
Commercial Track Access Agreement

([End User])

[Nominated

Route(s)]

Arc Infrastructure Pty Ltd
ABN 42 094 721 301

[insert Company name]
ABN [insert ABN]

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

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

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

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

Date

Between the parties

Arc	Arc Infrastructure Pty Ltd ABN 42 094 721 301 of level 3, 1 George Wiencke Drive, Perth Airport, Western Australia 6105
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Customer	[Insert Customer's name] ABN [Insert Customer's ABN] of [Insert Customer's address]
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Background	<ol style="list-style-type: none">1. This Agreement is an agreement for access based on standard terms pursuant to the Rail Access Code.2. Arc is entitled to grant access rights in respect of the Network.3. The Customer wishes to secure rights to access the Nominated Routes for the operation of Services over Nominated Routes by one or more Operators in accordance with one or more Operational Track Access Agreements on the terms and conditions of this Agreement.
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The parties agree as follows:

1. Definitions and Interpretations

1.1 Definitions

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

Term	Meaning
Acceptable Credit Rating	a minimum long term credit rating of either BBB from Standard & Poors or Baa2 from Moody's.
Access Rates	the Fixed Rate and the Variable Rate as set out in or calculated in accordance with item 3, Schedule 2.
Access Term	has the meaning given in clause 2.
Access Year	means each twelve (12) Month period during the Access Term commencing on 1 July and ending on 30 June provided that the initial Access Year begins on the Commencement Date and ends of the next subsequent 30 June and the final Access Year ends on the Expiry Date.
Accreditation	has the meaning given to it under the Rail Safety National Law. Accredited means to hold Accreditation.
Accredited Owner	<p>an owner (or other person having management and control) of a railway who is Accredited or taken to be Accredited.</p> <p>[CBH drafting note – this phrase is used in cl 7.1(a)(2), but is not defined in this CTAA. It is defined in the annexed OTAA only. Hence this addition which is copied from the annexed OTAA.]</p>
Actual Net Tonnes	<p>the aggregate Net Tonnes for all Services during a relevant period, measured using a reasonable method that can be verified by Arc.</p> <p>[CBH drafting note – it is unclear as to which industry this is referring to and there may be no industry standard. CBH considers that a more appropriate test is whether the method is reasonable and can be verified by Arc.]</p> <p>[CBH drafting note – the clause that used this definition has been deleted.]</p>
Agreement	this document and its schedules, annexures and attachments.
Anti-Corruption Laws	has the meaning given in clause 21.1(a)(2).
Applicable Part 5 Instrument	a 'Part 5 instrument' (as defined in Rail Access Code, section 40(3)) that is applicable to Arc, including the Train Management Guidelines, the Train Path Policy and the Over-payment Rules.
Arc Indemnified Parties	<p>(a) Arc and its Personnel; and</p> <p>(b) each Related Body Corporate of Arc and their Personnel.</p>
Arc's Network Rules	the Arc Network Safeworking Rules and Procedures issued in accordance with Arc's safety management system approved under Part 3 Division 6 of the Rail

Term	Meaning
	<p>Safety National Law together with any amendments, deletions or additions made to those Arc Network Safeworking Rules and Procedures in accordance with the safety management system and this Agreement for the purpose of ensuring the safe and efficient use of the Network and notified in writing to the Customer. [CBH drafting note – The definition of these Rules includes other policies and procedures issued by Arc. CBH considers that this is too broad. Any important rules and policies should be included in the Rules themselves and not as ad-hoc policies and notices from time to time. Otherwise, it is uncertain as to what exactly constitutes the Rules which makes compliance with them (including ensuring there are systems for compliance) challenging and costly.]</p>
Associated Persons	has the meaning given in clause 21.1(a)(4).
Business Day	a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
Change in Control	<p>means, in relation to an entity, any direct or indirect change in Control of the body other than where the Ultimate Holding Company of the entity prior to the change in Control continues to be the Ultimate Holding Company of the body after the relevant change in Control. [CBH drafting note – see new clause 18.3.]</p> <p>[CBH drafting note – clause 1.5(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]</p> <p>[CBH drafting note – clause 1.5(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]</p>
Charges	<p>the Fixed Charge, Variable Charge, Light Engine Movement Charge and Overpayment Charge and any other amount payable by the Customer as set out in or calculated in accordance with Schedule 2, as varied from time to time in accordance with this Agreement.</p>
Claim	<p>a claim, demand, action or proceeding of any nature, whether actual or threatened and includes any claim for payment of money (including damages) arising otherwise in Law or in equity including by statute, in tort for negligence or otherwise.</p>
Commencement Date	[insert]
Confidential Information	<p>in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:</p> <p>(a) is by its nature confidential;</p> <p>(b) is stated in this Agreement to be confidential;</p>

Term	Meaning
	<p>(c) is designated by a party in writing as being confidential; or</p> <p>(d) the receiving party knows or ought to know is confidential, but excludes information which:</p> <p>(e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it;</p> <p>(f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or</p> <p>(g) has been independently developed or acquired by the receiving party.</p>
Consequential Loss	<p>(a) [CBH drafting note – this is already covered by clause 12.4 (which includes an appropriate carve-out, where the loss is caused by fraud, Wilful Default, or material breach of this Agreement. If this drafting was not deleted, it would negate the carve-out in clause 12.4.)] any indirect or consequential loss or damage, or special or punitive damages; and</p> <p>(b) any loss of business, loss of profit, loss of use, loss of business reputation, loss of opportunities (including loss of contract (except this Agreement) and loss of bargain (except this Agreement), loss of anticipated savings, wasted overheads, loss of production, loss of revenue, port, shipping or demurrage costs or fees, or damage to credit rating,</p> <p>howsoever arising and whether in any action in contract, tort (including negligence), equity, or product liability, under statute or any other basis.</p> <p>[CBH drafting note – the amendments to clauses 12.1, 12.2 and 12.4, and the proposed updates to clause 13.1, address this carve-out.]</p> <p>[CBH drafting note – this is not required (and therefore causes confusion) given clause 13.3 (and see additional drafting added to clause 13.1 which excludes Consequential Loss).]</p> <p>[CBH drafting note – the proposed updates to clause 13.1 address this carve-out.]</p> <p>[CBH drafting note – this is not required (and therefore causes confusion) given clause 12.5 (and see additional drafting added to clause 13.1 which excludes Consequential Loss).]</p> <p>[CBH drafting note – as drafted, this would enable an indemnified person to claim its (for example) loss of profit which it suffers due to it having to pay award damages to a third party (noting also that a third party means any person who is not party to this Agreement, and would include Arc's related bodies corporate). See proposed clause 13.1(b) which provides a more reasonable carve-out, and removes the risk of this paragraph having unintended and unreasonable consequences.]</p>
Control	has the meaning in the Corporations Act.
Corporations Act	the Corporations Act 2001 (Cth).

Term	Meaning
Customer Indemnified Parties	the Customer and its Personnel, but excluding any Operator.
Customer Product	means any product which by law can be transported on a Train Path. [CBH drafting note – Customer Product should be anything that by law can be transported on the network on a Train Path. By hardcoding what can be transported, the Agreement lacks flexibility and means that the Customer must seek Arc's agreement (and potential renegotiation) for any deviation in the product transported. Arc should be agnostic as to the product that is to be transported provided that it is safely transported, which this Agreement (and the various law) already provides for. If necessary, product differentiation is usually dealt with in access charges. This is consistent with other precedents such as the ARTC Track Access Agreement.]
Dangerous Goods Code	the Australian Code for the Transport of Dangerous Goods by Road and Rail prepared by the National Transport Commission (or successor body) from time to time.
	[CBH drafting note – this definition is not used in this Agreement and so is deleted.]
Default Rate	at the relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website (www.rba.gov.au) plus 3% per annum. [CBH drafting note – CBH considers a more reasonable rate is the cash rate plus 3%.]
Destination	<p>(a) for the Scheduled Train Paths, means the destination of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for Non-Scheduled Train Paths, means the destination of the relevant Train Path provided in accordance with this Agreement or otherwise agreed between Arc and the Customer (or the Operator on behalf of the Customer); and [CBH drafting note – this amendment is consequent on the addition of Non-Scheduled Train Paths.]</p> <p>(c) for all Light Engine Movements and other temporary or ad hoc entitlements (including train paths arising by reason of compliance with instruction from Arc to an Operator) to access the Network which are provided by Arc to an Operator on the terms set out in the relevant Operational Track Access Agreement, means the point on the Network specified in the instruction issued by Arc to the relevant Operator in accordance with the relevant Operational Track Access Agreement.</p>
Dollars, A\$ and \$	the lawful currency of the Commonwealth of Australia.
Economic Regulator	means the Economic Regulation Authority Western Australia.
Environment	has the meaning given the <i>Environmental Protection Act 1986</i> (WA) and 'Environmental' has a corresponding meaning.

Term	Meaning
Environmental Condition	any Environmental Harm or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Harm and which in Arc's opinion (acting reasonably) may result in Arc or any other person incurring any material liability or being subjected to a direction of any Government Agency.
Environmental Harm	any actual or threatened adverse impact or damage to the Environment and includes 'environmental harm' as defined in the <i>Environmental Protection Act 1986</i> (WA).
Environmental Law	all present and future Laws concerning Environmental matters including the Environmental Protection Act 1986 (WA), Conservation and Land Management Act 1984 (WA), Rights in Water and Irrigation Act 1913 (WA), Dangerous Goods Safety Act 2004 (WA), Contaminated Sites Act 2003 (WA), Planning and Development Act 2005 (WA), relevant local and regional planning schemes, Aboriginal Heritage Act 1972 (WA) and Environmental Protection and Biodiversity Conservation Act 1999 (Cth).
Expert	means an expert appointed pursuant to clause 14.4.
Expiry Date	23:59 hours on [insert].
Fixed Charge	means a fixed charge payable in respect of a Scheduled Train Path, as set out in and calculated in accordance with Schedule 2 and varied in accordance with Schedule 3.
Force Majeure	<p>any cause, event or circumstance (or combination of causes, events and circumstances) which:</p> <ul style="list-style-type: none"> (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, [CBH drafting note – it is unreasonable for an event that is reasonably predictable to qualify as an event of force majeure.] <p>including:</p> <ul style="list-style-type: none"> (d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide [CBH drafting note – The broad categorisation of heat as a force majeure event is not appropriate as heat is expected during certain periods of the year. A speed restriction is not a cause, event or circumstance. It is an operational decision made as a result of a cause, event or circumstance. The use of the phrase "adverse weather conditions" creates ambiguity when read with paragraph (k) of this definition which refers to "inclement weather" as these concepts seem the same. CBH has resolved this by deleting reference to 'adverse weather conditions' here and leaving paragraph (k) intact.]

Term	Meaning
	<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 the Industrial Action is on a national or state-wide basis, and not specific to the affected party's Personnel; [CBH drafting note – the requirement for the industrial action to last longer than 28 days to qualify as force majeure is highly unusual and inappropriate. As such it is not reasonable.]</p> <p>but does not include:</p> <p>(h) loss of customers or loss of market share;</p> <p>(i) the failure of, or the breakdown of or other damage to plant, machinery or infrastructure except to the extent as a result of a cause, event or circumstance set out in paragraphs (a) to (g) of this definition; or</p> <p>(j) 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 to by any acts or omissions by the a party'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>
Good Industry Practice	<p>those practices, methods and acts, as varied from time to time, that are commonly used by:</p> <p>(a) in the case of Arc exercising a right or power or performing an obligation, efficient railway owners in Australia; and</p> <p>(b) in the case of the Customer exercising a right or power or performing an obligation, efficient below rail customers in Australia. [CBH drafting note – the Agreement uses this phrase in various places (including proposed mark ups). CBH suggests it is a defined term.]</p>
Government Agency	<p>any government, parliament or any governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.</p>
GST	<p>any tax calculated by reference to the value of goods or services provided, calculated and levied at the point of sale or supply of the goods or services and includes GST as that term is used in the GST Act.</p>
GST Act	<p><i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and includes other GST related legislation.</p>
GTK	<p>a unit of measure representing the movement of the combined mass of Rolling Stock and any Customer Product on or in that Rolling Stock travelling over a</p>

Term	Meaning
	<p>distance of 1 kilometre. [CBH drafting note – the previous sentence is not correct. It is not “or” Customer Product. It is the combined mass of the Rolling Stock and any Customer Product travelling 1km. The examples given below are correct.]</p> <p><i>By way of example:</i></p> <p>(a) 1 tonne of unloaded Rolling Stock travelling over a distance of 1 kilometre is equal to 1 GTK.</p> <p>(b) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 1 kilometre is equal to 2 GTK’s.</p> <p>(c) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 5 kilometres is equal to 10 GTK’s.</p>
Guarantor	<p>the party described as the ‘Guarantor’ under the guarantee given in favour of the Customer under the Over-payment Rules from time to time in accordance with clause 5.7.</p>
Incident	<p>a breakdown, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:</p> <p>(a) material damage to or interference with the Network;</p> <p>(b) material damage to property;</p> <p>(c) material personal injury to any person;</p> <p>(d) an Environmental Condition;</p> <p>(e) a Category A or a Category B notifiable occurrence as defined in the regulations to the Rail Safety National Law;</p> <p>(f) an incident requiring notification under the Standards (as defined in the Operational Track Access Agreement) and/or the Dangerous Goods Code; or</p> <p>(g) an incident not already described in paragraphs (a)-(f) above and requiring notification under any Law relating to safety or the environment.</p>
Industrial Action	<p>A strike, lockout, stoppage, go slow, labour disturbance, demarcation, industrial dispute or other industrial action.</p>
Insolvency Event	<p>the occurrence of any of the following events in relation to a person:</p> <p>[CBH drafting note – this is an arbitrary amount and it will depend on the entity. In summary, an Insolvency Event is where the person cannot pay their debts. If the \$1 million judgement has this effect then it will be caught by the other provisions below. If not, it should not be a deemed an insolvency event and trigger a default and termination rights. This is consistent with the treatment of insolvency events in other regimes such as ARTC.]</p> <p>(a) the person suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act;</p> <p>(b) the person enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its</p>

Term	Meaning
	<p>creditors or any class of them other than for purpose of a bona fide reconstruction or amalgamation;</p> <p>(c) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a person or over any of the person's assets or undertakings;</p> <p>(d) an application or order is made for the winding up or dissolution of the person (other than an application which is stayed, withdrawn or dismissed within 10 Business Days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the person, except for the purpose of an amalgamation or reconstruction;</p> <p>(e) the person is deregistered or any steps are taken to deregister the person under the Corporations Act;</p> <p>(f) the person ceases to carry on business; or</p> <p>(g) any event analogous or having a substantially similar effect to any of the events described above happens in connection with that person.</p>
Law	<p>(a) Commonwealth, state and local government legislation, including regulations, by-laws, orders, awards and proclamations;</p> <p>(b) legislation of any other jurisdiction with which the relevant party must comply;</p> <p>(c) common law and equity;</p> <p>(d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and</p> <p>(e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.</p>
Liability	<p>(a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (reasonably incurred) and interest; and [CBH drafting note – a full indemnity basis means that all costs, even wasted ones, will be recoverable. This is not reasonable.]</p> <p>(b) if the context permits, also includes any claim or demand for the payment of money, whether liquidated or not.</p>
Light Engine Movement	<p>the movement of a Train instigated by the Customer for a primary purpose other than the transport of Customer Product, including:</p> <p>(a) Rolling Stock service or repairs;</p> <p>(b) retrieval and movement of failed Rolling Stock;</p> <p>(c) movement of replacement Rolling Stock, or movement of additional required Rolling Stock;</p> <p>(d) relocation or storage of Rolling Stock; or</p> <p>(e) testing or trials of Rolling Stock,</p> <p>save that Light Engine Movements do not include Services transporting Customer Product utilising a Scheduled Train Path. [CBH drafting note – this definition and</p>

Term	Meaning
	the definition below are consequent on moving the light engine charges from the OTAA to this agreement.]
Light Engine Movement Charge	a charge for the right to operate Light Engine Movements in accordance with clause 7, as set out in Schedule 2.
Maintenance Calendar	a document provided to the Customer by Arc and updated in accordance with clause Error! Reference source not found. , which sets out all planned repairs, maintenance or upgrading of the Network and, to the extent they are known, unplanned or emergency repairs, maintenance or upgrading of the Network. [CBH drafting note – see amendments to clause 8.3.]
Maintenance Standards	has the meaning in clause 7.1. [CBH drafting note – this definition is used in clause 7.1.]
	[CBH drafting note – this definition is used in clause 8.3(a) only where it is used for clarity (that is, that Arc can take Possession of the Network at any time to undertake repairs etc.) As such, it doesn't appear to be needed. CBH suggests it is deleted unless there is a clear rationale for it.]
	[CBH drafting note – clause 1.5(c) has been deleted which deals with Material Changes so this definition has been deleted.]
Maximum Track Axle Load	Unless otherwise agreed with Arc, the axle load limit for the relevant parts of the Network that Trains will travel on, as set out in Schedule 1. [CBH drafting note - this amendment is to provide flexibility to the definition.]
Maximum Train Length	the train length limit for relevant parts of the Network that Trains will travel on, as set out in Schedule 1.
Modern Slavery	has the meaning given to it in the <i>Modern Slavery Act 2018</i> (Cth).
Modern Slavery Laws	means all applicable Laws concerning Modern Slavery or similar matters including but not limited to the <i>Modern Slavery Act 2018</i> (Cth).
Month	a calendar month.
	[CBH drafting note – clause 1.5(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the calculation of Material Change.]
Net Tonne	a tonne of Customer Product carried by a Service (excluding the tare weight of the Train) operated on a Train Path.
Network	the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies Corporate from time to time.
	[CBH drafting note – the references to 'Network Lease' in clause 11 have been deleted.]

Term	Meaning
Nominated Route	[CBH drafting note – the references to Network Lessor have been deleted where they appear in this Agreement so this definition is not necessary.] that part of the Network in respect of which this Agreement provides access, being that comprised in the routes as listed in Schedule 1.
Non-Scheduled Train Paths	those Train Paths, other than the Scheduled Train Paths, that may be provided in accordance with this Agreement or otherwise agreed between Arc and the Customer (or the Operator on behalf of the Customer). [CBH drafting note – the agreement as drafted does not provide for Non-Scheduled Train Paths. These are an invaluable service which allow for efficient use of the Network and are important for Customers like CBH who operationally need access to Train Paths on an ad-hoc basis.]
Operational Track Access Agreement	an operational track access agreement between Arc and an Operator, pursuant to which Arc agrees that the Operator may utilise Train Paths granted to the Customer in accordance with this Agreement for the purposes of operating Services.
Operator	an Accredited above rail operator which may be the Customer itself, nominated by the Customer to Arc in writing, to operate some or all of the Train Paths, and described as the Operator in an Operational Track Access Agreement, and, where the Customer engages multiple Operators, includes all Operators where the context permits.
Origin	<p>(a) for the Scheduled Train Paths, means the origin of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for Non-Scheduled Train Paths, means the origin of the relevant Train Path as agreed between Arc and the Customer (or the Operator on behalf of the Customer); and [CBH drafting note – this amendment is consequent on the addition of Non-Scheduled Train Paths.]</p> <p>(c) for all Light Engine Movements and other temporary or ad hoc entitlements (including train paths arising by reason of compliance with instruction from Arc to an Operator) to access the Network which are provided by Arc to an Operator on the terms set out in the relevant Operational Track Access Agreement, means the point on the Network specified in the instruction issued by Arc to the relevant Operator in accordance with the relevant Operational Track Access Agreement.</p>
Over-payment Charge	A charge for an over-payment or an under-payment as set out in Schedule 2 and calculated pursuant to the Over-payment Rules.
Over-payment Rules	Arc's over-payment rules approved under the Rail Access Code and including any amendments to, or replacement of, those rules approved by the Economic Regulator from time to time.
Park	to stand a Train or Rolling Stock on the Network for any period longer than the usual standing time allowed for under a Train Path in accordance with the Train

Term	Meaning
	Management Guidelines. [CBH drafting note – the parking clauses in the OTAA have been moved to the CTAA and modified.]
Parking Request	has the meaning given in clause 23.
Personnel	the directors, officers, employees, agents, contractors and licensees provided that Arc's Personnel excludes the Customer, any Operator and their respective contractors.
Possession of the Network	closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading.
Rail Access Code	the <i>Railways (Access) Code 2000 (WA)</i> .
Rail Safety National Law	the <i>Rail Safety National Law (WA)</i> as applied by the <i>Rail Safety National Law Application Act 2024</i> , including the <i>Rail Safety National Regulations (WA) 2024</i> and the <i>Rail Safety National Law (WA) (Alcohol and Drug Testing) Regulations 2024</i> .
Reasonable Grounds	<p>reasonable grounds and, where Arc's consent is being sought, includes:</p> <ul style="list-style-type: none"> (a) the Varied Train Path or Non-Scheduled Train Path not being available because it is already allocated to another operator or customer; (b) the Varied Train Path or Non-Scheduled Train Path not being available because there is not sufficient capacity available on the Network to accommodate the Varied Train Path; [CBH drafting note – there is no need for Arc's reasonable opinion. There is either capacity or not.] (c) the Varied Train Path or Non-Scheduled Train Path not being able to be operated safely or effectively or efficiently in the opinion of Arc (acting reasonably); (d) the Varied Train Path or Non-Scheduled Train Path being exactly the same or similar to a train path that has already been removed pursuant to clause 8.4; or (e) where to consent to the proposal would, or is likely to, result in Arc breaching: <ul style="list-style-type: none"> (1) any obligations imposed by Law, including any Law relating to safety; (2) the <i>Railways (Access) Act 1998 (WA)</i> or the Rail Access Code; or (3) any agreement to which it is a party.
Related Body Corporate	has the meaning given to that expression in the Corporations Act.
Relevant Parking	has the meaning given in clause 23.
	[CBH drafting note – clause 1.5(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]

Term	Meaning
Rolling Stock	a locomotive, carriage, wagon or other vehicle permitted for use on the Network, as set out in Schedule 4 (as amended from time to time in accordance with clause 3.2(d)).
Safety Interface Agreement	has the meaning given in clause 6.3.
Scheduled Train Paths	an entitlement to access the Nominated Route by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and departure, transit and arrival times between the Origin and Destination, as set out in Schedule 1, and as may be amended from time to time in accordance with clause 7 of this Agreement and clause 9 of an Operational Track Access Agreement.
Secured Sum	an amount equal to three months of the annual Fixed Charge. [CBH drafting note – the secured sum should be hardwired into the standard access provisions. Otherwise, there is a potential for Arc to use this term to secure an unreasonable amount of security which would have the effect of hindering access to the Network. CBH considers that an appropriate amount of Security would be three months of fixed charges as this a reasonable number between that specified in ARTC standard terms (one month as per section 4.8(a) of the ARTC Track Access Agreement) and six months in schedule 1 of the QR Access Agreement.]
Security	<p>means:</p> <ul style="list-style-type: none"> <li data-bbox="568 1093 1426 1198">(a) an unconditional and irrevocable bank guarantee issued by a bank holding an Australian banking licence with an Acceptable Credit Rating; or <li data-bbox="568 1216 1426 1279">(b) a parent company guarantee, issued by a company with an Acceptable Credit Rating, <p>on reasonable terms for the Secured Sum. [CBH drafting note – hardwiring a bank guarantee is not reasonable. A bank guarantee will cost the Customer money to establish and maintain. There should be other options, such as a parent company guarantee which would still protect Arc but be less costly for the Customer. Consideration should also be given to having the form of agreement hard-wired into this agreement so the form of the guarantee is clear and parties and the ERA have visibility over its terms so there are no unreasonable terms which are included.]</p>
Security Provider	any person that has issued or provided any Security held by Arc.
Service	<p>The operation of a Train on the Network by an Operator.</p> <p>[CBH drafting note – the definition proposed by Arc is very narrow and means that the parties will have to re-negotiate a Train Path if there is any change in the Customer Product. This may be solved by having a wide definition of Customer Product, which CBH is also suggesting. However, the restrictions in the definition are not required and a wide definition is more appropriate. This agreement already has protections for Arc as to how the Network is used. This further restriction is not necessary or reasonable.]</p>

Term	Meaning
Train	the combination of Rolling Stock used to operate Services.
Train Management Guidelines	Arc's train management guidelines approved under the Rail Access Code and includes any amendments to, or replacement of, those approved by the Economic Regulator from time to time.
Train Path	<p>an entitlement to operate a Train on the Network in one direction from Origin to Destination, by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and to departure, transit and arrival times and includes the following types:</p> <ul style="list-style-type: none"> (a) the Scheduled Train Paths; (b) the Non-Scheduled Train Paths; (c) train paths provided pursuant to clauses 3.6 and 3.7 of an Operational Track Access Agreement; and (d) where the context permits, all other ad hoc or temporary entitlements to access the Network in accordance with this Agreement or an Operational Track Access Agreement or as otherwise agreed between the parties, <p>as granted, amended or varied in accordance with this Agreement or an Operational Track Access Agreement.</p>
Train Path Policy	means the Train Path Policy applicable to Arc, approved or determined pursuant to the Rail Access Code including any amendments to or replacements of that policy approved by the Economic Regulator from time to time.
Transport Agreement	an agreement between the Customer and an Operator for the provision of rail haulage services to transport Customer Product utilising the Scheduled Train Paths set out in Schedule 1 or Non-Scheduled Train Paths.
Ultimate Holding Company	has the meaning in the Corporations Act. [CBH drafting note – this concept is used in the new clauses dealing with the Over-payment rules and Change of Control.]
Variable Charge	means a variable charge payable per GTK transported on a Train Path calculated in accordance with Schedule 2.
Variable Rate	means the unit rate for calculating the Variable Charge applied to each GTK as set out in Schedule 2, as varied from time to time in accordance with Schedule 3.
Variation Date	the agreed date from which the Customer's entitlement to a Varied Train Path is to take effect.
Varied Train Path	a variation to a Scheduled Train Path requested or offered by a party pursuant to clause 7.
Weekly Planning Meeting	has the meaning in clause 3.3. [CBH drafting note – this is defined in the new clause 3.3.]
Wilful Default	any wilful, intentional, wanton or reckless wrongful act or omission carried out or omitted to be done with:

Term	Meaning
	(a) knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or
	(b) a reckless disregard for, wanton indifference to, or knowledge of, the harmful consequences of the act or omission.

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to one gender includes all genders;
- (c) a reference to a person includes a natural person, firm, body corporate, unincorporated association, partnership, joint venture and Government Agencies;
- (d) an obligation, liability, representation or warranty:
 - (1) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (2) on the part of two or more persons binds them jointly and severally;
- (e) a reference to a party to a document include that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) a reference to the consent of a party means the prior written consent of that party;
- (g) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (h) a reference to a clause, annexure or a schedule is a reference to a clause, annexure or schedule of this Agreement;
- (i) a thing (including any amount) is a reference to the whole and each part of it;
- (j) where any party comprises more than one person then all of those persons together as well as each of them individually must comply with that party's obligations under this Agreement;
- (k) a reference to any Law includes:
 - (1) that Law as amended or re- enacted;
 - (2) a statute, regulation or provision enacted in replacement of that Law;
 - (3) any regulation or other statutory instrument made or issued under that Law; and
 - (4) any amendment made to a statute, regulation or provision as a consequence of another statute, regulation or provision;
- (l) a reference to a clause, a schedule, an agreement or any other document, instrument, publication or code is a reference to the clause, schedule, agreement, document, instrument, publication or code as varied or replaced from time to time;
- (m) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (n) a reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not:

- (1) which ceases to exist; or
- (2) whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (o) a reference to 'includes' or 'including' must be construed without limitation;
- (p) a reference to termination of this Agreement includes the expiry of the term of this Agreement;
- (q) where time is to be reckoned by reference to a day or event, that day or the day of the event will be excluded;
- (r) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day;
- (s) where a word or expression is defined, cognate words and expressions will be construed accordingly;
- (t) when a party is performing its obligations and exercising its rights and powers under this Agreement, it must act in accordance with Good Industry Practice unless this Agreement otherwise explicitly provides; and [CBH drafting note – this rule of interpretation avoids the need for specifying Good Industry Practice throughout the document. This should be a standard which each party generally adopts as part of performing its obligations and exercising its rights and powers under this Agreement.]
- (u) whenever a party is exercising a right or power (including but not limited to any discretion, approval or consent), the party must act reasonably and without unreasonable delay in exercising that right or power. [CBH drafting note – safe and efficient operation of the network is likely to be best achieved if the parties are acting reasonably and without unreasonable delay with each other. Further, this simple rule of interpretation avoids the need to include reasonable qualifiers through the agreement, thereby making this agreement easier to read. If this clause is not included in this agreement, all references in this document to a party exercising a right or power (including but not limited to any discretion, approval or consent) should be amended to expressly state that the party must act reasonably and without unreasonable delay in exercising that right or power.]

[CBH drafting note – this clause should be deleted as it is inappropriate and therefore not reasonable. The Operator is not a party to the CTAA. The Operator's access rights and obligations under the OTAA are between Arc and the Operator and should not be capable of being overridden by the CTAA between Arc and the Customer to which the Operator is not a party. Arc can and should ensure the CTAA and OTTA are consistent rather than seeking to use this clause to circumvent the need to ensure consistency between the CTAA and the OTAA.]

1.3 Exclusion of the contra proferentem rule

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

1.4 Rail Access Code

- (a) Nothing in this Agreement requires a party to do (or omit to do) anything contrary to the Rail Access Code and the parties agree that they will comply with the Rail Access Code.
- (b) If there is any inconsistency between this Agreement and any Applicable Part 5 Instrument, this Agreement takes precedence over the Applicable Part 5 Instrument to the extent of that inconsistency unless this Agreement expressly provides otherwise. [CBH drafting note – these provisions have been amended to make the order of preference given to the various documents clear.]
- (c) The parties acknowledge and agree that, except where directed by the Economic Regulator in accordance with the Rail Access Code, it is in Arc's sole discretion if and when it may seek

approval of the Economic Regulator for any amendment or replacement of any Applicable Part 5 Instrument and, without limitation:

- (1) Arc's discretion continues unchanged at all times, irrespective of any previous amendments or replacements; and
 - (2) nothing in this Agreement prevents or limits Arc from requesting any such amendment or replacement (nor, having taken any preliminary steps with respect to any proposal,) requires Arc to proceed to seek approval for any amendment or replacement.
- (d) The parties acknowledge and agree that nothing in this Agreement restricts or prevents the Customer (or any party) from making submissions to the Economic Regulator in respect of any matter under or in connection with the Rail Access Code. [CBH drafting note –this amendment and the amendment to clause 17.2 is to ensure that the Customer can fully engage with the ERA in respect of this Agreement and the Rail Access Code.]

[CBH drafting note – this clause should be deleted as it is unreasonable. The standard access provisions (SAP) represent the starting point for negotiations of the access agreement. They do not represent the access agreement that has in fact been negotiated and agreed by the railway owner and access holder. CBH is concerned that this term potentially allows Arc to seek changes to the SAP which are different to what has been negotiated and agreed with access holders, then use the changed SAP as a basis to force change of the agreed access agreement.]

1.5 Productivity and efficiency variations

- (a) Subject to the terms of this Agreement and without prejudice to each party's rights in respect of this Agreement:
- (1) a party, during the term of this Agreement, may notify the other party of a proposed variation to this Agreement to promote, or accommodate, a demonstrable efficiency or productivity improvement (**Productivity Proposal**); and
 - (2) where a party is notified of a Productivity Proposal, that party must, in good faith and acting reasonably:
 - (A) consider that Productivity Proposal having regard to any relevant factors including the costs, benefits and impacts of the Productivity Proposal on each of the parties, on the Services and on the operation and use of the Network, and whether the Productivity Proposal would result in a capacity increase for the Network, or efficiency improvements in one or more elements of the supply chain; and
 - (B) if requested by the other party, participate in discussions concerning the Productivity Proposal with a view to determining what (if any) amendments to this Agreement the parties are willing to agree.
- (b) If, despite reasonable consideration, a party declines to pursue all or part of a Productivity Proposal after complying with clause 1.5(a), that party must provide written confirmation to the other party of its reasons for doing so.
- (c) If the parties agree to make amendments to this Agreement, the parties must do all things reasonably necessary to give effect to those amendments in accordance with this Agreement.

[CBH drafting note – this clause is taken from the QR Rail Standard Access Agreement (clause 1.3). It promotes efficiency through collaboration between the parties.]

2. Access Term

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

3. Train Paths

3.1 Grant to Customer of Train Paths

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

3.2 Nature and scope of rights

- (a) Nothing in this Agreement gives the Customer any right, title or interest of any proprietary nature in the Network.
- (b) The Customer's right to have an Operator utilise a Train Path is non-exclusive, however, no train of another user of the Network (other than the Customer's relevant Operator) will be allotted a train path which conflicts with a Train Path other than on an ad hoc basis where an Operator does not utilise that Train Path on a given day. [CBH drafting note - once a Non-Scheduled Train Path has been allotted, a Train Path that conflicts with that Train Path should not be allotted.]
- (c) Notwithstanding clause 3.1, the Customer's right to a Train Path (and to have a nominated Operator utilise a Train Path) is subject to:
 - (1) the terms of this Agreement (including clauses 6.3, 8.3, 10 and 11.3), including the exercise, or operation, of rights, entitlements, limitations or exclusions under any of them;
 - (2) the Operational Track Access Agreement being in force (and not being suspended in accordance with its terms), and a Safety Interface Agreement being in force, at the time the Train Path is to be utilised; [CBH drafting note – the word “effective” is of unclear legal meaning. CBH understands this to mean “in force”, hence the drafting change. The OTAA and SIA should be in force at the relevant time. It is not necessary for them to be in force at all times during the Access Term.]
 - (3) [CBH drafting note – the clauses above regarding satisfying obligations and compliance are inconsistent with clause 14.1 which requires the parties to continue to perform their obligations notwithstanding any dispute between them. In circumstances where the parties are in dispute as to compliance with this agreement, the Customer's right to utilise a train path should continue until that dispute has been resolved. For example, the Customer may consider that it has paid all charges, while Arc may consider that charges remain outstanding. In that situation, the Customer should have the right to continue to utilise train paths whilst that dispute is in the process of being resolved.]the Trains utilising the Train Paths being comprised of Rolling Stock (or such other combination of locomotives, carriages, wagons and other vehicles agreed to in writing by Arc); [CBH drafting note – this is consistent with the equivalent provision in the Track Access Agreement.]
 - (4) [CBH drafting note – this term is vague and therefore creates commercial uncertainty which in turn is likely to lead to disputes. For example, what is an emergency and what if the emergency was caused by Arc? This is better managed through other, more fulsome, terms of the contract such as the force majeure clause.]
 - (5) the Train Management Guidelines and Arc's Network Rules; and
 - (6) all applicable Laws.
- (d) Arc acknowledges and agrees that any variation of the Rolling Stock used to provide the Services under the Operational Track Access Agreement may only occur with the prior written consent of the Customer. If the Customer agrees to the variation, Schedule 4 of this Agreement will be taken to be varied accordingly. [CBH drafting note – the Customer needs to consent to a change in Rolling Stock given its importance to this agreement.]

3.3 Weekly Planning Meeting

- (a) The parties agree that:
 - (1) Arc will participate in a weekly meeting (**Weekly Planning Meeting**) with each Operator for the objective of having Arc negotiate and agree with the Operator on behalf of the Customer any requested variations to Scheduled Train Paths and requested allocation of Non-Scheduled Train Paths for the following week from Monday to Sunday (which when agreed, and together with the Scheduled Train Paths which have not been varied, will constitute the Weekly Train Path Plan);
 - (2) Arc and the Operator will dedicate appropriate and sufficient resources to the Weekly Planning Meeting to ensure it can function effectively and efficiently; and
 - (3) Arc and each Operator will use all reasonable efforts to negotiate and agree the Weekly Train Path Plan.
- (b) When the Weekly Train Path Plan has been agreed:
 - (1) as soon as reasonably practicable following the Weekly Planning Meeting, Arc will issue to the Customer and the Operator(s) a notice showing varied Scheduled Train Paths and Non-Scheduled Train Paths for the following week; and
 - (2) to the extent that circumstances arise which cause the Customer or an Operator to seek subsequent variations to a Weekly Train Path Plan, Arc will seek to accommodate those variations.

[CBH drafting note – this clause is suggested to be included as it creates the mechanism for allocating Non-Scheduled Train Paths which allows for more efficient use of the Network. It also encourages collaboration between the parties.]

4. Operational Track Access Agreement and Arc Network Rules

4.1 Operational Track Access Agreement

- (a) The Customer acknowledges and agrees that:
 - (1) the grant of Train Paths to the Customer in accordance with this Agreement does not, by itself, entitle the Customer to itself operate Services or run Trains on the Network;
 - (2) it may only utilise the Train Paths by nominating one or more Operators to use the Train Paths allocated to that Operator by the Customer, under the terms of an Operational Track Access Agreement; and
 - (3) it will execute an Operational Track Access Agreement where it is the Operator.. [CBH drafting note – the negotiation of the OTAA is something for the Operator and Arc to negotiate. It should not be a matter of the Customer having to procure the entry into the agreement.]
- (b) Arc acknowledges and agrees that it will enter into an Operational Track Access Agreement with an Operator on the same terms or substantially similar terms as the draft operational track access agreement in Annexure A. [CBH drafting note – there is an obligation on Arc to enter into the OTAA where there are multiple operators under clause 4.4 but not a single operator. These amendments make the obligations consistent.]
- (c) Arc agrees that no later than five Business Days after entering into an Operational Track Access Agreement with an Operator, it will forward a copy of that Operational Track Access Agreement to the Customer. [CBH drafting note – given the interrelationship between this Agreement and the OTAA, the Customer should have a copy of the final document so it can manage its obligations under this Agreement.]

4.2 Benefit of Operational Track Access Agreement

- (a) The parties acknowledge that the access rights granted by Arc to an Operator under an Operational Track Access Agreement are granted for the purpose of enabling the Operator to provide haulage services to the Customer under a Transport Agreement and accordingly the Customer derives a benefit from and has an interest in the access rights granted to an Operator under an Operational Track Access Agreement.
- (b) In order to recognise and allow the Customer to protect the benefit and interest of the Customer in an Operational Track Access Agreement, Arc acknowledges and agrees the following in favour of the Customer:
- (1) Arc must comply with its obligations under each Operational Track Access Agreement;
 - (2) subject to clause 4.3, Arc must not agree any variation of an Operational Track Access Agreement (and will not agree to any changes in accordance with the Operational Track Access Agreement) without the prior written consent of the Customer; [CBH drafting note – the OTAA should not be varied without the prior written consent of the Customer as the OTAA is entered into solely to enable the Customer to utilise its train paths.]
 - (3) Arc must provide the Customer with full details of any variation to an Operational Track Access Agreement as soon as reasonably practicable after the variation is made; and
 - (4) the Customer may seek specific performance by Arc of Arc's obligations under any Operational Track Access Agreement if Arc is in default of those obligations and Arc must not object to that action solely on the ground that the Customer is not a party to the Operational Track Access Agreement.
- (c) Arc must:
- (1) provide to the Customer a copy of any notice given by Arc under an Operational Track Access Agreement at the same time as the giving of that notice by Arc to the Operator;
 - (2) provide to the Customer a copy of any notice received by Arc under an Operational Track Access Agreement promptly (and in any event, within 1 Business Day); and [CBH drafting note – this is included as the Customer is generally involved in logistics planning and is impacted by any issues under the OTAA and therefore needs visibility.]
 - (3) notify the Customer of any other circumstance concerning an Operational Track Access Agreement promptly on becoming aware of any such circumstance (and in any event, within 1 Business Day of Arc becoming aware of the circumstance), [CBH drafting note – given the importance of, and interrelationship between, the OTAA and the CTAA and the issues below then all material communications should be provided to the Customer as soon as possible. Notices should be given to the Customer straight away as the Customer can be copied in on the notice or the notice can be immediately forwarded.]

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

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

4.3 Permitted changes to Operational Track Access Agreement

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

4.4 Multiple Operators

The parties agree and acknowledge that:

- (a) the Customer may, at its discretion but subject to clause 4.4(c) engage multiple operators (each an Operator under this Agreement) to transport Customer Product by rail utilising one or more of the Train Paths;
- (b) the same Train Path may be shared by multiple Operators to perform a Service; and [CBH drafting note – the Customer should have the discretion to engage multiple operators to utilise its pathways, if required.]
- (c) if the Customer engages multiple Operators to transport Customer Product:
 - (1) the Customer must, as a condition precedent to the relevant Operator gaining access to the Network and the Train Paths, procure that the Operator enters into an Operational Track Access Agreement with Arc;
 - (2) Arc must do all things reasonably within its power to enter into an Operational Track Access Agreement with each Operator on the same terms as the draft operational track access agreement in Annexure A or substantially similar terms as agreed by Arc; and [CBH drafting note – this should be within Arc's power as it is a fundamental obligation of Arc under this agreement and therefore should be absolute. Without the OTAA, the Customer cannot use its train paths.]
 - (3) the Train Paths allocated to each Operator must be clearly set out in Schedule 1 to each Operator's Operational Track Access Agreement.

4.5 Replacement Operational Track Access Agreement

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

- (a) to the extent Arc has not already provided it pursuant to another clause under this Agreement, Arc must give notice in writing to the Customer as soon as practicable and in any event with 1 Business Day of the expiry or termination; [CBH drafting note – this is consistent with the proposed amendments to clause 4.2(c)(3).]
- (b) the Customer must nominate in writing to Arc an alternate Accredited operator to enter into an Operational Track Access Agreement with Arc; and [CBH drafting note – the Customer should not have an artificial timeframe for this obligation. It is in the Customer's interest to ensure this occurs as soon as practicable.]
- (c) Arc must enter into a substitute Operational Track Access Agreement with the alternate Accredited operator (on the same terms as the draft operational track access agreement in Annexure A or on substantially similar terms as agreed by Arc) for all of the Train Paths previously allocated in the expired or terminated (as applicable) Operational Track Access Agreement within 1 Month of receiving the Customer's nomination in accordance with clause 4.5(b).

4.6 [CBH drafting note – this is not necessary and not reasonable. It is for the Customer to comply with its obligations in respect of an Operator. These are

matters between the Customer and its Operator(s). If the Transport Agreement is terminated or expires then the Operator must notify Arc under the OTAA.]Arc's Network Rules

- (a) Arc must provide to the Customer a copy of Arc's Network Rules in force at the date of this Agreement within 5 Business Days of execution of this Agreement. For the avoidance of doubt, Arc's Network Rules in force at the date of this Agreement must be reasonable and in accordance with Good Industry Practice.
- (b) Notwithstanding anything in Arc's Network Rules, this Agreement takes precedence over Arc's Network Rules to the extent of any inconsistency.
- (c) Arc agrees that it may only amend Arc's Network Rules from the version in force as at the date of this Agreement in accordance with this Agreement and only where required under the Rail Safety National Law or in accordance with Good Industry Practice.
- (d) If Arc amends the Arc Network Rules in accordance with Good Industry Practice:
 - (1) Arc must give written notice to the Customer of the amendment together with an explanation for the reason for the amendment; and
 - (2) the Customer must comply with the amended Arc Network Rules from the date that is the later of:
 - (A) the date notified by Arc that the amendments are to come into force;
 - (B) the date determined by the Expert or agreed by the parties (if the amendments are the subject of a dispute); and
 - (C) 30 days from the date the Customer receives the written notice of the amendments from Arc.
- (e) If the Customer considers that the amendments to Arc's Network Rules:
 - (1) increase the costs to the Customer of performing its obligations under this Agreement;
 - (2) create additional restraints or restrictions on the Customer accessing the Services or Train Paths under this Agreement; or
 - (3) are not consistent with clause 4.6(c),the Customer may notify Arc and the relevant technical personnel of each party must meet, within 5 Business Days after the notice is given, with a view to resolving the issue by joint discussions.
- (f) If the parties are unable to resolve the issue in accordance with clause 4.6(e) within 10 Business Days, either party may refer the matter to an Expert in accordance with clause 14.4.

[CBH drafting note – clause **Error! Reference source not found.** states the Customer's right to use a Train Path is subject to the Train Management Guidelines and Arc's Network Rules. The Train Management Guidelines are a regulated document so the Customer has protection against adverse amendment of that document. However, Arc's Network Rules are able to be amended without oversight. CBH has inserted this clause to address this lack of protection. The clause provides flexibility for Arc to amend the Network Rules so they can appropriately manage the Network but provides guidance as to the types of amendments Arc may introduce so the purpose of the document is clear and the Customer is protected. The amendments also make it clear that this Agreement prevails over Arc's Network Rules to the extent of any inconsistency to ensure that future amendments cannot cut across this Agreement.]

5. Charges, invoices and payment

5.1 Invoices and payment of Charges

- (a) Arc will invoice the Customer for the Charges, and any other amounts which are payable under this Agreement, at the times, and in the manner, provided for in Schedule 2.
- (b) The Customer must pay the Charges and all other amounts which are payable under this Agreement:
 - (1) at the times otherwise specified in this Agreement;
 - (2) in immediately available funds;
 - (3) to Arc;
 - (4) at the place and in the manner reasonably required by Arc; and
 - (5) no later than 5pm local time in the place where payment is to be made.

[CBH drafting note – this is not reasonable. Customers should be obliged to pay if a request for payment has been made, particularly in circumstances where there are variable charges.]

- (c) If:
 - (1) any notice requesting payment for any amount; or
 - (2) this Agreement,

does not specify when a payment is due, it is due within 15 Business Days after the notice requesting payment is given.

- (d) If the Customer does not make a payment by the time that it is due under this Agreement (excluding any payments in dispute pursuant to clause 5.3), then Arc will give notice in writing requiring the non-payment be remedied, if the Customer fails to remedy the default within the time specified (which shall not be less than 21 days) Arc may immediately suspend the Customer's rights to access the Network pursuant to this Agreement until the overdue payment is made.

5.2 Review and Variation of Charges

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

5.3 Disputes regarding amounts payable under this Agreement

- (a) Where there exists a bona fide dispute in relation to any amount payable pursuant to this Agreement: [CBH drafting note – there may be circumstances in which an invoice is not issued, hence the deletion of the reference to invoice.]
 - (1) if the party disputing the amount payable does not dispute part of the amount claimed, that party must pay the amount that is not in dispute within the time required for payment; and [CBH drafting note – the original drafting assumes invoices will be issued with multiple line items which may not be the case.]
 - (2) the party who is claiming payment may refer the dispute in respect of the disputed amount for resolution in accordance with clause 14. [CBH drafting note – it is appropriate for the party claiming payment to elect whether to refer the matter to dispute, not the party who is disputing payment.]
- (b) If the resolution of the dispute in accordance with clause 14 determines that a party must pay an amount to the other party, the amount must be paid to the other party within 5 Business

Days after resolution of that dispute together with interest calculated in accordance with clause 5.5 (provided that for the purposes of calculating that interest, the due date for payment is deemed to be the date when the amount in dispute would have been due and payable but for the dispute).

5.4 No Set Off

A party may set off against any amounts due to the other party any amount which is due and payable by that party to the other party under this Agreement. [CBH drafting note – a prohibition on set off is not consistent with other standard access agreements such as ARTC and QR. It is more reasonable to allow set off between the parties.]

5.5 Interest

- (a) A party must pay interest on any amounts due to the other party under this Agreement (including all amounts properly included in an invoice) which are not paid when due.
- (b) Interest:
 - (1) will accrue daily at the rate per annum equal to the Default Rate;
 - (2) will be computed from and including the day when the money on which interest is payable becomes owing until but excluding the day of payment of that money;
 - (3) will be calculated on the actual days elapsed; and
 - (4) must be paid on demand.
- (c) If the resolution of a dispute under clause 5.3(a) is determined in the disputing party's favour, then:
 - (1) if the disputed amount has not been paid by the disputing party as at the date the dispute is resolved - no interest is payable; or
 - (2) to the extent the disputed amount has already been paid by the disputing party – the other party must repay that amount to the disputing party together with interest calculated in accordance with clause 5.5(b). [CBH drafting note – this balances the clause so that it is clear that the other party must pay interest if the amount that has been paid is not correct.]

5.6 GST

- (a) Except where the context suggests otherwise, terms used in this clause 5.6 have the meanings ascribed to those terms by the GST Act.
- (b) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 5.6.
- (c) Unless otherwise expressly stated, all Charges and other amounts due and payable under this Agreement are exclusive of GST. Any amounts that are specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 5.6.
- (d) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
- (e) Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

- (f) If GST is payable on a supply made by a party (**Supplier**) under or in connection with this Agreement, the party providing consideration for that supply (**Recipient**) must pay an additional amount to the Supplier equal to the GST payable in relation to the supply.
- (g) Any additional amount referred to in clause 5.6(f) must be paid by the Recipient at the same time as any other consideration is to be first provided for that supply provided the Supplier has issued to the Recipient a tax invoice complying with the relevant Law relating to that GST prior to the due date for payment.
- (h) [CBH drafting note – If the Supplier is registered for GST, there should be no reason they cannot recover any GST they incur and no reason to pass this on to the Recipient, unless they do not correctly obtain tax invoices. The Recipient should not have to indemnify the Supplier if the Supplier does not correctly obtain appropriate documentation.] If the GST payable on a supply made under or in connection with this Agreement (not taking into account any consideration that is inclusive of GST) varies from the additional amount paid by the Recipient under clause 5.6(f) in respect of that supply (as adjusted to take account of any previous payment made pursuant to this paragraph), then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any amount payable under this clause 5.6(i) must be paid no later than 10 Business Days after the Supplier provides an adjustment note to the other party.

5.7 Over-payment Rules

- (a) Arc agrees that it will comply with the Over-payment Rules.
- (b) Where there is a risk that the Arc may not have the financial ability to perform its obligations under this Agreement, the Customer may, by written notice, require Arc to procure from its Ultimate Holding Company or a parent entity with an Acceptable Credit Rating, a parent company guarantee in a form reasonably required by the Customer.
- (c) Arc will procure the parent company guarantee and provide it to the Customer within 10 Business Days of the Customer providing notice under clause 5.7(b).

[CBH drafting note – this is a simple clause which recognises that the Customer may be owed money as per the Over-payment Rules. It provides for a guarantee which may be satisfied by another entity in the group if it is administratively easier and cheaper than a bank guarantee. It is not reasonable for only the Customer to have obligations to provide security.]

6. No overloading of wagons

[CBH drafting note – Arc has a legitimate concern that any wagons are not, so far as reasonably practicable, overloaded and are also evenly loaded. CBH has amended clause 6.1 to reflect that legitimate concern. The amendments are required because the clause as originally drafted is unreasonable as it goes beyond that legitimate concern and seeks to impose unfair obligations on the Customer. The clause as originally drafted is also confusing. More specifically, it is fair for the loading obligation duty to be the same as the work health and safety duty, being “so far as is reasonably practicable”, as opposed to an absolute duty as proposed by Arc. It may not be reasonably practicable for the Customer to know with absolute certainty what has been loaded. However, the Customer should be obliged to ensure that, so far as reasonably practicable, the limit is not exceeded. The same principle ought to apply to even loading.]

6.1 No overloading

The Customer must ensure that, so far as is reasonably practicable, the axle load for any wagon or carriage comprised in a Train operated by an Operator under the Operational Track Access Agreement does not exceed the lowest of: [CBH drafting note - CBH has deleted the phrase “or likely to be operated” as it does not make sense. The issue of wagon axle load only arises for actual overloading, not theoretical overloading.]

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

6.2 Train loading

The Customer must ensure that, so far as is reasonably practicable [CBH drafting note - the phrase "loading system" is ambiguous and unnecessary. How the Customer / their Operator elect to load is a matter for them, provided they do not overload. Further, it is unreasonable to seek to have such an ambiguous concept in place prior to and at all times during the access term. What happens before the time of loading is not relevant.]

- (a) all wagons or carriages comprised in a Train are loaded so that not more than inconsequential amounts of Customer Product, freight or material being loaded into or hauled on or in a Train operated by the Operator falls, leaks, spills, emits or escapes from the Train or become deposited on or adjacent to the Network.
- (b) For the purposes of clause 6.2(a)(5), "**inconsequential amount**" means an amount that does not result in or lead to:
 - (1) damage to the Network;
 - (2) an injury, or the potential for injury, suffered by people on or adjacent to the Network, whether Arc Personnel or members of the public;
 - (3) a breach, contravention or offence of any Environmental Law; or
 - (4) a breach, contravention or offence of any Environmental Condition.

6.3 Entry into Safety Interface Agreement(s)

Arc and the Customer acknowledge and agree that prior to a Service being operated by an Operator, Arc and the relevant Operator must enter into a safety interface agreement for the purpose of identifying any risks to safety in relation to railway operations pursuant to section 105 of the Rail Safety National Law (**Safety Interface Agreement**). [CBH drafting note – There needs to be a standard form Safety Interface Agreement attached to the OTAA. Otherwise, there is no oversight on the terms and, given that a Service is subject to the entry into a Safety Interface Agreement, it would operate to avoid the regime in section 47A of the Code.]

7. Repairs and maintenance of the Network

7.1 Maintenance Standards

- (a) Arc must at all times maintain the Network (but only in so far as the Network is relevant to the Train Paths provided) to the highest of:
 - (1) the standard existing as at the Commencement Date of this Agreement;
 - (2) the minimum standard required to maintain its Accreditation as an Accredited Owner;
 - (3) the minimum standard required to perform the Services; and [CBH drafting note – this amendment and the amendments to this clause 7 are to ensure that the network is fit for purpose and to ensure that the Customer has visibility over the standard of the network. They are based on a similar regime in the ARTC Undertaking which requires ARTC to maintain the Network in a condition which is fit for use by the Operator to provide rail transport services (clause 6.1 ARTC TAA) and the QR standard access agreement which requires QR to carry out maintenance work so the operator can operate train services in accordance with the agreement (clause 7.1). The amendments are intended to address a key shortcoming in the provision of services under the regime which is that Arc has an obligation to maintain the network yet there is no mechanism for the Customer to track this and ensure performance standards for Services are being maintained. This pushes the risk associated with maintenance standards of the Network to the Customer and users which is not reasonable.]
 - (4) any other standards as the parties may agree in writing from time to time,

(Maintenance Standards).

7.2 Operating Restrictions

Arc may impose operating restrictions for safety reasons where required by the condition of the Network (but only so far as the Network is relevant to the Train Paths provided) giving notice of speed and weight restrictions, to the Operator, and the Operator must comply with such notice. To avoid doubt, nothing in this clause limits the obligation on Arc to comply with the Maintenance Standards or any other term of this Agreement. [CBH drafting note – this clause is not reasonable as it gives Arc a unilateral right to fundamentally undermine the rights of the Customer. Arc has an obligation to maintain the Network to the standard set out in cl 7.1. Arc should not be able to unilaterally impose operating restrictions on the Customer in the unconstrained manner permitted by this clause, particularly if restrictions are due to Arc's failure to maintain. A structured and fair regime is needed in respect of maintenance of the network. This clause and clause 8.3, as amended by CBH, provides that regime.]

7.3 Key Performance Indicators

In addition to any information required to be made available by Arc in accordance with the Rail Access Code, Arc will provide monthly reports to the Customer documenting Arc's performance against the performance indicators as set out in Schedule 5.

[CBH drafting note – this clause is intended to provide the Customer with some measure of the physical condition and performance of the Service being provided by Arc and paid for by the Customer. Without the ability to efficiently monitor the physical condition and performance of the Network through KPIs, Customers have very little ability to hold Arc accountable to specified maintenance standards. KPIs are a common provision in standard track access agreements. See for example clause 6.7 of the QR standard access agreement or clause 2.10 of the ARTC access agreement.]

8. Variations or cancellations of Train Paths

8.1 Temporary variations to Train Paths

The Customer acknowledges and agrees that:

- (a) the Train Paths may be temporarily varied under an Operational Track Access Agreement by instruction from Arc to the relevant Operator (and copied to the Customer): [CBH drafting note – if there is an issue with the Train Paths then the Customer should be aware as soon as possible.]
 - (1) for the purpose of preventing any actual or reasonably likely:
 - (A) breach of Arc's Network Rules or of clause 12 of an Operational Track Access Agreement by an Operator or of similar safety requirements by other operators on the Network;
 - (B) damage to the Network;
 - (C) injury to any person or material damage to any property; or
 - (D) delay to the progress of trains on the Network (but only insofar as any trains operated by an operator pursuant to a separate agreement have priority over the Operator's trains, under the Operational Track Access Agreement, having regard to the Train Management Guidelines); or
 - (2) for the purpose of preventing, or in response to, any actual or threatened breach by an Operator of any of its material obligations under an Operational Track Access Agreement;
- (b) the Train Paths may be temporarily varied under an Operational Track Access Agreement by instruction from Arc to the relevant Operator for the purpose of giving effect to an agreement for a temporary variation between Arc and the Customer, where the variation does not comprise:

- (1) any change to the origin or destination of a Train Path;
 - (2) any additional distance across the Network upon which the Train Path is intended to traverse; or
 - (3) in effect a new Train Path, including an Additional Train Path (as reasonably determined by Arc);
- (c) a temporary variation, change or adjustment of the Train Paths in accordance with an Operational Track Access Agreement has the effect of suspending the Customer's entitlement to all corresponding Train Paths in this Agreement for the duration of such temporary variation, change or adjustment; and
- (d) Neither party is liable to the other party for any Claim, and neither party must make any Claim against the other party, in respect of any loss suffered or incurred by the party in connection with any temporary variation, change or adjustment of the Train Paths under an Operational Track Access Agreement or this Agreement except to the extent the need for the temporary variation, change or adjustment was caused or contributed to by the other party or its Personnel.

8.2 Permanent variations to Train Paths by agreement between the parties

- (a) Subject to any agreement under clause 3.3, this clause 8.2 sets out the procedure to be followed by the parties if it is intended that a Scheduled Train Path be permanently varied for a particular time.
- (b) A party (**Requesting Party**) may give a written notice (**Variation Request**) to the other party (**Notified Party**) stating:
- (1) that the Requesting Party wishes to vary a Scheduled Train Path;
 - (2) the length of time the variation is proposed to be in force;
 - (3) the proposed date for commencement of the Customer's entitlements to the Varied Train Path; and
 - (4) the reason or reasons for the proposed variation.
- (c) Promptly following receipt by the Notified Party of the Variation Request, the parties (each acting reasonably) will attempt to agree the following:
- (1) any changes that must be made to the Train Paths to accommodate the Varied Train Path;
 - (2) the Variation Date and the length of the variation; and [CBH drafting note – as drafted this clause does not account for the fact that the variation could have a time limit. The clause has been amended to reflect this.]
 - (3) any other amendments to this Agreement required as a consequence of varying that Train Path.
- (d) A party may only withhold its consent to a Variation Request on Reasonable Grounds.
- (e) [CBH drafting note – this would be covered by clause 8.2(d) in any event as it would be a reasonable ground.] If the parties are able to agree the matters set out in clause 8.2(c), then:
- (1) this Agreement will be amended in accordance with clause 22.5 to reflect the agreed matters;
 - (2) the variations to this Agreement will become effective from the Variation Date and will continue for the period agreed, after which time they will revert to the previous Train Path; and

- (3) from the Variation Date and for the period agreed:
 - (A) the relevant Operator will be entitled to utilise each Varied Train Path and for the avoidance of doubt each Varied Train Path will be a Scheduled Train Path; and
 - (B) Arc will charge the Customer for each Varied Train Path in accordance with Schedule 2 and Arc will invoice the Customer for the Varied Train Path in accordance with clause 5.1.
- (f) If Schedule 1 of this Agreement is amended in accordance with this clause 8.2, Arc must give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.
- (g) If the parties are unable to agree any of the matters set out in clause 8.2(c), then:
 - (1) Arc is not obliged to make the Varied Train Path available to the Customer; and
 - (2) this Agreement will remain unchanged.
- (h) The parties acknowledge and agree that, where a Variation Request does not comprise:
 - (1) any change to the origin or destination of a Train Path;
 - (2) any additional distance across the Network upon which a Train Path is intended to traverse; or
 - (3) in effect any new Train Path, including an Additional Train Path (as reasonably determined by Arc),

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

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

- (a) Arc may perform repairs, maintenance or upgrading of the Network and take Possession of the Network in accordance with the Train Management Guidelines and this Agreement. To the extent this Agreement is inconsistent with the Train Management Guidelines, this Agreement will take priority.
- (b) Arc must:
 - (1) have in place a Maintenance Calendar at the commencement of this Agreement which, at a minimum, sets out the repairs, maintenance, upgrading or Possessions planned or known to Arc for the upcoming 12 months; and
 - (2) maintain and update that Maintenance Calendar on a rolling basis so that at all times it sets out the repairs, maintenance, upgrading or Possessions planned or known to Arc for the upcoming 12 months. [CBH drafting note – this is a simplified version of the regime in the QR Access Undertaking 3. It provides certainty for the parties without being onerous on Arc. Having adequate notice is an issue for customers and operators and this clause is intended to provide transparency to parties to enhance efficiency.]
- (c) At the commencement of this Agreement, Arc and the Customer will meet to discuss the scheduling of repairs, maintenance and upgrades to the Network and to the Customer's plant and take all reasonable steps to minimise the disruption to one another. Following that, Arc will create a proposed Maintenance Calendar which sets out the known and forecast repairs, maintenance and upgrading of the Network for the coming year.

- (d) Throughout the Access Term, the parties agree that they will work together in the scheduling of repairs, maintenance and upgrades to the Network and to the Customer's plant and take all reasonable steps to minimise the disruption to one another. Each party further agrees that it will invite the other party to participate in the party's regular maintenance planning meetings to assist the other party to plan repairs, maintenance or upgrades, where practicable, during the party's maintenance shutdowns.
- (e) Arc must, as soon as possible after Arc plans or becomes aware, update the Maintenance Calendar to:
- (1) include any planned repairs, maintenance or upgrading provided Arc provides at least the notice in the Train Management Guidelines;
 - (2) set out forecast planned maintenance or upgrading of the Network; and
 - (3) include urgent repairs, maintenance or upgrading due to emergencies.
- (f) Arc is not required to obtain the Customer's consent to undertake repairs, maintenance or upgrades:
- (1) if they are urgent repairs, maintenance or upgrades due to emergencies; or
 - (2) they are included in the Maintenance Calendar. [CBH drafting note – the intent of this clause is to provide transparency over repairs and upgrading and to require collaboration between the parties.]
- (g) If repairs, maintenance or upgrading of the Network, or taking Possession of the Network, are reasonably likely to materially affect the Train Paths and are required other than because of urgent repairs, maintenance or upgrading due to emergencies related to safety or natural events, Arc must, prior to commencement of the works:
- (1) take all reasonable steps to minimise any disruption to the Train Paths; and
 - (2) use reasonable endeavours to provide alternative Train Paths.
- (h) If the repairs, maintenance or upgrading activities:
- (1) can be carried out without affecting the use of Train Paths, Arc is not obliged to give prior notice to the Customer or include such repairs, maintenance or upgrading activities in the Maintenance Calendar;
 - (2) otherwise, Arc must give notice in accordance with the timeframes set out in the Train Management Guidelines including advising the Customer as soon as practicable of:
 - (A) the circumstances;
 - (B) the likely impact on Train Paths; and
 - (C) the likely duration of the Possession of the Network.
- (i) Any notice given under clause 8.3(h)(2) must describe:
- (1) the extent and nature of the works;
 - (2) the potential effect on Train Paths; and
 - (3) what alternative arrangements are proposed by Arc.
- (j) If any repair, maintenance or upgrading activity notified by Arc is not achievable within the anticipated timeframe Arc must:
- (1) as soon as is reasonably practicable notify the Customer; and

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

[CBH drafting note – this has been deleted as collaboration has been addressed above]

8.4 Cancellation of Train Paths for under-utilisation

- (a) Arc will monitor utilisation of Scheduled Train Paths over a 3 month period (**Monitoring Period**).
- (b) If a Scheduled Train Path has not been utilised during the Monitoring Period, Arc must give written notice to the Customer each time that the Scheduled Train Path has been identified as under utilised.
- (c) If the Scheduled Train Path has not been utilised as prescribed in this Agreement more than 6 times in aggregate in a six month period from the date of the notice referred to in clause 8.4(b), then Arc may issue the Customer with a written notice confirming the Scheduled Train Paths as under utilised at the end of that period (**Under- utilisation Notice**).
- (d) A Scheduled Train Path has not been utilised within the meaning of clauses 8.4(a) and 8.4(b) if the Operator has failed to:
 - (1) present a Train at the scheduled entry point onto the Network;
 - (2) operate the relevant Train so that it completes its full journey; or

[CBH drafting note – operational circumstances may require a different train configuration to be used but this should not mean that the Train Path has not been utilised.]

- (e) If the Scheduled Train Path has not been utilised during the relevant time periods described in clause 8.4(b) or 8.4(c) due to:
 - (1) Force Majeure affecting Arc, the Customer or the Operator;
 - (2) the failure of Arc to make the relevant Train Path available; or [CBH drafting note – this may lead to arguments as to whether the Customer or Operator was ready. The relevant question is whether the Train Path was available.]
 - (3) temporary changes or variations to the Scheduled Train Paths agreed by the parties in writing,

then the relevant time period will be extended by such period as is required for Arc to make available to the relevant Operator the Train Paths that were not utilised for any of the above reasons.

- (f) Once:
 - (1) a Scheduled Train Path has been confirmed as being under utilised pursuant to clause 8.4(c), and
 - (A) there is another operator who wishes to use the Train Path (or any part thereof); and
 - (B) there is no capacity to accommodate the operator if the Train Path is not cancelled, [CBH drafting note – a Train Path should only be cancelled if there is demand for it. An under-utilised Train Path is still being used (just not as frequently as Arc would like) and if there is no alternate demand then it is not hindering or stopping access. In these circumstances, the threat of cancellation is not appropriate as it may be used to renegotiate or amend the Agreement.]

Arc may give notice in writing to the Customer:

- (2) deleting the Scheduled Train Path (including the reasons for the deletion); or

- (3) varying the Scheduled Train Path to the nearest otherwise available time; and
 - (4) subject to any Dispute over the reasons for the cancellation, Schedule 1 will be taken to be amended accordingly; and
 - (5) Arc will give notice to the relevant Operator and must, as soon as reasonably practicable but subject to any Dispute over the reasons for the cancellation, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.
- (g) If Arc's notice under clause 8.4(f) is to vary the Scheduled Train Path to the nearest otherwise available time:
- (1) Arc will consult with the Customer on the Varied Train Path to be offered to the Customer; and
 - (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, but the Customer is not required to accept the Varied Train Path. [CBH drafting note – the amendments provide for more flexibility and greater efficiency for the network as they allow the Train Path to be moved to fit with the Customer's schedule rather than be deleted (which is a blunt remedy).]
- (h) Prior to Arc issuing a notice pursuant to clause 8.4(f), Arc will provide the Customer with an opportunity to:
- (1) provide any relevant evidence in relation to the under utilisation, or
 - (2) demonstrate to Arc's reasonable satisfaction a bona fide future requirement for that Train Path,

and Arc must take the Customer's response into account.

- (i) If the Customer demonstrates that the Train Path was not under utilised or there is a bona fide future requirement for that Train Path (for example, because the Customer will have, in the future, Customer Product for transportation by the Operator on the Train Path) then Arc must not delete that Scheduled Train Path. [CBH drafting note – there was no guidance as to what Arc may take into account and no requirement for Arc to consider the Customer's submissions. This seeks to address this in a light-handed way.]
- (j) Nothing in this Agreement requires Arc to reserve rights in favour of the Customer (or any Accredited operator it has nominated, or may in future wish to nominate) to operate a future train path.
- (k) Arc may terminate this Agreement on 5 Business Days' written notice to the Customer if, upon deletion of Scheduled Train Paths for under utilisation pursuant to this clause 8.4, there are no remaining Scheduled Train Paths.
- (l) This clause 8.4 does not limit Arc's rights under clause 11.

8.5 Review of Train Paths

- (a) Train Paths will be subject to review and variation in accordance with this clause 8.5.
- (b) Arc may 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 meet to discuss the reasons and, if the material differences are likely to continue, 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. [CBH

drafting note – if the Train Path is to be amended then it should be on the basis that the issue will continue.]

- (d) In clause 8.5(c), “**differ in material respects**” means, in relation to a Train Path, that the Service regularly fails to:
 - (1) be ready for entry to the Network within 15 minutes of the scheduled departure time; and/ or
 - (2) although entering the Network on time, the Service fails to exit the Network within 15 minutes of the scheduled time, where the Train Path was available, and the Services was not otherwise excused from performing. [CBH drafting note – these amendments are intended to make this Agreement consistent with the Train Management Guidelines (section headed "Approved Train Management Principle").]
- (e) Arc is not required to agree any Varied Train Path under clause 8.5(c) if there are Reasonable Grounds for withholding its consent.
- (f) The Customer is not required to accept a Varied Train Path offered by Arc under clause 8.5(c) if contractual obligations owed by the Customer to any person (including Arc) would prevent it from doing so.
- (g) In relation to any review under this clause 8.5, no account will be taken of performance which is affected by Force Majeure or the failure by Arc to make the Train Path available, temporary variations to the Train Path agreed by Arc and the Operator under the Operational Track Access Agreement or the mechanical failure of an Operator’s equipment.
- (h) If the parties agree under clause 8.5(c) to vary a Train Path, then:
 - (1) this Agreement must be amended in accordance with clause 22.5 to reflect the agreed matters;
 - (2) the variation to this Agreement will become effective from the Variation Date; and
 - (3) from the Variation Date:
 - (A) the relevant Operator will be entitled to utilise each Varied Train Path and for the avoidance of doubt each Varied Train Path will be a Scheduled Train Path; and
 - (B) Arc will charge the Customer for each Varied Train Paths in accordance with Schedule 2 and Arc will invoice the Customer for the Varied Train Path in accordance with clause 5.1.
- (i) If Schedule 1 of this Agreement is amended in accordance with this clause 8.5, Arc must give notice to the relevant Operator and must, as soon as reasonably practicable, amend schedule 1 in the relevant Operational Track Access Agreement to keep that schedule consistent with Schedule 1 of this Agreement.

8.6 Customer Cancellation of Services

- (a) The Customer may cancel a Train Path without penalty and in addition to, and without prejudice to, the Customer’s right to damages for Arc’s failure to provide a Train Path, if Arc has failed to provide the Train Path to the Customer, other than where:
 - (1) the Train Path was not provided because of a negligent or wrongful act or omission of the Customer or the Operator;
 - (2) the Train Path was cancelled due to late running trains caused by an act or omission of the Customer or the Operator;
 - (3) the Train Path was not provided due to Network access being suspended pursuant to clause 5.1(d);

- (4) the Train Path was not provided because of a Force Majeure event affecting the Customer.

[CBH drafting note – this clause is too narrow. The Customer should be able to cancel a Train Path without penalty where the Train Path is not provided by Arc other than in circumstances that are the fault of the Customer or Operator. Further, relief from the fixed charge ought not be the Customer's sole remedy for Arc's breach. The Customer should also have a right to claim damages for loss it may have suffered as a result of Arc's breach, which will of course be subject to any limitations or exclusions of liability under this agreement such as the exclusion regarding consequential loss.]

- (b) The Customer may cancel a Train Path without penalty if neither Arc nor any other operator intends to use the Train Path (or any part thereof). [CBH drafting note – the Customer should be able to cancel a Train Path without penalty where there is someone else who may use it.]
- (c) Arc may use a Train Path which becomes available because of the cancellation of a Service by the Customer for any purpose, including the giving of access to the Network to any other customer or operator pursuant to a separate agreement.

8.7 Reporting of cancelled Services

Arc will, within 7 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 utilised as a result of:

- (a) the failure of Arc to make the relevant Train Path available
- (b) Force Majeure affecting Arc, the Customer or the Operator; or
- (c) temporary changes or variations to the Scheduled Train Paths agreed by the parties in writing, during the previous Month including the following for each relevant Service:
- (d) scheduled Train ID;
- (e) date of scheduled departure;
- (f) scheduled origin; and
- (g) the reason the Train Path was not provided.

[CBH drafting note – given the importance of Train Paths and the ability of Arc to cancel them, there should be transparency over which Train Paths were not utilised as a result of matters outside the control of the Customer or by other arrangement. These criteria match the criteria in clause 8.4(e).]

8.8 Fixed Charges not payable for cancelled Train Paths

In addition to, and without prejudice to, the Customer's right to claim damages for Arc's failure to provide a Train Path, the Customer will not be liable to pay Fixed Charges where a Train Path is:

- (a) cancelled by Arc, other than where the circumstances described in clauses 8.6(a)(1) to (4) have occurred; or
- (b) cancelled by the Customer pursuant to clause 8.6 or because the Train Path was provided conditional upon operating restrictions which were not in accordance with this Agreement.. [CBH drafting note – it is not reasonable for Arc to be entitled to charges in these circumstances. It should also be made clear that relief from the Fixed Charge is not the Customer's sole remedy for the reason described above. This is consistent with the treatment of Fixed Charges in other regimes.]

8.9 Light Engine Movements

[CBH drafting note – this clause has been moved from the OTAA.]

- (a) Upon request by the Customer, Arc will use reasonable endeavours, subject to the Train Management Guidelines, grant the Customer a Train Path for the operation of a Light Engine Movement by the Operator using that Train Path.
- (b) Where Arc grants the Customer a Train Path for the operation of a Light Engine Movement by the Operator then the Customer must pay to Arc the Light Engine Movement Charge in accordance with Schedule 2.

9. Insurances

The Customer must, at its expense, take out and maintain current at all times during the Access Term: [CBH drafting note – the Customer is not the railway operator therefore should not be required to hold such cover.]

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

9.2 Arc's insurance policies

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

- (a) a public liability insurance policy which:
 - (1) covers the liability of Arc and its Personnel to any person arising out of or in connection with this Agreement, with a sum insured of not less than \$250,000,000 for any one occurrence or series of occurrences arising from one originating cause;
 - (2) includes cover in respect of personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or

body of water where such discharge, dispersal, release or escape is caused by a sudden, unexpected, unintended and accidental happening which occurs at a specific time and place with a sum insured of not less than a total of \$250,000,000 in respect of all occurrences during any one period of insurance; and

- (3) covers Arc's activities as operator of the Network; and
- (b) a policy or policies of insurance with respect to Arc's liability to the Customer pursuant to the indemnities in clause 12 to the extent coverable by insurance, which includes insurance against any Claim in respect of any personal injury to, or death of, any person employed or engaged by Arc which arises out of, or is caused or contributed to by, the performance or non-performance of this Agreement by Arc which insurances must provide cover:
 - (1) in respect of common law claims, for an amount not less than \$50,000,000; and
 - (2) for compulsory statutory workers' compensation insurance, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981 (WA)* or any other applicable Law.

9.3 Approved insurance companies

Each policy of insurance required to be taken out by the Customer and Arc under clause 9.1 and clause 9.2 must be placed with:

- (a) 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
- (b) a wholly owned captive insurance company of the party, reinsured with various insurers with a credit rating of at least "A-" by Standard & Poor's or such other reputable rating agency which is equivalent to a rating "A-" by Standard & Poors Rating Group.

[CBH drafting note – this amendment provides for more flexibility for Arc and the Customer. It is consistent with clause 16.1(f) of the ARTC track access agreement.]

9.4 Evidence of insurances

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

9.5 Insurance not a limit on a party's liability

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

10. Force Majeure

10.1 Suspension of obligations

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

- (a) if Arc is the Affected Party, it is prevented from or delayed in complying with its obligations (other than the obligation to pay money, including Charges) under:
 - (1) this Agreement;
 - (2) an Operational Track Access Agreement, or

- (3) a Safety Interface Agreement,

for any reason of Force Majeure; or

- (b) if the Customer is the Affected Party, it is prevented from or delayed in complying with its obligations (other than the obligation to pay money, including Charges) under this Agreement for any reason of Force Majeure,

provided the Affected Party complies with this clause 10.

10.2 Obligations of an Affected Party

The Affected Party must:

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

[CBH drafting note – this is inappropriately the subject of force majeure rather than being a carve out. Heat speed restrictions are imposed regularly during periods of predictable summer heat and therefore should not be considered a consequence of a ‘force majeure’ event.]

10.3 Force Majeure and obligations to pay

- (a) Where a Customer is unable to use a Train Path due to a Force Majeure affecting Arc, the Customer will not be obliged to pay any Charges (including Fixed Charges) in respect of the cancelled Train Path. [CBH drafting note – this is a more reasonable position. A FM event is where there is no fault on the party. Under Arc's proposed terms the Customer would bear a disproportionate financial risk in the event of a force majeure event. The position drafted is consistent with the QR terms and represents a fair allocation of risk.]

11. Suspension or termination

11.1 Termination by Arc

[CBH drafting note – these termination rights are extensive and too easy to trigger. CBH has proposed that they be cut down to be more reasonable.]

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

- (a) CBH drafting note – CBH submits that cl 4.6 be deleted, hence the deletion of this cl 4.6 related termination trigger.] [CBH drafting note – CBH submits that cl 4.6 be deleted, hence the deletion of this cl 4.6 related termination trigger.]the Customer's rights to access the Network pursuant to this Agreement have been suspended by Arc pursuant to clause 5.1(d), and that suspension has continued for not less than 10 Business Days; [CBH drafting note – Clause 5.1(d) already contemplates suspension for unremedied payment failure, and suspension should be the first step in relation to such payment failure before Arc can move to termination.]
- (b) the Customer fails to establish or maintain any Security as required under clause 15 and such failure is not remedied within 20 Business Days of Arc giving notice to the Customer of the failure; [CBH drafting note – 20 Business Days is appropriate given the time which may be required to procure provision of a security after being notified of the failure.]
- (c) the Customer fails to effect or maintain the insurances required to be taken out by it under clause 9.1 and the Customer has not remedied the breach within 10 Business Days of a notice from Arc requiring the breach to be remedied;
- (d) the Customer fails to comply with its obligations under clause 18 in a material respect;
- (e) the Customer breaches any of its material obligations under this Agreement (other than as described in any of clauses 11.1(a) - 11.1(d)) and[CBH drafting note – this is a factual issue, and not for Arc's opinion (even if reasonable) given the consequences.] the breach cannot be remedied and the Customer has not paid to Arc reasonable compensation in respect of the unremedied breach within 20 Business Days of Arc giving notice to the Customer of the breach; [CBH drafting note – the option to pay reasonable compensation is a right Arc has under the agreement for a breach that cannot be remedied and so it should also be an option for the Customer.]
- (f) the Customer breaches any of its material obligations under this Agreement (other than as described in any of clauses 11.1(a) - 11.1(d)) which can be remedied, and the Customer has not remedied the breach within the time specified (which shall not be less than 30 Business Days) in a notice from Arc to the Customer requiring the breach to be remedied; or [CBH drafting note – 10 Business Days will be too short given the different types of breaches which may be covered by this clause. CBH suggests a longer remedy period.]

[CBH drafting note – Arc has a fundamental obligation to provide the train paths. If Arc cannot do so, Arc should be in breach of this agreement. This clause undermines that fundamental obligation.]
- (g) an Insolvency Event occurs in relation to the Customer. [CBH drafting note – If a Security Provider became insolvent, the Customer would breach its obligation to maintain the Security, and that scenario is already covered by clause 11.1(b). This termination regime already deals with failure to maintain the Security (and gives the Customer a cure period), and these deleted words would have negated the cure period for failing to maintain the Security.]

11.2 Termination by the Customer

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

- (a) an Insolvency Event occurs in relation to Arc and, as a result of the Insolvency Event, Arc fails, or is unwilling, to provide access to the Network in accordance with this Agreement; [CBH drafting note – there is no justification for effectively suspending CBH's rights to access the Network for 3 months before it can terminate. It would also leave the clause open to gaming as to what happens after the 3 month period.]
- (b) Arc fails to comply with its obligations under clause 18 in a material respect;
- (c) Arc fails to establish or maintain any guarantee as required under clause 5.7 and such failure is not remedied within 20 Business Days of the Customer giving notice to Arc of the failure;

- (d) Arc fails to effect or maintain the insurances required to be taken out by it under clause 9.2 and Arc has not remedied the breach within 10 Business Days of a notice from the Customer requiring the breach to be remedied;
- (e) Arc fails to pay when due:
 - (1) any Over-payment Charge;
 - (2) any amount due to the Customer in accordance with clause 5.5; or
 - (3) any other amount due to the Customer in accordance with this Agreement,(excluding any payments in dispute pursuant to clause 5.3) and such failure is not remedied within 10 Business Days of the Customer giving notice to Arc of the failure;
- (f) Arc fails to provide access to the Network in accordance with this Agreement and such failure is not remedied within 5 Business Days of the Customer or the Operator giving notice to Arc of the failure; or [CBH drafting note – this is the fundamental obligation of Arc under this Agreement and so there should not be a long cure period in circumstances where Arc can provide access but is not providing access.]
- (g) 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 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 within 20 Business Days of the Customer giving notice to Arc of the breach.

11.3 Suspension by Arc

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

Arc may elect instead, or as a preliminary course of action, to suspend the obligations of both parties under this Agreement (subject to clause 11.3(b)) until the earlier of such time as the cause giving rise to the right to suspend has ceased to exist, the Agreement is terminated, or such earlier time as Arc by notice in writing lifts the suspension [CBH drafting note – Arc should still be required to act reasonably in this circumstance].

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

11.4 Suspension by Customer

- (a) Without limiting in any way the Customer's rights under clause 11.2, if:
 - (1) the Customer is entitled to terminate this Agreement under clause 11.2; or

- (2) an event or circumstance referred to in clause 11.2(d), 11.2(e) or 11.2(f) has occurred and, but for the effluxion of the relevant time referred to therein, the Customer would be entitled to terminate this Agreement under clause 11.2,

the Customer may elect instead, or as a preliminary course of action, to suspend the obligations of both parties under this Agreement (subject to clause 11.4(b)) until the earlier of such time as the cause giving rise to the right to suspend has ceased to exist, the Agreement is terminated, or such earlier time as the Customer by notice in writing lifts the suspension.

- (b) An election referred to in clause 11.4(a) is revocable at any time by the Customer and has no effect upon the obligations, debts or liabilities which have accrued before or after the election to suspend and is without prejudice to the Customer's other rights and remedies in respect of that or any other default. [CBH drafting note – As Arc has a right to suspend performance of its obligations then the Customer should also have a corresponding right. This is also consistent with other regimes such as the QR standard access agreement.]

11.5 Effect of termination or suspension

- (a) Without limitation to the other provisions of this clause 11.5, if this Agreement is terminated by either party for any reason (including pursuant to any common law right to terminate for repudiatory or fundamental breach), then:
- (1) Arc may issue an invoice for, and will be entitled to payment by the Customer of, those Charges which Arc would have been entitled to claim payment for under this Agreement up to the date that termination takes effect, but for the effluxion of the relevant time referred to in this Agreement before such payment claim could be made; and
- (2) the Customer must, within 10 Business Days of receiving the invoice under this clause 11.4, pay the amount properly claimed and set out in the invoice.

[CBH drafting note – this could cause confusion because it is not required.]

[CBH drafting note – deleted because CBH proposed the deletion of clause 11.1(k).]

- (b) Upon termination, or during suspension, of this Agreement all rights of the Customer in relation to the Train Paths or to otherwise access the Network in accordance with this Agreement will cease or be suspended (as relevant) immediately.
- (c) Termination or suspension of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (d) Upon termination or suspension of this Agreement under any circumstances, all covenants and agreements of Arc and the Customer which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement will survive such termination or suspension.
- (e) Notwithstanding clause 14, upon termination of this Agreement (including any purported termination) a party may not issue a Notice of Dispute under clause 14.1 in respect of the termination, purported termination or matter that has given rise to the notice of termination and, in respect of there being any Dispute with respect to any of the foregoing, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

[CBH drafting note – deleted because CBH proposed the deletion of clause 11.1(k).]

12. Indemnities

12.1 Indemnity by the Customer

Subject to the other provisions of this clause 12 and to clause 13, the Customer must, promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all [CBH drafting note – "Claim" includes things like threatened claims, which (for example) could be made by third parties on a vexatious or frivolous basis. CBH can agree to indemnify against losses, liabilities etc. which Arc incurs.]Liabilities which the Arc Indemnified Party suffers, incurs or is liable for in respect of:

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

to the extent that the death, injury, loss, damage or destruction arises out of or is as a consequence of:

- (c) a breach or non-performance of any of the obligations of the Customer under this Agreement; or

[CBH drafting note – Arc already has recourse against the Operator under the OTAA. Also, this aligns with the Arc indemnification below.]

- (d) any negligent act, negligent omission, fraud or Wilful Default of any Customer Indemnified Party,

[CBH drafting note – Arc already has recourse against the Operator under the OTAA. Also, this aligns with the Arc indemnification below.]

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

12.2 Indemnity by Arc

Subject to the other provisions of this clause 12 and to clause 13, Arc must, promptly on demand, indemnify and keep indemnified each Customer Indemnified Party from and against all Liabilities which the Customer Indemnified Party suffers, incurs or is liable for in respect of:

- (a) the death of or injury to any person; or
- (b) any loss of, or damage to or destruction of any real or personal property (including Customer Product and Rolling Stock) [CBH drafting note – this inclusion makes the indemnity reciprocal as Arc refers to the Network in clause 12.1.],

to the extent that the death, injury, loss, damage or destruction arises out of or is as a consequence of:

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

but the indemnity will be reduced proportionately to the extent that fraud, a Wilful Default, negligent act or negligent omission of any Customer Indemnified Party or any Operator Indemnified Party (as defined in the Operational Track Access Agreement) has caused or contributed to the relevant loss, damage, destruction, injury or death.

12.3 Duty to mitigate

The entitlement of a person to be indemnified under this Agreement (including under clauses 12.1, 12.2 or 12.4) 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 person's failure to take reasonable steps to mitigate the Liability. [CBH drafting note – the previous drafting had an unreasonable 'hair trigger' effect, whereas this revision allows the indemnification to remain but so that it does not apply to the extent a party fails to mitigate. It is also extended to other indemnities (including clause 12.4) as it is not reasonable for a party to indemnify the other party for liability where that party fails to mitigate that liability.]

12.4 Liability to third parties

The Customer indemnifies and must keep indemnified the Arc Indemnified Parties from and against all Claims by third parties against the Arc Indemnified Parties to the extent the Claims arise out of or are in connection with damage to or loss of any property (including Customer Product and Rolling Stock) where such property is being transported on or as part of a Service, but this indemnity will be reduced proportionately to the extent that any act or omission by an Arc Indemnified Party has caused or contributed to the damage to, or loss of, that property. [CBH drafting note – exclusion of contributory cause is fair and reasonable and normal commercial practice.]

12.5 Cost of recovery

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

12.6 Defence of Claims

- (a) Each party must render to the other party all reasonable assistance in the defence of any Claim made against the other party by a third party arising out of any Incident or other event or events giving rise to a Claim which is connected with this Agreement.
- (b) To the extent that a party (**responsible party**) is obliged under this Agreement to indemnify the other party (**indemnified party**) against a Claim by a third party against the indemnified party, the responsible party may, subject only to the terms of any applicable insurance which the indemnified party may have, at its own expense defend and settle any action or proceedings in the name of the indemnified party in connection with such Claim and execute such documents in the action or proceedings as the responsible party sees fit, provided that any such settlement may not (without the consent of the indemnified party) require the indemnified party to provide a remedy which is not the payment of money. The responsible party indemnifies the indemnified party in respect of all Liabilities which the indemnified party may incur on account of such defence or settlement of the action or proceedings.

12.7 Other indemnities

For the avoidance of doubt, the releases and indemnities in this clause 12 are in addition to, and without limitation to, any other release or indemnity given under this Agreement. [CBH drafting note – these indemnities have been deleted under the amendments to this Agreement.]

12.8 General provisions regarding releases and indemnities

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

13. Limits of liability

13.1 Liability for Consequential Loss

- (a) Subject to clauses 13.1(b) and 13.3, but despite any other provision of this Agreement and to the extent permitted by Law, no party will in any circumstances be liable to the other party in respect of (and, for clarity, the indemnities in this Agreement will not extend to) any Consequential Loss under or in connection with this Agreement, whether arising under this Agreement, at Law or otherwise.
- (b) Clause 13.1(a) does not apply to:
 - (1) clause 12.4; or
 - (2) relieve or limit a party's liability:
 - (A) in connection with the party's fraud or Wilful Default;
 - (B) where that party is the Customer, under its indemnity obligation under clause 12.1(a); or
 - (C) where that party is Arc, under its indemnity obligation under clause 12.2(a).

13.2 Minimum threshold on Claims

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

13.3 Failure to pay amounts

No exclusion or limitation of Liability, or restriction on the existence of or ability to make any Claim, in this Agreement (including this clause 13) applies to limit or extinguish [CBH drafting note – this carve-out should not apply so as to allow one party to, for example, claim loss of profit which results from the other party's failure to pay money under this Agreement (e.g. the creditor's ability to redeploy the moneys payable under this Agreement to make further profits).] a party's obligation under this Agreement to pay the other party monies due and payable in accordance with this Agreement, including under clause 4 or any amount as provided for in the Overpayment Rules. [CBH drafting note – this is consistent with the equivalent provision in the Track Access Agreement.]

[CBH drafting note – The proposed clauses 13.4, 13.5 and 13.6 would significantly erode (or, arguably, entirely negate) Arc's fundamental obligations. Arguably, they would be so favourable to Arc and detrimental to Customers that they would render this Agreement inconsistent with Arc's obligation to provide access. They would largely negate the purpose of other provisions in this Agreement, which is not reasonable. There would be a material likelihood that very few claims could be made against Arc, including for circumstances for which it is reasonable to expect the infrastructure owner to accept liability.]

[CBH drafting note – in addition to CBH's overarching comment at the beginning of this clause, this exception to the exclusion could never arise anyway (making this an unqualified exclusion of liability).]

[CBH drafting note – in addition to CBH's overarching comment at the beginning of clause 13.4, these qualifications are not required, highly unusual, and not reasonable.]

[CBH drafting note – in addition to CBH's overarching comment at the beginning of clause 13.4, these qualifications are not required (and, therefore, cause unnecessary confusion and, consequentially, create a material risk of disputes arising or this regime being gamed), highly unusual, and are not fair nor reasonable.]

- (a) CBH drafting note – in any event, it is not apparent how this could be the case.]

13.4 Other limits or exclusions of liability

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

13.5 Civil Liability Act

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

14. Resolution of disputes

14.1 Procedure to settle disputes

- (a) If a dispute arises between the parties in connection with this Agreement (**Dispute**) then, unless expressly provided to the contrary in this Agreement, the Dispute must be resolved in accordance with this clause 14 and either party may give a notice to the other party specifying the Dispute and requiring its resolution in accordance with this clause 14 (**Notice of Dispute**).
- (b) Subject to clause 14.1(c) and clause 14.4, the procedure that the parties must strictly follow to settle a Dispute is as follows:
- (1) first, negotiation of the Dispute in accordance with clause 14.2;
 - (2) second, mediation of the Dispute in accordance with clause 14.3 or determination of the Dispute by an Expert in accordance with clause 14.4; and
 - (3) third, litigation of the Dispute in accordance with clause 14.5.
- (c) Nothing in this clause 14:
- (1) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 14; or
 - (2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (d) The parties' obligations under this Agreement will continue notwithstanding any:
- (1) Dispute between the parties;
 - (2) submission of a Dispute to an Expert or mediation; or
 - (3) referral of a Dispute to litigation.
- (e) This clause 14 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (f) This clause 14 applies even where this Agreement is otherwise void or voidable.

14.2 Negotiation

- (a) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.

- (b) If the Dispute is not resolved within 10 Business Days after the Notice of Dispute is given, subject to clause 14.4, the Dispute must be referred to the chief executive officers of the parties (or their nominees) who must meet, within 15 Business Days after the Notice of Dispute is given, and try to resolve the Dispute by joint discussions.

14.3 Mediation

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

14.4 Expert

[CBH drafting note – it is usual for an Expert to determine disputes which are of an engineering, safety or technical nature. Given some of the issues which may arise under this Agreement it is more efficient if there is a process for an accredited expert to determine the issue.]

- (a) Unless otherwise provided in this Agreement, if the Dispute is of a technical, safety, or engineering nature and it has not been resolved within 10 Business Days after the Notice of Dispute is given, the Dispute must be determined by an Expert. The Expert will be:
 - (1) a person agreed between the parties within 10 Business Days of the date of the Notice of Dispute; or
 - (2) failing agreement within 10 Business Days and at the request of either party, a person nominated by the Resolution Institute.
- (b) Unless the parties otherwise agree in writing, the Expert will:
 - (1) accept written submissions from the parties as to the subject matter of the Dispute within 14 days of their appointment; and
 - (2) provide the determination in writing within 28 days of their appointment.
- (c) Unless the parties otherwise agree in writing, the Expert will have the power to:
 - (1) inform themselves independently as to facts and if necessary, any technical matter relating to the Dispute;

- (2) consult with such other professionally qualified persons as they think fit;
 - (3) receive and act on written submissions, sworn and unsworn statements and photocopied documents; and
 - (4) take such measures as they consider fit to expedite the resolution of the Dispute.
- (d) The parties will do all things reasonably required by the Expert to assist the Expert in reaching their determination.
- (e) The Expert must act honestly and fairly, independently and impartially, and must keep confidential all matters coming to them by reason of their appointment and performance of their duties.
- (f) The Expert will act as an expert and not as an arbitrator.
- (g) Unless the parties otherwise agree:
- (1) each party must bear its own costs relating to the expert determination; and
 - (2) the costs of the expert will be borne equally by the parties.
- (h) In the absence of manifest error, error of Law, corruption, fraud, partiality, bias or a breach of the rules of natural justice by the Expert, the Expert's decision will be final and binding on the parties.

14.5 Litigation

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

14.6 Joinder

- (a) The Customer acknowledges and agrees that Arc may request the Customer to participate in any dispute resolution process under the Operational Track Access Agreement if the Customer's participation is required to resolve the Dispute.
- (b) If the Customer considers, acting reasonably, that the Customer's participation is required to resolve the Dispute, the Customer must join the dispute resolution process under the Operational Track Access Agreement. [CBH drafting note – the Customer should have some ability to consider whether joinder is appropriate. The amendments make this clause more reasonable.]
- (c) The Customer acknowledges and agrees to the Operator participating in any dispute resolution process under this Agreement if Arc considers that it is necessary or appropriate for the Operator to join such a dispute.

15. Inspection and audit

[CBH drafting note –Due to information asymmetry, it is reasonable to provide a right for the Customer to have a mechanism to ensure that Arc is complying with its obligations under the Agreement. CBH has modelled this clause on the amended inspection and audit clause under the OTAA as that clause (as proposed to be amended) is a reasonable balance of the rights of the parties.]

15.1 Inspection and audit by a party

Subject to clause 15.2, a party may, at any time, by providing reasonable prior notice to the other party require an audit of the relevant aspect of any of the railway track and lines comprising the Network (but only in so far as the Network is relevant to the Train Paths) for the purpose of assessing whether the party is complying with its obligations under this Agreement.

15.2 Limitations on audit

- (a) Prior to conducting an audit under clause 15.1, a party must:
 - (1) have reasonable grounds for the purpose of the audit;
 - (2) provide written notice to the other party of the grounds of the audit and the reasons for requesting the audit; and
 - (3) unless the audit is in respect of an emergency, allow the party a reasonable opportunity to respond to the notice.
- (b) A party must not carry out more than such number of audits under clause 15.1 as are reasonably necessary in the circumstances for the purposes of assessing the matters referred to in clause 15.1.

15.3 Instructions and audit

- (a) In conducting an audit under clause 15.1, and provided it has complied with clause 15.2:
 - (1) each party must coordinate and cooperate with the other party and use its reasonable endeavours in the conduct of any such audit to minimise the disruption to the Service and mitigate any loss or damage arising from the conduct of the audit.
 - (2) a party must not cause or contribute to any damage to property, any Environmental Harm or any injury or death of persons.
 - (3) a party must comply with the health, safety, environment and other requirements as required by the other party (acting reasonably).
 - (4) Unless otherwise agreed, any such audit must be conducted in the presence of a representative of the other party;
 - (5) any such audit must be conducted in a manner that does not cause any disruption to any service of any other operator granted access to the Network by Arc or the provision of services by Arc to such operators, or otherwise impact adversely on a party's ability to comply with its obligations under this Agreement.
- (b) The party whose operations are audited must bear the reasonable costs of the conduct of the audit to the extent that the stated grounds for requiring the audit are demonstrated to exist. If they are not, the party undertaking the audit must bear the costs of conducting the audit.
- (c) The party undertaking the audit must provide the other party with a copy of the report for the relevant audit. However, an audit by a party does not relieve either party of its obligations under this Agreement or a law.

16. Security

16.1 Customer to provide Security

- (a) Arc may require the Customer to provide Security where there is a risk that the Customer may not have the financial ability to perform its obligations under this Agreement. [CBH drafting note – there should be conditions as to when Arc requires security and there should also be an obligation for security to be returned where the Customer has demonstrated performance with the terms given the Customer may be required to provide security in the form of a bank guarantee which will be expensive. CBH has suggested amendments to this clause to make it more reasonable.]
- (b) Subject to clause 15.1(a):
 - (1) the Customer must deliver to Arc Security for the Secured Sum prior to the commencement of Services by an Operator or, when Security has been requested

after Services have commenced, within 20 Business Days of written request by Arc;
and

- (2) the Customer must keep the Security for the Secured Sum current (and from a Security Provider with an Acceptable Credit Rating) at all times during the Access Term unless Arc is obliged to return the Security in accordance with clause 16.1(c).
- (c) Arc must release the Security to the Customer where the Customer has not been in default of its obligations under this Agreement in the last 3 months. [CBH drafting note – under clause 4.8(d) of the ARTC Track Access Agreement, the security is returned after 3 months of non default. CBH considers this is reasonable.]
- (d) Upon expiry or earlier termination of this Agreement, Arc must release the Security to the Customer provided that at the time of expiry or earlier termination the Customer is not in default of its obligations under this Agreement and there are no amounts owed by it to Arc under the Agreement immediately before it was terminated.

16.2 Exercise of Security

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

17. Confidentiality

17.1 Acknowledgment of confidentiality and confidentiality obligation

Each party acknowledges and agrees that:

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

17.2 Permitted disclosure

- (a) Subject to compliance with clauses 16.2(b) and 16.2(c), a party may disclose Confidential Information of the other party:
 - (1) where the other party has given its prior written consent to such disclosure;
 - (2) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
 - (3) if required by Law (other than section 275(1) of the *Personal Property Securities Act 2009 (Cth)*) or the rules of any stock exchange or by any Government Agency;

- (4) to the Economic Regulator or any other Government Agency in respect of any matter under the Rail Access Code or a related Law; [CBH drafting note – this amendment is to avoid for example an argument that, because a submission by a Customer is not *required* by the Code then the Customer cannot use Confidential Information in any submission to the ERA. This clause is intended to ensure the ERA has access to information that may be critical to the ERA being able to properly discharge its functions under the Code.]
 - (5) as required or permitted by this Agreement;
 - (6) to a ratings agency;
 - (7) to its insurers, auditors, legal advisors or other advisors or consultants under a duty of confidence;
 - (8) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
 - (9) to enable a party to exercise its rights, or perform its obligations under or in connection with this Agreement;
 - (10) in relation to the enforcement of its rights under or in connection with this Agreement;
 - (11) to its Related Bodies Corporate and its and their respective directors, officers and employees;
 - (12) to its Personnel to enable a party to perform its obligations under this Agreement or to make or defend any claim under this Agreement; or [CBH drafting note – given the interrelationship between the CTAA and the OTAA it is reasonable for the Operator to be subject to this exception.]
 - (13) in any proceeding arising out of or in connection with this Agreement;
- (b) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (1) otherwise keep the Confidential Information confidential; and
 - (2) except in respect of disclosure pursuant to clause 16.2(a)(3), use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 16.
- (c) Before making any disclosure pursuant to clause 16.2(a)(3), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (1) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
 - (2) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.
- (d) Nothing in this clause 16 prevents a party from disclosing to the Operator Confidential Information relating solely to:
- (1) supply chain management; or
 - (2) any actual or proposed variation to Schedule 1.

18. Assignment, transfers, change in control and encumbrances

18.1 Assignment or transfer of this Agreement

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

- (a) assign, or attempt to assign, any of its rights; or
- (b) novate, otherwise transfer or attempt to transfer, any of its rights or obligations,

under this Agreement to another person (**Proposed Transferee**) without the prior written consent of the other party (**Other Party**), which consent must not be withheld if:

- (c) the Other Party is satisfied, acting reasonably, that the Proposed Transferee is financially, technically and operationally capable of complying with the Transferor's obligations under this Agreement (the onus of proving which rests on the Transferor);
- (d) the Proposed Transferee is a Related Body Corporate of the Transferor,

[CBH drafting note – the network operator must still be able to perform its obligations under the agreement. That is, have the financial, technical and operational capability of complying with the agreement.]and:

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

18.2 Effect of assignment or transfer

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

18.3 Change of Control

- (a) A party must not undergo a Change in Control without the prior written consent of the other party, which must not be unreasonably withheld or delayed.
- (b) Without limitation, a party may reasonably withhold consent to a Change in Control in respect of the other party if the party reasonably considers that the other party will not, following the Change in Control, have the financial capability or technical or operational expertise to meet its obligations under this Agreement.

[CBH drafting note – a change in control clause is common in contracts to ensure that a party cannot circumvent the prohibition on assignment of the agreement by selling the entity that is a party to this Agreement rather than assign this Agreement.]

18.4 Encumbrance over this Agreement

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

19. Governing Law

19.1 Law of this Agreement

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

19.2 Jurisdiction

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

20. Notices

20.1 Notices in connection with this Agreement

- (a) Any notice, demand, invoice or other communication (**Notice**) required or permitted to be given to or by a party to this Agreement:

- (1) must be in legible writing and in English and

- (A) in the case of Notices for [insert], addressed as shown below:

- (I) in the case of Arc:

Attention: Chief Executive Officer

Address: Level 3, 1 George Wiencke Drive, Perth
Airport, Western Australia 6105

Email: commercial@arcinfra.com

and with a copy sent to: legal@arcinfra.com

- (II) in the case of the Customer: Attention: [insert]

Address: [insert]

Email: [Insert]

- (B) or as specified to the sender by a party by notice;
in the case of all other Notices, addressed as shown below:

- (I) in the case of Arc:

Attention: [insert]

Address: [insert]

Email: [insert]

- (II) in the case of the Customer:

Attention: [insert]

Address: [insert]

Email: [insert]

or as specified to the sender by a party by notice; [CBH drafting note – the amendments to this clause have been made to make it more reflective of what will happen in practice. Operational notices and the like do not need to be provided to the CEO, only the critical notices under the Agreement. The parties can agree what are critical notices.]

- (2) may be given by:
 - (A) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee; or
 - (B) [CBH drafting note – this is an unnecessarily complex email notice regime. CBH submits it should simply be the email is taken to be received at the time it is sent.]email, in which case the Notice is regarded as given by the sender and received by the addressee at the time the email is sent, unless the sender receives a return email notification that the email was not delivered, undeliverable or similar,

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and

- (3) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (b) In this clause 19, a reference to an addressee includes a reference to an addressee's Personnel.

20.2 Twenty-four hour contact details

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

21. Risk and cost of performing obligations and agents and contractors

21.1 Risk and cost

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

21.2 Agents and contractors

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

22. Anti-corruption and modern slavery

22.1 Anti-corruption

- (a) Each party represents, warrants and undertakes to the other party that:
 - (1) it has not offered, promised, given or agreed to give and shall not during the term of this Agreement offer, promise, give or agree to give to any person any bribe, whether on behalf of the other party or otherwise, with the object of obtaining a business advantage;
 - (2) it will not engage in any activity or practice which would constitute an offence under any applicable anti-bribery laws, including but not limited to the Criminal Code Act

1995 (Cth), United States Foreign Corrupt Practices Act of 1977, the United Kingdom's Bribery Act 2010 and Canada's Corruption of Public Officials Act (**Anti-Corruption Laws**);

- (3) it has and during the Access Term will maintain in place its own policies and procedures to ensure compliance with any applicable Anti-Corruption Laws;
- (4) it will procure that any person who performs or has performed services for or on its behalf in connection with this Agreement (**Associated Persons**) complies with this clause 21.1(a);
- (5) it will not enter into any agreement with any Associated Person in connection with this Agreement unless such agreement contains undertakings on the same terms as contained in this clause 21.1(a);
- (6) it has and will maintain in place effective accounting procedures and internal controls necessary to record all expenditure in connection with this Agreement;
- (7) from time to time during the Access Term, at the reasonable request of the other party, it will confirm in writing that it has complied with its undertakings under this clause 21.1(a) and will provide any information reasonably requested by the other party in support of such compliance;
- (8) it will report to the other party as soon as reasonably practicable any request or demand for any improper payments or other improper advantage of any kind received by the party from the other party or any other person in connection with the performance of this Agreement; and
- (9) it shall notify the other party as soon as practicable of any breach of any of the undertakings contained in this clause 21.1(a) of which it becomes aware.

[CBH drafting note – if the ERA considers it reasonable that an indemnity is given in these circumstances then it should be reciprocal. CBH considers it is not necessary here.]

22.2 Modern slavery

- (a) Each party must, and must ensure that all of its Personnel:
 - (1) comply with Modern Slavery Laws;
 - (2) not engage in any conduct which may breach, or put the other party in breach, of any Modern Slavery Laws;
 - (3) it has, and during the Access Term will maintain, in place its own policies and procedures to ensure compliance with any applicable Modern Slavery Laws; [CBH drafting note – each party should be responsible for determining how it complies with this obligation. The Customer should not have to comply with Arc's policies over which it has no control.]
 - (4) do all things required or necessary to mitigate or reduce risks of Modern Slavery within its operations or supply chain; and
 - (5) comply with all reasonable directions of the other party, and otherwise provide all assistance, records and information and do all things necessary to assist the other party to comply with its obligations under the Modern Slavery Laws and to verify compliance with this clause 21.2(a).
- (b) Each party warrants and represents that it (and its directors and/or employees):
 - (1) have not been convicted of any offence involving Modern Slavery; and

- (2) have not been and is/are not the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of any Modern Slavery Laws.
- (c) Each party must notify the other party as soon as reasonably practicable in writing if it becomes aware or has reason to believe that it, its Personnel or any other participants in its supply chain in connection with this Agreement have breached, or potentially breached, any Modern Slavery Laws.

22.3 Representations and warranties continue

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

23. Parking

[CBH drafting note – CBH considers Parking to be a normal part of efficient operational practice that is often required to facilitate use of a service. Arc's proposed drafting in the OTAA is unreasonable and goes beyond protecting Arc's legitimate concern of ensuring parking does not adversely impact services. It gives Arc ultimate discretion to approve parking, which may adversely impact the Customer's ability to utilise train services and has the potential to impose disproportionate administrative and financial costs on an Operator / Customer in circumstances where parking has no effect on Arc's operation of the network. The proposed amendments to this clause ensure Arc is still protected and that the Customer is not liable for significant parking charges in circumstances where the Customer/Operator must park trains and rolling stock and there is no effect on the operation of the network.]

- (a) The parties acknowledge that an Operator, on behalf of the Customer, may give Arc a notice which specifies:
 - (1) the Operator's request for Arc's consent to it Parking on the Network;
 - (2) the specific location for the requested Parking;
 - (3) the duration of the requested Parking including the time and date of commencement and cessation of the requested Parking; and
 - (4) a description of the Rolling Stock that are proposed to be Parked including the number of locomotives and carriages and wagons,

(Parking Request).

- (b) Arc must provide a response to the Operator which specifies whether Arc declines, approves, or approves with conditions, the Parking Request.
- (c) The Customer acknowledges that an Operator has no right to Park at any location on the Network for any duration (Relevant Parking) unless Arc gives the Operator:
 - (1) prior approval of the Relevant Parking under clause 23(b); or
 - (2) an Instruction to Park on the Network including for reasons of Force Majeure or in order to recover from an Incident or the failure of any Rolling Stock.
- (d) The Customer acknowledges that if Arc issues an Instruction requiring an Operator to cease Parking, then the Customer must ensure that the Operator complies with the Instruction.
- (e) The Customer must ensure that each Operator:
 - (1) complies with Arc's reasonable requirements in relation to Parking; and
 - (2) does not Park in a manner that is contrary to this clause 23.
- (f) There will be no charge for Parking in accordance with this clause.

24. General

24.1 Certificate

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

24.2 Exercise of rights

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

24.3 Remedies cumulative

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

24.4 Further assurances

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

24.5 Variation

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

24.6 Severability

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

24.7 No partnership or agency

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

24.8 Counterparts

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

24.9 Execution by attorney

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

24.10 Costs and expenses

- (a) Each party must pay its own legal and other costs and expenses in relation to the negotiation, preparation and execution of this Agreement.
- (b) A party in default must pay all costs (including reasonable solicitor/client costs) incurred by the other party in respect of that default and any notice relating to that default.
- (c) The Customer must pay all duty and other government imposts payable in connection with this Agreement and all other documents referred to in this Agreement when due or earlier if required in writing by Arc unless the duty or other government impost was payable in connection with a breach of this Agreement, a breach of any other document referred to in this Agreement or a breach of Law by Arc or any of its personnel. [CBH drafting note – this clause was too one sided as it makes the Customer liable for these payments even when caused by Arc's breach. CBH has made this more reasonable.]

24.11 Suspension

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

24.12 Survival

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

25. No implied representations or warranties

Except for:

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

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

26. Entire understanding

This Agreement:

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

Schedule 1

Scheduled Train Paths

Item 1 Nominated Routes

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

Item 2 Scheduled Train Paths

	[Insert Origin] (Origin)		[Insert Destination] (Destination)	
Train ID	Departure Day	Departure Time	Arrival Day	Arrival Time

[Include train path schedule for each Nominated Route]

Schedule 2

Charges

1. Monthly Payments

- (a) Within five (5) Business Days after the end of each Month, commencing from the Commencement Date, the Customer must provide Arc with a statement of the Actual Net Tonnes transported on each Service during the previous Month including the following information for each Service:
- (1) Train ID;
 - (2) Date of departure; and
 - (3) Origin.
- (b) The Customer may send the statement of Actual Net Tonnes to Arc by email or post but for the purpose of this item 1, the Customer's notification to Arc will include notification by email to commercial@arcinfra.com, or as otherwise advised by Arc to the Customer from time to time, and will be taken to be received by Arc when the Customer receives confirmation on its server that the message has been transmitted.
- (c) Within 5 Business Days after the end of each Month, and within 5 Business Days after expiry of the Access Term, Arc will calculate: [CBH drafting note – just as it is fair for customers to have a date by which the Customer is required to submit their Actual Net Tonnes statement, it is fair for Arc to have a date by which Arc must submit its invoice to the Customer.]
- (1) the Fixed Charges in accordance with item 4 below;
 - (2) the Variable Charges in accordance with item 5 below; and
- issue an invoice for the Fixed Charges and Variable Charges to the Customer.
- (d) The Customer must pay the amount invoiced under this item 1 within 21 days from the date the invoice is given by Arc to the Customer.

[CBH drafting note – this is not appropriate. Customers should be obliged to pay against invoices only, particularly in circumstances where there are variable charges.]

2. Over-payments and Under-payments

- (a) In respect of each Access Year during which Charges are received, Arc will calculate:
- (1) under payments; and
 - (2) over payments;
- in a manner consistent with the Over-payment Rules (**Over-payment Charge**).
- (b) Within 90 days of the end of each relevant Access Year, Arc will issue a statement to the Customer specifying the amount of any under-payment or over-payment for the preceding Access Year of the Access Term.
- (c) If an over-payment exists, Arc must pay the amount specified in the statement to the Customer within 21 days from the date the statement is given by Arc to the Customer.
- (d) If an under-payment exists, the Customer must pay the amount specified in the statement within 21 days from the date the statement is given by Arc to the Customer.
- (e) The obligation to calculate under payments and over payments continues until:
- (1) this Agreement expires or is terminated; and
 - (2) no Charges are received during an Access Year.

3. Access Rates

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

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

4. Fixed Charge Calculation

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

[insert]

5. Variable Charge Calculation

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

$$VC = VR \times GTK$$

Where:

VC = the Variable Charge

VR = the Variable Rate

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

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

$$GTK = D \times K$$

Where:

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

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

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

6. Variable Charge Discount

In calculating the Variable Charge in clause 5 of this Schedule 2 or the Light Engine Movement Charge in clause 7 of this Schedule 2, the weight per unit of Rolling Stock (including Customer Product) (D) will be discounted by the discount factor set out in the table in Schedule 4 to reflect the operational characteristics of the Rolling Stock. [CBH drafting note – the condition and operation of the Rolling Stock will have an effect on the cost to service. That is, if the Rolling Stock is lighter then it will result in less wear on the track and less maintenance etc. This clause 6 is intended to provide a mechanism for the parties to agree a discount to the Variable Charge to reflect the characteristics of the Rolling Stock and their effect on the network.]

[Note – Examples of where a discount factor would be used include:

- "Half wheel wear" weight reduction to reflect a wheel's reducing weight over its useful life due to latheing.
- "Half fuel" weight adjustments to reflect an average weight of fuel in the locomotive tank taking into account fuel that is consumed during the journey.]

7. Light Engine Movement Charge Calculation [CBH drafting note – this has been moved from the OTAA as it is more appropriately dealt with as part of this agreement.]

- (a) The Light Engine Movement Charge will be the Light Engine Movement Rate which is [insert] cents per GTK as adjusted in accordance with Schedule 3.
- (b) The Light Engine Movement Charge for each instance where the Customer requires the Operator to undertake a Light Engine Movement on the Network will be calculated by Arc in accordance with the following formula:

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

Where:

LEM = the Light Engine Movement

Charge LR = the Light Engine Movement

Rate

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

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

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

Where:

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

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

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

Schedule 3

Variation of Charges

1. Annual Variation of Access Rates

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

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

where:

R_n = The Access Rate to apply from 1 July of the applicable year.

R_b = The Access Rate applying at the Commencement Date.

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

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

[CBH drafting note – if the charges can be adjusted upwards then it is also reasonable that they can be adjusted downwards where there is deflation. This is consistent with other access agreements such as ARTC and QR.] [CBH drafting note – this is one-sided and takes the risk of a material change off Arc without doing the same for the Customer. It should either apply to both parties or be deleted. CBH suggests it is deleted as it creates uncertainty over an Agreement term, which is inconsistent with the intent of the Code.]

2. Rounding

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

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

Schedule 4

Rolling Stock

1. Locomotives

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

2. Wagons

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

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

Schedule 5

Performance Indicators

Category	Indicator	CBH drafting note -
Reliability Measures related to no and % of services performing according to schedule	No and % of healthy ^a services exiting within tolerance	Reported publicly by ARTC and used by ARTC and Aurizon Bulk Central Network (ABCN) in standard agreements. NSW Metro Rail Network and Country Rail Network also use consistent healthy/unhealthy terminology. QR publicly reports similar information in a slightly different format. Arc is required to publicly report information on similar aspects of performance, but uses a different reporting format which provides less clarity on performance. Of the options currently used, the ARTC/ABCN indicator provides the clearest understanding of network performance.
	No and % of unhealthy ^a services not deteriorating further	Publicly reported by ARTC and reported under standard access agreements for ARTC and ABCN. Provides valuable information for understanding of overall network performance.
	No and % of services that are healthy ^a	Reported publicly by ARTC and used by ARTC and ABCN in standard agreements. QR publicly reports similar information in a slightly different format. Provides valuable information for understanding of overall network performance.
Network Availability Measures relating to availability of network for operation of services	No and % of services rescheduled for the purpose of RIM possession	Reported by ARTC under standard access agreement. Partially publicly reported by QR. Provides valuable information on overall reliability of the train schedule, given the demand for network possessions.
	No and % of services cancelled and not rescheduled due to RIM (separately reported for planned possessions and other unplanned reasons)	Reported publicly by QR and similar information is publicly reported by Arc. In aggregate these KPIs should provide information on services not operated. Provides valuable information on network availability and reasons for services not run.
	No and % of services cancelled and not rescheduled due to operator/access holder	
	No and % of services cancelled and not rescheduled for other reasons	
Transit times/delays Measures relating to network delays to services	Average scheduled speed	Publicly reported by ARTC. Provides valuable information on whether network capability is improving or degrading over time, particularly when in conjunction with delay KPIs below.
	No and % of Services which transit the Network no later than scheduled transit, within tolerance	Reported by ARTC, ABCN. Provides valuable information for understanding of overall network performance.
	The average above rail delay, in minutes per transit hour	Information reported by ARTC, ABCN and QR, although QR presents the information in minutes per 100 train kilometres. Arc is also required to publicly

	The average below rail delay, in minutes per transit hour	report on number of delays by cause. Presenting the information in minutes per transit hour will provide a clearer understanding of the impact of delays across the network and will more readily enable comparison across networks.
	The average unallocated delay, in minutes per transit hour	
Speed restrictions	Impact of TSRs on train running (measured in total minutes)	Reported by ARTC, ABCN and QR. Arc is required to publicly report KM under TSR.
Measures the impact of speed restrictions on services		
Track condition	Track Quality Index (TQI)	Reported by ARTC, ABCN and QR. Should be reported by route. TQI is consistent with the ARTC approach.]
Measures track condition by route utilised.	TQI is calculated over 100m sections, using 0.5m raw data by a suitable continuous track geometry recording car and may be aggregated and reported on route basis. TQI is the sum of the standard deviations (x3) in each rail for a 20m inertial top (average over left and rights rail), horizontal alignment (versine over a 10m chord (average over left and right rail)), twist over 2.0m and gauge.	

^a “Healthy train” means one that:

- presents to the Network within tolerance, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule;
- is running late only due to causes within the Network, but only where the root cause is outside the rail operator’s control; or
- is running within tolerance, regardless of previous delays.

[CBH drafting note - For the purpose of these KPIs, “healthy” and “unhealthy” trains are defined consistent with the definition used by ARTC and ABCN.]

Arc uses the same terminology but with different definitions of healthy/unhealthy. There would be benefit in applying consistent approach across networks.]

[CBH drafting note - CBH considers consistency in reporting across networks valuable when assessing infrastructure performance. Publicly available submissions for other domestic rail networks have been leveraged in determining the list of requested indicators.]

Signing page

Executed as an Agreement

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

in accordance with section 127 of the *Corporations Act 2001*

sign here ► _____
Director

print name _____

sign here ► _____
Director/Company Secretary

print name _____

Executed by
**[insert]
ABN [insert]**

in accordance with section 127 of the *Corporations Act 2001*

sign here ► _____
Director

print name _____

sign here ► _____
Director/Company Secretary

print name _____

Annexure

Annexure A – Form of Operational Track Access Agreement



Operational Track Access Agreement

*([Operator] for [End User])
[Nominated Route(s)]*

Arc Infrastructure Pty Ltd
ABN 42 094 721 301

[Insert Company
Name] ABN [insert
ABN]

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

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

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

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Operational Track Access Agreement ([End User] Train Paths)

Date ▶

Between the parties

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

Operator **[insert Operator’s name]**
ABN [insert Operator’s ABN]
of [insert Operator’s address]

Background

1. This Agreement is an arrangement with respect to access based on standard terms pursuant to the Rail Access Code.
2. Arc is entitled to grant access rights in respect of the Network.
3. Arc is a party to a commercial access agreement with the Customer under which Arc has granted access rights to the Customer for the operation of the Services over the certain routes comprised in the Network.
4. The Customer has nominated the Operator in respect of the Customer’s access rights over the Nominated Routes.
5. Arc has agreed to grant to the Operator the rights to operate Services, using the Customer’s access rights to the Nominated Route(s), on the terms and conditions in this Agreement.

The parties agree as follows:

1 Definitions and interpretation

1.1 Definitions

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

Term	Meaning
Accreditation	has the meaning given to it under the Rail Safety National Law. Accredited means to hold Accreditation.
Accredited Owner	an owner (or other person having management and control) of a railway who is Accredited or taken to be Accredited.
Agreement	this document and its schedules, annexures and attachments.
Anti-Corruption Laws	has the meaning given in clause 26.1(a)(2).
Applicable Part 5 Instrument	a 'Part 5 instrument' (as defined in Rail Access Code, section 40(3)) that is applicable to Arc, including the Train Management Guidelines, the Train Path Policy and the Overpayment Rules.
Arc Indemnified Parties	(a) Arc and its Personnel; and (b) each Related Body Corporate of Arc and their Personnel.
Arc's Network Rules	the Arc Network Safeworking Rules and Procedures issued in accordance with Arc's safety management system approved under Part 3 Division 6 of the Rail Safety National Law together with any amendments, deletions or additions made to those Arc Network Safeworking Rules and Procedures in accordance with the safety management system and this Agreement for the purpose of ensuring the safe and efficient use of the Network and notified in writing to the Operator. [CBH drafting note – The definition of these Rules includes other policies and procedures issued by Arc. This is too broad. Any important rules and policies should be included in the Rules themselves and not ad-hoc policies and notices issued from time to time. Otherwise, what <i>exactly</i> constitutes the Rules is uncertain which makes compliance with them (including ensuring there are systems for compliance challenging and costly.)]
Associated Persons	has the meaning given in clause 26.1(a)(4).
Business Day	a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
Change in Control	means, in relation to an entity, any direct or indirect change in Control of the body other than where the Ultimate Holding Company of the entity prior to the change in Control continues to be the Ultimate Holding Company of the body after the relevant change in Control. [CBH drafting note – see new clause 22.3.]
	[CBH drafting note – clause 1.4(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]
	[CBH drafting note – clause 1.4(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]
	[CBH drafting note – these are commercial matters for the Customer and Arc so have been moved to the CTAA.]

Term	Meaning
Claim	a claim, demand, action or proceeding of any nature, whether actual or threatened and includes any claim for payment of money (including damages) arising otherwise in Law or in equity including by statute, in tort for negligence or otherwise.
Commencement Date	[insert]
Commercial Track Access Agreement	the agreement between the Customer and Arc dated on or about the date of this Agreement by which Arc grants the Customer an entitlement to access the Train Paths.
Confidential Information	<p>in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:</p> <ul style="list-style-type: none"> (a) is by its nature confidential; (b) is stated in this Agreement to be confidential; (c) is designated by a party in writing as being confidential; or (d) the receiving party knows or ought to know is confidential, but excludes information which: (e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it; (f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or (g) has been independently developed or acquired by the receiving party.
Consequential Loss	<ul style="list-style-type: none"> (a) [CBH drafting note – this is already covered by clause 18.4 (which includes an appropriate carve-out, where the loss is caused by fraud, Wilful Default, or material breach of this Agreement; if this drafting was not deleted, it would negate the carve-out in clause 18.4.)]any indirect or consequential loss or damage, or special or punitive damages; and (b) any loss of business, loss of profit, loss of use, loss of business reputation, loss of opportunities (including loss of contract (except this Agreement) and loss of bargain (except this Agreement), loss of anticipated savings, wasted overheads, loss of production, loss of revenue, port, shipping or demurrage costs or fees, or damage to credit rating, <p>howsoever arising and whether in any action in contract, tort (including negligence), equity, or product liability, under statute or any other basis.</p> <p>[CBH drafting note – the amendments to clauses 18.1, 18.2 and 18.4, and the proposed updates to clause 19.1, address this carve-out.]</p> <p>[CBH drafting note – not required (and therefore causes confusion) given clause 19.3 (and see additional drafting added to clause 19.1 which excludes Consequential Loss).]</p> <p>[CBH drafting note – the proposed updates to clause 19.1 address this carve-out.]</p> <p>[CBH drafting note – not required (and therefore causes confusion) given clause 18.5 (and see additional drafting added to clause 19.1 which excludes Consequential Loss).]</p> <p>[CBH drafting note – as drafted, this would enable an indemnified person to claim its (for example) loss of profit which it suffers due to it having to pay award damages to a third party (noting also that a third party means any person who is not party to this Agreement, and would</p>

Term	Meaning
	include Arc's related bodies corporate). See proposed clause 19.1(b) which provides more reasonable carve-out, and removes the risk of this paragraph having unintended and unreasonable consequences.]
Control	has the meaning in the Corporations Act.
Corporations Act	the <i>Corporations Act 2001</i> (Cth).
Customer	[insert]
Customer Indemnified Parties	the Customer and its directors, officers, employees, agents and contractors, but excluding the Operator.
Customer Product	means any product which by law can be transported on a Train Path. [CBH drafting note – Customer Product should be anything that by law can be transported on the network on a Train Path. By hardcoding what can be transported, the Agreement lacks flexibility and means that the Customer must seek Arc's agreement (and potential renegotiation) for any deviation in the product transported. Arc should be agnostic as to the product that is to be transported provided that it is safely transported, which this Agreement (and the various law) already provides for. If necessary, product differentiation is usually dealt with in access charges. This is consistent with other precedents such as the ARTC Track Access Agreement.]
Dangerous Goods Code	the Australian Code for the Transport of Dangerous Goods by Road and Rail prepared by the National Transport Commission (or successor body) from time to time.
Default Rate	at the relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website (www.rba.gov.au) at that time plus 3% per annum. [CBH drafting note – CBH considers a more reasonable rate is the cash rate plus 3%.]
Destination	<p>(a) for the Scheduled Train Paths, means the destination of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for Non-Scheduled Train Paths, means the destination of the relevant Train Path provided in accordance with this Agreement or otherwise agreed between Arc and the Customer (or the Operator on behalf of the Customer); [CBH drafting note – this amendment is consequent on the addition of Non-Scheduled Train Paths.]</p> <p>(c) for all Light Engine Movements and other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement, means the point on the Network specified in an Instruction issued by Arc in accordance with this Agreement.</p>
Dollars, A\$ and \$	the lawful currency of the Commonwealth of Australia.
Economic Regulator	means the Economic Regulation Authority Western Australia.
Environment	has the meaning given in the Environmental Protection Act 1986 (WA) and 'Environmental' has a corresponding meaning.
Environmental Condition	any Environmental Harm or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Harm and which in Arc's opinion (acting reasonably) may result in Arc or any other person incurring any material liability or being subjected to a direction of any Government Agency.
Environmental Harm	any actual or threatened adverse impact or damage to the Environment and includes 'environmental harm' as defined in the <i>Environmental Protection Act 1986</i> (WA).

Term	Meaning
Environmental Law	all present and future Laws concerning Environmental matters including the <i>Environmental Protection Act 1986</i> (WA), <i>Conservation and Land Management Act 1984</i> (WA), <i>Rights in Water and Irrigation Act 1914</i> (WA), <i>Dangerous Goods Safety Act 2004</i> (WA), <i>Contaminated Sites Act 2003</i> (WA), <i>Planning and Development Act 2005</i> (WA), relevant local and regional planning schemes, <i>Aboriginal Heritage Act 1972</i> (WA) and <i>Environmental Protection and Biodiversity Conservation Act 1999</i> (Cth).
Expert	means the expert appointed to clause 20.4.
Expiry Date	23:59 hours on [insert].
Force Majeure	<p>any cause, event or circumstance (or combination of causes, events and circumstances) which:</p> <ul style="list-style-type: none"> (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, [CBH drafting note – it is unreasonable for an event that is reasonably predictable to qualify as an event of force majeure.] <p>including:</p> <ul style="list-style-type: none"> (d) an act of God, lightning, storm, flood, fire, bushfire, earthquake or explosion, cyclone, tidal wave, landslide [CBH drafting note – The broad categorisation of heat as a force majeure event is not appropriate as heat is expected during certain periods of the year. A speed restriction is not a cause, event or circumstance. It is an operational decision made as a result of a cause, event or circumstance. The use of the phrase “adverse weather conditions” creates ambiguity when read with paragraph (k) of this definition which refers to “inclement weather” as these concepts seem the same. CBH has resolved this by deleting the reference to “adverse weather conditions” here and leaving paragraph (k) intact.] (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 the Industrial Action is on a national or state-wide basis and not specific to the affected party's Personnel; [CBH drafting note – the requirement for the industrial action to last longer than 28 days to qualify as force majeure is highly unusual and inappropriate. As such, it is not reasonable.] <p>but does not include:</p> <ul style="list-style-type: none"> (h) loss of customers or loss of market share; (i) the failure of, or the breakdown of or other damage to plant, machinery or infrastructure except to the extent as a result of a cause, event or circumstance set out in paragraph (a) or paragraph (g) of this definition; (j) wet or otherwise inclement weather (other than as described in paragraph (d) of this definition);

Term	Meaning
	<p>(k) causes, events or circumstances to the extent caused or contributed to by any acts or omissions by a party'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>
General Operational Instructions	means the online database controlled by Arc that contains operational information and instructions pertaining to the Network, as varied from time to time.
Good Industry Practice	<p>those practices, methods and acts, as varied from time to time, that are commonly used by:</p> <p>(a) in the case of Arc exercising a right or power or performing an obligation, efficient railway owners in Australia; and</p> <p>(b) in the case of the Operator exercising a right or power or performing an obligation, efficient above rail operators in Australia. [CBH drafting note – the Agreement uses this phrase in various places (including proposed mark ups). CBH suggests it is a defined term.]</p>
Government Agency	any government, parliament, governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.
	[CBH drafting note – this definition has been deleted as the clause that uses the definition has been deleted.]
GST	any tax calculated by reference to the value of goods or services provided, calculated and levied at the point of sale or supply of the goods or services and includes GST as that term is used in the GST Act.
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and includes other GST related legislation.
GTK	<p>a unit of measure representing the movement of the combined mass of Rolling Stock and any Customer Product on or in that Rolling Stock travelling over a distance of 1 kilometre. [CBH drafting note – the previous sentence is not correct. It is not “or” Customer Product. It is the combined mass of the Rolling Stock and any Customer Product travelling 1km. The examples given below are correct.]</p> <p><i>By way of example:</i></p> <p>(a) 1 tonne of unloaded Rolling Stock travelling over a distance of 1 kilometre is equal to 1 GTK.</p> <p>(b) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 1 kilometre is equal to 2 GTK’s.</p> <p>(c) 1 tonne of Rolling Stock carrying 1 tonne of Customer Product over a distance of 5 kilometres is equal to 10 GTK’s.</p>
Incident	<p>a breakdown, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:</p> <p>(a) material damage to or interference with the Network;</p> <p>(b) material damage to property;</p> <p>(c) material personal injury to any person;</p>

Term	Meaning
	<ul style="list-style-type: none"> (d) an Environmental Condition; (e) a Category A or a Category B notifiable occurrence as defined in the regulations to the Rail Safety National Law; (f) an incident which requiring notification under the Standards and/or the Dangerous Goods Code; or (g) an incident not already described in paragraphs (a)-(f) above and requiring notification under any Law relating to safety or the environment.
Industrial Action	a strike, lockout, stoppage, go slow, labour disturbance, demarcation or industrial dispute or other industrial action.
Insolvency Event	<p>the occurrence of any of the following events in relation to a person:</p> <p style="background-color: yellow; padding: 5px;">[CBH drafting note – this is an arbitrary amount and it will depend on the entity. In summary, an Insolvency Event is where the person cannot pay their debts. If the \$1 million judgement has this effect then it will be caught by the other provisions below. If not, it should not be a deemed an insolvency event and trigger a default and termination rights. This is consistent with the treatment of insolvency events in other regimes such as ARTC.]</p> <ul style="list-style-type: none"> (a) the person suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act; (b) the person enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them, other than for purpose of a bona fide reconstruction or amalgamation; (c) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a person or over any of the person’s assets or undertakings; (d) an application or order is made for the winding up or dissolution of the person (other than an application which is stayed, withdrawn or dismissed within 10 Business Days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the person, except for the purpose of an amalgamation or reconstruction; (e) the person is deregistered or any steps are taken to deregister the person under the Corporations Act; (f) the person ceases to carry on business; or (g) any event analogous or having a substantially similar effect to any of the events described above happens in connection with that person.
Instructions	<p>all instructions and directions, including instructions and directions of the kind listed in Schedule 4, issued by Arc from time to time which:</p> <ul style="list-style-type: none"> (a) ensure, facilitate or encourage the proper, efficient, safe and lawful: <ul style="list-style-type: none"> (1) use of and access to the Network by all Network users; and (2) management of the Network by Arc; (b) are consistent with the Train Management Guidelines; and (c) are given with a view to minimising the disruption to the Operator in a manner which is reasonable in the circumstances and taking into account the valid objectives of Arc (as set out in paragraphs (a) and (b) of this definition) in issuing the

Term	Meaning
	<p>instruction or direction, but does not include instructions and directions which:</p> <ul style="list-style-type: none"> (d) derogate from the Train Paths; (e) prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or (f) are given for the purpose only of achieving Arc's internal commercial objectives unrelated to the valid objectives of Arc as set out in paragraphs (a) and (b) of this definition, <p>unless the instructions or directions:</p> <ul style="list-style-type: none"> (g) are Train Control Directions properly given; (h) relate to emergencies or material safety issues; (i) are given to implement or support the Train Management Guidelines; (j) are necessary to prevent or to minimise the effect of a material breach of this Agreement; or (k) are otherwise authorised by this Agreement, <p>and a reference to Arc in this definition of Instructions includes also a reference to Arc's Personnel.</p>
Law	<ul style="list-style-type: none"> (a) Commonwealth, state and local government legislation, including regulations, by-laws, orders, awards and proclamations; (b) legislation of any other jurisdiction with which the relevant party must comply; (c) common law and equity; (d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and (e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.
Liability	<ul style="list-style-type: none"> (a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (reasonably incurred) and interest; and [CBH drafting note – a full indemnity basis means that all costs, even wasted ones, will be recoverable. This is not reasonable.] (b) if the context permits also includes any claim or demand for the payment of money, whether liquidated or not.
Light Engine Movement	<p>the movement of a Train instigated by the Operator for a primary purpose other than the transport of Customer Product, including but not limited to:</p> <ul style="list-style-type: none"> (a) Rolling Stock service or repairs; (b) retrieval and movement of failed Rolling Stock; (c) movement of replacement Rolling Stock, or movement of additional required Rolling Stock; (d) relocation or storage of Rolling Stock; or (e) testing or trials of Rolling Stock, <p>save that Light Engine Movements do not include Services transporting Customer Product utilising a Scheduled Train Path.</p>
	<p>[CBH drafting note – this has been moved to the CTAA.]</p>

Term	Meaning
Maintenance Calendar	a document either provided to the Customer or published by Arc on its website and updated in accordance with clause 9.4 which sets out all planned repairs, maintenance or upgrading of the Network and, to the extent they are known, unplanned or emergency repairs, maintenance or upgrading of the Network. [CBH drafting note – see amendments to clause 9.4.]
Maintenance Standards	has the meaning in clause 6.1. [CBH drafting note – see amendments to clause 6.1.] [CBH drafting note – this definition is used in clause 9.4 only where it is used for clarity (that is, that Arc can take Possession of the Network at any time to undertake repairs etc.) As such, it doesn't appear to be needed. CBH suggests it is deleted unless there is a clear rationale for it.]
Master Control Diagram	a diagrammatic or electronic record covering specific parts of the Network which shows all train paths including the Scheduled Train Paths. [CBH drafting note – clause 1.4(c) has been deleted which deals with Material Changes so this definition has been deleted.]
Maximum Track Axle Load	Unless otherwise agreed with Arc, the axle load limit for the relevant parts of the Network that Trains utilising Train Paths will travel on, as set out in Schedule 1. [CBH drafting note – this amendment is to provide flexibility to the definition.]
Maximum Train Length	the train length limit for relevant parts of the Network that Trains will travel on, as set out in Schedule 1.
Modern Slavery	has the meaning given to it in the <i>Modern Slavery Act 2018</i> (Cth).
Modern Slavery Laws	means all applicable Laws concerning Modern Slavery or similar matters including the <i>Modern Slavery Act 2018</i> (Cth).
Month	a calendar month. [CBH drafting note – clause 1.4(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the calculation of Material Change.]
Network	the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies Corporate from time to time. [CBH drafting note – the references to 'Network Lease' in clause 17 have been deleted.] [CBH drafting note – the references to Network Lessor have been deleted where they appear in this Agreement so this definition is not necessary.]
Nominated Route	that in respect of which this Agreement provides access, being that comprised in the routes as listed in Schedule 1.
Non-Scheduled Train Paths	those Train Paths, other than the Scheduled Train Paths, that may be provided in accordance with this Agreement or otherwise agreed between Arc and the Customer (or the Operator on behalf of the Customer). [CBH drafting note – the agreement as drafted does not provide for Non-Scheduled Train Paths. These are an invaluable service which allow for efficient use of the Network and are important for Customers like CBH who operationally need access to Train Paths on an ad-hoc basis.]
Operator Indemnified Parties	the Operator and its Personnel, but excluding Arc Indemnified Parties.

Term	Meaning
Origin	<p>(a) for the Scheduled Train Paths, means the origin of the relevant Train Path as specified in Schedule 1;</p> <p>(b) for Non-Scheduled Train Paths, means the origin of the relevant Train Path provided in accordance with this Agreement or otherwise agreed between Arc and the Customer (or the Operator on behalf of the Customer); and [CBH drafting note – this amendment is consequent on the addition of Non-Scheduled Train Paths.]</p> <p>(c) for all Light Engine Movements and other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement, means the point on the Network specified in an Instruction issued by Arc in accordance with this Agreement.</p>
Park	to stand a Train or Rolling Stock on the Network for any period longer than the usual standing time allowed for under a Train Path in accordance with the Train Management Guidelines.
Personnel	directors, officers, employees, agents, contractors and licensees provided that Arc's Personnel excludes the Operator, the Customer and their respective personnel.
Possession of the Network	closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading.
Rail Access Code	the <i>Railways (Access) Code 2000 (WA)</i> .
Rail Safety National Law	the <i>Rail Safety National Law (WA)</i> as applied by the <i>Rail Safety National Law Application Act 2024</i> , including the <i>Rail Safety National Regulations (WA) 2024</i> and the <i>Rail Safety National Law (WA) (Alcohol and Drug Testing) Regulations 2024</i> .
Related Body Corporate	has the meaning given to that expression in the Corporations Act. [CBH drafting note – clause 1.4(c) has been deleted which deals with Material Changes so this definition has been deleted as it was part of the definition of Material Change.]
Rolling Stock	a locomotive, carriage, wagon or other vehicle permitted for use on the Network, as set out in Schedule 5 (as varied from time to time in accordance with clause 5.3(c)).
Safety Interface Agreement	has the meaning described in clause 5.9.
Scheduled Train Paths	an entitlement to access the Nominated Route by reference to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and departure, transit and arrival times between the Origin and Destination, as set out in Schedule 1, and as may be amended from time to time under the Commercial Track Access Agreement.
Service	the operation of a Train on the Network by the Operator. [CBH drafting note – the definition proposed by Arc is very narrow and means that the parties will have to re-negotiate a Train Path if there is any change in the Customer Product. This may be solved by having a wide definition of Customer Product, which CBH is also suggesting. However, the restrictions in the definition are not required and a wide definition is more appropriate. This agreement already has protections for Arc as to how the Network is used. This further restriction is not necessary or reasonable.]
Standards	the Australian Standard AS4292- Rail Safety Management (Part 1: General and Interstate Requirements), and any other principles and

Term	Meaning
	standards prepared, approved and published by the Standards Australia in relation to rail safety.
Term	is defined in clause 2.
Track Access Permit	a permit issued by Arc which allows a person to enter the rail corridor within which the Network is located.
Train	the combination of Rolling Stock used to operate Services.
Train Control	the control of trains on the Network by Arc or its Personnel.
Train Control Centre	the facility or facilities maintained and operated by Arc or its Personnel at any geographic location for the purposes of communication with Train Crew in order to exercise Train Control.
Train Control Directions	all Instructions issued by Arc or its Personnel relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains.
Train Crew	a person or persons operating a Train.
Train Management Guidelines	Arc's train management guidelines approved under the Rail Access Code and includes any amendments to, or replacement of, those guidelines approved by the Economic Regulator from time to time.
Train Manifest	<p>a notice, in electronic form, prepared by the Operator in relation to a Service and containing the following details in relation to that Service:</p> <ul style="list-style-type: none"> (a) the designated Train number for the Service and its origin and destination; (b) the Track Access Permit Number for each of the Train Crew; (c) the date the Service will commence its operation on the Network; (d) the identification number of the locomotive or locomotives that will operate the Service in the order in which they will form the Train; (e) the number of Rolling Stock in the Train; (f) the gross mass of the Train and the axle load; (g) the length of the Train and the number of wagons or carriages; (h) for all Rolling Stock in the Train in the order in which it will be placed, leading end first, the following information: <ul style="list-style-type: none"> (1) Rolling Stock identification number; (2) Rolling Stock classification; (3) working mode; (4) gross weight of the Rolling Stock (which weight must not be less than the tare weight for that Rolling Stock as set out in Schedule 4); (5) all data provided by the Other Weighing System; and (6) the class of any dangerous goods (as described in the Dangerous Goods Code) carried in the wagon.
Train Path	<p>an entitlement to access the Network by reference to certain specifications relating to the Maximum Track Axle Load, Maximum Train Length, Rolling Stock, day of the week and to departure, transit and arrival times between entry and exit points on the Network and includes the following types:</p> <ul style="list-style-type: none"> (a) the Scheduled Train Paths and the Non-Scheduled Train Paths; (b) train paths provided to the Operator pursuant to clauses 3.6 and 3.7; and (c) all other ad hoc entitlements (including train paths arising by

Term	Meaning
	<p>reason of compliance with Instructions) to access the Network which are provided by Arc to the Operator on the terms set out in this Agreement and otherwise on such terms as Arc may stipulate in accordance with this Agreement or as otherwise agreed between the parties,</p> <p>as granted, amended or varied in accordance with this Agreement or the Commercial Track Access Agreement.</p>
Train Path Policy	<p>means the Train Path Policy applicable to Arc, approved or determined pursuant to the Rail Access Code including any amendments to or replacements of that policy approved by the Economic Regulator from time to time.</p>
	<p>[CBH drafting note – this definition has been deleted as the clause that uses the definition has been deleted.]</p>
Transport Agreement	<p>an agreement between the Customer and the Operator for the provision of rail haulage services to transport Customer Product utilising the Train Paths.</p>
Ultimate Holding Company	<p>has the meaning in the Corporations Act. [CBH drafting note – this concept is used in the new clause dealing with Change of Control.]</p>
Wagon Load	<p>the weight of an individual wagon attached to a Train, and includes the weight of the physical wagon and the weight of the product carried in that wagon.</p>
Wagon Weighing Device	<p>a device or combination of devices which is:</p> <ul style="list-style-type: none"> (a) calibrated, in accordance with a recognised industry standard, to measure; or (b) determined by an authority which provides independent assurance to be capable of measuring; or (c) agreed by the parties to be capable of measuring, Wagon Loads.
Weekly Planning Meeting	<p>has the meaning in clause 3.11. [CBH drafting note – this is defined in the new clause 3.11.]</p>
Weighing System	<p>a system that measures Wagon Load using a Wagon Weighing Device and which:</p> <ul style="list-style-type: none"> (a) is owned and operated by Arc (Arc’s Weighing System) at a point on the Network that Trains utilising Scheduled Train Paths will traverse; or, where Arc’s Weighing System is not available or operational: (b) is owned and operated by the Customer or the Operator (Other Weighing System), provided that the Other Weighing System is maintained at all times such that it meets the requirements of a Wagon Weighing Device under this Agreement.
Wheel Condition Monitor	<p>a system that measures the condition of the wheels on a wagon and which can also weigh that wagon, and which is owned and operated by Arc at a point on the Network that Trains utilising the Scheduled Train Paths will traverse.</p>
Wilful Default	<p>any wilful, intentional, wanton or reckless wrongful act or omission carried out or omitted to be done with:</p> <ul style="list-style-type: none"> (a) knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or (b) a reckless disregard for, wanton indifference to, or knowledge of, the harmful consequences of the act or omission.

Term	Meaning
Working Timetables	operating data for all or part of the Network issued as part of Arc's Network Rules and as amended from time to time.
Year	a 12 month period commencing on 1 July and ending on 30 June.

1.2 Interpretation

In this Agreement unless the context otherwise requires:

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

- (s) where a word or expression is defined, cognate words and expressions will be construed accordingly;
- (t) when a party is performing its obligations and exercising its rights and powers under this Agreement, it must act in accordance with Good Industry Practice unless this Agreement otherwise explicitly provides; and [CBH drafting note – this rule of interpretation avoids the need for specifying Good Industry Practice throughout the document. This should be a standard which each party generally adopts as part of performing its obligations and exercising its rights under this Agreement.]
- (u) whenever a party is exercising a right or power (including but not limited to any discretion, approval or consent), the party must act reasonably and without unreasonable delay in exercising that right or power. [CBH drafting note – safe and efficient operation of the network is likely to be best achieved if the parties are acting reasonably and without unreasonable delay with each other. Further, this simple rule of interpretation avoids the need to include reasonable qualifiers through the agreement, thereby making this agreement easier to read. If this clause is not included in this agreement, all references in this document to a party exercising a right or power (including but not limited to any discretion, approval or consent) should be amended to expressly state that the party must act reasonably and without unreasonable delay in exercising that right or power.]

1.3 Exclusion of the contra proferentem rule

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

1.4 Rail Access Code

- (a) Nothing in this Agreement requires a party to do (or omit to do) anything contrary to the Rail Access Code and the parties agree that they will comply with the Rail Access Code.
- (b) If there is any inconsistency between this Agreement and any Applicable Part 5 Instrument, this Agreement takes precedence over the Applicable Part 5 Instrument to the extent of that inconsistency unless this Agreement expressly provides otherwise. [CBH drafting note – these provisions have been amended to make the order of preference given to the various documents clear.]
- (c) The parties acknowledge and agree that, except where directed by the Economic Regulator in accordance with the Rail Access Code, it is in Arc's sole discretion if and when it may seek approval of the Economic Regulator for any amendment or replacement of any Applicable Part 5 Instrument and, without limitation:
 - (1) Arc's discretion continues unchanged at all times, irrespective of any previous amendments or replacements; and
 - (2) nothing in this Agreement prevents or limits Arc from requesting any such amendment or replacement (nor, having taken any preliminary steps with respect to any proposal, requires Arc to proceed to seek approval for any amendment or replacement.
- (d) The parties acknowledge and agree that nothing in this Agreement restricts or prevents the Operator (or any party) from making submissions to the Economic Regulator in respect of any matter under or in connection with the Rail Access Code. [CBH drafting note –this amendment and the amendment to clause 21.2 is to ensure that the Operator can fully engage with the ERA in respect of this Agreement and the Rail Access Code.]
- (c) [CBH drafting note – this clause should be deleted as it is unreasonable. The standard access provisions (SAP) represent the starting point for negotiations of the access

agreement. They do not represent the access agreement that has in fact been negotiated and agreed by the railway owner and access holder. CBH is concerned that this term potentially allows Arc to seek changes to the SAP which are different to what has been negotiated and agreed with access holders, then use the changed SAP as a basis to force change of the agreed access agreement.]

1.5 Productivity and efficiency variations

- (a) Subject to the terms of this Agreement and without prejudice to each party's rights in respect of this Agreement:
- (1) a party, during the term of this Agreement, may notify the other party of a proposed variation to this Agreement to promote, or accommodate, a demonstrable efficiency or productivity improvement (**Productivity Proposal**); and
 - (2) where a party is notified of a Productivity Proposal, that party must, in good faith:
 - (A) consider that Productivity Proposal having regard to any relevant factors including the costs, benefits and impacts of the Productivity Proposal on each of the parties, on the Services and on the operation and use of the Network, and whether the Productivity Proposal would result in a capacity increase for the Network, or efficiency improvements in one or more elements of the supply chain; and
 - (B) if requested by the other party, participate in discussions concerning the Productivity Proposal with a view to determining what (if any) amendments to this Agreement the parties are willing to agree.
- (b) If, despite reasonable consideration, a party declines to pursue all or part of a Productivity Proposal after complying with clause 1.5(a), that party must provide written confirmation to the other party of its reasons for doing so.
- (c) If the parties agree to make amendments to this Agreement, the parties must do all things reasonably necessary to give effect to those amendments in accordance with this Agreement.

[CBH drafting note – this clause is taken from the QR Rail Standard Access Agreement (clause 1.3). It promotes efficiency through collaboration between the parties.]

2 Term of this Agreement

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

3 Track access rights

3.1 Acknowledgement

Arc hereby confirms and the Operator acknowledges that:

- (a) Arc has granted the Scheduled Train Paths and the Non-Scheduled Train Paths to the Customer pursuant to the Commercial Track Access Agreement; and

- (b) the Operator may only use the Scheduled Train Paths and the Non-Scheduled Train Paths referred to in clause 3.1(a) to operate Services pursuant to this Agreement.

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

- (a) Arc grants to the Operator the right to operate Services on the Nominated Routes using the Train Paths referred to in clause 3.1(a) on the terms set out in this Agreement.
- (b) Arc grants to the Operator the right under this Agreement to submit on behalf of the Customer a request to Park in accordance with this Agreement and the Commercial Track Access Agreement. [CBH drafting note – this is included as part of the amendments to the parking regime in clause 3.10.]

3.3 Nature and scope of operational rights

- (a) Nothing in this Agreement gives the Operator any right, title or interest of any proprietary nature in the Network.
- (b) Notwithstanding clauses 3.1 and 3.2, the Operator's right to operate any Service on the Network (including Services on a Nominated Route using a Scheduled Train Path referred to in clause 3.1(a)) is subject to:
- (1) the terms of this Agreement (including clauses 6, 9.4, 16 and 17.3), including the exercise, or operation, of rights, entitlements, limitations or exclusions under any of them;
 - (2) [CBH drafting note – the clause above regarding satisfying obligations and compliance are inconsistent with clause 20.1 which requires the parties to continue to perform their obligations notwithstanding any dispute between them. In circumstances where the parties are in dispute as to compliance with this agreement, the Customer's right to utilise a Train Path should continue until that dispute has been resolved.]
 - (3) the Commercial Track Access Agreement being in force and a Safety Interface Agreement being in force at the time the Train Path is to be utilised; [CBH drafting note – the word "effective" is of unclear legal meaning. CBH understands this to mean "in force", hence the drafting change. The OTAA and SIA should be in force at the relevant time. It is not necessary for them to be in force at all times during the Access Term.]
 - (4) the Trains utilising the Train Path being comprised of Rolling Stock (or such other combination of locomotives, carriages, wagons and other vehicles agreed to in writing by Arc); [CBH drafting note – this is consistent with the equivalent provision in the Track Access Agreement.]
 - (5) [CBH drafting note – this term is vague and therefore creates commercial uncertainty which in turn is likely to lead to disputes. For example, what is an emergency and what if the emergency was caused by Arc? This is better managed through other, more fulsome, terms of the contract such as the force majeure clause.]the Train Management Guidelines and Arc's Network Rules; and
 - (6) all applicable Laws.

3.4 No other access

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

3.5 Extension and Renewal

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

3.6 Early and late services

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

3.7 Light Engine Movements

- (a) Upon request by the Operator, Arc will use reasonable endeavours, subject to the Train Management Guidelines, grant the Operator a Train Path for the operation of a Light Engine Movement by the Operator using that Train Path [CBH drafting note – Arc should not have an absolute discretion for Light Engine Movements given their importance. Subclause (b) has been moved to the CTAA as it is more appropriately a matter as between the Customer and Arc.]

3.8 Supply chain management

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

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

3.9 Working Timetable

- (a) Arc must ensure that the Operator receives details of, or has access to, those parts of the Working Timetables relating to the Train Paths (including any updates or revisions to those parts).

- (b) Arc must as soon as reasonably practicable notify the Operator of any changes to the Working Timetables that may affect the provision of the Services. Any Instruction which relates to the provision of the Services will be deemed to be notice of a change to the Working Timetables for the purposes of this clause 3.9.

3.10 Master Control Diagram

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

3.11 Parking

The parties acknowledge and agree that the grant of the right to operate Services on the Network under this Agreement includes the right to Park to the extent determined in accordance with the applicable Commercial Track Access Agreement and otherwise only with the prior written consent of Arc, which must not be unreasonably withheld.

[CBH drafting note – the amendments to this clause are to make it more reasonable from an operational perspective. The Parking rights are appropriately set out in the CTAA and this clause points to those.]

3.12 Weekly Planning Meeting

- (a) The parties agree that:
 - (1) Arc will participate in a weekly meeting (**Weekly Planning Meeting**) with the Operator for the objective of having Arc negotiate and agree with the Operator (on behalf of the Customer) any requested variations to Scheduled Train Paths and requested allocation of Non-Scheduled Train Paths for the following week from Monday to Sunday (which when agreed, and together with the Scheduled Train Paths which have not been varied, will constitute the Weekly Train Path Plan);
 - (2) Arc and the Operator will dedicate appropriate and sufficient resources to the Weekly Planning Meeting to ensure it can function effectively and efficiently; and
 - (3) use all reasonable efforts to negotiate and agree the Weekly Train Path Plan.
- (b) When the Weekly Train Path Plan has been agreed:
 - (1) as soon as reasonably practicable following the Weekly Planning Meeting, Arc will issue to the Operator a notice showing varied Scheduled Train Paths and Non-Scheduled Train Paths for the following week; and
 - (2) to the extent that circumstances arise which cause the Customer or an Operator to seek subsequent variations to a Weekly Train Path Plan, Arc will seek to accommodate those variations.

[CBH drafting note – this clause is suggested to be included as it creates the mechanism for allocating Non-Scheduled Train Paths which allows for more efficient use of the Network. It also encourages collaboration between the parties.]

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

5.1 Arc to control

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

5.2 Arc's obligations

Arc must at all times during the Term:

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

5.3 Operator's obligations in relation to Rolling Stock

- (a) The Operator must at all times during the Term ensure that:
 - (1) each Train operated by the Operator on the Network is at all times in a good and safe operational condition and complies with all relevant Laws, the requirements of the Operator's Accreditation and the requirements of Arc's Network Rules; and
 - (2) all of the equipment and Rolling Stock used by the Operator on or in connection with the Network is maintained to a sufficient standard of safety and to a sufficient level of operational efficiency,

but in any case in respect of a particular matter to standards set out in all relevant volumes as amended or superseded from time to time, and published on Arc's website, of: [CBH drafting note – Arc should publish these on its website so it is clear to all parties the standards that apply.]
- (3) the 'Railways of Australia Manual of Engineering Standards and Practices'; and
- (4) the draft code of practice on rolling stock issued or published by the Australasian Railways Association or the Rail Industry Safety and Standards Board, as the case may be, and, if that draft code of practice is subsequently endorsed by the Commonwealth of Australia (including any Government Agency) for national implementation (including on the

Network), then such code of practice once it is so endorsed.

- (b) The Operator may only use the Rolling Stock to provide the Services.
- (c) If the Operator proposes to change any Rolling Stock used to provide the Services, the Operator must first obtain the consent of the Customer and, if it obtains such consent, 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 the Customer's and Arc's prior consent in accordance with this clause. [CBH drafting note – given the consequences of such a change the Customer must consent to the decision.]
- (d) At all times that a Train is operated on the Network, the Operator must ensure that all wagons and carriages comprised in that Train are loaded evenly:
 - (1) in a manner that will ensure the Operator can comply with clause 5.5(a)(10);
 - (2) below or up to the lower of:
 - (A) the rated carrying capacity of the relevant Rolling Stock; and
 - (B) the Maximum Track Axle Load for the relevant Train Path.
- (e) Where any wagon or carriage comprised in a Train operated by the Operator under this Agreement is not loaded in accordance with the requirements of clause 5.3(d), as may be determined by Arc acting reasonably (including by use of a Weighing System or a Wheel Condition Monitor):
 - (1) Arc may, notwithstanding any other provisions of this Agreement and without limitation to its other rights in relation to clause 5.3(d), prohibit the Train from entering onto or continuing to operate on the Network;
 - (2) Arc may, in its absolute discretion and on such conditions as it sees fit, issue an Instruction permitting the Train to enter onto or continue to operate on the Network, but is under no circumstances obliged to do so; and
 - (3) Arc is not liable to the Operator for any Claim, and the Operator must not make any Claim against Arc, in respect of any loss suffered or incurred by the Operator in connection with any act or omission of Arc in accordance with this clause 5.3(e).

5.4 Operator's obligations in relation to Train Crew

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

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

5.5 Operator's general obligations

- (a) The Operator must, at its own cost, at all times during the Term:
 - (1) ensure that its use of the Network complies with the Train Paths applicable to each Service;
 - (2) if it becomes aware 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 as soon as reasonably practicable, including

advising the magnitude of any variance and revised time of departure and/or arrival; [CBH drafting note – there is overlap between the obligations on the Operator to advise Arc of deviations from Train Paths. The amendments seek to consolidate these for ease of reading and clarity.]

- (3) ensure that its use of the Network is carried out in such a way as to minimise obstruction of the Network and so that use of the Network by any other user authorised by Arc is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an Instruction validly given);
 - (4) comply with all Laws which are in any way applicable to operation of the Services or its use of the Network;
 - (5) not materially change, alter, repair, deface, damage or otherwise affect any part of the Network;
 - (6) provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre as at the date of this Agreement and use such equipment to communicate with the Train Control Centre. If Arc proposes to change communications equipment in the Train Control Centre in accordance with Good Industry Practice and the proposal will result in the Operator having to replace or upgrade its communications equipment, Arc must seek the Operator's consent and the Operator must act reasonably in considering Arc's proposal. If the Operator consents, the Operator must at its cost replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre; [CBH drafting note – it is not reasonable for Arc to have a unilateral right to require the Operator to upgrade or replace its equipment as this could cost millions. Any decision of this magnitude should require the consent of the Operator, acting reasonably, if it is to be responsible for the full cost of it.]
 - (7) provide to Arc any information related to the operation of the Services (excluding commercial information) as Arc reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator, other operators, the Customer and the public;
 - (8) provide to Arc a Train Manifest in a format acceptable to Arc for each Service not less than 15 minutes prior to that Service commencing use of the Network and provide notice of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network;
 - (9) inform Arc as soon as reasonably practicable of any cancellation or intended cancellation by the Operator of any Service; and
 - (10) to the standard expected of a diligent and competent above rail operator, not allow more than inconsequential amounts of Customer Product, freight or material being loaded onto or hauled on or in a Train operated by the Operator to fall, leak, spill, emit or escape from the Train or become deposited on or adjacent to the Network.
- (b) For the purposes of clause 5.5(a)(10), **inconsequential amount** means an amount that does not result in or lead to:
- (1) damage to the Network;
 - (2) an injury, or the potential for injury, suffered by people on or adjacent to the Network, whether Arc Personnel or members of the public;
 - (3) a breach, contravention or offence of any Environmental Law; or
 - (4) an Environmental Condition.

[CBH drafting note – Trains may not be fitted with GPS trackers. Further, this potentially gives rise to employee relations issues with respect to tracking. There are other processes, procedures and infrastructure in place to ensure appropriate visibility of trains around the Network.]

5.6 Operator's obligations in relation to disposal of waste

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

5.7 Operator's obligations in relation to any Network blockage

- (a) A blockage of the Network which is caused by a failed train, including any train operated by the Operator, will be managed in accordance with the Train Management Guidelines.
- (b) If a train, other than a Train operated by the Operator, fails and causes a blockage of the Network, the Operator must provide reasonable assistance to Arc as necessary to facilitate the clearing of the blockage and the costs reasonably incurred by the Operator in providing such assistance must be reimbursed by Arc as soon as reasonably practicable. [CBH drafting note – it is not reasonable to require the Operator to incur costs assisting Arc (or another party) where the Operator is not at fault and Arc is likely to be reimbursed or indemnified from that party for its costs.]

5.8 Entry into Safety Interface Agreement

The parties acknowledge and agree that prior to a Service being operated pursuant to this Agreement, the parties must enter into the safety interface agreement in the form attached at Schedule 2 for the purpose of identifying any risks to safety in relation to railway operations pursuant to section 105 of the Rail Safety National Law. [CBH drafting note – There needs to be a standard form Safety Interface Agreement attached to the OTAA. Otherwise, there is no oversight on the terms and, given that a Service is subject to the entry into a Safety Interface Agreement, it would operate to avoid the regime in section 47A of the Code.]

6 Repairs and maintenance of the Network

6.1 Maintenance Standards

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

- (a) the standard existing as at the Commencement Date of this Agreement;
- (b) the minimum standard required to maintain its Accreditation as an Accredited Owner;
- (c) the minimum standard required to perform the Services; and [CBH drafting note - this amendment and the amendments to clause 6 are to ensure that the network is fit for purpose and to ensure that the Operator has visibility over the standard of the network. They are based on a similar regime in the ARTC Undertaking which requires ARTC to maintain the Network in a condition which is fit for use by the Operator to provide rail transport services (clause 6.1 ARTC TAA) and the QR standard access agreement which requires QR to carry out maintenance work so the operator can operate train services in accordance with the agreement (clause

7.1). The amendments are intended to address a key shortcoming in the provision of services under the regime which is that Arc has an obligation to maintain the network yet there is no mechanism for the Operator to track this and ensure performance standards for Services are being maintained. This pushes the risk associated with maintenance standards of the Network to the Customer and users which is not reasonable.]

- (d) any other standards as the parties may agree in writing from time to time,
(Maintenance Standards).

6.2 Operating restrictions

Arc may impose operating restrictions for safety reasons where Arc has undertaken maintenance and it is required by the condition of the Network (but only so far as the Network is relevant to the Train Paths provided) giving notice of speed and weight restrictions, and the Operator must comply with such notice. To avoid doubt, nothing in this clause limits the obligation on Arc to comply with the Maintenance Standards. [CBH drafting note – this clause is not reasonable as it gives Arc a unilateral right to fundamentally undermine the rights of the Customer. Arc has an obligation to maintain the Network to the standard set out in cl 6.1. Arc should not be able to unilaterally impose operating restrictions on the Customer in the unconstrained manner permitted by this clause, particularly if restrictions are due to Arc's failure to maintain. A structured and fair regime is needed in respect of maintenance of the network. This clause and clause 9.4, as amended by CBH, provides that regime.]

6.3 Key Performance Indicators

In addition to any information required to be made available by Arc in accordance with the Rail Access Code, Arc will provide monthly reports to the Operator documenting Arc's performance against the performance indicators as set out in Schedule 6.

[CBH drafting note – this clause is intended to provide the Operator with some measure of the physical condition and performance of the Service being provided by Arc and paid for by the Customer. Without the ability to efficiently monitor the physical condition and performance of the Network through KPIs. Operators have very little ability to hold Arc accountable to specified maintenance standards. KPIs are a common provision in track access agreements. See for example clause 6.7 of the QR standard access agreement or clause 2.10 of the ARTC access agreement.]

7 Accreditation

7.1 Accreditation warranty

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

7.2 Evidence of Accreditation

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

7.3 Suspension or cancellation of Operator's Accreditation

- (a) If at any time the Operator's Accreditation is:
- (1) suspended or cancelled and that suspension or cancellation has an effect on or relevance to the Operator's obligations under this Agreement; or
 - (2) amended so that the Operator cannot perform its obligations generally under this Agreement,
- the Operator must immediately notify Arc and the Customer and cease all Services until:
- (3) the Accreditation is reinstated; or
 - (4) if Accreditation is conditionally reinstated, the conditions are either complied with or apply only to the extent that they have no material effect or relevance to the Operator's obligations under this Agreement.
- (b) Nothing in this clause 7.3 derogates from the parties' rights under clause 17 in respect of suspension or termination of this Agreement.

7.4 Suspension or cancellation of Arc's Accreditation

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

8 Instructions

8.1 Issue of Instructions by Arc

- (a) Arc may issue Instructions to the Operator provided that such Instructions are reasonable and consistent with this Agreement and the Commercial Track Access Agreement. [CBH drafting note – there should be conditions around the issuance of Instructions. These amendments are not onerous on Arc.]
- (b) Arc must in giving any Instruction use reasonable endeavours to minimise disruption to the Services.
- (c) As soon as reasonably practicable must give to the Operator a written copy of an Instruction unless such Instruction is ordinarily not given in writing by Arc to operators granted access to the Network.

8.2 Compliance by the Operator with Instructions

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

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

9 Variations or cancellations of Train Paths

9.1 Operator and Arc consultation protocols

- (a) [CBH drafting note – this is deleted as the obligations have been generally consolidated into clause 5.5(a).]

The parties must, at all times during the Term, have and maintain consultation and communication protocols for the purpose of facilitating the exchange of information under clause 9.1(a), including, unless otherwise agreed, establishing a 24 hour communications link.

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

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

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

9.3 Variations to Train Paths under the Commercial Track Access Agreement

The Operator acknowledges that:

- (a) the Scheduled Train Paths may be varied or removed (including where

permanently cancelled for under-utilisation) under the Commercial Track Access Agreement;

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

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

[CBH drafting note – these amendments are to make the clause consistent with the CTAA amendments.]

- (a) Arc may perform repairs, maintenance or upgrading of the Network and take Possession of the Network in accordance with the Commercial Track Access Agreement and the Train Management Guidelines only. To the extent this clause 9.4 is inconsistent with the Train Management Guidelines, this clause will take priority. [CBH drafting note – these amendments are to make the clause consistent with the CTAA amendments.]
- (b) Arc must:
 - (1) have in place a Maintenance Calendar at the commencement of this Agreement which, at a minimum, sets out the repairs, maintenance, upgrading or Possessions planned or known to Arc for the upcoming 12 months; and
 - (2) maintain and update that Maintenance Calendar on a rolling basis so that at all times it sets out the repairs, maintenance, upgrading or Possessions planned or known to Arc for the upcoming 12 months. [CBH drafting note – this is a simplified version of the regime in the QR Access Undertaking 3. It provides certainty for the parties without being onerous on Arc. Having adequate notice is an issue for customers and operators and this clause is intended to provide transparency to parties to enhance efficiency.]
- (c) Throughout the Access Term, the parties agree that they will work together in the scheduling of repairs, maintenance and upgrades to the Network and take all reasonable steps to minimise the disruption to one another.
- (d) Arc must amend or modify the Maintenance Calendar to:
 - (1) include any planned repairs, maintenance or upgrading provided Arc provides at least the notice in the Train Management Guidelines;
 - (2) set out forecast planned maintenance or upgrading of the Network; and
 - (3) include urgent repairs, maintenance or upgrading due to emergencies.
- (e) Arc is not required to obtain the Customer's consent to u n d e r t a k e repairs, maintenance or upgrades:
 - (1) if they are urgent repairs, maintenance or upgrades due to emergencies; or
 - (2) they are included in the Maintenance Calendar. [CBH drafting note – the intent of this clause is to provide transparency over repairs and upgrading and to require collaboration between the parties. The clause seeks to ensure that the notice periods in the Train Management Guidelines are not overridden by times in this clause.]
- (f) If repairs, maintenance or upgrading of the Network or taking Possession of the Network, are reasonably likely to materially affect the Train Paths and are required other than because of urgent repairs, maintenance or upgrading due to emergencies related to safety or natural events, Arc must prior to commencement of the works:
 - (1) take all reasonable steps to minimise any disruption to the Train Paths;

and

- (2) use reasonable endeavours to provide alternative Train Paths.
- (g) 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 or include such repairs, maintenance or upgrading activities in the Maintenance Calendar;
 - (2) otherwise, Arc must give notice in accordance with the timeframes set out in the Train Management Guidelines including advising the Operator as soon as practicable of:
 - (A) the circumstances;
 - (B) the likely impact on the Train Paths; and
- (h) the likely duration of the Possession of the Network. Any notice given under clause 10.4(g)(2) must describe:
 - (1) the extent and nature of the works;
 - (2) the potential effect on Train Paths; and
 - (3) what alternative arrangements are proposed by Arc.
- (i) If any repair, maintenance or upgrading activity notified by Arc is not achievable within the anticipated timeframe, Arc must:
 - (1) as soon as is reasonably practicable notify the Operator; and
 - (2) provide a revised and continuing estimate of the anticipated completion time of the works.

9.5 Cancellation of Services using Train Paths and alternative use

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

[CBH drafting note – CBH has proposed deleting the ability of the Operator to cancel Train Paths in clause 8.6 of the CTAA. These amendments are to make the clause consistent with the CTAA amendments.]

[CBH drafting note – there is no need for the Operator to make such an acknowledgement under the OTAA. In any event, this clause has been amended in the CTAA.]

10 Inspection and audit

[CBH drafting note – this clause was one sided and highly favourable to Arc. The suggested amendments make it reasonable by, as far as practicable, making the provisions apply to either party. It is based on the 2025 proposed standard access agreement for QR Rail (clause 9).]

10.1 Inspection and audit by a party

Subject to clause 10.2, a party may at any time by providing reasonable prior notice to the other party require:

- (a) in the case of Arc, a particular Service of the Operator which is using the Network to undergo an audit for the purpose of assessing:
 - (1) the Operator's compliance with the terms and conditions of this Agreement, including whether each Train Manifest provided by the Operator under clause 5.5(a)(8) is correct;
 - (2) whether the Rolling Stock comprised in a Service is maintained to the standards set out in this Agreement, for the purpose of avoiding any

- actual or apprehended damage to the Network;
- (3) whether any one or more of the individual wagons or carriages used by the Operator in the provision of a Service is loaded unevenly or in excess of the Maximum Track Axle Load or its rated carrying capacity; or
 - (4) whether any one or more of the individual wagons or carriages used by the Operator in the provision of the Service is loaded in an unsafe or potentially unsafe manner; and
- (b) in the case of Operator, an audit of the relevant aspect of any of the railway track and lines comprising the Network (but only in so far as the Network is relevant to the Scheduled Train Paths) for the purpose of assessing whether Arc is complying with its obligations under clause 6.

10.2 Limitations on audit

- (a) Prior to conducting an audit under clause 10.1, a party must:
- (1) have reasonable grounds for the purpose of the audit;
 - (2) provide written notice to the other party of the grounds of the audit and the reasons for requesting the audit; and
 - (3) unless the audit is in respect of an emergency, allow the party a reasonable opportunity to respond to the notice.
- (b) A party must not carry out more than such number of audits under clause 10.1 as are reasonably necessary in the circumstances for the purposes of assessing the matters referred to in clause 10.1.

10.3 Instructions and audit

- (a) In conducting an audit under clause 10.1, and provided it has complied with clause 10.2:
- (1) Arc may give an Instruction to the Operator to divert or delay a Service or make any part of a Train engaged in providing a Service available for inspection or weighing for the purpose of the audit.
 - (2) each party must coordinate and cooperate with the other party and use its reasonable endeavours in the conduct of any such audit to minimise the disruption to the Operator's Service and mitigate any loss or damage arising from the conduct of the audit.
 - (3) a party must not cause or contribute to any damage to property, any Environmental Harm or any injury or death of persons.
 - (4) a party must comply with the health, safety, environment and other requirements as required by the other party (acting reasonably).
 - (5) Unless otherwise agreed, any such audit must be conducted in the presence of a representative of the other party;
 - (6) the ability of Arc to issue an Instruction to the Operator, at any time during the audit and which must be complied with immediately by the Operator, to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and other operators;
 - (7) any such audit must be conducted in a manner that does not cause any disruption to any service of any other operator granted access to the Network by Arc or the provision of services by Arc to such operators, or otherwise impact adversely on a party's ability to comply with its obligations under this Agreement.
- (b) The Operator will be liable for any Claims made against Arc by another user of the Network or party that holds rights of access to any part of the Network as a result of a delay or cancellation of a train service of that entity as a result of the exercise by the Operator of its audit rights under this clause except to the extent such delay or cancellation was caused or contributed to by Arc's breach of this

clause.

- (c) The party whose operations are audited must bear the reasonable costs of the conduct of the audit to the extent that the stated grounds for requiring the audit are demonstrated to exist. If they are not, the party undertaking the audit must bear the costs of conducting the audit.
- (d) The party undertaking the audit must provide the other party with a copy of the report for the relevant audit. However, an audit by a party does not relieve either party of its obligations under this Agreement or a law.

10.4 Monitoring equipment

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

[CBH drafting note – this section has been deleted as it is addressed by the amendments above.]

11 Emergencies and Incidents

11.1 Plans for dealing with Incidents

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

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

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

11.3 Notification of Incidents

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

11.4 Investigation of Incidents

- (a) Incidents will be investigated in accordance with the Rail Safety National Law and

as otherwise required by Law.

- (b) Each party must co-operate with an investigation under this clause 11.4 and make available records and personnel relevant to the Incident.
- (c) The parties must consult with each other to determine any action to be taken as a result of any investigation.

11.5 Operator's report

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

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Operator's Train and to the Network;
- (c) the factors which are known to have contributed to the cause of the loss or damage to the Operator's Train and to the Network (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)); [CBH drafting note – this is a usual provision so the party is not penalised for being transparent.]
- (d) an analysis in printed format of speed recorder charts for the Operator's Train;
- (e) such other information which is required to be disclosed in a report to the Director General of Transport under the Rail Safety National Law; and
- (f) any other information required to be disclosed in a report under the Dangerous Goods Code.

11.6 Arc's report

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

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Operator's Train and to the Network;
- (c) the factors which are known to have contributed to the cause of the loss or damage to the Operator's Train and to the Network (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)); [CBH drafting note – this is a usual provision so the party is not penalised for being transparent.]
- (d) such other information which is required to be disclosed in a report to the Director General of Transport under the Rail Safety Act; and
- (e) any other information required to be disclosed in a report under the Dangerous Goods Code.

11.7 No disposal of equipment

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

11.8 Interim responsibility for recovery costs

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

12 Safety Standards

12.1 Compliance by the parties

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

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

12.2 Notification of Breach

- (a) Without limitation to clause 17, as soon as Arc becomes aware of a breach by the Operator of any of Arc's Network Rules which occurs during or as a result of the use by the Operator of the Network (**Breach**) it must give notice in writing to the Operator setting out:
 - (1) the time, place and a general description of the Breach;
 - (2) what, in Arc's reasonable opinion, caused the Breach and which person or persons were responsible for the Breach;
 - (3) the consequences, if any, of the Breach for operation of the Services or the use by other users of the Network;
 - (4) any proposed modification of its procedures which Arc intends to make;
 - (5) any Instruction requiring that the Breach be remedied; and
 - (6) any modifications to the Operator's procedures which Arc reasonably considers that the Operator should make to prevent future Breaches (however, no modification can be required which is reasonably likely to cause, or causes, the Operator to be in breach of its Accreditation).
- (b) Unless the Breach is or will result in an emergency, Arc must provide the Operator with a reasonable period and no less than 5 Business Days to respond to the notice.
- (c) If the Operator responds, Arc must consider any response in good faith and take into the account the response in determining the matters referred to in clause 12.2(4) to (6) prior to requiring such modification or issuing any Instruction. [CBH drafting note – these amendments require Arc to seek a response from the Operator and take into account the Operator's response before determining a solution. The clause is still one sided in favour of Arc after

these inclusions.]

12.3 Provision of Arc's Network Rules

- (a) Arc must provide to the Operator a copy of Arc's Network Rules in force at the date of this Agreement within five Business Days of execution of this Agreement. For the avoidance of doubt, Arc's Network Rules in force at the date of this Agreement must be reasonable and in accordance with Good Industry Practice
- (b) Notwithstanding anything in Arc's Network Rules, this Agreement takes precedence over Arc's Network Rules to the extent of any inconsistency.
- (c) Arc agrees that it will only amend Arc's Network Rules from the version in force as at the date of this Agreement where required under the Rail Safety National Law or in accordance with Good Industry Practice.
- (d) If Arc amends the Arc Network Rules:
 - (1) Arc must give written notice of the amendment together with an explanation for the reason for the amendments; and
 - (2) the Customer must comply with the amended Arc Network Rules from the date that is the later of:
 - (A) the date notified by Arc that the amendments are to come into force;
 - (B) the date determined by the Expert or agreed by the parties (if the amendments are the subject of a dispute); and
 - (C) 30 days from the date of the written notice of the amendments from Arc.
- (e) 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(c),the Operator may notify Arc and the relevant technical personnel of each party must meet, within 5 Business Days after the notice is given, with a view to resolving the issue by joint discussions.
- (f) If the parties are unable to resolve the issue in accordance with clause 12.3(e) within 10 Business Days, either party may refer the matter to an Expert in accordance with clause 20.4 [CBH drafting note – clause **Error! Reference source not found.** states the Operator's right to use a Train Path is subject to the Train Management Guidelines and Arc's Network Rules. The Train Management Guidelines are a regulated document so the Operator has protection against adverse amendment of that document. However, Arc's Network Rules are able to be amended without oversight. CBH has inserted this clause to address this lack of protection. The clause provides flexibility for Arc to amend the Network Rules so they can appropriately manage the Network but provides guidance as to the types of amendments Arc may introduce so the purpose of the document is clear and the Operator is protected. The amendments also make it clear that this Agreement prevails over Arc's Network Rules to the extent of any inconsistency to ensure that future amendments cannot cut across this Agreement.]

13 Environmental requirements and dangerous goods

13.1 Compliance with Environmental Requirements

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

13.2 Notification of carriage of certain materials

The Operator must include in all Train Manifests such detail in relation to the identification of dangerous goods as is required by the Dangerous Goods Code and as is otherwise reasonably required by Arc (on terms not inconsistent with the Dangerous Goods Code).

13.3 Notification of Incident involving dangerous goods

The Operator must provide to Arc details, at the earliest practicable time after the Operator becomes aware, of all incidents (including non-compliance with relevant Laws, whether or not an Incident) involving dangerous goods including but not limited to any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

13.4 Notification of Environmental Condition

(a) Where:

- (1) Arc becomes aware that, as a result of the activities of the Operator under this Agreement, an Environmental Condition exists or has occurred and Arc reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or
- (2) Arc is given a direction by a Government Agency that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition resulting from the activities of the Operator in connection with this Agreement, [CBH drafting note – this is consistent with the equivalent provision in the Track Access Agreement.]

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

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

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

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

the Operator is responsible for maintaining and operating the Rolling Stock in accordance with Good Industry Practices ; and

- (3) Arc is responsible for providing Train Paths and maintaining the Network in accordance with this Agreement.

(c) If the parties are unable to reach agreement under clause 13.4(b), the matter will be referred to dispute resolution under clause 20.

14 Insurances

14.1 Operator's insurance policies

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

(a) a public liability insurance policy which:

- (1) covers the liability of the Operator and its Personnel to any person arising out of or in connection with this Agreement with a sum insured

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

14.2 Arc's insurance policies

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

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

caused or contributed to by, the performance or non-performance of this Agreement by Arc which insurances must provide cover:

- (1) in respect of common law claims, for an amount not less than \$50,000,000; and
- (2) for compulsory statutory workers' compensation insurance, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981* (WA) or any other applicable Law.

14.3 Approved insurance companies

Each policy of insurance required to be taken out by the Operator and Arc under clause 14.1 and clause 14.2 must be placed with:

- (a) 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
- (b) a wholly owned captive insurance company of the party, reinsured with various insurers with a credit rating of at least "A-" by Standard & Poor's or such other reputable rating agency which is equivalent to a rating "A-" by Standard & Poors Rating Group.

[CBH drafting note – this amendment provides for more flexibility for the Operator. It is consistent with clause 16.1(f) of the ARTC track access agreement.]

14.4 Evidence of insurances

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

14.5 Insurance not a limit on party's liability

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

15 Matters relating to the Transport Agreement

- (a) The Operator must 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 where the subject matter of the notice or the circumstance relates to any event of 'Force Majeure' (as defined in the Transport Agreement) affecting the Operator or the Customer under the Transport Agreement.
- (b) The Operator must immediately notify Arc if the Transport Agreement has been terminated or expires.

[CBH drafting note – this is not reasonable. It is for the Operator to comply with its obligations in respect of a Transport Agreement. It is unreasonable for Arc to be provided with notices of a default for example as they may be cured. Arc needs to know if the Transport Agreement is terminated and if the Operator cannot perform because it is subject to force majeure. These have been retained. The other matters are matters between the Customer and the Operator.]

16 Force Majeure

16.1 Suspension of obligations

The obligations of a party (**Affected Party**) under this Agreement are suspended during

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

16.2 Obligations of an Affected Party

The Affected Party must:

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

[CBH drafting note – this is inappropriately the subject of force majeure rather than being a carve out. Heat speed restrictions are imposed regularly during periods of predictable summer heat and therefore should not be considered a consequence of a ‘force majeure’ event.] [CBH drafting note – this is not required as the charges have been moved to the CTAA.]

17 Suspension or termination

17.1 Termination by Arc

[CBH drafting note – these termination rights are extensive and too easy to trigger. CBH has proposed that they be cut down to be more reasonable.]

- (a) Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, Arc may immediately terminate this Agreement by notice in writing to the Operator if:

[CBH drafting note - Subclause (1) was deleted because the Customer might enter a new CTAA with Arc before the term of this OTAA ends, in which case the Customer should not have to wait until Arc and the Operator enter into a replacement OTAA before the Customer can access the network under its replacement CTAA; during the period when a CTAA is terminated and (if applicable) replaced with another CTAA, this OTAA stays in place but is, in effect, inactive. Subclause (2) was deleted because if the Transport Agreement is terminated before the term of this OTAA ends, the Operator and Customer might enter into a replacement Transport Agreement, in which case the Customer should not have to wait until Arc and the Operator enter into a replacement OTAA before the Customer can continue accessing the network under its CTAA.]

- (1) the Operator fails to pay when due any amount due to Arc under this Agreement (other than any amount for which the Operator has, before the relevant due date for payment, given Arc Notice of Dispute) and such failure is not remedied within 10 Business Days of Arc giving

- notice to the Operator of the failure;
- (2) [CBH drafting note – this is deleted as Charges are no longer payable by the Operator to Arc under this OTAA (they are now payable under the CTAA), and clause 4 has been deleted, so those references are no longer applicable.]the Operator fails to effect or maintain the insurances required to be taken out by it under clause 14 and the Operator has not remedied the breach within 10 Business Days of a notice from Arc requiring the breach to be remedied;
 - (3) the Operator fails to comply with its obligations under clause 22 in a material respect;
 - (4) the Operator breaches any of its material obligations under this Agreement (other than as described in any of clauses 17.1(a)(1) to 17.1(a)(3) or clauses 17.1(a)(7) and 17.1(a)(8)) and the breach cannot be remedied and the Operator has not paid to Arc reasonable compensation in respect of the unremedied breach within 20 Business Days of Arc giving notice to the Operator of the breach; [CBH drafting note – breaches which are incapable of remedy were not addressed.]
 - (5) the Operator breaches any of its material obligations under this Agreement (other than as described in any of clauses 17.1(a)(1) to 17.1(a)(3) or clauses 17.1(a)(7) and 17.1(a)(8)) which can be remedied and the Operator has not remedied the breach within the time specified (which shall not be less than 30 Business Days) in a notice from Arc to the Operator requiring the breach to be remedied; [CBH drafting note – , 10 Business Days will be too short given the different types of breaches which may be covered by this clause . CBH suggests a longer remedy period.]
 - (6) an Insolvency Event occurs in relation to the Operator
 - (7) without limiting clause 17.1(a)(4) or 17.1(a)(5), the Operator becomes unable to lawfully perform, in a material respect, material obligations which apply to the Operator under this Agreement due to the Operator's Accreditation being, for a continuous period of at least 1 Month, suspended or cancelled, or amended;[CBH drafting note – the formulation below in (A) was vague (e.g. "has an effect on or relevance to" is not the appropriate test, rather the test ought to be that the Operator ceases to be able to lawfully perform its obligations); presumably Arc wants this so as to avoid the Operator arguing that it has not "breached" its obligations (with "breaches" covered by paragraphs. (4) and (5) above) if the Operator has become unable to lawfully perform those obligations due to a change in its Accreditation status). :
 - (8) the Operator breaches clause 13.4(a) [CBH drafting note – the regime in clause 13.4(a) is clear, whereas Arc's formulation of this clause introduced the concept of Arc's opinion about the impacts.] and such breach is not remedied within 10 Business Days of Arc giving notice to the Operator of the breach,

[CBH drafting note – it is not apparent why this is needed (e.g. what substantive addition it provides beyond the provisions above). Breaches which cause safety risks will constitute breaches of material obligations under this Agreement, which, if left unremedied, will trigger termination rights under the provisions above. This additional paragraph is redundant and causes confusion (and therefore risks of disputes or gaming).]provided that for the events described in any of clause 17.1(a)(1), 17.1(a)(5), 17.1(a)(7) and 17.1(a)(8), Arc has first exercised its corresponding right of suspension under clause 17.3 in respect of the event.

17.2 Termination by the Operator

- (a) Without limiting any other rights of termination contained elsewhere in this Agreement or at Law, the Operator may immediately terminate this Agreement

by notice in writing to Arc if:

- (1) the Commercial Track Access Agreement is terminated or expires;
 - (1) the Transport Agreement is terminated or expires;
 - (2) Arc fails to comply with its obligations under clause 22 in a material respect;
 - (3) Arc fails to effect or maintain the insurances required to be taken out by it under clause 14 and Arc has not remedied the breach within 10 Business Days of a notice from the Operator requiring the breach to be remedied;
 - (4) Arc fails to pay when due any 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) an Insolvency Event occurs in relation to Arc, or Arc's Accreditation is suspended, cancelled, or amended, [CBH drafting note – we have combined this paragraph (6) with paragraph (7) below. The preceding comment sets out the rationale for the amendments.]and, as a result of the Insolvency Event or suspension, cancellation, or amendment, Arc fails, or is unwilling, to provide access to the Network in accordance with this Agreement for not less than 5 Business Days; [CBH drafting note – there is no justification for effectively suspending the Operator's rights to access the Network for 3 months (under this clause) or 1 Month (under paragraph (7) below) before the Operator can terminate. It would leave the clause open to gaming as to what happens after the 3 month period.]
 - (6) Arc breaches any of its material obligations under this Agreement (other than as described in any of clauses 17.1(b)(3) to 17.1(b)(5)) and the breach cannot be remedied and Arc has not paid to the Operator reasonable compensation in respect of the breach within 20 Business Days of the Operator giving notice to Arc of the breach; [CBH drafting note – breaches which are incapable of remedy were not addressed.]
 - (7) Arc breaches any of its material obligations under this Agreement (other than as described in any of clauses 17.2(a)(3) to 17.2(a)(5)) which can be remedied and Arc has not remedied the breach within the time specified (which shall not be less than 30 Business Days) in a notice from the Operator to Arc requiring the breach to be remedied.
- (b) Nothing in this clause 17.2 derogates from or affects Arc's rights and powers to manage the Network and any of its other rights or powers under any other agreement with any other person, including any track access agreement with any other operator.

17.3 Suspension by Arc

- (a) Without limiting in any way Arc's rights under clause 17.1, if:
- (1) Arc is entitled to terminate this Agreement under clause 17.1;
 - (2) an event or circumstance referred to in clause 17.1(a)(1), 17.1(a)(4), 17.1(a)(5), 17.1(a)(7) or 17.1(a)(8) has occurred and, but for the effluxion of the relevant time referred to therein, Arc would be entitled to terminate this Agreement under clause 17.1; or
 - (3) obligations under the Commercial Access Agreement are suspended,
- Arc may elect, or as a preliminary course of action, instead to suspend the obligations of both parties under this Agreement (subject to clause 17.3(b)) until the earlier of such time as the cause giving rise to the suspension ceases to exist, termination of this Agreement or such earlier time as Arc by notice in writing lifts the suspension. [CBH drafting note – Arc should still be required to act reasonably

in this circumstance]

- (b) An election referred to in clause 17.3(a) is revocable at any time by Arc and has no effect upon the obligations, debts or liabilities which have accrued before or after the election to suspend and, for the avoidance of doubt, does not affect or suspect the Operator's obligation to pay Charges under this Agreement (including with respect to the period of suspension) and is without prejudice to Arc's other rights and remedies in respect of that or any other default.

17.4 Suspension by Operator

- (a) Without limiting in any way the Operator's rights under clause 17.2, if:
 - (1) the Operator is entitled to terminate this Agreement under clause 17.2; or
 - (2) an event or circumstance referred to in any of clauses 17.2(a)(5) to 17.2(a)(8) has occurred and, but for the effluxion of the relevant time referred to therein, the Operator would be entitled to terminate this Agreement under clause 17.2,

the Operator may elect instead, or as a preliminary course of action, to suspend the obligations of both parties under this Agreement (subject to clause 17.4(b)) until the earlier of such time as the cause giving rise to the right to suspend has ceased to exist, the Agreement is terminated, or such earlier time as the Operator by notice in writing lifts the suspension.

- (b) An election referred to in clause 17.4(a) is revocable at any time by the Operator and has no effect upon the obligations, debts or liabilities which have accrued before or after the election to suspend and is without prejudice to the Operator's other rights and remedies in respect of that or any other default. [CBH drafting note – As Arc has a right to suspend performance of its obligations then the Operator should also have a corresponding right. This is also consistent with other regimes such as the QR standard access agreement.]

17.5 Removal of Rolling Stock following termination

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

17.6 Effect of termination or suspension

- (a) Without limitation to the other provisions of this clause 17.6, if this Agreement is terminated by either party for any reason (including pursuant to any common law

right to terminate for repudiatory or fundamental breach), then:

- (1) Arc may issue an invoice for, and will be entitled to payment by the Operator of, those Charges which Arc would have been entitled to claim payment for under this Agreement up to the date that termination takes effect, but for the effluxion of the relevant time referred to in this Agreement before such payment claim could be made; and
- (2) the Operator must, within 10 Business Days of receiving the invoice under this clause 17.5, pay the amount properly claimed and set out in the invoice.

[CBH drafting note – this could cause confusion because it is not required.]

[CBH drafting note – deleted because CBH proposed the deletion of clause 17.1(a)(1) and (2).]

Upon termination, or during suspension, of this Agreement all rights of the Operator to use the Train Paths or to otherwise access the Network in accordance with this Agreement will cease immediately.

- (b) [CBH drafting note – deleted because CBH proposed the deletion of clause 17.1(a)(1) and (2).] Upon termination or suspension of this Agreement all rights of the Operator to use the Train Paths or to otherwise access the Network in accordance with this Agreement will cease immediately.
- (c) Termination or suspension of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (d) Upon termination or suspension of this Agreement under any circumstances, all covenants and agreements of Arc and the Operator which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement will survive such termination or suspension.
- (e) Notwithstanding clause 20, upon termination of this Agreement (including any purported termination) a party may not issue a Notice of Dispute under clause 20.1(a) in respect of the termination, purported termination or matter that has given rise to the notice of termination and, in respect of there being any Dispute with respect to any of the foregoing, either party may commence legal proceedings in respect of the Dispute in a Court of competent jurisdiction.

18 Indemnities

18.1 Indemnity by Operator

Subject to the other provisions of this clause 18 and to clause 19, the Operator must promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all [CBH drafting note – "Claim" includes things like threatened claims, which (for example) could be made by third parties on a vexatious or frivolous basis. CBH would accept indemnification against losses, liabilities etc. which Arc incurs.] Liabilities which the Arc Indemnified Party suffers, incurs, or is liable for in respect of:

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

to the extent that the death, injury, loss, damage or destruction arises out of or is as a consequence of:

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

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

18.2 Indemnity by Arc

Subject to the other provisions of this clause 18 and to clause 19, Arc must promptly on demand, indemnify and keep indemnified each Operator Indemnified Party from and against all Liabilities which the Operator Indemnified Party suffers, incurs or is liable for in respect of:

- (a) the death of or injury to any person; or
- (b) any loss of, damage to or destruction of any real or personal property (including Customer Product and Rolling Stock), [CBH drafting note – this inclusion makes the indemnity reciprocal as Arc refers to the Network in clause 18.1.]

to the extent that the death, injury, loss, damage or destruction arises out of or is as a consequence of:

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

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

18.3 Duty to mitigate

The entitlement of a person to be indemnified under this Agreement (including under clauses 18.1, 18.2 or 18.4) 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 person's failure to take reasonable steps to mitigate the Liability. [CBH drafting note – the previous drafting had an unreasonable 'hair trigger' effect, whereas this revision allows the indemnification to remain but so that it does not apply to the extent a party fails to mitigate. It is also extended to other indemnities (including clause 12.4) as it is not reasonable for a party to indemnify the other party for liability where that party fails to mitigate that liability.]

18.4 Liability to third parties

The Operator indemnifies and must keep indemnified the Arc Indemnified Parties against all Claims by third parties against the Arc Indemnified Parties to the extent the Claims arise out of or are in connection with damage to or loss of any third party owned property (including Customer Product and Rolling Stock) where such property is being transported as part of, or on, a Service, but this indemnity will be reduced proportionately to the extent that any act or omission by, an Arc Indemnified Party has caused or contributed to the damage to, or loss of, that property. [CBH drafting note – exclusion of contributory cause is fair and reasonable and normal commercial practice.]

[CBH drafting note – this is excessive and not reasonable]

18.5 Cost of recovery

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

18.6 Defence of Claims

- (a) Each party must render to the other party all reasonable assistance in the defence of any Claim made against the other party by a third party arising out of any Incident or other event or events giving rise to a Claim which is connected with this Agreement.
- (b) To the extent that a party (**responsible party**) is obliged under this Agreement to indemnify the other party (**indemnified party**) against a Claim by a third party against the indemnified party, the responsible party may, subject only to the terms of any applicable insurance which the indemnified party may have, at its own expense defend and settle any action or proceedings in the name of the indemnified party in connection with such Claim and execute such documents in the action or proceedings as the responsible party sees fit, provided that any such settlement may not (without the consent of the indemnified party) require the indemnified party to provide a remedy which is not the payment of money. The responsible party indemnifies the indemnified party in respect of all Liabilities which the indemnified party may incur on account of such defence or settlement of the action or proceedings.

18.7 Other indemnities

For the avoidance of doubt, the releases and indemnities in this clause 18 are in addition to, and without limitation to, any other release or indemnity given under this Agreement, including under clauses 17.4(c) and 17.4(d). [CBH drafting note – these indemnities have been deleted under the amendments to this Agreement.]

18.8 General provisions regarding releases and indemnities

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

19 Limits of Liability

19.1 No Liability for Consequential Loss

- (a) Subject to clauses 19.1(b) and 19.3, 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, for clarity, the indemnities in this Agreement will not extend to) any Consequential Loss under or in connection with this Agreement, whether arising under this Agreement, at Law or otherwise.
- (b) Clause 19.1(a) does not apply to:
 - (1) clause 18.4; or
 - (2) relieve or limit a party's liability:
 - (A) in connection with the party's fraud or Wilful Misconduct;
 - (B) where that party is the Operator, under its indemnity obligations under clause 18.1(a); or
 - (C) where that party is Arc, under its indemnity obligations under clause 18.2(a).

19.2 Minimum threshold on Claims

Neither party may make any Claim against the other under or in connection with this Agreement, whether under an indemnity, in contract, in tort (including negligence), in

equity, under statute or on any other basis, if the amount of all Claims by the party against the other in relation to the loss or destruction of, or damage to, property, or injury or death of any person, arising out of or in connection with one event, or a series of related events, in connection with this Agreement, does not in the aggregate exceed \$20,000, provided that this clause 19.2 does not apply to loss, destruction, damage, injury or death arising from the fraud or Wilful Default of the other party.

19.3 Failure to pay amounts

No exclusion or limitation of Liability, or restriction on the existence of or ability to make any Claim, in this Agreement (including this clause 19) applies to limit or extinguish [CBH drafting note – this carve-out should not apply so as to allow one party to, for example, claim loss of profit which results from the other party's failure to pay money under this Agreement (e.g. the creditor's ability to redeploy the moneys payable under this Agreement to make further profits).] a party's obligation under this Agreement to pay the other party monies due and payable in accordance with this Agreement including under clause 4 or any amount as expressly provided for in the Overpayment Rules. [CBH drafting note – this is consistent with the equivalent provision in the Track Access Agreement.]

[CBH drafting note – The proposed clauses 19.4, 19.5 and 19.6 would significantly erode (or, arguably, entirely negate) Arc's fundamental obligations. Arguably, they would be so favourable to Arc and detrimental to Customers that they would render this Agreement inconsistent with Arc's obligation to provide access. They would largely negate the purpose of other provisions in this Agreement, which is not reasonable. There would be a material likelihood that very few claims could be made against Arc, including for circumstances for which it is reasonable to expect the infrastructure owner to accept liability.]

[CBH drafting note – in addition to CBH's overarching comment at the beginning of clause 19.4, these qualifications are not required, highly unusual, and not reasonable.]

19.4 Other limits or exclusions of liability

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

19.5 Civil Liability Act

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

20 Resolution of disputes

20.1 Procedure to settle disputes

- (a) If a dispute arises between the parties in connection with this Agreement (**Dispute**) then, unless expressly provided to the contrary in this Agreement, the Dispute must be resolved in accordance with this clause 20 and either party may give a notice to the other party specifying the Dispute and requiring its resolution in accordance with this clause 20 (**Notice of Dispute**).
- (b) Subject to clause 20.1(c) and clause 20.4, the procedure that the parties must strictly follow to settle a Dispute is as follows:
 - (1) first, negotiation of the Dispute in accordance with clause 20.2;

- (2) second, mediation of the Dispute in accordance with clause 20.3 or determination of the Dispute by an Expert in accordance with clause 20.4; and
 - (3) third, litigation of the Dispute in accordance with clause 20.5.
- (c) Nothing in this clause 20:
 - (1) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 20; or
 - (2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (d) The parties' obligations under this Agreement will continue notwithstanding any:
 - (1) Dispute between the parties;
 - (2) submission of a Dispute to an Expert or mediation; or
 - (3) referral of a Dispute to litigation.
- (e) This clause 20 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (f) This clause 20 applies even where this Agreement is otherwise void or voidable.

20.2 Negotiation

- (a) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, with a view to resolving the Dispute by joint discussions.
- (b) If the Dispute is not resolved within 10 Business Days after the Notice of Dispute is given, subject to clause 20.4, the Dispute must be referred to the chief executive officers of the parties (or their nominees) who must meet, within 15 Business Days after the Notice of Dispute is given, with a view to resolving the Dispute by joint discussions.

20.3 Mediation

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

- attendance at the mediation; and
- (3) the costs of the mediator will be borne equally by the parties.

20.4 Expert

[CBH drafting note – it is usual for an Expert to determine disputes which are of an engineering, safety or technical nature. Given some of the issues which may arise under this Agreement it is more efficient if there is a process for an accredited expert to determine the issue.]

- (a) Unless otherwise provided in this Agreement, if the Dispute is of a technical, safety, or engineering nature and it has not been resolved within 10 Business Days after the Notice of Dispute is given, the Dispute must be determined by an Expert. The Expert will be:
 - (1) a person agreed between the parties within 10 Business Days of the date of the Notice of Dispute; or
 - (2) failing agreement within 10 Business Days and at the request of either party, a person nominated by the Resolution Institute.
- (b) Unless the parties otherwise agree in writing, the Expert will:
 - (1) accept written submissions from the parties as to the subject matter of the Dispute within 14 days of their appointment; and
 - (2) provide the determination in writing within 28 days of their appointment.
- (c) Unless the parties otherwise agree in writing, the Expert will have the power to:
 - (1) inform themselves independently as to facts and if necessary, any technical matter relating to the Dispute;
 - (2) consult with such other professionally qualified persons as they think fit;
 - (3) receive and act on written submissions, sworn and unsworn statements and photocopied documents; and
 - (4) take such measures as they consider fit to expedite the resolution of the Dispute.
- (d) The parties will do all things reasonably required by the Expert to assist the Expert in reaching their determination.
- (e) The Expert must act honestly and fairly, independently and impartially and must keep confidential all matters coming to them by reason of their appointment and performance of their duties.
- (f) The Expert will act as an expert and not as an arbitrator.
- (g) Unless the parties otherwise agree:
 - (1) each party must bear its own costs relating to the expert determination; and
 - (2) the costs of the expert will be borne equally by the parties.
- (h) In the absence of manifest error, error of Law, corruption, fraud, partiality, bias or a breach of the rules of natural justice by the Expert, the Expert's decision will be final and binding on the parties.

20.5 Litigation

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

20.6 Joinder

- (a) The Operator acknowledges and agrees that Arc may request the Operator to participate in any dispute resolution process under the Commercial Track Access Agreement if the Operator's participation is required to resolve the Dispute.
- (b) If the Operator considers, acting reasonably, that the Operator's participation is required to resolve the Dispute, the Operator must join the dispute resolution process under the Commercial Track Access Agreement. [CBH drafting note – the Operator should have some ability to consider whether joinder is appropriate. The amendments make this clause more reasonable.]
- (c) The Operator acknowledges and agrees to the Customer participating in any dispute resolution process under this Agreement if the Customer considers that it is necessary or appropriate for the Customer to join such a dispute.

21 Confidentiality

21.1 Acknowledgment of confidentiality and confidentiality obligation

Each party acknowledges and agrees that:

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

21.2 Permitted disclosures

- (a) Subject to compliance with clauses 21.2(c) and 21.2(d), a party may disclose Confidential Information of the other party:
 - (1) where the other party has given its prior written consent to such disclosure;
 - (2) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
 - (3) if required by Law (other than section 275(1) of the *Personal Property Securities Act 2009 (Cth)*) or the rules of any stock exchange or by any Government Agency;
 - (4) to the Economic Regulator or any other Government Agency in respect of any matter under the Rail Access Code or a related Law; [CBH drafting note – this amendment is to avoid for example an argument that, because a submission by an Operator is not *required* by the Code then the Operator cannot use Confidential Information in any submission to the ERA. This clause is intended to ensure the ERA has access to information that may be critical to the ERA being able to properly discharge its functions under the Code.]
 - (5) as required or permitted by this Agreement;
 - (6) to a ratings agency;
 - (7) to its insurers, auditors, legal advisors or other advisors or consultants

- under a duty of confidence;
 - (8) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
 - (9) to enable a party to exercise its rights, or perform its obligations under or in connection with this Agreement;
 - (10) in relation to the enforcement of its rights under or in connection with this Agreement;
 - (11) to its Related Bodies Corporate and its and their respective officers and employees;
 - (12) 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
 - (13) in any proceeding arising out of or in connection with this Agreement;
- (b) A party may disclose Confidential Information to the Customer in connection with matters under this Agreement which the party considers in good faith may relate to the Commercial Track Access Agreement or Transport Agreement or as otherwise required under this Agreement. [CBH drafting note – the Operator should not have to go through the potentially difficult process of assessing and determining whether the information may “reasonably affect” the Commercial Track Access Agreement or Transport Agreement. Indeed, the Operator may need to disclose the information to assess whether it may reasonably affect them, which could put the Operator in breach if it subsequently determines that it does not reasonably affect them. The fairer and more appropriate test is whether the discloser considers in good faith that the information relates to those agreements.]
- (c) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (1) otherwise keep the Confidential Information confidential; and
 - (2) except in respect of disclosure pursuant to clause 21.2(a)(3), use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 21.
- (d) Before making any disclosure pursuant to clause 21.2(a)(3), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (1) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
 - (2) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.
- (e) Arc must provide to the Customer a copy of:
- (1) this Agreement as soon as practicable after the date on which it is executed by the parties; and
 - (2) any variations to this Agreement as soon as practicable after the date on which the variation is agreed by the parties,
- and nothing in this clause 21 prevents Arc from complying with that obligation.

22 Assignment, transfers, change in control and encumbrances

22.1 Assignment or transfer of this Agreement

- (a) A party (**Transferor**) must not:
- (1) assign, or attempt to assign, any of its rights; or

- (2) novate, otherwise transfer or attempt to transfer, any of its rights or obligations,

under this Agreement to another person (**Proposed Transferee**) without the prior written consent of the other party (**Other Party**), which consent must not be withheld if:

- (3) the Other Party is satisfied, acting reasonably, that the Proposed Transferee is financially, technically and operationally capable of complying with the Transferor's obligations under this Agreement (the onus of proving which rests on the Transferor); or
- (4) the Proposed Transferee is a Related Body Corporate of the Transferor; and.

[CBH drafting note – the network operator must still be able to perform its obligations under the agreement. That is, have the financial, technical and operational capability of complying with the agreement.]

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

and:

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

22.2 Effect of assignment or transfer

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

22.3 Change of Control

- (a) A party must not undergo a Change in Control without the prior written consent of the other party, which must not be unreasonably withheld or delayed.
- (b) Without limitation, a party may reasonably withhold consent to a Change in Control in respect of the other party if the party reasonably considers that the other party will not, following the Change in Control, have the financial capability or technical or operational expertise to meet its obligations under this Agreement.

[CBH drafting note – a change in control clause is common in contracts to ensure that a party cannot circumvent the prohibition on assignment of the agreement by selling the entity that is a party to this Agreement rather than assign this Agreement]

22.4 Encumbrance over this Agreement

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

23 Governing Law

23.1 Law of this Agreement

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

23.2 Jurisdiction

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

24 Notices

24.1 Notices in connection with this Agreement

- (a) Any notice, demand, invoice or other communication (**Notice**) required or permitted to be given to or by a party to this Agreement:

- (1) must be in legible writing and in English and

- (A) in the case of Notices for **[insert]** addressed as shown below:

- (i) in the case of Arc:

- Attention: Chief Executive Officer

- Address: Level 3, 1 George Wiencke Drive, Perth Airport,
Western Australia 6105

- Email: commercial@arcinfra.com

- and with a copy sent to: legal@arcinfra.com

- (ii) in the case of the Operator:

- Attention: [Insert]

- Address: [Insert]

- Email: [Insert]

- or as specified to the sender by a party by notice;

- (B) in the case of all other Notices, addressed as shown below:

- (i) in the case of Arc:

- Attention: [insert]

- Address: [insert]

- Email: [insert]

- (ii) in the case of the Customer:

- Attention: [insert]

- Address: [insert]

- Email: [insert]

- or as specified to the sender by a party by notice; **[CBH drafting note – the amendments to this clause have been made to make it more reflective of what will happen in practice. Operational notices and the like do not need to be provided to the CEO, only the critical notices under the agreement. The parties can agree what are critical notices]**

- (2) may be given by:
- (A) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee; or
 - (B) email, in which case the Notice is regarded as given by the sender and received by the addressee at the time the email is sent, unless the sender receives a return email notification that the email was not delivered, undeliverable or similar, [CBH drafting note – this is an unnecessarily complex email notice regime. CBH submits it should simply be the email is taken to be received at the time it is sent.]
- but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and
- (3) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (b) In this clause 24, a reference to an addressee includes a reference to an addressee's Personnel.

24.2 Twenty-four hour contact details

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

25 Risk and cost of performing obligations and agents and contractors

25.1 Risk and cost

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

25.2 Agents and contractors

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

26 Anti-corruption and modern slavery

26.1 Anti-corruption

- (a) Each party represents, warrants and undertakes to the other party that:
 - (1) it has not offered, promised, given or agreed to give and shall not during the term of this Agreement offer, promise, give or agree to give to any person any bribe, whether on behalf of the other party or otherwise, with the object of obtaining a business advantage;

- (2) it will not engage in any activity or practice which would constitute an offence under any applicable anti-bribery laws, including but not limited to the Criminal Code Act 1995 (Cth), United States Foreign Corrupt Practices Act of 1977, the United Kingdom's Bribery Act 2010 and Canada's Corruption of Public Officials Act (**Anti-Corruption Laws**);
- (3) it has and during the Term will maintain in place its own policies and procedures to ensure compliance with any applicable Anti-Corruption Laws;
- (4) it will procure that any person who performs or has performed services for or on its behalf in connection with this Agreement (**Associated Persons**) complies with this clause 26.1(a);
- (5) it will not enter into any agreement with any Associated Person in connection with this Agreement unless such agreement contains undertakings on the same terms as contained in this clause 26.1(a);
- (6) it has and will maintain in place effective accounting procedures and internal controls necessary to record all expenditure in connection with this Agreement;
- (7) from time to time during the Access Term, at the reasonable request of the other party, it will confirm in writing that it has complied with its undertakings under this clause 26.1(a) and will provide any information reasonably requested by the other party in support of such compliance;
- (8) it will report to the other party as soon as reasonably practicable any request or demand for any improper payments or other improper advantage of any kind received by the party from the other party or any other person in connection with the performance of this Agreement; and
- (9) it shall notify the other party as soon as practicable of any breach of any of the undertakings contained in this clause 26.1(a) of which it becomes aware.

[CBH drafting note – if the ERA considers it reasonable that an indemnity is given in these circumstances then it should be reciprocal. CBH considers it is not necessary here.]

26.2 Modern slavery

- (a) Each party must, and must ensure that all of the Operator's Personnel:
 - (1) comply with Modern Slavery Laws;
 - (2) not engage in any conduct which may breach, or put the other party in breach, of any Modern Slavery Laws;
 - (3) it has, and during the Access Term will maintain, in place its own policies and procedures to ensure compliance with any applicable Modern Slavery Laws; [CBH drafting note – each party should be responsible for determining how it complies with this obligation. The Operator should not have to comply with Arc's policies over which it has no control.]
 - (4) do all things required or necessary to mitigate or reduce risks of Modern Slavery within the Operator's operations or supply chain; and
 - (5) comply with all reasonable directions of the other party, and otherwise provide all assistance, records and information and do all things necessary to assist the other party to comply with its obligations under the Modern Slavery Laws and to verify the Operator's compliance with this clause 26.2(a).
- (b) Each party warrants and represents that it (and its directors and/or employees):
 - (1) have not been convicted of any offence involving Modern Slavery; and
 - (2) have not been and is/are not the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of any Modern

Slavery Laws.

- (c) Each party must notify the other party as soon as reasonably practicable in writing if it becomes aware or has reason to believe that it, the Operator's Personnel or any other participants in its supply chain in connection with this Agreement have breached, or potentially breached, any Modern Slavery Laws.

26.3 Representations and warranties continue

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

27 General

27.1 Certificate

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

27.2 Exercise of rights

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

27.3 Remedies cumulative

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

27.4 Further assurances

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

27.5 Variation

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

27.6 Severability

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

27.7 No partnership or agency

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

or to create a liability against it in any way or for any purpose.

27.8 Counterparts

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

27.9 Execution by attorney

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

27.10 Costs and expenses

- (a) Each party must pay its own legal and other costs and expenses in relation to the negotiation, preparation and execution of this Agreement.
- (b) A party in default must pay all costs (including reasonable solicitor/client costs) incurred by the other party in respect of that default and any notice relating to that default.
- (c) The Operator must pay all duty and other government imposts payable in connection with this Agreement and all other documents referred to in this Agreement when due or earlier if required in writing by Arc unless the duty or other government impost was payable in connection with a breach of this Agreement, a breach of any other document referred to in this Agreement or a breach of Law by Arc or any of its personnel. [CBH drafting note – this clause was too one sided as it makes the Customer liable for these payments even when caused by Arc's breach. CBH has made this more reasonable.]

27.11 Suspension

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

27.12 Survival

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

28 No implied representations or warranties

Except for:

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

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

29 Entire understanding

This Agreement:

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

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

Schedule 1

Schedule 1 – Scheduled Train Paths

Item 1 Nominated Routes

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

Item 2 Scheduled Train Paths

	[Insert Origin] (Origin)		[Insert Destination] (Destination)	
Train ID	Departure Day	Departure Time	Arrival Day	Arrival Time

[Include train path schedule for each Nominated Route]

Schedule 2

Schedule 2 – Safety Interface Agreement

[CBH drafting note – as set out above under clause 5.8, there needs to be a standard form Safety Interface Agreement attached to the OTAA. Otherwise, there is no oversight on the terms and, given that a Service is subject to the entry into a Safety Interface Agreement, it would operate to avoid the regime in section 47A of the Code.]

[CBH drafting note – the Light Engine Movements Charge have been moved to the CTAA.]
[CBH drafting note – the parking charges have been removed from the OTAA and CTAA.]

Schedule 3

Schedule 3 – NOT USED

CBH drafting note – this is one-sided and takes all the risk of a material change off Arc without doing the same for the Customer. It should either apply to both parties or be deleted. CBH suggests it is deleted as it creates uncertainty over an Agreement term, which is inconsistent with the intent of the Code.]

Schedule 4

Schedule 4 – Instructions

1. Instructions

Instructions include:

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

2. Examples of Instructions

Examples of Instructions include:

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

Schedule 5

Schedule 5 – Rolling Stock

1. Locomotives

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

2. Wagons

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

Schedule 6

Schedule 6 – Performance Indicators

Category	Indicator	CBH drafting note -
Reliability Measures related to no and % of services performing according to schedule	No and % of healthy ^a services exiting within tolerance	Reported publicly by ARTC and used by ARTC and ABCN in standard agreements. NSW Metro Rail Network and Country Rail Network also use consistent healthy/unhealthy terminology. QR publicly reports similar information in a slightly different format. Arc is required to publicly report information on similar aspects of performance but uses a different reporting format which provides less clarity on performance. Of the options currently used, the ARTC/ABCN indicator provides the clearest understanding of network performance.
	No and % of unhealthy ^a services not deteriorating further	Publicly reported by ARTC and reported under standard access agreements for ARTC and ABCN. Provides valuable information for understanding of overall network performance.
	No and % of services that are healthy ^a	Reported publicly by ARTC and used by ARTC and ABCN in standard agreements. QR publicly reports similar information in a slightly different format. Provides valuable information for understanding of overall network performance.
Network Availability Measures relating to availability of network for operation of services	No and % of services rescheduled for the purpose of RIM possession	Reported by ARTC under standard access agreement. Partially publicly reported by QR. Provides valuable information on overall reliability of the train schedule, given the demand for network possessions.
	No and % of services cancelled and not rescheduled due to RIM (potentially separately reported for planned possessions and other unplanned reasons)	
	No and % of services cancelled and not rescheduled due to operator/access holder	
	No and % of services cancelled and not rescheduled for other reasons	
Transit times/delays Measures relating to network delays to services	Average scheduled speed	Publicly reported by ARTC. Provides valuable information on whether network capability is improving or degrading over time, particularly when in conjunction with delay KPIs below.
	No and % of Services which transit the Network no later than scheduled transit, within tolerance	Reported by ARTC, ABCN. Provides valuable information for understanding of overall network performance.
	The average above rail delay, in minutes per transit hour	Information reported by ARTC, ABCN and QR, although QR presents the information in minutes per 100 train kilometres. Arc is also required to publicly report on number of delays by cause. Presenting the information in minutes per transit

The average below rail delay, in minutes per transit hour

hour will provide a clearer understanding of the impact of delays across the network and will more readily enable comparison across networks.

The average unallocated delay, in minutes per transit hour

Speed restrictions Measures the impact of speed restrictions on services	Impact of TSRs on train running (measured in total minutes)	Reported by ARTC, ABCN and QR. Arc is required to publicly report KM under TSR.
Track condition Measures track condition by route utilised.	Track Quality Index (TQI) TQI is calculated over 100m sections, using 0.5m raw data by a suitable continuous track geometry recording car and may be aggregated and reported on route basis. TQI is the sum of the standard deviations (x3) in each rail for a 20m inertial top (average over left and rights rail), horizontal alignment (versine over a 10m chord (average over left and right rail)), twist over 2.0m and gauge.]	Reported by ARTC, ABCN and QR. Should be reported by route. TQI is consistent with the ARTC approach.]

^a “Healthy train” means that:

- presents to the Network within tolerance, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
- is running late only due to causes within the Network, but only where the root cause is outside the rail operator’s control; or
- is running within tolerance, regardless of previous delays.

[CBH drafting note - For the purpose of these KPIs, “healthy” and “unhealthy” trains are defined consistent with the definition used by ARTC and ABCN.]

Arc uses the same terminology but with different definitions of healthy/unhealthy. There would be benefit in applying consistent approach across networks.]

[CBH drafting note - CBH considers consistency in reporting across networks valuable when assessing infrastructure performance. Publicly available submissions for other domestic rail networks have been leveraged in determining the list of requested indicators]

Signing page

Executed as an Agreement

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

sign here ► _____
Director

print name _____

sign here ► _____
Director/Company Secretary

print name _____

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

sign here ► _____
Director

print name _____

sign here ► _____
Director/Company Secretary

print name _____