clause 20:
  - (1) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 20; or
  - (2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (c) The parties' obligations under this Agreement will continue notwithstanding any:
  - (1) Dispute between the parties;
  - (2) submission of a Dispute to mediation; or
  - (3) referral of a Dispute to litigation.
- (d) This clause 20 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (e) This clause 20 applies even where this Agreement is otherwise void or voidable.

## 20.2 Negotiation

- (a) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, with a view to resolving the Dispute by joint discussions.
- (b) If the Dispute is not resolved within 10 Business Days after the Notice of Dispute is given, the Dispute must be referred to the chief executive officers of the parties (or their nominees) who must meet, within 15 Business Days after the Notice of Dispute is given, with a view to resolving the Dispute by joint discussions.

## 20.3 Mediation

- (a) If the Dispute is not resolved within 1 Month after the Notice of Dispute is given, either party may refer the Dispute to mediation by written notice to the other party (**Mediation Notice**).
- (b) The mediation must be conducted in Perth, Western Australia by a single mediator.
- (c) The Institute of Arbitrators and Mediators Australia Mediation Rules (at the date of this Agreement), as amended by this clause 20, apply to the mediation, except where they conflict with this clause 20.
- (d) If the parties have not agreed upon the mediator and the mediator's remuneration within 5 Business Days of the Mediation Notice being given:
  - (1) the mediator is the person appointed by; and
  - (2) the remuneration of the mediator is the amount or rate determined by, the President of the Law Society of Western Australia (**Principal Appointor**) or the Principal Appointor's nominee, acting on the request of either party.
- (e) Unless the parties otherwise agree:
  - (1) each party may appoint a person, including a legally qualified person, to represent it or assist it in the mediation;
  - (2) each party must bear its own costs relating to the preparation for and attendance at the mediation; and
  - (3) the costs of the mediator will be borne equally by the parties.

## 20.4 Litigation

Irrespective of whether a Mediation Notice has been issued, if the Dispute is not resolved within 1 Month after the Notice of Dispute is given, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

## 20.5 Joinder

- (a) The Operator acknowledges and agrees that Arc may direct the Operator to participate in any dispute resolution process under the Commercial Track Access Agreement if Arc considers that it is necessary or appropriate for the Operator to join such a dispute.
- (b) The Operator must comply with any direction given by Arc under clause 20.5(a).
- (c) The Operator acknowledges and agrees to the Customer participating in any dispute resolution process under this Agreement if Arc considers that it is necessary or appropriate for the Customer to join such a dispute.

## 21 Confidentiality

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### 21.1 Acknowledgment of confidentiality and confidentiality obligation

Each party acknowledges and agrees that:

- (a) subject to clause 21.2:
  - (1) it must keep confidential and must not disclose any Confidential Information disclosed to it by the other party;
  - (2) it must not use Confidential Information for any purpose other than as necessary for the purposes of this Agreement; and
  - (3) it must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media release or other publicity relating to the other party's Confidential Information; and
- (b) any Confidential Information provided by the other party remains the property of the other party.

### 21.2 Permitted disclosures

- (a) Subject to compliance with clauses 21.2(c) and 21.2(d), a party may disclose Confidential Information of the other party:
  - (1) where the other party has given its prior written consent to such disclosure;
  - (2) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
  - (3) if required by Law (other than section 275(1) of the *Personal Property Securities Act 2009 (Cth)*) or the rules of any stock exchange or by any Government Agency;
  - (4) as required or permitted by this Agreement;
  - (5) to a ratings agency;
  - (6) to its insurers, auditors, legal advisors or other advisors or consultants under a duty of confidence;
  - (7) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
  - (8) to enable a party to exercise its rights, or perform its obligations under or in connection with this Agreement;
  - (9) in relation to the enforcement of its rights under or in connection with this Agreement;
  - (10) to its Related Bodies Corporate and its and their respective officers and employees;
  - (11) to its Personnel to enable a party to exercise its rights, or perform its obligations under this Agreement or to make or defend any claim under this Agreement; or
  - (12) in any proceeding arising out of or in connection with this Agreement;
- (b) A party may disclose Confidential Information to the Customer in connection with matters under this Agreement which may reasonably affect the Commercial

Track Access Agreement or Transport Agreement or as otherwise required under this Agreement.

- (c) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (1) otherwise keep the Confidential Information confidential; and
  - (2) except in respect of disclosure pursuant to clause 21.2(a)(3), use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 21.
- (d) Before making any disclosure pursuant to clause 21.2(a)(3), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (1) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
  - (2) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.
- (e) Arc must provide to the Customer a copy of:
- (1) this Agreement as soon as practicable after the date on which it is executed by the parties; and
  - (2) any variations to this Agreement as soon as practicable after the date on which the variation is agreed by the parties,
- and nothing in this clause 21 prevents Arc from complying with that obligation.

## 22 Assignment, transfers and encumbrances

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### 22.1 Assignment or transfer of this Agreement

- (a) A party (**Transferor**) must not:
- (1) assign, or attempt to assign, any of its rights; or
  - (2) novate, otherwise transfer or attempt to transfer, any of its rights or obligations,
- under this Agreement to another person (**Proposed Transferee**) without the prior written consent of the other party (**Other Party**), which consent must not be withheld if:
- (3) the Other Party is satisfied, acting reasonably, that the Proposed Transferee is financially, technically and operationally capable of complying with the Transferor's obligations under this Agreement (the onus of proving which rests on the Transferor);
  - (4) the Proposed Transferee is a Related Body Corporate of the Transferor; or
  - (5) the Transferor is Arc and the Proposed Transferee is entitled to and willing to grant access to the Network in accordance with this Agreement,
- and:

- (6) if the Transferor is the Operator, is a transfer or novation of this Agreement that is in conjunction with (and to the same entity that is taking from the Operator and assuming) an equivalent dealing in the Transport Agreement;

and:

- (7) in the case of an assignment, on or before such assignment the Proposed Transferee executes such documents, on terms acceptable to the Other Party (acting reasonably), whereby the Proposed Transferee agrees to be bound by, and is obliged to adhere to, the provisions of this Agreement; or
- (8) in the case of a novation or other transfer, on or before such transfer the Proposed Transferee executes such documents on terms acceptable to the Other Party (acting reasonably) which would have the effect as if the Proposed Transferee was named in place of the Transferor in this Agreement.

## **22.2 Effect of assignment or transfer**

Any assignment, novation or other transfer 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, novation or transfer.

## **22.3 Encumbrance over this Agreement**

The Operator must not grant or allow to exist a mortgage, charge or other security interest over any of its right, title and interest in this Agreement without the prior written consent of Arc.

## **23 Governing Law**

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### **23.1 Law of this Agreement**

This Agreement takes effect, is governed by and is to be construed in accordance with the Laws for the time being of the State of Western Australia.

### **23.2 Jurisdiction**

- (a) The parties submit to the exclusive jurisdiction of the courts exercising jurisdiction in the State of Western Australia.
- (b) Arc and the Operator irrevocably waive any objection to the venue of any legal process brought in the courts exercising jurisdiction in the State of Western Australia, and any courts which have jurisdiction to hear appeals from any of those courts, on the basis that the process has been brought in an inconvenient forum.

## 24 Notices

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### 24.1 Notices in connection with this Agreement

- (a) Any notice, demand, invoice or other communication (**Notice**) required or permitted to be given to or by a party to this Agreement:
- (1) must be in legible writing and in English addressed as shown below:
- (A) in the case of Arc:
- Attention: Chief Executive Officer
- Address: Level 3, 1 George Wiencke Drive, Perth Airport, Western Australia 6105
- Email: [commercial@arcinfra.com](mailto:commercial@arcinfra.com)
- and with a copy sent to: [legal@arcinfra.com](mailto:legal@arcinfra.com)
- (B) in the case of the Operator:
- Attention: [Insert]
- Address: [Insert]
- Email: [Insert]
- or as specified to the sender by a party by notice;
- (2) may be given by:
- (A) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee; or
- (B) email (sent as an attachment), in which case the Notice is regarded as given by the sender and received by the addressee on the first to occur of:
- (i) the time shown in the delivery confirmation report generated by the sender's email system; or
- (ii) if the sender's email system does not generate a delivery confirmation report within 12 hours of the time the email is sent, unless the sender receives a return email notification that the email was not delivered, undeliverable or similar, at the time which is 12 hours from the time the email was sent,
- but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and
- (3) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (b) In this clause 24, a reference to an addressee includes a reference to an addressee's Personnel.

## 24.2 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 and agents and contractors

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### 25.1 Risk and cost

Unless otherwise expressly stated in this Agreement, each party bears the sole risk and must pay the costs and expenses of performing or complying with all of its obligations under this Agreement.

### 25.2 Agents and contractors

- (a) A party to this Agreement may appoint or engage any third party as its agent or contractor in relation to the exercise of any rights or the performance of any obligations under this Agreement as long as the third party complies with the requirements of this Agreement, including obtaining any Accreditation or other authorisation, approval, consent, permit or licence required by this Agreement.
- (b) The appointment of a third party as agent or contractor in accordance with clause 25.2(a) does not operate to relieve a party of any of its obligations or liabilities under this Agreement and each party is liable to the other as if the acts and omissions of any agent or contractor it appoints or engages were its own acts or omissions.

## 26 Anti-corruption and modern slavery

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### 26.1 Anti-corruption

- (a) The Operator represents, warrants and undertakes to Arc that:
  - (1) it has not offered, promised, given or agreed to give and shall not during the term of this Agreement offer, promise, give or agree to give to any person any bribe, whether on behalf of Arc or otherwise, with the object of obtaining a business advantage;
  - (2) it will not engage in any activity or practice which would constitute an offence under any applicable anti-bribery laws, including but not limited to the Criminal Code Act 1995 (Cth), United States Foreign Corrupt Practices Act of 1977, the United Kingdom's Bribery Act 2010 and Canada's Corruption of Public Officials Act (**Anti-Corruption Laws**);
  - (3) it has and during the Term will maintain in place its own policies and procedures to ensure compliance with any applicable Anti-Corruption Laws;
  - (4) it will procure that any person who performs or has performed services for or on its behalf in connection with this Agreement (**Associated Persons**) complies with this clause 26.1(a);

- (5) it will not enter into any agreement with any Associated Person in connection with this Agreement unless such agreement contains undertakings on the same terms as contained in this clause 26.1(a);
  - (6) it has and will maintain in place effective accounting procedures and internal controls necessary to record all expenditure in connection with this Agreement;
  - (7) from time to time during the Access Term, at the reasonable request of Arc, it will confirm in writing that it has complied with its undertakings under this clause 26.1(a) and will provide any information reasonably requested by Arc in support of such compliance;
  - (8) it will report to Arc as soon as practicable any request or demand for any improper payments or other improper advantage of any kind received by the Operator from Arc or any other person in connection with the performance of this Agreement; and
  - (9) it shall notify Arc as soon as practicable of any breach of any of the undertakings contained in this clause 26.1(a) of which it becomes aware.
- (b) To the fullest extent permitted by Law, the Operator shall indemnify and hold harmless the Arc Indemnified Parties and their directors, officers, employees, and agents from and against any and all Claims that the Arc Indemnified Parties incur or suffer that arise out of or in connection with the Operator's breach of any representation, warranty or other obligation in clause 26.1(a).

## 26.2 Modern slavery

- (a) The Operator must, and must ensure that all of the Operator's Personnel:
- (1) comply with Modern Slavery Laws;
  - (2) not engage in any conduct which may breach, or put Arc in breach, of any Modern Slavery Laws;
  - (3) comply with all policies, procedures, guidelines, codes (including codes of conduct) of Arc relating to Modern Slavery;
  - (4) do all things required or necessary to mitigate or reduce risks of Modern Slavery within the Operator's operations or supply chain; and
  - (5) comply with all reasonable directions of Arc, and otherwise provide all assistance, records and information and do all things necessary to assist Arc to comply with its obligations under the Modern Slavery Laws and to verify the Operator's compliance with this clause 26.2(a).
- (b) The Operator warrants and represents that it (and its directors and/or employees):
- (1) have not been convicted of any offence involving Modern Slavery; and
  - (2) have not been and is/are not the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of any Modern Slavery Laws.
- (c) The Operator must notify Arc immediately (and in any case within 24 hours) in writing if it becomes aware or has reason to believe that it, the Operator's Personnel or any other participants in its supply chain in connection with this Agreement have breached, or potentially breached, any Modern Slavery Laws.

## **26.3 Representations and warranties continue**

Each representation and warranty in this clause 26 is given as at the date of this Agreement and is repeated at all times thereafter for the duration of the Term.

## **27 General**

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### **27.1 Certificate**

A certificate signed by any duly authorised officer of Arc as to a matter or as to a sum payable to Arc in connection with this Agreement is prima facie evidence of the matters stated in it or the sum payable.

### **27.2 Exercise of rights**

- (a) A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy.
- (b) A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy.
- (c) Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

### **27.3 Remedies cumulative**

The rights, powers and remedies provided in this Agreement are cumulative with and not exclusive of the rights, powers or remedies provided by Law independently of this Agreement.

### **27.4 Further assurances**

Each party agrees, at its own expense, on the request of the other party, to do everything reasonably necessary to give effect to this Agreement and the transactions contemplated by it, including, but not limited to, the signing of documents.

### **27.5 Variation**

This Agreement may not be varied except in writing signed by all parties.

### **27.6 Severability**

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

### **27.7 No partnership or agency**

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

## 27.8 Counterparts

This Agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument.

## 27.9 Execution by attorney

If an attorney executes this Agreement, the attorney declares that the attorney has no notice of revocation, termination or suspension of the power of attorney under which the attorney executes this Agreement.

## 27.10 Costs and expenses

- (a) Each party must pay its own legal and other costs and expenses in relation to the negotiation, preparation and execution of this Agreement.
- (b) A party in default must pay all costs (including solicitor/client costs on a full indemnity basis) incurred by the other party in respect of that default and any notice relating to that default.
- (c) The Operator must pay all duty and other government imposts payable in connection with this Agreement and all other documents referred to in this Agreement when due or earlier if required in writing by Arc.

## 27.11 Suspension

Except as expressly provided for in this Agreement, neither party has a right to suspend its obligations under this Agreement for any reason.

## 27.12 Survival

Each indemnity in this Agreement and clauses 1, 16, 17, 18, 19, 20, and 26 and any rights or obligations which accrued in respect of a prior breach of this Agreement, survive termination or expiry of this Agreement.

## 28 No implied representations or warranties

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Except for:

- (a) the express terms and warranties set out in this Agreement; and
- (b) those implied terms and warranties that are imposed by Law that are mandatory and cannot be excluded,

neither party gives any warranties to the other party and all other terms, conditions, warranties, stipulations or other statements whatsoever, whether express or implied, by Law, or otherwise howsoever, are expressly excluded.

## 29 Entire understanding

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This Agreement:

- (a) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and

- (b) supersedes any prior agreement or understanding on anything connected with that subject matter.

# Schedule 1

## Schedule 1 – Scheduled Train Paths

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### Item 1 Nominated Routes

Nominated Route <b>(Origin to Destination)</b>	Maximum Track Axle Load	Maximum Train Length (metres)
[insert]	[insert]	[insert]

### Item 2 Scheduled Train Paths

	[Insert Origin] ( <b>Origin</b> )		[Insert Destination] ( <b>Destination</b> )	
Train ID	Departure Day	Departure Time	Arrival Day	Arrival Time

[Include train path schedule for each Nominated Route]

## Schedule 2 – Charges

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### 1. Monthly Payments

- (a) At the end of each Month, Arc will calculate the Charges for that Month.
- (b) Arc will issue an invoice for the Charges to the Operator.
- (c) The Operator must pay the amount invoiced under this item 1 within 21 days from the date the invoice is given by Arc to the Operator.

### 2. Rates

	Rate in 20XX (\$)
Parking Charge (\$ per minute)	[X]
Light Engine Movement Charge (cents per GTK)	[X]

The rates set out above will be used to calculate the Charges, subject to adjustment in accordance with Schedule 3.

### 3. Light Engine Movement Charge Calculation

- a. The Light Engine Movement Charge for each instance where the Operator undertakes a Light Engine Movement on the Network will be calculated by Arc in accordance with the following formula:

$$\text{LEM} = \text{LR} \times \text{GTK}$$

Where:

LEM = the Light Engine Movement Charge

LR = the Light Engine Movement Rate

GTK = the number of GTK's for the Light Engine Movement, as calculated in accordance with 7(b) below).

- b. The GTK's will be calculated by Arc by aggregating the GTK's of each movement of Rolling Stock on a Light Engine Movement in accordance with the following formula:

$$\text{GTK} = \text{D} \times \text{K}$$

Where:

GTK = the aggregate of the GTK's per unit of Rolling Stock

D = the gross weight per unit of Rolling Stock (including Operator Product)

K = the total distance (in kilometres) per movement.

#### 4. Parking Charge Calculation

The Parking Charge for each instance where the Operator Parks on the Network for a period in excess of 15 minutes will be calculated by Arc in accordance with the following formula:

$$PC = PR \times (M - 15)$$

Where:

PC = the Parking Charge

PR = the Parking Rate

M = the number of minutes the Operator has Parked

## Schedule 3 – Variation of Charges

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### 1 Fee Variation

- a. On 1 July of each year (commencing from 1 July 20XX), the Rates as set out in Item 2 of Schedule 2 will be increased in accordance with the following formula:

$$R_n = R_b \times (CPI_n \div CPI_b)$$

where:

R<sub>n</sub> = the Rate to apply from 1 July of the applicable year.

R<sub>b</sub> = the Rate applying at the Commencement Date.

CPI<sub>n</sub> = the Australian Bureau of Statistics catalogue number 6401.0 Consumer Price Index All Groups – Australia, available from [www.abs.gov.au](http://www.abs.gov.au) for 31 March in the applicable year.

CPI<sub>b</sub> = the Australian Bureau of Statistics catalogue number 6401.0 Consumer Price Index All Groups – Australia, available from [www.abs.gov.au](http://www.abs.gov.au) for 31 March 20XX

- b. If, at any given time throughout the Term, CPI<sub>n</sub> is less than CPI<sub>b</sub>, CPI<sub>n</sub> will be deemed to be equal to CPI<sub>b</sub> for the purpose of the above calculation.
- c. For the avoidance of doubt, the Rate for each year shall not be less than the Rate payable for the immediately preceding period.

### 2 Material Change

- a. If at any time after the date of this Agreement a Change in Law or Change in Tax occurs which affects the financial position of Arc or the costs to Arc of performing its obligations under this Agreement, Arc may notify the Operator giving details of the Net Financial Effect.
- b. Within 10 Business Days after receipt of a notice under item 2a above, Arc and the Operator must meet and negotiate in good faith any appropriate adjustments to the Charges and any other amounts payable under this Agreement in order to remove, as far as practicable, the Net Financial Effect of the Material Change and return Arc to the position it would have been in had the Material Change not occurred.
- c. If the parties do not reach agreement within 15 Business Days of Arc's notice, the matter will be referred to dispute resolution under clause 20.

### 3 Rounding

Any amount calculated under this Agreement which exceeds four decimal places will be rounded to four decimal places. For the purposes of such rounding, if the digit at the fifth decimal place is:

- a. between zero and four (inclusive), the number is to be rounded down to the nearest fourth decimal place; and
- b. between five and nine (inclusive), the number is to be rounded up to the nearest fourth decimal place.

## Schedule 4 – Instructions

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### 1. Instructions

Instructions include:

- (a) Arc's Network Rules;
- (b) the Working Timetables;
- (c) Train Control Directions;
- (d) General Operational Instructions; and
- (e) Train notices.

### 2. Examples of Instructions

Examples of Instructions include:

- (a) to cease use of a Train Path by the Service and for the Service to proceed over such other Train Path on the Network as Arc nominates;
- (b) 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 Train as Arc nominates;
- (c) to cause the Service to proceed to a point on the Network and stand there until Arc issues a further Instruction in relation to the Service;
- (d) if the Service operates outside of its Train Path, to delay or redirect the Service to allow access to the Network by another operator of a Train (including, if relevant, Arc) whose service would, but for the delay or redirection of the Service, be delayed or further delayed;
- (e) to change the entry or exit time of a Train Path;
- (f) to issue notification of a temporary speed restriction on a section of track;
- (g) to cancel a Train Path; and
- (h) to amend or clarify application of Arc's Network Rules.

Schedule 5 – Rolling Stock

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1. Locomotives

<b>Locomotive Class</b>		
Locomotive Power (gross)		
Locomotive Power (traction type)		
Locomotive tractive effort (continuous)		
Maximum Operating Speed		
Number of axles		
Locomotive axle load (tonnes)		
Bogie axle Configuration		
Tare Weight (tonnes)		
Locomotive length over coupling (mm)		
Dynamic Brake		
Gauge		
Radio Equipment Compatible with Arc Train Control (that is capable of exchanging voice and data)		

2. Wagons

<b>Wagon Class</b>	
Wagon type	
Lids	
Tare Weight (tonnes)	
Wagon length (mm)	
Maximum speed	
Number of axles per wagon	
Gauge	
Bogie wheelbase (mm)	
Carrying Capacity (Gross minus Tare)	

<b>Wagon Class</b>	
(tonnes)	

# Signing page

## Executed as an Agreement

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Executed by  
**Arc Infrastructure Pty Ltd**  
**ABN 42 094 721 301**  
in accordance with section 127 of the *Corporations Act 2001*

sign here ► \_\_\_\_\_  
Director

print name \_\_\_\_\_

sign here ► \_\_\_\_\_  
Director/Company Secretary

print name \_\_\_\_\_

Executed by  
**[insert]**  
**ABN [insert]**  
in accordance with section 127 of the *Corporations Act 2001*

sign here ► \_\_\_\_\_  
Director

print name \_\_\_\_\_

sign here ► \_\_\_\_\_  
Director/Company Secretary

print name \_\_\_\_\_