

Arc Infrastructure Track Access Agreement

#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strikethrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
1	Definitions and Interpretation	Definitions	1.1	Low	Transparency and clarity of obligations	<i>Arc's Network Rules</i> the Network Safeworking Rules and Procedures applied consistently to all operators using the Network and 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 in accordance with Clause 12.3(b); for the purpose of ensuring the safe use of the Network;	Operators agree the necessity of a set of Network Safeworking Rules and Procedures, but have proposed some amendments to the definition of Arc's Network Rules to provide operators' and customers' with confidence in the way that Arc's Network Rules will be managed, in particular, that they will be consistently applied to all operators, and that Arc will follow a reasonable process (proposed to be addressed in a new Clause 12.3(b)) when amending the rules.	CTAA - Yes OTAA - Yes
2	Definitions and Interpretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>Change in Law</i> (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; (d) the imposition of a legally binding requirement for authorisations not required as at the Commencement Date; (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; (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; (g) or 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).	A change in the standard access provisions should not give rise to a right for Arc to adjust access charges for a change in costs. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) and do not in of themselves impose any obligations on Arc. Operators do not expect (and indeed the draft standard access provisions do not contemplate) that there is any automatic change to an existing agreement where a change is subsequently made to the standard access provisions. To the extent that adopting access terms consistent with the standard access provisions imposes costs on Arc that it would not otherwise incur, this is relevant to the agreements that reflect those particular access terms.	CTAA - Yes OTAA - Yes
3	Definitions and Interpretation	Definitions	1.1	Medium	Transparency and clarity of obligations Balanced and reasonable terms	<i>Consequential Loss</i> (a) Subject to paragraph (b) of this definition, Any loss 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. (b) The following are expressly excluded from paragraph (a) of this definition to the extent that the applicable party would, in the absence of this definition, be entitled to recover them at law: (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; (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); (3) any loss, damage or cost arising out of or in connection with fraud or Wilful Default; (4) without limiting paragraph (b)(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 (5) any loss, damage or cost arising out of or in connection with damage to third party property other than Customer Product.	Part (b) of this definition should not unnecessarily limit the extent of the exclusion of Consequential Loss per part (a) of this definition.	CTAA - Yes OTAA - Yes
4	Definitions and Interpretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>Customer</i> (Insert) means a party for whom the Operator provides rail haulage services using a Train Path.	Train services are not always dedicated to a specific Customer or Transport Agreement, with multiple operators providing freighter services on a multi-product and multi-user basis. For customers who require dedicated train services, Arc offers the alternate CTAA form of agreement. There should be no requirement to specifically identify a Customer for the rail haulage service in the TAA form of the standard access provisions.	CTAA - No OTAA - No

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5	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>Customer Product</i> means [insert], or any other product approved by Arc in writing, that is transported by the Operator on a Train Path. For the avoidance of doubt, Arc will not unreasonably withhold its consent to the transportation of additional product where the parties are able to agree the applicable Charges prior to carriage on the Network.	Operators acknowledge that, in some instances, Arc applies product based price differentiation, and that as a result, the standard access provisions include a constraint on the product able to be transported on a service, in order to align the product with the agreed access charge. However, it is important that this does not act as a constraint on the efficient operation of train services, potentially including consolidation of different types of products onto a single service. This should be permitted to occur, with Operators recognising that in some instances this may be accompanied by an amendment to the access charges for the service.	CTAA - Yes OTAA - Partially
6	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<i>Force Majeure</i> any cause, event or circumstance (or combination of causes, events and circumstances) which: (a) is beyond the reasonable control of the party claiming force majeure; (b) prevents the affected party from performing its obligations under this Agreement; and (c) cannot be predicted , prevented, overcome or remedied by the exercise by the party affected of a reasonable standard of care and diligence, including: (d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide, extreme heat, severe weather conditions or other catastrophe or natural calamity , heat (including speed restrictions due to the impact of heat or other atmospheric conditions) or adverse weather conditions; (e) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic; (ea) 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 (f) Industrial Action; provided that, in the case of the Operator 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 Operator's Personnel and lasts for longer than 28 days; (fa) delay of a supplier or Customer due to any of the foregoing whenever arising, but does not include: (g) loss of customers or loss of market share; (h) 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; (i) heat , wet or otherwise inclement weather other than as described in paragraph (d) of this definition; (j) causes, events or circumstances to the extent caused or contributed by if the Operator is the affected party, any acts or omissions by a party's the Operator's Personnel; or (k) 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.	Operators do not consider that heat (other than extreme heat) should be included as a FM event. Heat based speed restrictions are a management tool to address common and predictable levels of heat during summer months, particularly on those parts of the Network constructed to lighter track standards. The extent to which speed restrictions are used is based on a cost/benefit assessment, which trades the benefit of increased train speed with the cost of maintaining the network to a standard that allows for a lower incidence of speed restriction. Accordingly, Arc should have regard to a reasonable expectation of heat restrictions and good industry practice when considering the standard to which it maintains its track and in defining the service that it is able to contract, rather than classify heat restrictions as FM. The inclusion of applicable Australian Laws or enforcement action in response to a pandemic is included in the CTAA form of agreement but not the TAA. Operators consider this to be a reasonable FM inclusion, and request that it also be included in the TAA. Otherwise, Operators consider that the FM inclusions and exclusions should be drafted in a reciprocal way, with the same issues being classified as FM for both parties. This is consistent with regulator approved standard access agreements for ARTC (Interstate and Hunter Valley), Queensland Rail and Aurizon Network.	CTAA - Partially OTAA - Partially
7	Definitions and Intepretation	Definitions	1.1	Low	Performance transparency and accountability	<i>Good Industry Practice</i> those practices, methods and acts, as varied from time to time, that are commonly used in the railway industry by prudent persons.	Refer item 31	CTAA - Yes OTAA - Yes
8	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>GPS Information</i> the following data for each locomotive set out in Schedule 5 utilising a Train Path, with each transmission of data to comprise: (a) date and time stamp; (b) GPS coordinates (latitude and longitude); and (c) details of the locomotive (including vehicle identifier).	Refer item 28	CTAA - No OTAA - Yes

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9	Definitions and Intepretation	Definitions	1.1	High	Performance transparency and accountability Financial risk allocation	Not Provided Train Path means a Train Path that Arc has failed to provide to the Operator, but excluding Train Paths where: (a) the Train Path was not provided because of a negligent or wrongful act or omission of the Operator; (b) the Train Path was cancelled at the request of the Operator; (c) the Train Path was not provided due to Network access being suspended pursuant to Clause 17.3; (d) the Train Path was not provided because of a Force Majeure event; and includes Train Paths that were provided conditional upon operating restrictions which, in the Operator's reasonable opinion, cause the path to be unusable by the Operator having regard to other elements of its logistics chain.	Refer item 42 for discussion on the need to define Not Provided Train Path. In addition to train paths that are clearly not provided by Arc, eg due to track possessions, if Arc makes a train path available but only subject to operating restrictions (such as heat speed restrictions) that mean that it is effectively unusable by the Operator, then this should also be treated as a Not Provided Train Path.	CTAA - Yes OTAA - No
10	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations Balanced and reasonable terms	<i>Reasonable Grounds</i> reasonable grounds and, where Arc's consent is being sought, includes: (a) the Varied Train Path not being available because it is already allocated to another operator or customer; (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; (c) the Operator being unable to demonstrate to Arc's reasonable satisfaction a bona fide requirement for the Varied Train Path; (d) the Varied Train Path not being able to be operated safely or effectively or efficiently in the opinion of Arc (acting reasonably); (e) the Varied Train Path being exactly the same or similar to a train path that has already been removed pursuant to clause 9.5; or (f) where to consent to the proposal would, or is likely to, result in Arc breaching: (g) any obligations imposed by Law, including any Law relating to safety; (h) the Railways (Access) Act 1998 (WA) or the Rail Access Code; or (i) any agreement to which it is a party.	Operators' note the 'Reasonable Grounds' definition in Arc's Train Path Policy, and cannot see a justification for requiring that any additional considerations (beyond those in the Train Path Policy definition) be determined in Arc's 'opinion'.	CTAA - Yes OTAA - No
11	Definitions and Intepretation	Definitions	1.1	Medium	Financial risk allocation Transparency and clarity of obligations	<i>Secured Sum</i> [insert - sum to be no greater than six months access charges]	Arc's standard access provisions should include guidance as to the permitted security amount. Six months access charges is accepted as the maximum required value of security under Queensland Rail and Aurizon Network regulator endorsed standard access agreements. This reflects that six months will allow a railway owner sufficient time to identify that there is a payment problem and seek to rectify that payment problem through negotiated means, before calling on the security.	CTAA - Yes OTAA - No
12	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<i>Security</i> means: (a) 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 which secures the obligations of the Operator (including the obligations to pay money) under this Agreement; (b) a parent company guarantee in a form acceptable to Arc (acting reasonably) and from an Australian incorporated holding company (as defined in the Corporations Act) of the Operator that has an Acceptable Credit Rating; (c) any other form of security reasonably acceptable to Arc, in a form and upon terms reasonably acceptable to Arc.	Alternate forms of security, including a parent company guarantee from a suitable company, should be permitted where this will reasonably address Arc's financial risk.	CTAA - Yes OTAA - No
13	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>Service</i> the operation of a Train on the Network by the Operator: (a) utilising a Train Path for the purpose of transporting Customer Product for the Customer under the Transport Agreement; or (b) for a Light Engine Movement or other ad-hoc entitlement for access granted pursuant to this Agreement.	Refer item 4	CTAA - No OTAA - No

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14	Definitions and Interpretation	Definitions	1.1	Medium	Balanced and reasonable terms	Transmission Method The provision of GPS Information to Arc by one or more of the following methods:- (a) FTP server hosting;- (b) HTTP or HTTPS website hosting;- (c) duplication of GPS streams to Arc servers;- (d) secured VPN link; or (e) a method that Arc reasonably requests the Operator to use to interface with any technology that Arc implements during the Access Term.—	Refer item 28	CTAA - No OTAA - Yes
15	Definitions and Interpretation	Definitions	1.1	Medium	Balanced and reasonable terms	Transport Agreement an agreement between the Operator and the Customer for the provision of rail haulage services to transport Customer Product utilising the Scheduled Train Paths.	Refer item 4	CTAA - No OTAA - No
16	Definitions and Interpretation	Rail Access Code	1.4(a)	Medium	Transparency and clarity of obligations Balanced and reasonable terms		Paragraph (a) provides that nothing in the Agreement requires Arc to do (or omit to do) anything contrary to the Rail Access Code or any Applicable Part 5 Instrument. However, in a number of cases, provisions of the proposed TAA do not align with the Part 5 Instruments. The intended application of this provision is therefore unclear. The operators' preference is, where relevant, to rely on the Part 5 Instruments (as amended from time to time), and avoid drafting potentially inconsistent provisions into the standard access provisions. This view is reflected where applicable in specific comments.	CTAA - Yes OTAA - Yes
17	Definitions and Interpretation	Rail Access Code	1.4(c)	Medium	Balanced and reasonable terms	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.	Refer item 2 in relation to the treatment of New Standard Access Provisions as a Material Change. Operators do not consider that there should be a need for any amendment to an existing agreement in the event of a change in the standard access provisions. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) but do not, in and of themselves, impose any obligations on Arc. Issues that will have an impact on the safe operation of the Network will typically be addressed in Arc's Network Rules or in Part 5 Instruments (which all operators must comply with under the standard access provisions).	CTAA - Yes OTAA - Yes
18	Track Access Rights	Nature and scope of rights	3.2(c)	Medium	Transparency and clarity of obligations	Notwithstanding clause 3.1, the Operator's right to operate any Service on the Network (including Services on the Nominated Route using a Scheduled Train Path) 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) a Safety Interface Agreement being effective at all times during the Access Term. (3) the Operator complying, and being in compliance, with the terms of this Agreement, including its warranties given under this Agreement and clauses 7, 14, 15 and (if applicable) 21.1 and the Safety Interface Agreement; (4) the Trains utilising the Train Path being comprised of Rolling Stock (or such other combination of locomotives, railcars, carriages and wagons agreed to in writing by Arc); (5) emergencies or material safety considerations; (6) the Train Management Guidelines, the Train Path Policy and Arc's Network Rules; and (7) all applicable Laws.	Operators consider that, in addition to the Train Management Guidelines and Arc's Network Rules, both Arc and the operator should be required to comply with Arc's Train Path Policy.	CTAA - Yes OTAA - Yes

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19	Track Access Rights	Extension and Renewal	3.4	Medium	Balanced and reasonable terms	<p>(a) This Agreement may only be extended by written agreement between the parties. This Agreement does not automatically renew and may not be held over.</p> <p>(b) The Operator may, not less than 120 days before the Expiry Date, give written notice to Arc that the Operator wishes to renew this Agreement in relation to the Scheduled Train Paths, specifying the proposed term of such renewal, and Arc will enter into negotiations with the Operator in relation to the possibility of such renewal.</p> <p>(c) Arc may consent to the renewal and the parties may enter into a new track access agreement in relation to the Scheduled Train Paths.</p>	Operator's accept that there is no automatic right to a renewal of their access agreement. However, there would be significant value in including in the standard access provisions a right for Operators to negotiate for a new agreement in relation to their scheduled train paths. This allows Operators a clear opportunity to negotiate ongoing access to paths, which is important to support business continuity, while enabling a full renegotiation of the terms and conditions of the agreement consistent with Arc's requirements.	CTAA - Yes OTAA - No
20	Track Access Rights	Light Engine Movements	3.6(a)	Low	Balanced and reasonable terms	Upon request by the Operator, Arc will use reasonable endeavours, may, in its absolute discretion and subject to the Train Management Guidelines, to grant the Operator a Train Path for the operation of a Light Engine Movement	Ad hoc light engine movements, including for the purposes of locomotive maintenance and incident recovery, are an essential part of the operation of train services, but are unable to be predicted for the purpose of contracting capacity. A reasonable endeavours obligation to provide access for light engine movements better reflects the necessity of these movements, while continuing to ensure that Arc does not have an obligation to accommodate light engine movements where it is not reasonable to do so given other network requirements.	CTAA - No OTAA - Yes
21	Track Access Rights	Parking	3.9(b)-(c)	Medium	Efficient supply chains Financial risk allocation	<p>(b) Notwithstanding clause 3.9(a), if, at the Operator's request, Arc grants the Operator a right to Park on the Network for a period of more than [nominated time] 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 for each [nominated interval] minute in excess of [nominated time] 15 minutes.</p> <p>(c) The Operator may Park without charge:</p> <p>(1) with Arc's consent where the Operator requests to do so and provided period of Parking does not exceed [nominated time] 15 minutes;</p> <p>(1A) where it is unable to operate Rolling Stock due to a Possession of the Network;</p> <p>(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;</p> <p>(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</p> <p>(4) for a reasonable period in order to recover from Incidents or Rolling Stock failure.</p>	This is a very restrictive parking (or stowage) right compared to other railway owners, and the use of a 'per minute' parking charge imposes a high administrative cost on all parties to ensure that parking charges are appropriately applied. Access entitlements usually incorporate a reasonable period of parking prior to the application of any charges. What is a reasonable period will depend on the context of the access, and other demands for that stowage location. In areas where there are multiple operators on the network who may at times require a parking location (including in locations for EGR users such as the long arrival roads into Forrestfield), a limited parking allowance is reasonable in order to provide an effective signal to Operators to move their train as soon as practicable. In such multi-user locations, Operators consider a parking allowance of one hour, and a per hour charge for additional parking, will provide effective usage signals while maintaining a manageable charging structure. However, where an Operator is the sole operator in an area of the network, and there are no consequences to other parties from parking in a location, a significantly longer parking timeframe would be reasonable.	CTAA - No OTAA - Yes
22	Track Access Rights	Supply chain management	n/a	High	Performance transparency and accountability Efficient supply chains	<p>3.10 Supply Chain Management</p> <p>(a) Arc will provide monthly reports to the Operator documenting performance against the performance indicators as set out in Schedule 6.</p> <p>(b) The parties agree to work together to manage and optimise the efficiency of the supply chain as it applies to the Operator's rail operations and the Network, including, where agreed:</p> <p>(1) holding regular meetings involving senior representatives of both parties to review operational performance and to agree improvement strategies; and</p> <p>(2) the commitment of personnel and other resources by each party to develop and maintain additional data and reporting format, where required, which demonstrates the performance of each aspect of the supply chain.</p>	<p>Arc's standard access provisions do not include any provision for reporting and monitoring of performance, or any mechanism aimed at improving performance over time. Operators acknowledge the complexity around developing a performance regime involving KPIs and performance standards, particularly given overall outcomes are significantly affected by both railway owner and operator performance. For this reason, Operators consider that the standard access provisions should include a performance monitoring arrangement, rather than a performance regime with contractual and financial consequences. Establishing a set of KPIs, and monitoring system performance (including railway owner and operator performance) can provide information on trend performance outcomes, and opportunities for performance improvement.</p> <p>From examining performance frameworks in other rail networks, it is clear that KPIs are generally aimed at providing information on similar aspects of performance, although it is often the case that different indicators are applied. Rail operators have developed a suite of KPIs that we would like to be consistently used across all rail networks. The benefit of a consistent set of KPIs is clearest where individual trains operate over multiple networks (such as is the case for interstate trains on Arc's EGR). However, a consistent suite of KPIs is of value regardless of the operation of multi-network services. This is because most rail operators, and many end customers, operate over a national footprint, and a consistent suite of KPIs allows valid comparisons of performance across jurisdictions, and allows Operators to present consistent performance information to their end customers. Operators' preferred KPI suite is being considered by ARTC as part of its review of performance reporting under its Interstate Access Undertaking.</p> <p>Accordingly, Operators propose to include in Schedule 6 a set of KPIs based on the performance indicators sought for consistent national application (attached to this submission).</p>	CTAA - Yes OTAA - Yes

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23	Billing and Payments	No Set off	4.4	Low	Financial risk allocation	All payments which a party is required to make under this Agreement must be made without deductions, counter-claims, conditions, set off or withholdings. A party may deduct from any amounts which are due and payable by the party to the other party under this Agreement any amounts which are due and payable by the other party to the party under this Agreement.	Permitting the application of offsets is a common in regulator approved standard access agreements, including Queensland Rail and Aurizon Network.	CTAA - Yes OTAA - Yes
24	Control and management of access to the Network and use of the Network	Operator's obligations in relation to Rolling Stock	5.3(a)	Medium	Transparency and clarity of obligations	The Operator must at all times during the Access 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 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"; (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 on rolling stock 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. Arc will publish the relevant standards on its website.	The standards referred to in this clause are not easily accessible using a general internet search, leading to uncertainty around the specific requirements of this clause.	CTAA - No OTAA - Yes
25	Control and management of access to the Network and use of the Network	Operator's obligations in relation to Rolling Stock	5.3(a)	Medium	Balanced and reasonable terms	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.	Promoting rollingstock inter-operability and reducing the cost and time of securing rollingstock authorisations are key issues being progressed under the National Rail Action Plan (NRAP). Objectives include: - increased consistency of rollingstock standards applied across networks; - transparent and consistent processes applied by railway owners in assessing rollingstock acceptability; - mutual recognition of authorisation and testing processes, with additional requirements only where necessary to address network specific risks. Under the NRAP framework, Operators understand that Arc is working closely with ARTC to harmonise their rollingstock approval requirements and processes, and Operators support the continuation of this work. Over time, Operators anticipate that this will allow faster and more transparent rollingstock approval processes to be adopted.	CTAA - No OTAA - Yes
26	Control and management of access to the Network and use of the Network	Operator's general obligations	5.5(a)(2)	Low	Transparency and clarity of obligations	5.5(a)(2) if it becomes aware of a Network failure or 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 as soon as reasonably practicable, including advising the magnitude of any variance and revised time of departure and/or arrival;	There is considerable overlap between Clause 5.5(a)(2) and Clause 9.1(a) both of which place obligations on an Operator to advise Arc of potential deviations from a Train Path, but which differ slightly in their detail. Operators suggests consolidating the provisions into a single clause within Clause 5.5(a)(2) in order to improve the clarity of an Operator's obligation.	CTAA - No OTAA - Yes
27	Control and management of access to the Network and use of the Network	Operator's general obligations	5.5(a)(6)	Medium	Balanced and reasonable terms	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: (A) Arc will consult with the Operator and the Operator will, after such consultation and after reasonable notice from ARTC to the Operator, reasonably replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre; and (B) where the proposed change to the communications equipment in the Train Control Centre constitutes a significant change to the communications equipment and/or communication system, Arc will further consult with other rail network managers, rail safety governance organisations, and the National Transport Commission and Interoperability Advisory Group (as relevant) to discuss the proposed changes.	Operators' acknowledge that, at times, a railway manager may need to upgrade its train control and communication systems, and this may require corresponding changes to an Operator's communications equipment. However, Operators' are concerned with how such upgrades are specified, having regard both to the potential cost that may be imposed on an Operator, as well as to the implications for interoperability across networks. The proposed drafting amendments are aimed at ensuring that these issues are properly considered. The drafting is consistent with the ARTC ITAA recently approved by the ACCC, and reflects an approach that has regard to the legitimate interests of Operators, as well as to the need to promote network inter-operability when considering significant changes to communications systems and equipment. The NRAP framework includes prioritisation of rail interoperability through the development of mandatory and model digital train control technology requirements. Eastern states have aligned on European Train Control System (ETCS) as a DTCT of choice for their networks and a strategic business case is being developed on train control and signalling interoperability pathway for Australia. Operators anticipate that Arc will be engaged in this work to address any interoperability issues.	CTAA - No OTAA - Yes

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28	Control and management of access to the Network and use of the Network	Operator's obligation to provide GPS Information	5.6	Medium	Balanced and reasonable terms	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.	The standard access provisions provide a process (in clause 5.5(a)(6) for upgrades to communication equipment for train control, so the purpose of this provision as a stand alone obligation is unclear. Arc has not consulted with Operators around the requirement to transmit GPS information, and Operators have not had an opportunity to understand and assess the costs that this obligation will impose upon them. Clause 5.5(a)(6) provides a mechanism for this to occur.	CTAA - No OTAA - Yes
29	Control and management of access to the Network and use of the Network	Operator's obligations in relation to disposal of waste	5.7	Low	Transparency and clarity of obligations	(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 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 5.6. (c) If the Operator has not installed in each Train for that Service a means of treating, processing and discharging the waste in accordance with this clause 5.6, 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.	Operators question why this requirement is not able to be addressed through the general environmental management provisions in clause 13.	CTAA - No OTAA - Yes
30	Control and management of access to the Network and use of the Network	Operator's obligations in relation to any Network blockage	5.8(b)	Medium	Balanced and reasonable terms	(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-- provided that: (1) Arc must consult with the Operator before issuing any Instruction about using the Operator's Rolling Stock or Train Crew to clear the blockage; (2) the Operator is not obliged to provide assistance where this would require it to do anything contrary to its Accreditation, or otherwise where the Operator does not consider it safe to do so; and (3) where Arc issues an Instruction in accordance with Clause 5.8(b)(1), it will: (A) reimburse the Operator's direct costs and expenses of providing such assistance; (B) Arc will release and indemnify the Operator for all and any injury, loss and damage arising from or related to the assistance provided, including damage to the rescued party's rollingstock. (c) To the extent that a Network blockage is caused by an Operator or an Operator's Rolling Stock: (A) the Operator must pay Arc's direct costs and expenses incurred in clearing that blockage, and those costs and expenses will be a debt due and owing by the Operator to Arc; and (B) the Operator will release and indemnify Arc for all and any injury, loss and damage arising from or related to the clearing of that blockage.	The general requirements on Operators in relation to assisting with clearing of a Network blockage are set out in Arc's Train Management Guidelines (CI 2.2.2) which states that, unless agreement is reached on how the costs and risks of providing assistance will be shared, the Operator is not required to provide assistance. Reflecting this, Operators consider that any obligation in the standard access provisions for an Operator to provide assistance must be accompanied by detail on how the costs and risks of providing assistance will be shared. Operators considers that this must: - include a requirement to consult with the Operator before issuing any Instruction to assist in clearing the blockage - not oblige the Operator to do anything contrary to its accreditation or that cannot be done safely - provide for Arc to reimburse the Operator's reasonable costs and indemnify the Operator against any claims for damage to the rescued party's rollingstock; and - provide an ability for Arc to recover the reasonable costs of clearing a blockage from an Operator who has caused the blockage and to be indemnified against any claims by the Operator for damage to its rollingstock.	CTAA - No OTAA - Yes
31	Repairs and maintenance of the Network	Maintenance Standards	6.1(a)	High	Performance transparency and accountability	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 minimum standard required, in accordance with Good Industry Practice, to perform the Services in accordance with this Agreement; 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.	Operators consider that Arc should be obliged to maintain the Network to a standard that permits the operation of the Services that will be contracted under that agreement. It is then the responsibility of Arc, as the railway manager, to assess what level of Service it is willing to contract, given the standard of the network at the commencement date of the agreement. The Operator should not be required to accept the risk that the contracted Services cannot be delivered as anticipated, because of the network standard is insufficient at the commencement date. In order to assess what standard the Network must be maintained at to deliver the Services, Operators believe that the Service can be defined at a high level according to scheduled transit time, axle load and train length, as provided in Schedule 2. The Network performance required to deliver these services should be subject to a Good Industry Practice standard.	CTAA - Yes OTAA - Yes
32	Variations or cancellations of Train Paths	Operator and Arc consultation protocols	9.1(a)	Low	Transparency and clarity of obligations	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.	Refer Item 26	CTAA - No OTAA - Yes

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33	Variations or cancellations of Train Paths	Operator and Arc consultation protocols	9.1(b)	Low	Transparency and clarity of obligations		This obligation may be better located within Clause 5.5(a)	CTAA - No OTAA - Yes
34	Variations or cancellations of Train Paths	Temporary variations of Train Paths	9.2	Low	Efficient supply chains Balanced and reasonable terms	(c) for the purpose of giving effect to an agreement for a temporary variation between Arc and the Operator, 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, and 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 temporary variation, change or adjustment of the Train Paths.	This mechanism is included in the CTAA, and Operators consider it should also be included in the TAA. This provides an efficient means of implementing agreed temporary variations to Train Paths, which otherwise would require a variation to the Agreement.	CTAA - Yes OTAA - No
35	Variations or cancellations of Train Paths	Repairs, maintenance and upgrading of the Network and temporary variations of Train Paths	9.4(c)	High	Efficient supply chains	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 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.	Operators acknowledge that the timeframes for notification of possessions are included in the Train Management Guidelines. However, we note that for many possessions, Arc is required to provide Operators with significantly less notice around planned possessions than is provided by other railway managers, for example Queensland Rail must provide three months notice of all planned possessions, and ARTC has detailed guidance around its notification requirements depending on the impact the possession has on services, with planned possessions with any impact on train services typically requiring 10-26 weeks notice. In a review conducted by Queensland's Cross River Rail Delivery Authority on how to reduce the impact of possessions on freight services, a key recommendation was to more effectively co-ordinate possessions across the relevant supply chains, and to provide increased notice of possessions, in order to allow Operators more time to plan changes and manage effects with customers. Accordingly Operators would like Arc to implement a review of its Train Management Guidelines with the result that: - Arc's Train Management Guidelines require that Arc develop and update on a regular (monthly) basis, a rolling 12 month possessions calendar which sets out its expectations for planned possessions for each route; - Arc's Train Management Guidelines include an obligation on Arc to consult and, to the extent practicable, co-ordinate possessions with adjoining networks; and - the notification timeframes in Arc's Train Management Guidelines to be reviewed to align with contemporary expectations in order to help mitigate the impact of essential possessions on freight supply chains. In particular, we consider that Arc should provide 30 days notice for all non-emergency possessions of less than 6 hours, and 3 months notice for all non-emergency possessions of 6-48 hours, (unless the possessions will not affect the use of Train Paths).	CTAA - Partially OTAA - Yes
36	Variations or cancellations of Train Paths	Repairs, maintenance and upgrading of the Network and temporary variations of Train Paths	9.4(f)	Medium	Efficient supply chains	Arc and the Operator agree that they will work together in the scheduling of repairs, maintenance and upgrades to the Network and to the Operator's facilities and to the Customer's facilities and take all reasonable steps to minimise the disruption to one another. The Operator further agrees that it will invite Arc to participate in the Operator's regular maintenance planning meetings to assist Arc to plan repairs, maintenance or upgrades, where practicable, during the Customer's maintenance shutdowns.	While Operators agree that there is a need for Arc and Operators to work collaboratively to minimise the impact of possessions on freight services, in many cases freight services operated under a TAA form of agreement are not dedicated to a particular customer, and Arc's specific proposed drafting around regular maintenance planning meetings and Customer maintenance shutdowns are not applicable.	CTAA - Yes OTAA - No

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strikethrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
37	Variations or cancellations of Train Paths	Cancellation of Train Paths for under-utilisation	9.5(a)-(e)	High	Efficient supply chains	<p>(a) Arc may cancel or vary a Train Path for under-utilisation in accordance with the under-utilisation provisions established in Arc's Train Path Policy.</p> <p>(a) Arc will monitor utilisation of Scheduled Train Paths over a 3 month period (Monitoring Period).</p> <p>(b) If a Scheduled Train Path has not been utilised during the Monitoring Period, Arc may give written notice to the Operator that the Scheduled Train Path has been identified as under utilised.</p> <p>(c) If the Operator fails to utilise the Scheduled Train Path 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 9.5(b), then Arc may issue the Operator with a written notice confirming the Scheduled Train Paths as under utilised at the end of that period (Under-utilisation Notice).</p> <p>(d) A Scheduled Train Path has not been utilised within the meaning of clauses 9.5(b) and 9.5(c) if the Operator has failed to:</p> <p>(1) present a Train at the scheduled entry point onto the Network; or</p> <p>(2) operate the relevant Train so that it completes its full journey; or</p> <p>(3) operate a Train of the length and weight of a Train that would usually run in the Scheduled Train Path as set out in Schedule 1.</p> <p>(e) If the Operator has been unable to utilise the Scheduled Train Path during the relevant time periods described in clause 9.5(b) or 9.5(c) due to:</p> <p>(1) Force Majeure affecting Arc or the Operator;</p> <p>(2) the failure of Arc to make the relevant Train Path available, where the Operator is able to demonstrate that it was ready, willing and able to make use of the relevant Train Path; or</p> <p>(3) temporary changes or variations to the Scheduled Train Paths agreed by the parties in writing,</p> <p>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.</p>	<p>The inclusion of an effective mechanism for cancelling train paths for under-utilisation is an important tool for a rail manager, allowing it to act to prevent hoarding of high value paths (which in turn can promote improved competition amongst rail operators) and to optimise its train schedules to promote the efficient utilisation of capacity. It is also critical for all Operators on Arc's network to understand the under-utilisation framework applied by Arc, so that they can assess when there may be opportunities to access under-utilised paths. Arc's Train Path Policy establishes the framework to be applied when cancelling train paths for under-utilisation. In order to promote consistency and transparency in Arc's application of this framework, Operators consider that the standard access provisions should directly incorporate the under-utilisation framework established in the Train Path Policy, including as it changes from time to time.</p> <p>Separately, Operators would like Arc to implement a review of its Train Path Policy in order to incorporate a nationally consistent approach to assessing under-utilisation, and to establish the actions that Arc can take when a train path is identified as under-utilised. The key elements that Operators have sought to be reflected in a nationally consistent approach are:</p> <ul style="list-style-type: none"> - a train path should be classified as under-utilised where the Operator fails to use at least 50% of scheduled paths over 3 months, or at least 75% of scheduled paths over 6 months, or where the Operator no longer has an entitlement for a necessary connecting train path on an adjoining network; - a train path is treated as 'utilised' for the purpose of this framework where it is used for a train service of at least 50% of its usual length/weight and which completes its full journey; - where a train path is under-utilised, Arc should have an option to reschedule the path to the nearest otherwise available time rather than cancel it. This is particularly relevant in the general freight market, where there is high demand for premium paths that can meet freight owner's preferred arrival and departure times, and would allow an under-utilised premium path to be reassigned to another operator, with the initial operator's path rescheduled. 	CTAA - Yes OTAA - No
38	Variations or cancellations of Train Paths	Cancellation of Train Paths for under-utilisation	9.5(a)-(g)	High	Efficient supply chains	<p>(f) Once a Scheduled Train Path has been confirmed as being under utilised pursuant to Arc's Train Path Policy clause 9.5(e), Arc may give notice in writing to the Operator:</p> <p>(1) deleting the Scheduled Train Path (and the Operator is deemed to have consented to this deletion); or</p> <p>(2) varying the Scheduled Train Path to the nearest otherwise available time,</p> <p>and Schedule 1 will be taken to be amended accordingly.</p> <p>(f2) If Arc's notice under clause 9.5(f) is to vary the Scheduled Train Path to the nearest otherwise available time:</p> <p>(1) Arc will consult with the Operator on the Varied Train Path to be offered to the Operator;</p> <p>(2) The Operator will use best endeavours to vary its contractual obligations (if any) with adjoining rail networks and terminals to align with the Varied Train Path offered by Arc;</p> <p>(3) Subject to clause 9.5(f2)(2), the Operator is not required to accept a Varied Train Path offered by Arc under clause 9.5(f) if contractual obligations owed by the Operator to any person (including Arc) would prevent it from doing so.</p>		CTAA - Yes OTAA - No

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strickthrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
39	Variations or cancellations of Train Paths	Review of Train Paths	9.6(d) -f)	High	Efficient supply chains	<p>(a) Arc may review a Train Path in accordance with the train path review provisions in its Train Path Policy.</p> <p>(a) Train Paths will be subject to review in accordance with this clause 9.6-</p> <p>(b) Arc may at its discretion by written notice to the Operator 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)-</p> <p>(c) If on such comparison, the departure or arrival times for a Train 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-</p> <p>(d) In clause 9.6(c) differs in material respects means, in relation to a Train Path, that the Service fails regularly to-</p> <p>(1) be ready for entry to the Network at the scheduled departure time; or-</p> <p>(2) the Service fails to regularly enter and exit the Network on time, where the Train Path was available-</p> <p>(e) Arc is not required to offer or agree any Varied Train Path under clause 9.6(c) if there are Reasonable Grounds for withholding its consent-</p> <p>(f) The Operator:</p> <p>(1) Will use best endeavours to vary its contractual obligations (if any) with adjoining rail networks and terminals to align with the Varied Train Path offered by Arc; and</p> <p>(2) Subject to clause 9.6(f)(1), is not required to accept a Varied Train Path offered by Arc under clause 9.6(c) if contractual obligations owed by the Operator to any person (including Arc) would prevent it from doing so.</p>	<p>Consistent with above comments on under-utilised train paths, an effective mechanism for rescheduling train services that consistently operate late is an important schedule optimisation tool for a rail manager. In order to promote consistency and transparency in Arc's application of this framework, Operators consider that the standard access provisions should directly incorporate the train path review framework established in the Train Path Policy, including as it changes from time to time.</p> <p>Separately, Operators would like Arc to implement a review of its Train Path Policy in order to incorporate a nationally consistent approach to reviewing train paths based on actual utilisation, and to ensure that the review provisions can be effectively applied for train services that operate over multiple networks in order to complete their journey. The key elements that Operators have sought to be reflected in a nationally consistent approach are:</p> <ul style="list-style-type: none"> - a consistent approach to assessing when actual train service operations materially differ from a scheduled train path (using a 3 months history) - a requirement for the rail manager to offer a varied train path that more closely reflects the actual 3 month history; and - the Operator to use its best endeavours to vary any contractual obligations (if any) with adjoining rail networks and terminals to align with the offered varied train path. 	CTAA - Yes OTAA - No
40	Variations or cancellations of Train Paths	Cancellation of Train Paths by Operator	9.7	High	Efficient supply chains	<p>9.7 Cancellation of Train Paths Services by Operator</p> <p>(a) The Operator may cancel a Train Path Service without penalty if the Operator is unable to use a Scheduled Train Path due to:</p> <p>(1) the Scheduled Train Path being unavailable due to Arc undertaking repair, maintenance or upgrade works on the Network;</p> <p>(2) a derailment, collision or other emergency event, unless that event is caused by an act or omission of the Operator; or</p> <p>(3) late- running trains, unless the late-running is caused by an act or omission of the Operator.</p> <p>(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 any other customer or operator pursuant to a separate agreement.</p> <p>(c) Where Arc is able to secure another customer or operator to operate an additional service on the Train Path which becomes available because of the cancellation, the Operator will not be liable for any Charges associated with that cancelled service.</p> <p>9.7A Cancellation of Scheduled Train Paths by Operator</p> <p>(a) The Operator may permanently cancel a Scheduled Train Paths, upon payment of a path cancellation fee as specified in this clause, by serving a written notice on Arc to that effect.</p> <p>(b) [path cancellation fee details to be included based on guiding principles approved by ERA]</p>	<p>Operator's support the ability for Arc to utilise a Train Path that becomes available because of an Operator's cancellation. However, Operators consider that Arc should not be able to effectively charge twice for the same Train Path. Accordingly, if Arc is able to secure another customer to use a cancelled Train Path for an additional service (rather than simply amending the time of operation of an existing service), then the Operator should not be liable to pay any access charges for that Train Path.</p> <p>Operators consider that the agreement should permit an Operator to permanently cancel a Scheduled Train Path, upon providing a nominated period of notice or upon payment of a path cancellation fee (which would equal fixed path charges for the required notice period) . The appropriate notice period will vary according to the circumstances of the market in which the services are provided, and the standard access provisions should include guidance about how the required notice period will be determined. This should include:</p> <ul style="list-style-type: none"> - for general freight services, where there is high demand for premium paths, Operators should be encouraged to relinquish paths which they no longer require. Accordingly, the cancellation notice period should align with the notice periods required by ARTC for the same services, which is one years notice (for agreements up to a five year term), scaling up to two years notice (for agreements up to a ten year term); - for bulk mining products whose use is dependent on an ongoing mining operation, path cancellation should be permitted for mine cessation, with a notice period sufficient to allow Arc to recover actual maintenance and investment costs incurred prior to the notice being provided (eg aligned to Arc's Major Periodic Maintenance cycle). 	CTAA - Yes OTAA - No

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41	Variations or cancellations of Train Paths	Reporting of cancelled services	n/a	High	Performance transparency and accountability	9.7B Reporting of Cancelled Services (a) Arc will, within seven Business Days of the end of each Month provide the Operator with a statement of Train Paths not utilised, identifying which of these were Not Provided Train Paths, during the previous Month including the following for each relevant Service: (1) scheduled Train ID; (2) date of scheduled departure; (3) scheduled origin; and (4) reason the Train Path was not provided (collectively, the Not Provided Train Path Statement). (b) Failure by Arc to provide a Not Provided Train Path Statement in accordance with this clause 10.9 will result in all Train Paths which were not utilised being deemed Not Provided Train Paths for the purposes of calculating the Fixed Charge for the relevant Month.	Refer item 42	CTAA - Yes OTAA - No
42	Variations or cancellations of Train Paths	Fixed Charges remain payable	9.8	High	Performance transparency and accountability Financial risk allocation	The Operator will not be obliged Cancellation of a Scheduled Train Path pursuant to clause 9.7 or for any other reason does not relieve the Operator of the obligation to pay Fixed Charges in respect of Not Provided Train Paths the cancelled Scheduled Train Path.	Operators consider that a fundamental requirement of the standard access provisions is that they reflect a reasonable, balanced and efficient allocation of risk, which requires that risks are allocated to the party who has the greatest ability to control and manage that risk. Consistent with this principle, to the extent that Arc does not provide the Train Paths as agreed for reasons that are within its control, Operators should not be required to pay access charges (including fixed charges) for those paths. Where, as proposed by Arc, it receives fixed access charges regardless of whether it provides access to the contracted paths, Arc has no real incentive to deliver those paths as agreed. Instead, Arc's incentive will be to minimise its costs of providing and maintaining the Network, regardless of the impact that this has on the quality of service provided to Operators. This will be particularly be evident where a high proportion of the total access charge is applied as a fixed charge. In order to ensure that a railway manager is accountable in delivering contracted services, it is essential that it does not receive access charges where that service is not delivered. This is the approach taken by all other railway managers, including in the regulator approved standard access agreements for ARTC Interstate, Aurizon Network, Queensland Rail and ARTC Hunter Valley.	CTAA - Yes OTAA - Partially
43	Emergencies and Incidents	Operator's report	11.5	Medium	Transparency and clarity of obligations	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 (with the parties acknowledging that such statement will be without prejudice and will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary)); (d) 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) 11.6 any other information required to be disclosed in a report under the Dangerous Goods Code.	Amendments are proposed in order to ensure that the Operator does not have any incentive (eg for insurance or indemnity reasons) to limit information provided in the Operator's report.	CTAA - No OTAA - Yes

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44	Emergencies and Incidents	Arc's report	11.6	Medium	Transparency and clarity of obligations	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 (with the parties acknowledging that such statement will be without prejudice and will not be binding on Arc and will not be taken to be an admission by Arc for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary)); (d) 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 any other information required to be disclosed in a report under the Dangerous Goods Code.	Amendments are proposed to ensure that Arc does not have any incentive (eg for insurance or indemnity reasons) to limit information provided in Arc's report.	CTAA - No OTAA - Yes
45	Safety Standards	Provision of Arc's Network Rules	12.3	Low	Transparency and clarity of obligations	(a) 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. Arc must maintain a copy of Arc's Network Rules on its website. (b) Arc may amend Arc's Network Rules for the purpose of ensuring the safe use of the Network, provided that Arc consults with the Operator and provides reasonable notice of the required date to comply with the amended Arc Network Rules. (c) If the Operator considers that the amendments to Arc's Network Rules: (1) increase the costs to the Operator of performing its obligations under this Agreement; (2) create additional restraints or restrictions on the Operator accessing the Services or Train Paths under this Agreement; or (3) are not consistent with Clause 12.3(b); the Operator may notify Arc and the relevant technical personnel of eah party must meet, within 5 Business Days after the notice is given, with a viwe to resolving the issue. (d) if the parties are unable to resolve the issue in acordance with clause 12.3(c) within 10 Business Days, either party may refer the matter to dispute resolution in accordance with Clause 20.	The standard access provisions provide that the Operator's right to use a path is subject to the Train Management Guidelines and Arc's Network Rules. The Train Management Guidelines are a formal instrument under the Code, and can only be changed following review by the ERA and confirmation that the change is reasonable. However, while the right to use the path is subject to Arc's Network Rules, there is no mechanism to ensure that changes to the Network Rules are reasonable and take into account any impacts on the Operator. The proposed drafting amendments are to provide this protection.	CTAA - No OTAA - Yes
46	Insurance	Operator's insurance policies	14.1(c)	Medium	Balanced and reasonable terms	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	Carrier liability insurance should not be required under an access agreement.	CTAA - No OTAA - Yes
47	Insurance	Approved insurance companies	14.3	Medium	Balanced and reasonable terms	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, or any insurance policy required to be effected and maintained by either party pursuant to clause 14.1 and 14.2 may at any time be placed in whole or in part with a wholly owned captive insurance company, reinsured with various insurers in Australia and London (Lloyds and company markets) with a minimum Standard & Poor's rating of A-.	The standard access provisions should reflect the use of captive insurance companies by Operators. This recognition is consistent with ACCC's recently approved ARTC Interstate Track Access Agreement.	CTAA - Yes OTAA - Yes

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48	Matters relating to the Transport Agreement		15	Medium	Balanced and reasonable terms	(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 circumstance relates to any: (3) default or alleged default by the Customer under the Transport Agreement; (4) repudiation or alleged repudiation of the Transport Agreement by the Customer; or (5) 'Force Majeure Event' (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 is terminated or expires.	There is no reason why Arc requires these notifications in relation to a Transport Agreement, and such requirements are not included in any other regulator approved standard access agreement for Operator held access rights	CTAA - No OTAA - No
49	Force Majeure	Heat Speed Restrictions	16.3	Medium	Balanced and reasonable terms	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.	Refer item 6	CTAA - Yes OTAA - Yes
50	Force Majeure	Force Majeure and obligations to pay	16.4	High	Financial risk allocation	(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 (including for the avoidance of doubt the Fixed Charges) must be paid and the Operator's liability arises irrespective of whether a Force Majeure affecting a party has occurred during the Year. Where an Operator is unable to use a Scheduled Train Path due to a Force Majeure affecting either party, the Operator will not be obliged to pay Charges in respect of the cancelled Scheduled Train Path.	Operators consider that a balanced allocation of risk would require that they are not charged access charges where train paths are not provided due to a FM event. This is the position typically adopted in access agreements with the regulator approved standard access agreements for Queensland Rail, Aurizon Network and ARTC Interstate all providing that fixed access charges are not applied during the period of a railway owner's FM. In addition, Operators consider that the Arc fixed access charges should be excused when Operators are unable to run their services because of a FM event affecting another network used for their journey. This is primarily an issue for east-west freighter services, which are run by multiple Operators. These services are operated on a multi-user basis, and revenue generation is dependent on the freight actually consigned to each service (rather than bulk services which may have a capacity charge applied on a take or pay basis). Where services are unable to be operated due to any network unavailability (and therefore no revenue can be generated), a requirement to pay fixed access charges in addition to the Operator's own fixed costs is a major cost impost on an Operator. This is a risk that is not applicable to the competing road freight providers, as similar fixed road access charges do not apply. A balanced approach, where both the railway owner and the railway operator accept the loss of revenue during any network FM event, will better reflect the nature of this market. From a drafting perspective, the simplest way to achieve this is to provide that fixed access charges do not apply for a FM event affecting either party (where an FM event on another network will be treated as an Operator FM).	CTAA - Yes OTAA - No
51	Suspension or termination	Termination by Arc	17.1(a)(1)-(5)	Medium	Balanced and reasonable terms	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 Operator if: (1) the Operator fails to pay when due: (A) any Charges; (B) any amount due to Arc in accordance with clause 4.5; or (C) any other amount due to Arc in accordance with 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 the time specified by Arc under clause 4.1(e) 10 Business Days of Arc giving notice to the Operator of the failure; (2) the Operator fails to comply with its obligations under clause 12; (3) the Operator fails to effect or maintain the insurances required to be taken out by it under clause 14.1 and such breach is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure; (4) the Operator fails to establish, maintain or replace any Security as required under clause 21 and such failure is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure; (5) the Operator fails to comply with its obligations under clause 23;	The termination provisions identify specific clauses where an Operator's non-compliance is considered sufficiently material to warrant termination as specified. Otherwise, there is a general right of termination for repeated or material breaches by the Operator. Operators note that while a breach of clause 12 (Safety Standards) creates a specific termination trigger in the TAA, this is not the case under the CTAA. In order to retain consistency between the forms of agreement, Operators consider that a breach of Clause 12 should be removed as a specific termination trigger in the TAA. In relation to payment breaches, clause 4 provides Arc with a suspension right where the non-payment has not been rectified within a specified time. The timeframes for termination for non-payment should be no less than the timeframes for this suspension right in clause 4. Otherwise, the Operator should be permitted time and opportunity to rectify any breach (except where it is not possible to do so).	CTAA - Partially OTAA - Partially

Arc Infrastructure Track Access Agreement

#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strikethrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
52	Suspension or termination	Termination by Arc	17.1(a)(7)	High	Balanced and reasonable terms	(7) 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;	The provision of train paths is a fundamental obligation under this agreement, and Operators believe that if Arc is no longer able to provide the agreed train paths for any reason, this should be a breach of agreement. The Network Lease is an agreement between PTA (on behalf of the WA Government) and Arc. To the extent that Arc is to no longer hold this lease, Operators believe that maintaining continuity of rail based supply chains should be an essential consideration for the WA Government. Therefore, any issues arising from Arc no longer holding the Network Lease are most appropriately managed through the agreement's assignment provisions. For comparison, the Queensland Rail Standard Access Agreement (under AU3) includes an assignment clause that deals with the scenario where Queensland Rail no longer has the right to operate the network or any part of it relevant to providing access rights under an agreement.	CTAA - Yes OTAA - No
53	Suspension or termination	Termination by Arc	17.1(a)(11)		Balanced and reasonable terms	where the Operator has a transport agreement with a single customer for all haulage services using the Scheduled Train Paths, that the Ttransport Aagreement is terminated or expires; or	Proposed redrafting to reflect the removal of Transport Agreement as a defined term.	CTAA - No OTAA - No
54	Suspension or termination	Termination by Operator	17.2(a)	Medium	Balanced and reasonable terms	(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) Arc fails to comply with its obligations under clause 23; (1A) Arc fails to effect or maintain the insurances required to be taken out by it under clause 14.2 and such breach is not remedied within 10 Business Days of the Operator giving notice to Arc of the failure; (2) 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; (3) 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 Arc cannot perform its obligations generally under this Agreement; or (4) Arc fails to pay when due: (A) any Overpayment Charge; (B) any amount due to the Operator in accordance with clause 4.5; or (C) 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; (5) where the Operator has a transport agreement with a single customer for all haulage services using the Scheduled Train Paths, that the Ttransport Aagreement is terminated or expires; 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.	The termination rights of the parties should generally be reciprocal, so a failure by Arc to maintain the required insurances should give rise to an Operator termination right, consistent with the definition of Arc's termination rights. Otherwise, the proposed redrafting reflects the removal of Transport Agreement as a defined term.	CTAA - Yes OTAA - Yes

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strikethrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
55	Suspension or termination	Effect of termination or suspension	17.5(c)	High	Balanced and reasonable terms	<p>If-</p> <p>(1) Arc terminates this Agreement pursuant to clause 17.1(a)(7) then-</p> <p>(A) if Arc ceasing to have the sufficient rights under its Network Lease(s) as referred to in clause 17.1(a)(7) is the result (directly or indirectly) of Operator's breach of this Agreement then Arc will be entitled to damages as if the Operator had repudiated this Agreement and that repudiation had been accepted; alternatively</p> <p>(B) if Arc ceasing to have the sufficient rights under its Network Lease(s) as referred to Clause 17.1(a)(7) 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) then the Operator will be entitled to damages as if Arc had repudiated this Agreement and that repudiation had been accepted,</p> <p>(C) except where clause 17.5(c)(1)(B) 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)(7).</p> <p>(2) the Operator terminates this Agreement pursuant to clause 17.2(a)(5), then except where the Transport Agreement was terminated as a direct result of breach of this Agreement by Arc (such breach not being the direct or indirect result of an act or omission of Operator or Customer or any of their personnel), Arc will be entitled to damages as if the Operator had repudiated this Agreement and that repudiation had been accepted.</p>	Refer item 52	CTAA - Yes OTAA - No
56	Suspension or termination	Effect of termination or suspension	17.5(h)	High	Balanced and reasonable terms	<p>If Arc removes one or some, but not all, Nominated Routes from this Agreement pursuant to clause 17.1(a)(7)-</p> <p>(1) the provisions of this clause 17.5 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</p> <p>(2) otherwise, this Agreement shall continue unaffected, including with respect to all remaining Nominated Routes.</p>	Refer item 52	CTAA - Yes OTAA - No
57	Indemnities	Duty to mitigate	18.3	Medium	Balanced and reasonable terms	<p>The entitlement of a party to be indemnified under clauses 18.1 or 18.2 does not extend to, or apply to, Liability which the person pays, suffers or is liable for, to the extent that the Liability arose, or increased, as a result of that party's failure to take is subject to that party taking reasonable steps to mitigate its loss.</p>	Amended drafting avoids a 'hair trigger' application of the clause, so that the indemnity remains in place but does not apply to the extent that a party has not taken reasonable steps to mitigate.	CTAA - Yes OTAA - Yes
58	Indemnities	Liability to third parties	18.4	High	Balanced and reasonable terms	<p>(a) Notwithstanding clauses 18.1, 18.2, 18.4(b), 18.4(e) and 19.1, the Operator is solely liable for and releases, indemnifies and must keep indemnified the Arc</p> <p>Indemnified Parties from and against all Claims made by a third party 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) being transported on or as part of a Service.</p> <p>(b) Without limitation to clause 18.4(c), 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 (including the Customer) and must provide to Arc details of the Operator's conditions of carriage relevant to Arc's liability in place from time to time.</p> <p>(c) The Operator is responsible for all conduct of the Operator's Customer relating to this Agreement (including the Services). Any act or omission of the Customer is deemed to be an act or omission by the Operator for the purposes of this Agreement. Without limitation to the foregoing, the following provisions apply wherever (and to the extent that) the Operator is not same as the Customer:-</p> <p>(1) The parties acknowledge and agree that:-</p> <p>(A) the releases and indemnities given by the Operator under this Agreement; and</p> <p>(B) the provisions of this Agreement limiting and excluding Liability of (and the making of Claims against) Arc and its Personnel,-</p> <p>(Relevant Provisions) should also apply in the same way as if the Customer were a party to this Agreement and a reference to the Operator in the Relevant Provisions included a reference to the</p> <p>Customer-</p> <p>(2) The Operator indemnifies and must keep indemnified the Arc Indemnified Parties from and against all Claims by the Customer (including any Liabilities arising out of Claims) in a way that gives effect to the Relevant Provisions (and each of them) as if the Relevant Provisions (and each of them) did apply as between Arc and the Customer (with any reference to the Operator in the Relevant Provisions including reference to the</p> <p>Customer)-</p>	Indemnities should apply in a reciprocal manner, with the Operator's customer to be treated in the same way as other third parties.	CTAA - No OTAA - No

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
59	Limits of Liability	No Liability for Consequential Loss	19.1	Medium	Balanced and reasonable terms	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.	Operators do not consider that the agreement should provide for any exceptions from the consequential loss exclusions, except as provided by law.	CTAA - Yes OTAA - Yes
60	Limits of Liability	Minimum threshold on Claims	19.2	Low	Balanced and reasonable terms	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 \$100,000 .	The minimum threshold on claims typically adopted in regulated standard access agreements is \$100,000, with this value adopted by Queensland Rail, ARTC Interstate, Sydney Trains and Aurizon Network.	CTAA - Yes OTAA - Yes
61	Resolution of disputes	Resolution of disputes	20	Medium	Balanced and reasonable terms		Operators believe that there is merit in including an option for expert resolution of disputes, as this provides a fast and low cost option for resolving dispute of a primarily technical nature. While we have not provided proposed drafting for an expert resolution process, there are numerous examples in other regulated standard access agreements. Key features that should be included are: - expert resolution should be available following a nominated period (eg 10 business days) for the parties to resolve the dispute; - expert resolution should be used for disputes of a technical, safety or engineering nature; - the expert must be agreed by the parties, or otherwise appointed by a suitable independent party; - in the absence of manifest error, the decision of the expert is to be final and binding; and - the cost of the expert are to be shared equally between the parties, with each party otherwise bearing its own costs.	CTAA - Yes OTAA - Yes
62	Security	Operator to provide Security	21.1(a)	High	Transparency and clarity of obligations Balanced and reasonable terms	Arc may require the Operator to provide Security if it considers (acting reasonably) that the Operator may: (1) not be financially sound; (2) not be able to meet its debts as and when they fall due; or (3) not otherwise be capable of performing its obligations under this Agreement.	The ability for Arc to require an Operator to provide security should be based upon a reasonable assessment of financial risk.	CTAA - Yes OTAA - No
63	Confidentiality	Permitted disclosures	22.2(a)	High	Transparency and clarity of obligations Balanced and reasonable terms	Subject to compliance with clauses 22.2(b) and 22.2(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; (6a) by an Operator to its Customer under a duty of confidence; (6b) by an Operator to the Economic Regulator 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.	Access charges are often a large component of the total cost of providing a rail haulage service. In order to be able to provide transparency to customers when negotiating rail haulage agreements, Operators' consider that the standard access provisions should enable Operators to disclose information on tariffs to their customers as part of a negotiation, or when explaining the reasons for changes in costs through the course of an agreement. Section 47A(2)(c) provides that standard access provisions should not seek to restrict an access holder from disclosing the terms and conditions of an access agreement or proposed access agreement to the economic regulator or to an arbitrator (in relation to an arbitration under the Code). To comply with this requirement, Operators consider that the standard access provisions must allow that, over the course of the agreement, information be provided to the Regulator. Information provision to an arbitrator is not considered to be required, as arbitration under the Code would occur prior to the agreement being finalised.	CTAA - Partially OTAA - Partially

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strickthrough , additions are in bold)	Rationale	Consistent with CTAA/OTAA comment?
64	Anti-corruption and modern slavery		27	Low	Transparency and clarity of obligations	Delete in its entirety	This clause requiring Operator compliance with Anti-Corruption and Modern Slavery laws is not necessary for an Access Agreement. In any event, the Operator is required to comply with all Laws applicable to the operation of the Services or its use of the Network as per clause 5.5. In the event that obligations in relation to anti-corruption and modern slavery are retained in the Standard Access Provisions, they should: - be reciprocal - be transparent and certain, i.e. not requiring the Operator to accept uncertain obligations such as in 27.2(a) to do all things requested by Arc to facilitate Arc's compliance with Modern Slavery Laws, or comply with undisclosed policies, procedures, guidelines, codes of Arc in relation to Modern Slavery. Note also, in the event that the ERA considered it reasonable to include Anti-Corruption and Modern Slavery provisions in the standard access provisions, these should align with Arc's proposed provisions in the CTAA, which represent a more reasonable suite of obligations than the proposed TAA drafting.	CTAA - Yes OTAA - Yes
65	Scheduled Train Paths Train path definition		Schedule 1	Medium	Performance transparency and accountability		An alternate format of service definition should be included for Non-Scheduled Services, which operate in a variable way to align with customer demand (eg grain services). While these services do not operate to a fixed schedule, Schedule 1 should specify an average scheduled time for services on each nominated route, to provide an Operator with confidence in the transit time that will apply to these services (which is necessary in order for the Operator to define how the services will operate within its broader logistics chain).	CTAA - Yes OTAA - No
66	Charges	Rates	Schedule 2 3	High	Efficient supply chains		The Code provides that the ERA may require Arc to prepare a Standing Offer for a specified rail operation where 2 or more entities are carrying on similar rail operations on a specified route. Operators consider that, where such a Standing Offer is developed within the term of a Code based agreement, Schedule 2 should provide an option for the Operator to revise its Rates to align with any applicable Standing Offer developed for a similar service.	CTAA - Yes OTAA - No
67	Charges	Fixed Charge Calculation	Schedule 2 4	High	Financial risk allocation Transparency and clarity of obligations		Arc should be required to incorporate guidance in the Standard Access Provisions as to: - the proportion of access charges that can be applied as a fixed charge; and - the formula by which those fixed charges will be applied. The underlying principles for the application of fixed charges should be: - fixed Charges must be clearly disclosed and demonstrably aligned with Arc's underlying fixed/variable cost structure. - the split between fixed and variable charges must be explicitly documented - the fixed charge should not in any circumstances exceed the total access charge for operating a fully loaded service - fixed charges must not be imposed on paths not delivered by Arc either due to its own cause (eg maintenance possessions) or Force Majeure, including both forward and return journeys. This reflects that if a forward path is not provided by Arc, then the operator is unable to run either the forward or return journey (and vice versa) - the fixed charge should include a discount tied to contract term, to reward long-term contractual commitments.	CTAA - Yes OTAA - No
68	Variation of Charges	Fee Variation	Schedule 3 1(b)-(c)	Medium	Financial risk allocation	b. If, at any given time throughout the Access Term, CPI is less than CPI_b, CPI will be deemed to be equal to CPI_b 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.	Access charges should vary in accordance with CPI, including reducing where CPI is negative. This is consistent with ACCC recent approval of the ARTC ITAA.	CTAA - Yes OTAA - Yes
69	Performance Indicators		N/a	High	Performance transparency and accountability	New Schedule to be included	Refer to submission for details.	CTAA - Yes OTAA - Yes

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
1	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations	Arc's Network Rules the Network Safeworking Rules and Procedures applied consistently to all operators using the Network and 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 in accordance with Clause 12.3(b); for the purpose of ensuring the safe use of the Network;	Operators agree the necessity of a set of Network Safeworking Rules and Procedures, but have proposed some amendments to the definition of Arc's Network Rules to provide operators' and customers' with confidence in the way that Arc's Network Rules will be managed, in particular, that they will be consistently applied to all operators, and that Arc will follow a reasonable process (proposed to be addressed in a new Clause 12.3(b)) when amending the rules.	CTAA - Yes OTAA - Yes
2	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<i>Change in Law</i> (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; (d) the imposition of a legally binding requirement for authorisations not required as at the Commencement Date; (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; (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; (g) or 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).	A change in the standard access provisions should not give rise to a right for Arc to adjust access charges for a change in costs. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) and do not in an of themselves impose any obligations on Arc. Operators do not expect (and indeed the draft standard access provisions do not contemplate) that there is any automatic change to an existing agreement where a change is subsequently made to the standard access provisions. To the extent that adopting access terms consistent with the standard access provisions imposes costs on Arc that it would not otherwise incur, this is relevant to the agreements that reflect those particular access terms.	TAA - Yes OTAA - Yes
3	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations Balanced and reasonable terms	<i>Consequential Loss</i> (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. (b) The following are expressly excluded from paragraph (a) of this definition to the extent that the applicable party would, in the absence of this definition, be entitled to recover them at law: (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; (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); (3) any loss, damage or cost arising out of or in connection with fraud or Wilful Default; (4) without limiting paragraph (b)(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 (5) any loss, damage or cost arising out of or in connection with damage to third party property other than Customer Product.	Part (b) of this definition should not unnecessarily limit the extent of the exclusion of Consequential Loss per part (a) of this definition.	TAA - Yes OTAA - Yes
4	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<i>Customer Product</i> means [insert] or any other product approved by Arc in writing, that is transported by the Operator on a Train Path. For the avoidance of doubt, Arc will not unreasonably withhold its consent to the transportation of additional product where the parties are able to agree the applicable Charges prior to carriage on the Network.	Operators acknowledge that, in some instances, Arc applies product based price differentiation, and that as a result, the standard access provisions include a constraint on the product able to be transported on a service, in order to align the product with the agreed access charge. However, it is important that this does not act as a constraint on the efficient operation of train services, potentially including consolidation of different types of products onto a single service. This should be permitted to occur, with Operators recognising that in some instances this may be accompanied by an amendment to the access charges for the service.	TAA - Yes OTAA - Partially

Arc Infrastructure Commercial Track Access Agreement

#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
5	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<p><i>Force Majeure</i></p> <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> <p>(c) cannot be predicted, prevented, overcome or remedied by the exercise by the party affected of a reasonable standard of care and diligence, including:</p> <p>(d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide, extreme heat, severe weather conditions or other catastrophe or natural calamity, heat (including speed restrictions due to the impact of heat or other atmospheric conditions) or adverse weather 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 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 20 days,</p> <p>(ga) delay of a supplier or Customer due to any of the foregoing whenever arising,</p> <p>but does not include:</p> <p>(h) loss of customers or loss of market share;</p> <p>(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;</p> <p>(j) heat, wet or otherwise inclement weather other than as described in paragraph 4 of this definition;</p> <p>(k) causes, events or circumstances to the extent caused or contributed by if the Customer is the affected party, any acts or omissions by a party's the Customer'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>	<p>Operators do not consider that heat (other than extreme heat) should be included as a FM event. Heat based speed restrictions are a management tool to address common and predictable levels of heat during summer months, particularly on those parts of the Network constructed to lighter track standards. The extent to which speed restrictions are used is based on a cost/benefit assessment, which trades the benefit of increased train speed with the cost of maintaining the network to a standard that allows for a lower incidence of speed restriction. Accordingly, Arc should have regard to a reasonable expectation of heat restrictions and good industry practice when considering the standard to which it maintains its track and in defining the service that it is able to contract, rather than classify heat restrictions as FM.</p> <p>The inclusion of applicable Australian Laws or enforcement action in response to a pandemic is included in the CTAA form of agreement but not the TAA. Operators consider this to be a reasonable FM inclusion, and request that it also be included in the TAA.</p> <p>Otherwise, Operators consider that the FM inclusions and exclusions should be drafted in a reciprocal way, with the same issues being classified as FM for both parties. This is consistent with regulator approved standard access agreements for ARTC (Interstate and Hunter Valley), Queensland Rail and Aurizon Network.</p>	TAA - Partially OTAA - Partially
6	Definitions and Intepretation	Definitions	1.1	Low	Performance transparency and accountability	<p><i>Good Industry Practice</i></p> <p>those practices, methods and acts, as varied from time to time, that are commonly used in the railway industry by prudent persons.</p>	Refer item 18	TAA - Yes OTAA - Yes
7	Definitions and Intepretation	Definitions	1.1	High	Performance transparency and accountability Financial risk allocation	<p><i>Not Provided Train Path</i></p> <p>means a Train Path that Arc has failed to provide to the Customer, but excluding Train Paths where:</p> <p>(a) the Train Path was not provided because of a negligent or wrongful act or omission of the CustoeMr or the Operator;</p> <p>(b) the Train Path was cancelled at the request of the Customer or the Operator;</p> <p>(c) the Train Path was not provided due to Network access being suspended pursuant to Clause 11.3;</p> <p>(d) the Train Path was not provided because of a Force Majeure event,</p> <p>and includes Train Paths that were provided conditional upon operating restrictions which, in the Operator's reasonable opinion, cause the path to be unusable by the Operator having regard to other elements of its logistics chain.</p>	Refer item 25 for discussion on the need to define Not Provided Train Path.	TAA - Yes OTAA - No

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8	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations Balanced and reasonable terms	<i>Reasonable Grounds</i> reasonable grounds and, where Arc's consent is being sought, includes: (a) the Varied Train Path not being available because it is already allocated to another operator or customer; (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; (c) the Customer being unable to demonstrate to Arc's reasonable satisfaction a bona fide requirement for the Varied Train Path; (d) the Varied Train Path not being able to be operated safely or effectively or efficiently in the opinion of Arc (acting reasonably); (e) the Varied Train Path being exactly the same or similar to a train path that has already been removed pursuant to clause 9.5; or (f) where to consent to the proposal would, or is likely to, result in Arc breaching: (g) any obligations imposed by Law, including any Law relating to safety; (h) the Railways (Access) Act 1998 (WA) or the Rail Access Code; or (i) any agreement to which it is a party.	Operators' note the 'Reasonable Grounds' definition in Arc's Train Path Policy, and cannot see a justification for requiring that any additional considerations (beyond those in the Train Path Policy definition) be determined in Arc's 'opinion'.	TAA - Yes OTAA - No
9	Definitions and Intepretation	Definitions	1.1	Medium	Transparency and clarity of obligations	<i>Secured Sum</i> [insert - sum to be no greater than six months access charges]	Arc's standard access provisions should include guidance as to the permitted security amount. Six months access charges is accepted as the maximum required value of security under Queensland Rail and Aurizon Network regulator endorsed standard access agreements. This reflects that six months will allow a railway owner sufficient time to identify that there is a payment problem and seek to rectify that payment problem through negotiated means, before calling on the security.	TAA - Yes OTAA - No
10	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<i>Security</i> means: (a) 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 which secures the obligations of the Customer (including the obligations to pay money) under this Agreement; (b) a parent company guarantee in a form acceptable to Arc (acting reasonably) and from an Australian incorporated holding company (as defined in the Corporations Act) of the Customer that has an Acceptable Credit Rating; (c) any other form of security reasonably acceptable to Arc, in a form and upon terms reasonably acceptable to Arc.	Alternate forms of security, including a parent company guarantee from a suitable company, should be permitted where this will reasonably address Arc's financial risk.	TAA - Yes OTAA - No
11	Definitions and Intepretation	Rail Access Code	1.5(a)	Medium	Transparency and clarity of obligations Balanced and reasonable terms		Paragraph (a) provides that nothing in the Agreement requires Arc to do (or omit to do) anything contrary to the Rail Access Code or any Applicable Part 5 Instrument. However, in a number of cases, provisions of the proposed TAA do not align with the Part 5 Instruments. The intended application of this provision is therefore unclear. The operators' preference is, where relevant, to rely on the Part 5 Instruments (as amended from time to time), and avoid drafting potentially inconsistent provisions into the standard access provisions. This view is reflected where applicable in specific comments.	TAA - Yes OTAA - Yes

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12	Definitions and Intepretation	Rail Access Code	1.5(c)	Medium	Balanced and reasonable terms	<p>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):-</p> <p>(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:-</p> <p>(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):-</p> <p>(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</p> <p>(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.</p>	<p>Refer item 2 in relation to the treatment of New Standard Access Provisions as a Material Change.</p> <p>Operators do not consider that there should be a need for any amendment to an existing agreement in the event of a change in the standard access provisions. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) but do not, in and of themselves, impose any obligations on Arc. Issues that will have an impact on the safe operation of the Network will typically be addressed in Arc's Network Rules or in Part 5 Instruments (which all operators must comply with under the standard access provisions).</p>	<p>TAA - Yes OTAA - Yes</p>
13	Train Paths	Nature and scope of rights	3.2(c)	Medium	Transparency and clarity of obligations	<p>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:</p> <p>(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;</p> <p>(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;</p> <p>(3) the Operator satisfying its obligations under the Operational Track Access Agreement and the relevant Safety Interface Agreement;</p> <p>(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;</p> <p>(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);</p> <p>(6) emergencies or material safety considerations;</p> <p>(7) the Train Management Guidelines, the Train Path Policy and Arc's Network Rules; and</p> <p>(8) all applicable Laws.</p>	<p>Operators consider that, in addition to the Train Management Guidelines and Arc's Network Rules, both Arc and the operator should be required to comply with Arc's Train Path Policy.</p>	<p>TAA - Yes OTAA - Yes</p>
14	Train Paths	Extension and Renewal	n/a	Medium	Balanced and reasonable terms	<p>3.3 Extension and Renewal</p> <p>(a) This Agreement may only be extended by written agreement between the parties. This Agreement does not automatically renew and may not be held over.</p> <p>(b) The Operator may, not less than 120 days before the Expiry Date, give written notice to Arc that the Operator wishes to renew this Agreement in relation to the Scheduled Train Paths, specifying the proposed term of such renewal, and Arc will enter into negotiations with the Operator in relation to the possibility of such renewal.</p> <p>(c) Arc may consent to the reweal and the parties may enter into a new track access agreement in relation to the Scheduled Train Paths.</p>	<p>Operator's accept that there is no automatic right to a renewal of their access agreement. However, there would be significant value in including in the standard access provisions a right for the Customer to negotiate for a new agreement in relation to their scheduled train paths. This allows Customers a clear opportunity to negotiate ongoing access to paths, which is important to support business continuity, while enabling a full renegotiation of the terms and conditions of the agreement consistent with Arc's requirements.</p>	<p>TAA - Partially OTAA - No</p>

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15	Train Paths	Supply chain management	n/a	High	Performance transparency and accountability Efficient supply chains	3.3 Supply Chain Management (a) Arc will provide monthly reports to the Customer and to the Operator documenting performance against the performance indicators as set out in Schedule 6. (b) The parties agree to work together to manage and optimise the efficiency of the supply chain as it applies to the Customer's and Operator's rail operations and the Network, including, where agreed: (1) holding regular meetings involving senior representatives of all parties to review operational performance and to agree improvement strategies; and (2) the commitment of personnel and other resources by each party to develop and maintain additional data and reporting format, where required, which demonstrates the performance of each aspect of the supply chain.	Arc's standard access provisions do not include any provision for reporting and monitoring of performance, or any mechanism aimed at improving performance over time. Operators acknowledge the complexity around developing a performance regime involving KPIs and performance standards, particularly given overall outcomes are significantly affected by both railway owner and operator performance. For this reason, Operators consider that the standard access provisions should include a performance monitoring arrangement, rather than a performance regime with contractual and financial consequences. Establishing a set of KPIs, and monitoring system performance (including railway owner and operator performance) can provide information on trend performance outcomes, and opportunities for performance improvement. From examining performance frameworks in other rail networks, it is clear that KPIs are generally aimed at providing information on similar aspects of performance, although it is often the case that different indicators are applied. Rail operators have developed a suite of KPIs that we would like to be consistently used across all rail networks. The benefit of a consistent set of KPIs is clearest where individual trains operate over multiple networks (such as is the case for interstate trains on Arc's EGR). However, a consistent suite of KPIs is of value regardless of the operation of multi-network services. This is because most rail operators, and many end customers, operate over a national footprint, and a consistent suite of KPIs allows valid comparisons of performance across jurisdictions, and allows Operators to present consistent performance information to their end customers. Operators' preferred KPI suite is being considered by ARTC as part of its review of performance reporting under its Interstate Access Undertaking. Accordingly, Operators propose to include in Schedule 6 a set of KPIs based on the performance indicators sought for consistent national application (attached to this submission).	TAA - Yes OTAA - Yes
16	Billing and Payments	No Set off	5.4	Low	Financial risk allocation	All payments which a party is required to make under this Agreement must be made without deductions, counter claims, conditions, set off or withholdings. A party may deduct from any amounts which are due and payable by the party to the other party under this Agreement any amounts which are due and payable by the other party to the party under this Agreement.	Permitting the application of offsets is a common in regulator approved standard access agreements, including Queensland Rail and Aurizon Network.	TAA - Yes OTAA - Yes
17	Loading system	Loading system 6		Medium	Balanced and reasonable terms		The drafting puts a highly onerous obligation onto the Customer who must ensure wagons are not overloaded and must maintain a loading system that is capable of evenly loading all wagons. Operators have not specified any alternate drafting proposed, but suggest that there should be an allowance for reasonable tolerance around these obligations.	TAA - No OTAA - No
18	Repairs and maintenance of the Network	Maintenance Standards	7.1(a)	Low	Performance transparency and accountability	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 minimum standard required, in accordance with Good Industry Practice, to perform the Services in accordance with this Agreement; 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.	Operators consider that Arc should be obliged to maintain the Network to a standard that permits the operation of the Services that will be contracted under that agreement. It is then the responsibility of Arc, as the railway manager, to assess what level of Service it is willing to contract, given the standard of the network at the commencement date of the agreement. The Operator should not be required to accept the risk that the contracted Services cannot be delivered as anticipated, because of the network standard is insufficient at the commencement date. In order to assess what standard the Network must be maintained at to deliver the Services, Operators believe that the Service can be defined at a high level according to scheduled transit time, axle load and train length, as provided in Schedule 2. The Network performance required to deliver these services should be subject to a Good Industry Practice standard.	TAA - Yes OTAA - Yes

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19	Variations or cancellations of Train Paths	Repairs, maintenance and upgrading of the Network and temporary variations of Train Paths	8.3(c)	High	Efficient supply chains	<p>If the repairs, maintenance or upgrading activities:</p> <p>(1) can be carried out without affecting the use of Train Paths, Arc is not obliged to give prior notice to the Customer and the Operator;</p> <p>(2) are required because of emergencies related to safety or natural events, Arc is not obliged to give prior notice to the Customer and the Operator but Arc must advise the Customer and the Operator as soon as practicable of:</p> <p>(A) the circumstances;</p> <p>(B) the likely impact on Train Paths; and</p> <p>(C) the likely duration of the Possession of the Network; or</p> <p>(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.</p>	<p>Operators acknowledge that the timeframes for notification of possessions are included in the Train Management Guidelines. However, we note that for many possessions, Arc is required to provide Operators with significantly less notice around planned possessions than is provided by other railway managers, for example Queensland Rail must provide three months notice of all planned possessions, and ARTC has detailed guidance around its notification requirements depending on the impact the possession has on services, with planned possessions with any impact on train services typically requiring 10-26 weeks notice. In a review conducted by Queensland's Cross River Rail Delivery Authority on how to reduce the impact of possessions on freight services, a key recommendation was to more effectively co-ordinate possessions across the relevant supply chains, and to provide increased notice of possessions, in order to allow Operators more time to plan changes and manage effects with customers.</p> <p>Accordingly Operators would like Arc to implement a review of its Train Management Guidelines with the result that:</p> <ul style="list-style-type: none"> - Arc's Train Management Guidelines require that Arc develop and update on a regular (monthly) basis, a rolling 12 month possessions calendar which sets out its expectations for planned possessions for each route; - Arc's Train Management Guidelines include an obligation on Arc to consult and, to the extent practicable, co-ordinate possessions with adjoining networks; and - the notification timeframes in Arc's Train Management Guidelines to be reviewed to align with contemporary expectations in order to help mitigate the impact of essential possessions on freight supply chains. In particular, we consider that Arc should provide 30 days notice for all non-emergency possessions of less than 6 hours, and 3 months notice for all non-emergency possessions of 6-48 hours, (unless the possessions will not affect the use of Train Paths). 	TAA - Partially OTAA - No
20	Variations or cancellations of Train Paths	Cancellation of Train Paths for under-utilisation	8.4(a)-(d)	High	Efficient supply chains	<p>(a) Arc may cancel or vary a Train Path for under-utilisation in accordance with the under-utilisation provisions established in Arc's Train Path Policy.</p> <p>(a) Arc will monitor utilisation of Scheduled Train Paths over a 3 month period (Monitoring Period)-</p> <p>(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-</p> <p>(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)-</p> <p>(d) A Scheduled Train Path has not been utilised within the meaning of clauses 9.5(b) and 9.5(c) if the Operator has failed to-</p> <p>(1) present a Train at the scheduled entry point onto the Network; or</p> <p>(2) operate the relevant Train so that it completes its full journey; or</p> <p>(3) operate a Train of the length and weight of a Train that would usually run in the Scheduled Train Path as set out in Schedule 1-</p>	<p>The inclusion of an effective mechanism for cancelling train paths for under-utilisation is an important tool for a rail manager, allowing it to act to prevent hoarding of high value paths (which in turn can promote improved competition amongst rail operators) and to optimise its train schedules to promote the efficient utilisation of capacity. It is also critical for all Operators on Arc's network to understand the under-utilisation framework applied by Arc, so that they can assess when there may be opportunities to access under-utilised paths. Arc's Train Path Policy establishes the framework to be applied when cancelling train paths for under-utilisation. In order to promote consistency and transparency in Arc's application of this framework, Operators consider that the standard access provisions should directly incorporate the under-utilisation framework established in the Train Path Policy, including as it changes from time to time.</p> <p>Separately, Operators would like Arc to implement a review of its Train Path Policy in order to incorporate a nationally consistent approach to assessing under-utilisation, and to establish the actions that Arc can take when a train path is identified as under-utilised. The key elements that Operators have sought to be reflected in a nationally consistent approach are:</p> <ul style="list-style-type: none"> - a train path should be classified as under-utilised where the Operator fails to use at least 50% of scheduled paths over 3 months, or at least 75% of scheduled paths over 6 months, or where the Operator no longer has an entitlement for a necessary connecting train path on an 	TAA - Yes OTAA - No

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21	Variations or cancellations of Train Paths	Cancellation of Train Paths for under-utilisation	8.4(f)	High	Efficient supply chains	<p>(f) Once a Scheduled Train Path has been confirmed as being under utilised pursuant to Arc's Train Path Policy clause 8.4(c), Arc may give notice in writing to the Customer:</p> <p>(1) deleting the Scheduled Train Path (and the Customer is deemed to have consented to this deletion); or (2) vary to Scheduled Train Path to the nearest otherwise available time, and: (3) Schedule 1 will be taken to be amended accordingly; and (4) 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.</p> <p>(f2) If Arc's notice under clause 9.5(f) is to vary the Scheduled Train Path to the nearest otherwise available time:</p> <p>(1) Arc will consult with the Customer on the Varied Train Path to be offered to the Customer; (2) The Customer will use best endeavours to vary its contractual obligations (if any) with adjoining rail networks and terminals to align with the Varied Train Path offered by Arc; (3) Subject to clause 8.4(f2)(2), the Customer is not required to accept a Varied Train Path offered by Arc under clause 8.4(f) if contractual obligations owed by the Customer to any person (including Arc) would prevent it from doing so.</p>	<p>adjoining network;</p> <ul style="list-style-type: none"> - a train path is treated as 'utilised' for the purpose of this framework where it is used for a train serve of at least 50% of its usual length/weight and which completes its full journey; - where a train path is under-utilised, Arc should have an option to reschedule the path to the nearest otherwise available time rather than cancel it. This is particularly relevant in the general freight market, where there is high demand for premium paths that can meet freight owner's preferred arrival and departure times, and would allow an under-utilised premium path to be reassigned to another operator, with the initial operator's path rescheduled. 	TAA - Yes OTAA - No
22	Variations or cancellations of Train Paths	Review of Train Paths	8.5(d) -f)	High	Efficient supply chains	<p>(a) Arc may review a Train Path in accordance with the train path review provisions in its Train Path Policy.</p> <p>(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 fails regularly to:- (1) be ready for entry to the Network at the scheduled departure time; 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 offer or agree any Varied Train Path under clause 8.5(c) if there are Reasonable Grounds for withholding its consent.- (f) The Customer: (1) will use best endeavours to vary its contractual obligations (if any) with adjoining rail networks and terminals to align with the Varied Train Path offered by Arc; and (2) subject to clause 8.5(f)(1), 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.</p>	<p>Consistent with above comments on under-utilised train paths, an effective mechanism for rescheduling train services that consistently operate late is an important schedule optimisation tool for a rail manager. In order to promote consistency and transparency in Arc's application of this framework, Operators consider that the standard access provisions should directly incorporate the train path review framework established in the Train Path Policy, including as it changes from time to time.</p> <p>Separately, Operators would like Arc to implement a review of its Train Path Policy in order to incorporate a nationally consistent approach to reviewing train paths based on actual utilisation, and to ensure that the review provisions can be effectively applied for train services that operate over multiple networks in order to complete their journey. The key elements that Operators have sought to be reflected in a nationally consistent approach are:</p> <ul style="list-style-type: none"> - a consistent approach to assessing when actual train service operations materially differ from a scheduled train path (using a 3 months history) - a requirement for the rail manager to offer a varied train path that more closely reflects the actual 3 month history; and - the Operator to use its best endeavours to vary any contractual obligations (if any) with adjoining rail networks and terminals to align with the offered varied train path. 	TAA - Yes OTAA - No

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23	Variations or cancellations of Train Paths	Customer or Operator Cancellation of Services	8.6	High	Efficient supply chains	<p>(a) The Customer or Operator may cancel a Train Path without penalty if the Scheduled Train Path is unable to be used due to:</p> <p>(1) the Scheduled Train Path being unavailable due to Arc undertaking repair, maintenance or upgrade works on the Network;</p> <p>(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</p> <p>(3) late- running trains, unless the late-running is caused by an act or omission of the Customer or the relevant Operator.</p> <p>(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.</p> <p>(c) Where Arc is able to secure another customer or operator to operate an additional service on the Train Path which becomes available because of the cancellation, the Customer will not be liable for any Charges associated with that cancelled service.</p> <p>9.7A Cancellation of Scheduled Train Paths by Customer</p> <p>(a) The Customer may permanently cancel a Scheduled Train Paths, upon payment of a path cancellation fee as specified in this clause, by serving a written notice on Arc to that effect.</p> <p>(b) [path cancellation fee details to be included based on guiding principles approved by ERA]</p>	<p>Operator's support the ability for Arc to utilise a Train Path that becomes available because of an Operator's cancellation. However, Operators consider that Arc should not be able to effectively charge twice for the same Train Path. Accordingly, if Arc is able to secure another customer to use a cancelled Train Path for an additional service (rather than simply amending the time of operation of an existing service), then the Operator should not be liable to pay any access charges for that Train Path.</p> <p>Operators consider that the agreement should permit an Operator to permanently cancel a Scheduled Train Path, upon providing a nominated period of notice or upon payment of a path cancellation fee (which would equal fixed path charges for the required notice period) . The appropriate notice period will vary according to the circumstances of the market in which the services are provided, and the standard access provisions should include guidance about how the required notice period will be determined. This should include:</p> <ul style="list-style-type: none"> - for general freight services, where there is high demand for premium paths, Operators should be encouraged to relinquish paths which they no longer require. Accordingly, the cancellation notice period should align with the notice periods required by ARTC for the same services, which is one years notice (for agreements up to a five year term), scaling up to two years notice (for agreements up to a ten year term); - for bulk mining products whose use is dependent on an ongoing mining operation, path cancellation should be permitted for mine cessation, with a notice period sufficient to allow Arc to recover actual maintenance and investment costs incurred prior to the notice being provided (eg aligned to Arc's Major Periodic Maintenance cycle). 	TAA - Yes OTAA - No
24	Variations or cancellations of Train Paths	Reporting of cancelled services	n/a	High	Performance transparency and accountability	<p>8.6A Reporting of Cancelled Services</p> <p>(a) Arc will, within seven Business Days of the end of each Month provide the Customer with a statement of Train Paths not utilised, identifying which of these were Not Provided Train Paths, during the previous Month including the following for each relevant Service:</p> <p>(1) scheduled Train ID;</p> <p>(2) date of scheduled departure;</p> <p>(3) scheduled origin; and</p> <p>(4) reason the Train Path was not provided (collectively, the Not Provided Train Path Statement).</p> <p>(b) Failure by Arc to provide a Not Provided Train Path Statement in accordance with this clause 10.9 will result in all Train Paths which were not utilised being deemed Not Provided Train Paths for the purposes of calculating the Fixed Charge for the relevant Month.</p>	Refer item 25	TAA - Yes OTAA - No
25	Variations or cancellations of Train Paths	Fixed Charges remain payable	9.8	High	Performance transparency and accountability Financial risk allocation	<p>The Customer will not be obliged Cancellation of a Scheduled Train Path pursuant to clause 8.6 or for any other reason does not relieve the Customer of the obligation to pay Fixed Charges in respect of Not Provided Train Paths the cancelled Scheduled Train Path.</p>	<p>Operators consider that a fundamental requirement of the standard access provisions is that they reflect a reasonable, balanced and efficient allocation of risk, which requires that risks are allocated to the party who has the greatest ability to control and manage that risk. Consistent with this principle, to the extent that Arc does not provide the Train Paths as agreed for reasons that are within its control, Operators should not be required to pay access charges (including fixed charges) for those paths. Where, as proposed by Arc, it receives fixed access charges regardless of whether it provides access to the contracted paths, Arc has no real incentive to deliver those paths as agreed. Instead, Arc's incentive will be to minimise its costs of providing and maintaining the Network, regardless of the impact that this has on the quality of service provided to Operators. This will be particularly be evident where a high proportion of the total access charge is applied as a fixed charge. In order to ensure that a railway manager is accountable in delivering contracted services, it is essential that it does not receive access charges where that service is not delivered. This is the approach taken by all other railway managers, including in the regulator approved standard access agreements for ARTC Interstate, Aurizon Network, Queensland Rail and ARTC Hunter Valley.</p>	TAA - Yes OTAA - Partially

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
26	Insurance	Approved insurance companies	9.3	Medium	Balanced and reasonable terms	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, or any insurance policy required to be effected and maintained by either party pursuant to clause 9.1 and 9.2 may at any time be placed in whole or in part with a wholly owned captive insurance company, reinsured with various insurers in Australia and London (Lloyds and company markets) with a minimum Standard & Poor's rating of A- .	The standard access provisions should reflect the use of captive insurance companies by Operators. This recognition is consistent with ACCC's recently approved ARTC Interstate Track Access Agreement.	TAA - Yes OTAA - Yes
27	Force Majeure	Heat Speed Restrictions	10.3	Medium	Balanced and reasonable terms	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 10.	Refer item 5	TAA - Yes OTAA - Yes
28	Force Majeure	Force Majeure and obligations to pay	10.4	High	Financial risk allocation	(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 (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. Where an Operator is unable to use a Scheduled Train Path due to a Force Majeure affecting Arc, the Customer will not be obliged to pay Fixed Charges in respect of the cancelled Scheduled Train Path.	Operators consider that a balanced allocation of risk would require that they are not charged access charges where train paths are not provided due to a FM event. This is the position typically adopted in access agreements with the regulator approved standard access agreements for Queensland Rail, Aurizon Network and ARTC Interstate all providing that fixed access charges are not applied during the period of a railway owner's FM. In addition, Operators consider that the Arc fixed access charges should be excused when Operators are unable to run their services because of a FM event affecting another network used for their journey. This is primarily an issue for east-west freighter services, which are run by multiple Operators. These services are operated on a multi-user basis, and revenue generation is dependent on the freight actually consigned to each service (rather than bulk services which may have a capacity charge applied on a take or pay basis). Where services are unable to be operated due to any network unavailability (and therefore no revenue can be generated), a requirement to pay fixed access charges in addition to the Operator's own fixed costs is a major cost impost on an Operator. This is a risk that is not applicable to the competing road freight providers, as similar fixed road access charges do not apply. A balanced approach, where both the railway owner and the railway operator accept the loss of revenue during any network FM event, will better reflect the nature of this market. From a drafting perspective, the simplest way to achieve this is to provide that fixed access charges do not apply for a FM event affecting either party (where an FM event on another network will be treated as an Operator FM).	TAA - Yes OTAA - No
29	Suspension or termination	Termination by Arc	11.1(e)-(h)	Medium	Balanced and reasonable terms	(e) the Customer fails to pay when due: (A) any Charges; (B) any amount due to Arc in accordance with clause 5.5; or (C) 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 the time specified by Arc under clause 5.1(e) 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 and such breach is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure;	In relation to payment breaches, clause 4 provides Arc with a suspension right where the non-payment has not be rectified within a specified time. The timeframes for termination for non-payment should be no less than the timeframes for this suspension right in clause 4. Otherwise, the Operator should be permitted time and opportunity to rectify any breach (except where it is not possible to do so).	TAA - Yes OTAA - Yes

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
30	Suspension or termination	Termination by Arc	11.1(k)	High	Balanced and reasonable terms	(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	The provision of train paths is a fundamental obligation under this agreement, and Operators believe that if Arc is no longer able to provide the agreed train paths for any reason, this should be a breach of agreement. The Network Lease is an agreement between PTA (on behalf of the WA Government) and Arc. To the extent that Arc is to no longer hold this lease, Operators believe that maintaining continuity of rail based supply chains should be an essential consideration for the WA Government. Therefore, any issues arising from Arc no longer holding the Network Lease are most appropriately managed through the agreement's assignment provisions. For comparison, the Queensland Rail Standard Access Agreement (under AU3) includes an assignment clause that deals with the scenario where Queensland Rail no longer has the right to operate the network or any part of it relevant to providing access rights under an agreement.	TAA - Partially OTAA - No
31	Suspension or termination	Termination by Operator	11.2	Medium	Balanced and reasonable terms	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; (e2) Arc fails to effect or maintain the insurances required to be taken out by it under clause 9.2 and such breach is not remedied within 10 Business Days of the Customer 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 30 Business Days 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.	The termination rights of the parties should generally be reciprocal, so a failure by Arc to maintain the required insurances should give rise to an Operator termination right, consistent with the definition of Arc's termination rights.	TAA - Partially OTAA - Yes
32	Suspension or termination	Effect of termination or suspension	11.4(c)	High	Balanced and reasonable terms	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).	Refer item 30	TAA - Yes OTAA - No
33	Suspension or termination	Effect of termination or suspension	11.4(h)	High	Balanced and reasonable terms	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.	Refer item 30	TAA - Yes OTAA - No

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
34	Indemnities	Duty to mitigate	12.3	Medium	Balanced and reasonable terms	The entitlement of a party to be indemnified under clauses 12.1 or 12.2 does not extend to, or apply to, Liability which the person pays, suffers or is liable for, to the extent that the Liability arose, or increased, as a result of that party's failure to take is subject to that party taking reasonable steps to mitigate its loss.	Amended drafting avoids a 'hair trigger' application of the clause, so that the indemnity remains in place but does not apply to the extent that a party has not taken reasonable steps to mitigate.	CTAA - Yes OTAA - Yes
35	Limits of Liability	No Liability for Consequential Loss	19.1	Medium	Balanced and reasonable terms	Except for breach of, or under an indemnity given under, clause 12.4 but if 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 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.	Operators do not consider that the agreement should provide for any exceptions from the consequential loss exclusions, except as provided by law.	TAA - Yes OTAA - Yes
36	Limits of Liability	Minimum threshold on Claims	19.2	Low	Balanced and reasonable terms	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 \$50,000 .	The minimum threshold on claims typically adopted in regulated standard access agreements is \$100,000, with this value adopted by Queensland Rail, ARTC Interstate, Sydney Trains and Aurizon Network.	TAA - Yes OTAA - Yes
37	Resolution of disputes	Resolution of disputes	14	Medium			Operators believe that there is merit in including an option for expert resolution of disputes, as this provides a fast and low cost option for resolving dispute of a primarily technical nature. While we have not provided proposed drafting for an expert resolution process, there are numerous examples in other regulated standard access agreements. Key features that should be included are: - expert resolution should be available following a nominated period (eg 10 business days) for the parties to resolve the dispute; - expert resolution should be used for disputes of a technical, safety or engineering nature; - the expert must be agreed by the parties, or otherwise appointed by a suitable independent party; - in the absence of manifest error, the decision of the expert is to be final and binding; and - the cost of the expert are to be shared equally between the parties, with each party otherwise bearing its own costs.	TAA - Yes OTAA - Yes
38	Security	Operator to provide Security	15.1(a)	High	Transparency and clarity of obligations Balanced and reasonable terms	Arc may require the Customer to provide Security if it considers (acting reasonably) that the Customer may: (1) not be financially sound; (2) not be able to meet its debts as and when they fall due; or (3) not otherwise be capable of performing its obligations under this Agreement.	The ability for Arc to require an Operator to provide security should be based upon a reasonable assessment of financial risk.	TAA - Yes OTAA - No
39	Confidentiality	Permitted disclosures	16.2(a)	High	Transparency and clarity of obligations Balanced and reasonable terms	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; (6a) by a Customer to the Economic Regulator 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 (but excluding the Operator) 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.	Section 47A(2)(c) of the Code provides that standard access provisions should not seek to restrict an access holder from disclosing the terms and conditions of an access agreement or proposed access agreement to the economic regulator or to an arbitrator (in relation to an arbitration under the Code). To comply with this requirement, Operators consider that the standard access provisions must allow that, over the course of the agreement, information be provided to the Regulator. Information provision to an arbitrator is not considered to be required, as arbitration under the Code would occur prior to the agreement being finalised.	TAA - Partially OTAA - Yes

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#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
40	Anti-corruption and modern slavery		21	Low	Transparency and clarity of obligations	Delete in its entirety	This clause requiring Operator compliance with Anti-Corruption and Modern Slavery laws is not necessary for an Access Agreement. In any event, the Operator is required to comply with all Laws applicable to the operation of the Services or its use of the Network as per clause 5.5. In the event that obligations in relation to anti-corruption and modern slavery are retained in the Standard Access Provisions, they should: - be reciprocal - be transparent and certain, i.e. not requiring the Operator to accept uncertain obligations such as in 27.2(a) to do all things requested by Arc to facilitate Arc's compliance with Modern Slavery Laws, or comply with undisclosed policies, procedures, guidelines, codes of Arc in relation to Modern Slavery. Note also, in the event that the ERA considered it reasonable to include Anti-Corruption and Modern Slavery provisions in the standard access provisions, these should align with Arc's proposed provisions in the CTAA, which represent a more reasonable suite of obligations than the proposed TAA drafting.	TAA - Partially OTAA - Yes
41	Scheduled Train Paths Train path definition		Schedule 1	Medium	Performance transparency and accountability		An alternate format of service definition should be included for Non-Scheduled Services, which operate in a variable way to align with customer demand (eg grain services). While these services do not operate to a fixed schedule, Schedule 1 should specify an average scheduled time for services on each nominated route, to provide a Customer with confidence in the transit time that will apply to these services (which is necessary in order for the Customer to define how the services will operate within its broader logistics chain).	TAA - Yes OTAA - No
42	Charges	Rates	Schedule 2 3	High	Efficient supply chains		The Code provides that the ERA may require Arc to prepare a Standing Offer for a specified rail operation where 2 or more entities are carrying on similar rail operations on a specified route. Operators consider that, where such a Standing Offer is developed within the term of a Code based agreement, Schedule 2 should provide an option for the Customer to revise its Rates to align with any applicable Standing Offer developed for a similar service.	TAA - Yes OTAA - No
43	Charges	Fixed Charge Calculation	Schedule 2 4	High	Financial risk allocation Transparency and clarity of obligations		Arc should be required to incorporate guidance in the Standard Access Provisions as to: - the proportion of access charges that can be applied as a fixed charge; and - the formula by which those fixed charges will be applied. The underlying principles for the application of fixed charges should be: - fixed Charges must be clearly disclosed and demonstrably aligned with Arc's underlying fixed/variable cost structure. - the split between fixed and variable charges must be explicitly documented - the fixed charge should not in any circumstances exceed the total access charge for operating a fully loaded service - fixed charges must not be imposed on paths not delivered by Arc either due to its own cause (eg maintenance possessions) or Force Majeure, including both forward and return journeys. This reflects that if a forward path is not provided by Arc, then the operator is unable to run either the forward or return journey (and vice versa) - the fixed charge should include a discount tied to contract term, to reward long-term contractual commitments.	TAA - Yes OTAA - No
44	Variation of Charges	Fee Variation	Schedule 3 1(b)-(c)	Medium	Financial risk allocation	b. If, at any given time throughout the Access Term, CPI is less than CPIb, CPI will be deemed to be equal to CPIb 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.	Access charges should vary in accordance with CPI, including reducing where CPI is negative. This is consistent with ACCC recent approval of ARTC ITAA.	TAA - Yes OTAA - Yes
45	Performance Indicators		N/a	High	Performance transparency and accountability	New Schedule to be included	Refer to submission for details.	TAA - Yes OTAA - Yes
Annexure A - Form of Operational Track Access Agreement								
46	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations	<i>Arc's Network Rules</i> the Network Safeworking Rules and Procedures applied consistently to all operators using the Network and 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 in accordance with Clause 12.3(b). ; for the purpose of ensuring the safe use of the Network;	Operators agree the necessity of a set of Network Safeworking Rules and Procedures, but have proposed some amendments to the definition of Arc's Network Rules to provide operators' and customers' with confidence in the way that Arc's Network Rules will be managed, in particular, that they will be consistently applied to all operators, and that Arc will follow a reasonable process (proposed to be addressed in a new Clause 12.3(b)) when amending the rules.	TAA - Yes CTAA - Yes

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47	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<p><i>Change in Law</i></p> <p>(a) any amendment, repeal or enactment of any Law;</p> <p>(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;</p> <p>(c) the making of any new directive, or any change in an existing directive, of any Government Agency that is legally binding;</p> <p>(d) the imposition of a legally binding requirement for authorisations not required as at the Commencement Date;</p> <p>(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;</p> <p>(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;</p> <p>(g) or 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).</p>	A change in the standard access provisions should not give rise to a right for Arc to adjust access charges for a change in costs. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) and do not in an of themselves impose any obligations on Arc. Operators do not expect (and indeed the draft standard access provisions do not contemplate) that there is any automatic change to an existing agreement where a change is subsequently made to the standard access provisions. To the extent that adopting access terms consistent with the standard access provisions imposes costs on Arc that it would not otherwise incur, this is relevant to the agreements that reflect those particular access terms.	TAA - Yes CTAA - Yes
48	Definitions and Intepretation	Definitions	1.1	Low	Transparency and clarity of obligations Balanced and reasonable terms	<p><i>Consequential Loss</i></p> <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 to the extent that the applicable party would, in the absence of this definition, be entitled to recover them at law:</p> <p>(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;</p> <p>(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);</p> <p>(3) any loss, damage or cost arising out of or in connection with fraud or Wilful Default;</p> <p>(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</p> <p>(5) any loss, damage or cost arising out of or in connection with damage to third party property other than Customer Product.</p>	Part (b) of this definition should not unnecessarily limit the extent of the exclusion of Consequential Loss per part (a) of this definition.	TAA - Yes CTAA - Yes
49	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<p><i>Customer Product</i></p> <p>means [insert], or any other product approved by Arc in writing (such approval not to be unreasonably withheld), that is transported by the Operator on a Train Path.</p>		TAA - Partially CTAA - Partially

Arc Infrastructure Commercial Track Access Agreement

#	Part	Clause	Clause #	Materiality	Issue	Proposed Drafting (deletions are in strike through , additions are in bold)	Rationale	Consistent with TAA comment?
50	Definitions and Intepretation	Definitions	1.1	Low	Balanced and reasonable terms	<p><i>Force Majeure</i> 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; (b) prevents the affected party from performing its obligations under this Agreement; and (c) cannot be prevented, overcome or remedied by the exercise by the party affected of a reasonable standard of care and diligence, including:</p> <p>(d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide, extreme heat, severe weather conditions or other catastrophe or natural calamity, heat (including speed restrictions due to the impact of heat or other atmospheric conditions); (e) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic; (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 (g) Industrial Action provided that, in the case of the Operator 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 Operator's Personnel and lasts for longer than 28 days, (ga) delay of a supplier or Customer due to any of the foregoing whenever arising, but does not include:</p> <p>(h) loss of customers or loss of market share; (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; (j) heat, wet or otherwise inclement weather other than as described in paragraph (d) of this definition; (k) causes, events or circumstances to the extent caused or contributed by if the Operator is the affected party, any acts or omissions by a party's the Operator's Personnel; or (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> <p><i>Good Industry Practice</i> those practices, methods and acts, as varied from time to time, that are commonly used in the railway industry by prudent persons.</p>	Operators do not consider that heat (other than extreme heat) should be included as a FM event. Heat based speed restrictions are a management tool to address common and predictable levels of heat during summer months, particularly on those parts of the Network constructed to lighter track standards. The extent to which speed restrictions are used is based on a cost/benefit assessment, which trades the benefit of increased train speed with the cost of maintaining the network to a standard that allows for a lower incidence of speed restriction. Accordingly, Arc should have regard to a reasonable expectation of heat restrictions and good industry practice when considering the standard to which it maintains its track and in defining the service that it is able to contract, rather than classify heat restrictions as FM. The inclusion of applicable Australian Laws or enforcement action in response to a pandemic is included in the CTAA form of agreement but not the TAA. Operators consider this to be a reasonable FM inclusion, and request that it also be included in the TAA. Otherwise, Operators consider that the FM inclusions and exclusions should be drafted in a reciprocal way, with the same issues being classified as FM for both parties. This is consistent with regulator approved standard access agreements for ARTC (Interstate and Hunter Valley), Queensland Rail and Aurizon Network.	TAA - Partially CTAA - Yes
51	Definitions and Intepretation	Definitions	1.1	Low	Performance transparency and accountability	<p><i>Good Industry Practice</i> those practices, methods and acts, as varied from time to time, that are commonly used in the railway industry by prudent persons.</p>	Refer item 68	TAA - Yes CTAA - Yes
52	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<p><i>GPS Information</i> the following data for each locomotive set out in Schedule 5 utilising a Train Path, with each transmission of data to comprise:- (a) date and time stamp; (b) GPS coordinates (latitude and longitude); and (c) details of the locomotive (including vehicle identifier).</p>	Refer item 65	TAA - Yes CTAA - No
53	Definitions and Intepretation	Definitions	1.1	Medium	Balanced and reasonable terms	<p><i>Transmission Method</i> The provision of GPS Information to Arc by one or more of the following methods:- (a) FTP server hosting; (b) HTTP or HTTPS website hosting; (c) duplication of GPS streams to Arc servers; (d) secured VPN link; or (e) a method that Arc reasonably requests the Operator to use to interface with any technology that Arc implements during the Access Term.</p>	Refer item 65	TAA - Yes OTAA - No
54	Definitions and Intepretation	Rail Access Code	1.4(a)	Medium	Transparency and clarity of obligations Balanced and reasonable terms		Paragraph (a) provides that nothing in the Agreement requires Arc to do (or omit to do) anything contrary to the Rail Access Code or any Applicable Part 5 Instrument. However, in a number of cases, provisions of the proposed TAA do not align with the Part 5 Instruments. The intended application of this provision is therefore unclear. The operators' preference is, where relevant, to rely on the Part 5 Instruments (as amended from time to time), and avoid drafting potentially inconsistent provisions into the standard access provisions. This view is reflected where applicable in specific comments.	TAA - Yes CTAA - Yes

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55	Definitions and Intepretation	Rail Access Code	1.4(c)	Medium	Balanced and reasonable terms	<p>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.</p>	<p>Refer item 47 in relation to the treatment of New Standard Access Provisions as a Material Change.</p> <p>Operators do not consider that there should be a need for any amendment to an existing agreement in the event of a change in the standard access provisions. The standard access provisions provide a template form of access agreement (which has been endorsed by the ERA as reasonable) but do not, in and of themselves, impose any obligations on Arc. Issues that will have an impact on the safe operation of the Network will typically be addressed in Arc's Network Rules or in Part 5 Instruments (which all operators must comply with under the standard access provisions).</p>	TAA - Yes CTAA - Yes
56	Track Access Rights	Nature and scope of rights	3.3(c)	Medium	Transparency and clarity of obligations	<p>Notwithstanding clause 3.1 and 3.2, the Operator's right to operate any Service on the Network (including Services on the Nominated Route using a Scheduled Train Path) is subject to:</p> <ol style="list-style-type: none"> (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, railcars, carriages and wagons agreed to in writing by Arc); (5) emergencies or material safety considerations; (6) the Train Management Guidelines, the Train Path Policy and Arc's Network Rules; and (7) all applicable Laws. 	Operators consider that, in addition to the Train Management Guidelines and Arc's Network Rules, both Arc and the operator should be required to comply with Arc's Train Path Policy.	TAA - Yes CTAA - Yes
57	Track Access Rights	Light Engine Movements	3.7(a)	Low	Balanced and reasonable terms	<p>Upon request by the Operator, Arc will use reasonable endeavours, may, in its absolute discretion and subject to the Train Management Guidelines, to grant the Operator a Train Path for the operation of a Light Engine Movement</p>	<p>Ad hoc light engine movements, including for the purposes of locomotive maintenance and incident recovery, are an essential part of the operation of train services, but are unable to be predicted for the purpose of contracting capacity. A reasonable endeavours obligation to provide access for light engine movements better reflects the necessity of these movements, while continuing to ensure that Arc does not have an obligation to accommodate light engine movements where it is not reasonable to do so given other network requirements.</p>	TAA - Yes CTAA - No

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58	Track Access Rights	Supply chain management	3.8	High	Performance transparency and accountability Efficient supply chains	<p>(a) Arc will provide monthly reports to the Operator documenting performance against the performance indicators as set out in Schedule 6.</p> <p>(b) The parties agree to work together to manage and optimise the efficiency of the supply chain as it applies to the Operator's rail operations and the Network, including, where agreed:</p> <p>(a1) holding regular meetings involving senior representatives of both parties to review operational performance and to agree improvement strategies; and</p> <p>(b) providing data relating to the respective parties' role in the supply chain, on a regular basis; and</p> <p>(c) the commitment of personnel and other resources by each party to develop and maintain a common data set and reporting format, where required, which demonstrates the performance of each aspect of the supply chain.</p> <p>(c2) the commitment of personnel and other resources by each party to develop and maintain additional a common data set and reporting format, where required, which demonstrates the performance of each aspect of the supply chain.</p>	<p>Arc's standard access provisions do not include any provision for reporting and monitoring of performance, or any mechanism aimed at improving performance over time. Operators acknowledge the complexity around developing a performance regime involving KPIs and performance standards, particularly given overall outcomes are significantly affected by both railway owner and operator performance. For this reason, Operators consider that the standard access provisions should include a performance monitoring arrangement, rather than a performance regime with contractual and financial consequences. Establishing a set of KPIs, and monitoring system performance (including railway owner and operator performance) can provide information on trend performance outcomes, and opportunities for performance improvement.</p> <p>From examining performance frameworks in other rail networks, it is clear that KPIs are generally aimed at providing information on similar aspects of performance, although it is often the case that different indicators are applied. Rail operators have developed a suite of KPIs that we would like to be consistently used across all rail networks. The benefit of a consistent set of KPIs is clearest where individual trains operate over multiple networks (such as is the case for interstate trains on Arc's EGR). However, a consistent suite of KPIs is of value regardless of the operation of multi-network services. This is because most rail operators, and many end customers, operate over a national footprint, and a consistent suite of KPIs allows valid comparisons of performance across jurisdictions, and allows Operators to present consistent performance information to their end customers. Operators' preferred KPI suite is being considered by ARTC as part of its review of performance reporting under its Interstate Access Undertaking.</p> <p>Accordingly, Operators propose to include in Schedule 6 a set of KPIs based on the performance indicators sought for consistent national application (attached to this submission).</p>	TAA - Yes CTAA - Yes
59	Track Access Rights	Parking	3.11(c)	Medium	Efficient supply chains Financial risk allocation	<p>(b) Notwithstanding clause 3.11(a), if, at the Operator's request, Arc grants the Operator a right to Park on the Network for a period of more than [nominated time] 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 for each [nominated interval] minute in excess of [nominated time] 15 minutes.</p> <p>(c) The Operator may Park without charge:</p> <p>(1) with Arc's consent where the Operator requests to do so and provided period of Parking does not exceed [nominated time] 15 minutes;</p> <p>(1A) where it is unable to operate Rolling Stock due to a Possession of the Network;</p> <p>(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;</p> <p>(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</p> <p>(4) for a reasonable period in order to recover from Incidents or Rolling Stock failure.</p>	<p>This is a very restrictive parking (or stowage) right compared to other railway owners, and the use of a 'per minute' parking charge imposes a high administrative cost on all parties to ensure that parking charges are appropriately applied. Access entitlements usually incorporate a reasonable period of parking prior to the application of any charges. What is a reasonable period will depend on the context of the access, and other demands for that stowage location. In areas where there are multiple operators on the network who may at times require a parking location (including in locations for EGR users such as the long arrival roads into Forrestfield), a limited parking allowance is reasonable in order to provide an effective signal to Operators to move their train as soon as practicable. In such multi-user locations, Operators consider a parking allowance of one hour, and a per hour charge for additional parking, will provide effective usage signals while maintaining a manageable charging structure. However, where an Operator is the sole operator in an area of the network, and there are no consequences to other parties from parking in a location, a significantly longer parking timeframe would be reasonable.</p>	TAA - Yes CTAA - No
60	Billing and Payments	No Set off	4.5	Low	Financial risk allocation	<p>All payments which a party is required to make under this Agreement must be made without deductions, counter claims, conditions, set off or withholdings. A party may deduct from any amounts which are due and payable by the party to the other party under this Agreement any amounts which are due and payable by the other party to the party under this Agreement.</p> <p>All payments which a party is required to make under this Agreement must be made without deductions, counter claims, conditions, set off or withholdings. A party may deduct from any amounts which are due and payable by the party to the other party under this Agreement any amounts which are due and payable by the other party to the party under this Agreement.</p>	<p>Permitting the application of offsets is a common in regulator approved standard access agreements, including Queensland Rail and Aurizon Network.</p>	TAA - Yes CTAA - Yes

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61	Control and management of access to the Network and use of the Network	Operator's obligations in relation to Rolling Stock	5.3(a)	Medium	Transparency and clarity of obligations	The Operator must at all times during the Access 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 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"; (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 on rolling stock 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. Arc will publish the relevant standards on its website.	The standards referred to in this clause are not easily accessible using a general internet search, leading to uncertainty around the specific requirements of this clause.	TAA - Yes CTAA - No
62	Control and management of access to the Network and use of the Network	Operator's obligations in relation to Rolling Stock	5.3(c)	Medium	Balanced and reasonable terms	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.	Promoting rollingstock inter-operability and reducing the cost and time of securing rollingstock authorisations are key issues being progressed under the National Rail Action Plan (NRAP). Objectives include: - increased consistency of rollingstock standards applied across networks; - transparent and consistent processes applied by railway owners in assessing rollingstock acceptability; - mutual recognition of authorisation and testing processes, with additional requirements only where necessary to address network specific risks. Under the NRAP framework, Operators understand that Arc is working closely with ARTC to harmonise their rollingstock approval requirements and processes, and Operators support the continuation of this work. Over time, Operators anticipate that this will allow faster and more transparent rollingstock approval processes to be adopted.	TAA - Yes CTAA - No
63	Control and management of access to the Network and use of the Network	Operator's general obligations	5.5(a)(2)	Low	Transparency and clarity of obligations	5.5(a)(2) if it becomes aware of a Network failure or 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 as soon as reasonably practicable, including advising the magnitude of any variance and revised time of departure and/or arrival;	There is considerable overlap between Clause 5.5(a)(2) and Clause 9.1(a) both of which place obligations on an Operator to advise Arc of potential deviations from a Train Path, but which differ slightly in their detail. Aurizon suggests consolidating the provisions into a single clause within Clause 5.5(a)(2) in order to improve the clarity of an Operator's obligation.	TAA - Yes CTAA - No
64	Control and management of access to the Network and use of the Network	Operator's general obligations	5.5(a)(6)	Medium	Balanced and reasonable terms	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: (A) Arc will consult with the Operator and the Operator will, after such consultation and after reasonable notice from ARTC to the Operator, reasonably replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre; and (B) where the proposed change to the communications equipment in the Train Control Centre constitutes a significant change to the communications equipment and/or communication system, Arc will further consult with other rail network managers, rail safety governance organisations, and the National Transport Commission and Interoperability Advisory Group (as relevant) to discuss the proposed changes.	Operators' acknowledge that, at times, a railway manager may need to upgrade its train control and communication systems, and this may require corresponding changes to an Operator's communications equipment. However, Operators' are concerned with how such upgrades are specified, having regard both to the potential cost that may be imposed on an Operator, as well as to the implications for interoperability across networks. The proposed drafting amendments are aimed at ensuring that these issues are properly considered. The drafting is consistent with the ARTC ITAA recently approved by the ACCC, and reflects an approach that has regard to the legitimate interests of Operators, as well as to the need to promote network inter-operability when considering significant changes to communications systems and equipment. The NRAP framework includes prioritisation of rail interoperability through the development of mandatory and model digital train control technology requirements. Eastern states have aligned on European Train Control System (ETCS) as a DTCT of choice for their networks and a strategic business case is being developed on train control and signalling interoperability pathway for Australia. Operators anticipate that Arc will be engaged in this work to address any interoperability issues.	TAA - Yes CTAA - No
65	Control and management of access to the Network and use of the Network	Operator's obligation to provide GPS Information	5.6	Medium	Balanced and reasonable terms	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.	The standard access provisions provide a process (in clause 5.5(a)(6) for upgrades to communication equipment for train control, so the purpose of this provision as a stand alone obligation is unclear. Arc has not consulted with Operators around the requirement to transmit GPS information, and Operators have not had an opportunity to understand and assess the costs that this obligation will impose upon them. Clause 5.5(a)(6) provides a mechanism for this to occur.	TAA - Yes CTAA - No

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66	Control and management of access to the Network and use of the Network	Operator's obligations in relation to disposal of waste	5.7	Low	Transparency and clarity of obligations	(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 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 5.6. (c) If the Operator has not installed in each Train for that Service a means of treating, processing and discharging the waste in accordance with this clause 5.6, 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.	Operators question why this requirement is not able to be addressed through the general environmental management provisions in clause 13.	TAA - Yes CTAA - No
67	Control and management of access to the Network and use of the Network	Operator's obligations in relation to any Network blockage	5.8(b)	Medium	Balanced and reasonable terms	(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. provided that: (1) Arc must consult with the Operator before issuing any Instruction about using the Operator's Rolling Stock or Train Crew to clear the blockage; (2) the Operator is not obliged to provide assistance where this would require it to do anything contrary to its Accreditation, or otherwise where the Operator does not consider it safe to do so; and (3) where Arc issues an Instruction in accordance with Clause 5.8(b)(1), it will: (A) reimburse the Operator's direct costs and expenses of providing such assistance; (B) Arc will release and indemnify the Operator for all and any injury, loss and damage arising from or related to the assistance provided, including damage to the rescued party's rollingstock. (c) To the extent that a Network blockage is caused by an Operator or an Operator's Rolling Stock: (A) the Operator must pay Arc's direct costs and expenses incurred in clearing that blockage, and those costs and expenses will be a debt due and owing by the Operator to Arc; and (B) the Operator will release and indemnify Arc for all and any injury, loss and damage arising from or related to the clearing of that blockage.	The general requirements on Operators in relation to assisting with clearing of a Network blockage are set out in Arc's Train Management Guidelines (CI 2.2.2) which states that, unless agreement is reached on how the costs and risks of providing assistance will be shared, the Operator is not required to provide assistance. Reflecting this, Operators consider that any obligation in the standard access provisions for an Operator to provide assistance must be accompanied by detail on how the costs and risks of providing assistance will be shared. Operators considers that this must: - include a requirement to consult with the Operator before issuing any Instruction to assist in clearing the blockage - not oblige the Operator to do anything contrary to its accreditation or that cannot be done safely - provide for Arc to reimburse the Operator's reasonable costs and indemnify the Operator against any claims for damage to the rescued party's rollingstock; and - provide an ability for Arc to recover the reasonable costs of clearing a blockage from an Operator who has caused the blockage and to be indemnified against any claims by the Operator for damage to its rollingstock.	TAA - Yes CTAA - No
68	Repairs and maintenance of the Network	Maintenance Standards	6.1(a)	Low	Performance transparency and accountability	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 minimum standard required, in accordance with Good Industry Practice, to perform the Services in accordance with this Agreement; 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.	Operators consider that Arc should be obliged to maintain the Network to a standard that permits the operation of the Services that will be contracted under that agreement. It is then the responsibility of Arc, as the railway manager, to assess what level of Service it is willing to contract, given the standard of the network at the commencement date of the agreement. The Operator should not be required to accept the risk that the contracted Services cannot be delivered as anticipated, because of the network standard is insufficient at the commencement date. In order to assess what standard the Network must be maintained at to deliver the Services, Operators believe that the Service can be defined at a high level according to scheduled transit time, axle load and train length, as provided in Schedule 2. The Network performance required to deliver these services should be subject to a Good Industry Practice standard.	TAA - Yes CTAA - Yes
69	Variations or cancellations of Train Paths	Operator and Arc consultation protocols	9.1(a)	Low	Transparency and clarity of obligations	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.	Refer Item 63.	TAA - Yes CTAA - No
70	Variations or cancellations of Train Paths	Operator and Arc consultation protocols	9.1(b)	Low	Transparency and clarity of obligations		This obligation may be better located within Clause 5.5(a)	TAA - Yes CTAA - No

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71	Variations or cancellations of Train Paths	Repairs, maintenance and upgrading of the Network and temporary variations of Train Paths	9.4(c)	High	Efficient supply chains	<p>If the repairs, maintenance or upgrading activities:</p> <p>(1) can be carried out without affecting the use of Train Paths, Arc is not obliged to give prior notice to the Operator;</p> <p>(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:</p> <p>(A) the circumstances;</p> <p>(B) the likely impact on Train Paths; and</p> <p>(C) the likely duration of the Possession of the Network; or</p> <p>(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.</p>	<p>Operators acknowledge that the timeframes for notification of possessions are included in the Train Management Guidelines. However, we note that for many possessions, Arc is required to provide Operators with significantly less notice around planned possessions than is provided by other railway managers, for example Queensland Rail must provide three months notice of all planned possessions, and ARTC has detailed guidance around its notification requirements depending on the impact the possession has on services, with planned possessions with any impact on train services typically requiring 10-26 weeks notice. In a review conducted by Queensland's Cross River Rail Delivery Authority on how to reduce the impact of possessions on freight services, a key recommendation was to more effectively co-ordinate possessions across the relevant supply chains, and to provide increased notice of possessions, in order to allow Operators more time to plan changes and manage effects with customers.</p> <p>Accordingly Operators would like Arc to implement a review of its Train Management Guidelines with the result that:</p> <ul style="list-style-type: none"> - Arc's Train Management Guidelines require that Arc develop and update on a regular (monthly) basis, a rolling 12 month possessions calendar which sets out its expectations for planned possessions for each route; - Arc's Train Management Guidelines include an obligation on Arc to consult and, to the extent practicable, co-ordinate possessions with adjoining networks; and - the notification timeframes in Arc's Train Management Guidelines to be reviewed to align with contemporary expectations in order to help mitigate the impact of essential possessions on freight supply chains. In particular, we consider that Arc should provide 30 days notice for all non-emergency possessions of less than 6 hours, and 3 months notice for all non-emergency possessions of 6-48 hours, (unless the possessions will not affect the use of Train Paths). 	TAA - Yes CTAA - Yes
72	Variations or cancellations of Train Paths	Fixed Charges remain payable	9.7	High	Performance transparency and accountability Financial risk allocation	<p>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.</p>	<p>It is unclear why there needs to be an acknowledgement from the Operator regarding fixed charges for cancelled paths.</p>	TAA - Partially CTAA - Partially
73	Emergencies and Incidents	Operator's report	11.5	Medium	Transparency and clarity of obligations	<p>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):</p> <p>(a) the time and location of the Incident;</p> <p>(b) available details of all loss or damage to the Operator's Train and to the Network;</p> <p>(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 (with the parties acknowledging that such statement will be without prejudice and will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary));</p> <p>(d) an analysis in printed format of speed recorder charts for the Operator's Train;</p> <p>(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</p> <p>(f) 11.6 any other information required to be disclosed in a report under the Dangerous Goods Code.</p>	<p>To ensure that the Operator does not have any incentive (eg for insurance or indemnity reasons) to limit information provided in the Operator's report.</p>	TAA - Yes CTAA - No

Arc Infrastructure Commercial Track Access Agreement

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74	Emergencies and Incidents	Arc's report	11.6	Medium	Transparency and clarity of obligations	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 (with the parties acknowledging that such statement will be without prejudice and will not be binding on Arc and will not be taken to be an admission by Arc for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary)) ; (d) 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 any other information required to be disclosed in a report under the Dangerous Goods Code.	Amendments are proposed to ensure that Arc does not have any incentive (eg for insurance or indemnity reasons) to limit information provided in Arc's report.	TAA - Yes CTAA - No
75	Safety Standards	Provision of Arc's Network Rules	12.3	Low	Transparency and clarity of obligations	(a) 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. Arc must maintain a copy of Arc's Network Rules on its website. (b) Arc may amend Arc's Network Rules for the purpose of ensuring the safe use of the Network, provided that Arc consults with the Operator and provides reasonable notice of the required date to comply with the amended Arc Network Rules. (c) If the Operator considers that the amendments to Arc's Network Rules: (1) increase the costs to the Operator of performing its obligations under this Agreement; (2) create additional restraints or restrictions on the Operator accessing the Services or Train Paths under this Agreement; or (3) are not consistent with Clause 12.3(b); the Operator may notify Arc and the relevant technical personnel of eah party must meet, within 5 Business Days after the notice is given, with a viwe to resolving the issue. (d) if the parties are unable to resolve the issue in accordance with clause 12.3(c) within 10 Business Days, either party may refer the matter to dispute resolution in accordance with Clause 20.	The standard access provisions provide that the Operator's right to use a path is subject to the Train Management Guidelines and Arc's Network Rules. The Train Management Guidelines are a formal instrument under the Code, and can only be changed following review by the ERA and confirmation that the change is reasonable. However, while the right to use the path is subject to Arc's Network Rules, there is no mechanism to ensure that changes to the Network Rules are reasonable and take into account any impacts on the Operator. The proposed drafting amendments are to provide this protection.	TAA - Yes CTAA - No
76	Insurance	Operator's insurance policies	14.1(c)	Medium	Balanced and reasonable terms	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	Carrier liability insurance should not be required under an access agreement.	TAA - Yes CTAA - No
77	Insurance	Approved insurance companies	14.3	Medium	Balanced and reasonable terms	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, or any insurance policy required to be effected and maintained by either party pursuant to clause 14.1 and 14.2 may at any time be placed in whole or in part with a wholly owned captive insurance company, reinsured with various insurers in Australia and London (Lloyds and company markets) with a minimum Standard & Poor's rating of A-.	The standard access provisions should reflect the use of captive insurance companies by Operators. This recognition is consistent with ACCC's recently approved ARTC Interstate Track Access Agreement.	TAA - Yes CTAA - Yes
78	Force Majeure	Heat Speed Restrictions	16.3	Medium	Balanced and reasonable terms	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.	Refer item 50	TAA - Yes CTAA - Yes
79	Suspension or termination	Termination by Arc	17.1(a)(3)-(5)	Medium	Balanced and reasonable terms	(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 the time specified by Arc under clause 4.1(e) 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 14.1 and such breach is not remedied within 10 Business Days of Arc giving notice to the Operator of the failure; (5) the Operator fails to comply with its obligations under clause 22;	The Operator should be permitted time and opportunity to rectify any breach (except where it is not possible to do so).	TAA - Partially CTAA - Yes

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80	Suspension or termination	Termination by Operator	17.2(a)(3)-(4)	Medium	Balanced and reasonable terms	(3) Arc fails to comply with its obligations under clause 22; (3A) Arc fails to effect or maintain the insurances required to be taken out by it under clause 14.2 and such breach is not remedied within 10 Business Days of the Operator giving notice to Arc of the failure; (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;	The termination rights of the parties should generally be reciprocal, so a failure by Arc to maintain the required insurances should give rise to an Operator termination right, consistent with the definition of Arc's termination rights.	TAA - Yes CTAA - Yes
81	Indemnities	Duty to mitigate	18.3	Medium	Balanced and reasonable terms	The entitlement of a party to be indemnified under clauses 18.1 or 18.2 does not extend to, or apply to, Liability which the person pays, suffers or is liable for, to the extent that the Liability arose, or increased, as a result of that party's failure to take is subject to that party taking reasonable steps to mitigate its loss.	Amended drafting avoids a 'hair trigger' application of the clause, so that the indemnity remains in place but does not apply to the extent that a party has not taken reasonable steps to mitigate.	TAA - Yes CTAA - Yes
82	Limits of Liability	No Liability for Consequential Loss	19.1	Medium	Balanced and reasonable terms	Except for breach of, or under an indemnity given under, clause 18.4 but not 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.	Operators do not consider that the agreement should provide for any exceptions from the consequential loss exclusions, except as provided by law.	TAA - Yes CTAA - Yes
83	Limits of Liability	Minimum threshold on Claims	19.2	Low	Balanced and reasonable terms	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 \$50,000 .	The minimum threshold on claims typically adopted in regulated standard access agreements is \$100,000, with this value adopted by Queensland Rail, ARTC Interstate, Sydney Trains and Aurizon Network.	TAA - Yes CTAA - Yes
84	Resolution of disputes	Resolution of disputes	20	Medium	Balanced and reasonable terms		Operators believe that there is merit in including an option for expert resolution of disputes, as this provides a fast and low cost option for resolving dispute of a primarily technical nature. While we have not provided proposed drafting for an expert resolution process, there are numerous examples in other regulated standard access agreements. Key features that should be included are: - expert resolution should be available following a nominated period (eg 10 business days) for the parties to resolve the dispute; - expert resolution should be used for disputes of a technical, safety or engineering nature; - the expert must be agreed by the parties, or otherwise appointed by a suitable independent party; - in the absence of manifest error, the decision of the expert is to be final and binding; and - the cost of the expert are to be shared equally between the parties, with each party otherwise bearing its own costs.	TAA - Yes CTAA - Yes
85	Confidentiality	Permitted disclosures	21.2(a)	High	Transparency and clarity of obligations Balanced and reasonable terms	Subject to compliance with clauses 21.2(b) and 21.2(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; (6A) by an Operator to the Economic Regulator 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.	Section 47A(2)(c) of the Code provides that standard access provisions should not seek to restrict an access holder from disclosing the terms and conditions of an access agreement or proposed access agreement to the economic regulator or to an arbitrator (in relation to an arbitration under the Code). To comply with this requirement, Operators consider that the standard access provisions must allow that, over the course of the agreement, information be provided to the Regulator. Information provision to an arbitrator is not considered to be required, as arbitration under the Code would occur prior to the agreement being finalised.	TAA - Partially CTAA - Yes

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86	Anti-corruption and modern slavery		26	Low	Transparency and clarity of obligations	Delete in its entirety	<p>This clause requiring Operator compliance with Anti-Corruption and Modern Slavery laws is not necessary for an Access Agreement. In any event, the Operator is required to comply with all Laws applicable to the operation of the Services or its use of the Network as per clause 5.5.</p> <p>In the event that obligations in relation to anti-corruption and modern slavery are retained in the Standard Access Provisions, they should:</p> <ul style="list-style-type: none"> - be reciprocal - be transparent and certain, i.e. not requiring the Operator to accept uncertain obligations such as in 27.2(a) to do all things requested by Arc to facilitate Arc's compliance with Modern Slavery Laws, or comply with undisclosed policies, procedures, guidelines, codes of Arc in relation to Modern Slavery. <p>Note also, in the event that the ERA considered it reasonable to include Anti-Corruption and Modern Slavery provisions in the standard access provisions, these should align with Arc's proposed provisions in the CTAA, which represent a more reasonable suite of obligations than the proposed OTAA drafting.</p>	TAA - Partially CTAA - Yes
87	Variation of Charges	Fee Variation	Schedule 3 1(b)-(c)	Medium	Financial risk allocation	<p>b. If, at any given time throughout the Access Term, CPI is less than CPIb, CPI will be deemed to be equal to CPIb for the purpose of the above calculation.</p> <p>c. For the avoidance of doubt, the Rate for each year shall not be less than the Rate payable for the immediately preceding period.</p>	<p>Access charges should vary in accordance with CPI, including reducing where CPI is negative. This is consistent with ACCC recent approval of ARTC ITAA.</p>	TAA - Yes CTAA - Yes
88	Performance Indicators		N/a	High	Performance transparency and accountability	New Schedule to be included	Refer to submission for details.	TAA - Yes CTAA - Yes