

TRACK ACCESS AGREEMENT

PARTIES

**the party specified at Item A of Schedule 1
(AABCN)**

**the party specified at Item B of Schedule 1
(Operator)**

**if applicable, the party specified at Item K of Schedule 1
(Guarantor)**

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DATE:

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PARTIES: the party specified at Item A of Schedule 1 (**AABCN**)

AND the party specified at Item B of Schedule 1 (**Operator**)

AND if any, the party specified at Item K of Schedule 1 (**Guarantor**)

INTRODUCTION:

- A.** At the Operator's request, AABCN has agreed to grant to the Operator access rights to the Network on the terms and conditions in this Agreement.
- B.** The Operator has agreed to enter into this Agreement with AABCN to confirm the terms and conditions that apply to the Operator's access rights.
- C.** If applicable, the Guarantor has agreed to guarantee the performance by the Operator of the Operator's obligations under this Agreement.

AGREEMENT:

1. Interpretation

1.1 Definitions

In this Agreement unless the context otherwise requires:

Acceptable Credit Rating means a long term issuer credit rating of not less than A by Standard & Poors or of not less than A2 by Moody's Investor Services.

Accreditation means to be an Accredited Person under the applicable *Rail Safety Act* (and **Accredited** and **Accrediting** bear a corresponding meaning).

Accredited Person has the meaning in the applicable *Rail Safety Act*.

Agreement means this agreement.

Applicable Law means the laws, decrees and regulations enacted or to be enacted either in South Australia or the Northern Territory or by federal legislature of Australia concerning the matters referred to in this Agreement whether enacted before or after the date of this Agreement and all regulations, orders, codes of practice or delegated or subordinate legislation made under them and the regulations, requirements and bylaws of any Government Authority.

Approved Additional Infrastructure shall have the meaning given to it in sub-clause 5.7(d).

Approved Issuer means Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group, National Australia Bank or such other bank that holds an Acceptable Credit Rating and a licence issued by the Australian Prudential Regulation Authority and that is approved by AABCN (in its sole discretion).

Associated Facility means any:

- (a) track structure;

- (b) over and under structure;
- (c) support (including support for equipment or items associated with the use of the Network);
- (d) tunnel;
- (e) bridge;
- (f) Train Control system;
- (g) signalling and/or communication system;
- (h) Monitoring Equipment; and
- (i) other associated plant, machinery and equipment from time to time,

to the extent that such asset is related to or connected with the Network, but excludes any terminal or yard related to or connected with:

- (j) the Network; or
- (k) any Associated Facility listed in limbs (a) – (i) above.

AABCN Indemnified Persons has the meaning given in clause 13.1(a).

AABCN's Network Rules means:

- (a) the Code of Practice for the Defined Interstate Rail Network;
- (b) the One Rail Australia Addendum to the Code of Practice for the Defined Interstate Rail Network; and
- (c) all policies, procedures, Instructions and notices issued by AABCN to the Operator for the purpose of ensuring the safe and/or efficient use and/or operation of the Network and/or the Associated Facilities, including:
 - (i) the Time-path Allocation and Reallocation Policy;
 - (ii) the Train Management Policy; and
 - (iii) the Service Quality Policy,

as notified by AABCN to the Operator, and in each case as amended by AABCN from time to time.

Business Day means any day other than a Saturday, Sunday or public holiday in South Australia or the Northern Territory.

Change in Control means:

- (a) a change in the Control of an entity;
- (b) any direct or indirect change in an entity's shareholding which results in a change in more than fifty percent (50%) of the direct or indirect shareholding of the entity; or

- (c) any direct or indirect change in an entity's shareholding which results in a change of more than fifty percent (50%) of the voting rights in the entity.

Change in Law means:

- (a) any amendment, repeal, modification or enactment of any Applicable Law;
- (b) any change in the interpretation or application, including by the exercise of delegated authority, of any Applicable Law resulting from a decision of a court or Government Authority;
- (c) the making of any new directive, or any change in an existing directive, of any Government Authority;
- (d) the imposition of a requirement for authorisations not required as at the date of this Agreement;
- (e) after the date of grant of any authorisation, a change in the terms and conditions attaching to that authorisation or the attachment of any new terms or conditions;
- (f) any authorisation that has been granted ceasing to remain in full force and effect, or being renewed on conditions different to those attached to the original authorisation; or
- (g) the imposition of a new tax, an increase in the rate of a tax or a change in the basis of calculation of a tax.

Charges means the Fixed Charges, Variable Charges and any other charges and fees required to be paid by the Operator under this Agreement including Overloading Charges.

Claim means all claims, legal actions and demands (including the costs and expenses of defending or settling any claims, legal actions and demands).

Code of Practice means the *AustralAsia Railway (Third Party Access) Code* as set out in the *AustralAsia Railway (Third Party Access) Act 1999* of the Northern Territory and South Australia.

Commencement Date means the date set out in Item C of Schedule 1.

Communications Provider means a third party provider that constructs, operates or maintains communications infrastructure on or adjacent to the Network for use by or in conjunction with the applicable Train management system of the Network.

Conditions Precedent means each of the conditions precedent set out in Item F of Schedule 1.

Confidential Information means:

- (a) all information provided by one party to the other under and for the purpose of this Agreement or exchanged between the parties during the negotiations preceding the execution of this Agreement;
- (b) the terms of this Agreement; and

- (c) any information in any form that is by its nature confidential, stated to be confidential or designated by a party in writing as being confidential.

Control has the meaning given to it in the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Dangerous Goods has the meaning given in the Dangerous Goods Code.

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

Environment includes all aspects of the surroundings of human beings including:

- (a) the physical characteristics of those surroundings such as the land, the waters and the atmosphere;
- (b) the biological characteristics of those surroundings such as the animals, plants and other forms of life; and
- (c) the aesthetic characteristics of those surroundings such as their appearance, sound, smells, tastes and textures,

whether affecting human beings as individuals or in social groups.

Environmental Condition means any Environmental Damage or any event, circumstance, condition, operation or activity in respect of which it is reasonably foreseeable is likely to result in Environmental Damage and/or which in AABCN's reasonable opinion may result in AABCN (or any of its Related Bodies Corporate) or any other person incurring any material liability or being subjected to a direction of any Government Authority.

Environmental Damage means any material injury or damage to persons, living organisms or property or any material pollution or impairment of the Environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration.

Expiry Date means the date specified at Item D of Schedule 1.

Financial Sum means an amount of money that is to be calculated in accordance with principles agreed between the Operator and AABCN or determined by an expert in accordance with clause 15.4 and that does not include any amount payable as an access charge.

Fixed Charges means the fixed charge as set out in Schedule 4 and as adjusted from time to time in accordance with Schedule 5.

Force Majeure means any cause, event or circumstance or combination of causes, events or circumstances which:

- (a) is beyond the reasonable control of the affected party;
- (b) occurs without the negligence of the affected party; and
- (c) the affected party was not able to prevent or is not reasonably able to overcome by the exercise of due diligence and care,

and includes the following causes, events or circumstances subject to them meeting the criteria set out in paragraphs (a) through (c) above:

- (d) hostile conduct using computer or related networks or systems, intended to disrupt and/or destroy a party's critical IT systems, assets, or functions;
- (e) inevitable accident, derailment, breakdown or damage to or confiscation of property;
- (f) storm, flood, fire, earthquake, explosion, washaway, landslide or other catastrophe;
- (g) peril of navigation, act of foreign enemies, hostility, war (declared or undeclared), invasion, civil war, rebellion, revolution, insurrection, riot, blockade, civil commotion, national emergency (whether in fact or law), malicious damage or sabotage, act of terrorism, security-related matters;
- (h) nuclear ionisation or radioactivity;
- (i) executive or administrative order or act of either general or particular application of any government, prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth),
- (j) quarantine or customs restrictions, strike, lockout, stoppage, go-slow, labour disturbance or other such industrial dispute or action,

but does not include any:

- (k) breakdown or delay of any Trains or Rollingstock operated by the Operator;
- (l) event affecting another network connected to the Network, or any loading or unloading facility, required by the Operator to use its rights as contemplated by this Agreement; or
- (m) lack of funds or other financial cause.

Further Infrastructure means further infrastructure added to or included in the Network that at the date of this Agreement does not form part of the Network.

Government Authority means, as the context requires, the relevant and competent government or any governmental, semi-governmental or administrative department, entity, agency, authority, commission, corporation or body (including those constituted or formed under any statute), regardless of whether that department, entity, agency, authority, commission, corporation or body is established by the Commonwealth, a State, a Territory or local government.

Guaranteed Obligations has the meaning given in clause 16.2(a).

Healthy Train means a Train that, having regard to the daily train plan applicable on the day:

- (a) presents to the Network on time, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
- (b) is running late only due to causes within the Network, but only where the root cause is outside the Operator's control; or
- (c) is running on time, regardless of previous delays.

Incident means a breakdown, derailment, accident or emergency on or in connection with the Network or any Associated Facility that causes or may reasonably be expected to pose a danger of causing any one or more of the following:

- (d) material damage to or interference with the Network or any Associated Facility managed by AABCN or a Related Body Corporate of AABCN (or any authorised delegate of either of them);
- (e) material damage to property;
- (f) death or material personal injury to any person;
- (g) an Environmental Condition;
- (h) notifiable occurrences as defined in the regulations to the applicable Rail Safety Act;
- (i) an incident that requires notification under the Standards; or
- (j) an incident requiring notification under the Dangerous Goods Code.

Indirect or Consequential Loss includes:

- (a) economic loss, any indirect or consequential loss, loss of profits or anticipated profits (other than profits and anticipated profits embedded in the calculation of Charges payable under this Agreement), loss of opportunities, loss of or damage to reputation or goodwill, loss of or damage to credit rating, loss of savings or anticipated savings, any wasted overheads or demurrage, loss of contracts, loss of revenue, loss of production, loss of freight haulage tonnage, loss of use, loss of rent income or loss of occupation (whether or not any such loss is of a direct, indirect or consequential nature);
- (b) the payment of liquidated sums, penalties or damages under any agreement (other than payment of the same under this Agreement);
- (c) any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport; and
- (d) in respect of a breach of an agreement, loss or damage that does not naturally, according to the usual course of things, arise from the breach,

but does not include:

- (e) property damage or losses arising from third party claims for property loss, property damage, personal injury, nervous shock or death;
- (f) clean up and remediation costs resulting from toxic or hazardous substances; and/or
- (g) any fines or penalties imposed by a Government Authority for failure by the party to comply with Applicable Law as a result of the other party's failure to comply with the requirements of this Agreement, and any costs or expenses incurred by the first party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failures or breaches.

Insolvent has the meaning given by the *Corporations Act* (and **Insolvency** has a corresponding meaning).

Instructions means all instructions and directions issued by AABCN from time to time (including the instructions and directions referred to, and/or contained in, the documents set out in Schedule 6).

KPIs means the key performance indicators set out in Schedule 7 as varied from time to time by agreement of AABCN and the Operator.

Loss means any damage, loss, costs or expenses of any nature or description, including:

- (a) economic loss, any indirect or consequential loss, loss of profits or anticipated profits (other than profits and anticipated profits embedded in the calculation of Charges payable under this Agreement), loss of opportunities, loss of or damage to reputation or goodwill, loss of or damage to credit rating, loss of savings or anticipated savings, any wasted overheads or demurrage, loss of contracts, loss of revenue, loss of production, loss of freight haulage tonnage, loss of use, loss of rent income or loss of occupation (whether or not any such loss is of a direct, indirect or consequential nature);
- (b) the payment of liquidated sums, penalties or damages under any agreement (other than payment of the same under this Agreement);
- (c) any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport; and
- (d) in respect of a breach of an agreement, loss or damage that does not naturally, according to the usual course of things, arise from the breach.

Material Change means:

- (a) a Change in Law; or
- (b) a change in the costs incurred by AABCN due to the requirements of the landowner who owns or controls the land on which the Network and/or any Associated Facility exists.

Monitoring Equipment means any equipment (including hot box detectors) either permanently or temporarily placed or positioned on or beside or within the Network to detect, measure, record, collect data and/or, if required, report on all or any aspects of the Network and/or the Rollingstock (including those matters set out in clause 8.5(a)).

Net Financial Effect means the net effect in financial terms of a Change in Law on the costs of AABCN performing its obligations or exercising its rights under this Agreement, including any offsetting benefits or adverse effects directly or indirectly connected to the Change in Law.

Network means the railway network in South Australia and the Northern Territory (including related infrastructure) that is delineated, described or defined in Schedule 2, but excludes:

- (a) any Associated Facilities (except to the extent explicitly referenced in Schedule 2); and/or

(b) any terminals or yards.

Operator Nominated Location has the meaning given in Item M of Schedule 1.

Overloading Charge means has the meaning given in clause 8.2(a).

Rail Safety Acts means:

(a) the *Rail Safety National Law (South Australia) Act 2012*; and

(b) the *Rail Safety (National Uniform Legislation) Act 2012*,

and Rail Safety Act means either of them as the context requires (or such equivalent legislation or legislation enacted in substitution from time to time).

Related Body Corporate has the meaning in the *Corporations Act* (and for the purpose of this Agreement (i) includes a partnership whether or not it is incorporated; and (ii) with respect to AABCN, includes Aurizon Bulk Central Pty Ltd (ABN 17 079 444 296)).

Rollingstock means a locomotive, carriage, wagon or other vehicle suitable for use on a railway.

Scheduled Train Paths means each of the non-exclusive entitlements of the Operator to use the Network between the times and between the locations set out in Schedule 3 of this Agreement, as amended or varied permanently pursuant to the Time-path Allocation and Reallocation Policy.

Security means an on demand, irrevocable bank guarantee from an Approved Issuer in the form and for the amount specified in Item J of Schedule 1, or such other form or amount as may be approved by AABCN.

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

Service Quality Policy means the service quality policy set out at <https://1rail.com.au>, as amended by AABCN from time to time.

Solvent has the meaning in the *Corporations Act*.

Special Conditions means the conditions set out in Item H of Schedule 1 (if any).

Standards means the Australian Standard AS4292.1 *Rail Safety Management (General Requirements)*, and any other principles and standards prepared, approved and published by Standards Australia in relation to rail safety.

Term means the period from the Commencement Date to the Expiry Date unless terminated pursuant to this Agreement or extended in accordance with clause 3.2 or otherwise by written agreement of AABCN and the Operator.

Time-path Allocation and Reallocation Policy means the time-path allocation and re-allocation policy set out at <https://1rail.com.au>, as amended by AABCN from time to time.

Train means one or more units of Rollingstock coupled together, at least one of which is a locomotive or other self-propelled unit.

Train Control means the control of Trains by AABCN on the Network.

Train Control Centre means the facility or facilities maintained and operated by AABCN for the purposes of Train Control.

Train Control Directions means all:

- (a) Instructions issued by AABCN relating to management, continuity and/or safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains; or
- (b) instructions issued by a third party pursuant to clause 8.5(d).

Train Crew means a person or persons in charge of operating a Train.

Train Management Policy means the train management policy set out at <https://1rail.com.au>, as amended by AABCN from time to time.

Train Manifest means a written notice (which written notice may be given in electronic form) prepared by the Operator in relation to a Service and containing the following details in relation to that Service:

- (a) the designated train number for the Service and its origin and destination;
- (b) the date the Service will commence its operation on the Network;
- (c) the motive power to be used by the Train;
- (d) the number of vehicles in the Train;
- (e) the gross mass of the Train;
- (f) the length of the Train; and
- (g) for each vehicle in the Train in the order in which they will be placed, leading end first, the following information:
 - (i) vehicle number;
 - (ii) vehicle classification;
 - (iii) vehicle type;
 - (iv) gross weight of vehicle; and
 - (v) the class of any Dangerous Goods carried on the vehicle.

Train Paths means:

- (a) the Scheduled Train Paths;
- (b) the train paths provided to the Operator pursuant to the Time-path Allocation and Reallocation Policy; and

- (c) all other ad hoc entitlements (including train paths arising by reason of compliance with Instructions) to access the Network that are provided by AABCN to the Operator on the terms set out in this Agreement and otherwise on such terms as AABCN may stipulate in accordance with this Agreement or as otherwise agreed between the AABCN and the Operator.

Variable Charges means the variable charges as calculated in accordance with Schedule 4 paragraph 1(b).

Variable Rate means the rate as specified in Schedule 4 and as adjusted from time to time in accordance with Schedule 5.

Wilful Default means a wanton or reckless act, omission or breach of this Agreement by AABCN or the Operator that reasonably evidences that the perpetrator wilfully and utterly disregarded the harmful and avoidable consequences to the other arising from the relevant act, omission or breach of this Agreement.

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to one gender includes all genders;
- (c) a reference to a 'person' includes companies and associations;
- (d) a reference to a 'party' is to a party to this Agreement and includes their respective executors, administrators, successors, agents, permitted assigns and substitutes;
- (e) a reference to the consent of a party means the prior written consent of that party;
- (f) a reference to a 'statute', 'ordinance', 'code' or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (g) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this Agreement, and a reference to this Agreement includes any schedule or annexure;
- (h) a reference to time is to Adelaide, Australia time, or if the context so requires, is to Darwin, Australia time;
- (i) a reference to 'A\$', '\$A', 'dollar' or '\$' is to Australian currency;
- (j) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it;
- (k) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (l) references to the word 'include' and 'including' means 'including, but not limited to'; and

- (m) without limiting clause 16, a promise on the part of two or more persons binds them jointly and severally.

1.3 Payment and administrative obligations due on Business Day

- (a) If any amount becomes payable under this Agreement on a day that is not a Business Day, then that amount is payable on the prior Business Day.
- (b) If AABCN is due to perform an administrative obligation on a day that is not a Business Day, then that obligation must be performed no later than the next Business Day.

2. Track Access Rights

2.1 Grant to Operator of Train Paths

AABCN grants to the Operator, during the Term of this Agreement, the use and availability of the Train Paths and the associated use of the Network upon the terms and conditions set out in this Agreement.

2.2 No other access

The Operator agrees at all times during the Term of this Agreement not to access or attempt to access the Network and/or any Associated Facility in any way other than as is authorised by this Agreement.

2.3 Use of a Train Path is not exclusive

The Operator's rights to the Train Paths pursuant to this Agreement do not give the Operator an exclusive right to any Train Path. However, AABCN will not allot any two Trains (whether the Operator's Trains or the Trains of another user of the Network) to the same scheduled arrival or departure times.

2.4 Light engine movements

The Operator's rights to Train Paths under the Train Management Policy do not include any rights of access to the Network for the purpose of the Operator's light engine movements other than those granted by AABCN to the Operator on such terms as AABCN may stipulate, and which rights therefore fall within the negotiated ad hoc entitlements as referred to in paragraph (c) of the definition of "Train Paths".

2.5 Key Performance Indicators

- (a) The KPIs set out in Part A in Schedule 7 are applicable to AABCN and the KPIs set out in Part B of Schedule 7 are applicable to the Operator.
- (b) Each of AABCN and the Operator must monitor its performance against the KPIs applicable to it at all times during the Term.
- (c) AABCN and the Operator will meet regularly for the purpose of discussing the actual performance of each party against the KPIs applicable to it.

2.6 Exclusion of Liability

Notwithstanding any other clause in this Agreement, AABCN excludes, and the Operator releases AABCN and AABCN's Related Bodies Corporate from, liability for all Losses suffered or incurred by the Operator in the event that a Train Path (or any part of a Train Path) is not available, or that the Operator's Train is not or will not be delivered on time to its ultimate or intermediate destination, if that unavailability or failure to deliver is as a result of:

- (a) failure by the Operator to satisfy the Conditions Precedent;
- (b) failure by the Operator to contact AABCN personnel at the Train Control Centre that the Operator's Train is ready in all respects for departure within 15 minutes of the scheduled time for departure of that Train according to the relevant Train Path;
- (c) failure of the Operator's Service;
- (d) emergencies or genuine and material safety considerations;
- (e) AABCN varying a Train Path for the purpose of preventing any actual or potential:
 - (i) breach of safety requirements in relation to the Network and/or any Associated Facility;
 - (ii) breach by another Train operator of the terms and conditions of that operator's access to and use of the Network;
 - (iii) death or injury to any person;
 - (iv) loss or damage to any property which includes, but is not limited to, the Network and/or any Associated Facility;
 - (v) delay to the progress of Trains that have priority over the Operator's Trains;
or
- (f) matters outside the reasonable control of AABCN (including the occurrence of Force Majeure affecting AABCN or its Related Bodies Corporate).

3. Term of Agreement

3.1 Term of Agreement

This Agreement commences on the date of this Agreement and, unless terminated earlier pursuant to this Agreement or extended in accordance with clause 3.2 or otherwise by agreement of AABCN and the Operator, will continue until 23:59 hours on the Expiry Date.

3.2 Extension of Term

- (a) No earlier than twelve (12) months prior to the expiry of the then current Term and no later than six (6) months prior to the expiry of the then current Term, the Operator may request in writing to AABCN that the Term of this Agreement be extended for the period specified in Item E of Schedule 1.
- (b) Within 60 days of receipt of a request given by the Operator under clause 3.2(a), AABCN must give notice to the Operator as to whether it agrees to (or declines, which it may do so in its absolute discretion) the requested extension of the Term.

- (c) The Operator may not request more than the number of extensions to the Term specified in Item E of Schedule 1.

3.3 Conditions Precedent to commencement of right to Services

Notwithstanding anything to the contrary in this Agreement, as a condition precedent to the Operator's entitlement to access or use the Network and Associated Facilities under this Agreement:

- (a) the Operator must have satisfied each of the Conditions Precedent (to AABCN's satisfaction) and provided evidence to AABCN of the satisfaction of each Condition Precedent; and
- (b) AABCN must have given notice to the Operator confirming that the Conditions Precedent have been satisfied (which notice must be given within 5 Business Days after the Operator has provided evidence to AABCN under clause 3.3(a), demonstrating that the Conditions Precedent have been satisfied to AABCN's satisfaction).

4. Charges and payment

4.1 Charges

The Operator must pay the Charges to AABCN in accordance with the terms of this clause 4.

4.2 Invoices

- (a) AABCN may:
 - (i) on or after the last day of each calendar month during the Term, issue an invoice to the Operator for Charges due to be paid by the Operator to AABCN with respect to that calendar month and any other amounts payable by the Operator under this Agreement as at the date of the invoice; and
 - (ii) at any other time, issue an invoice to the Operator for any amounts payable by the Operator under this Agreement on or after the expiry or termination of this Agreement (as applicable).
- (b) Each invoice will itemise the Charges (including those payable with respect to each Scheduled Train Path) and other amounts payable by the Operator under this Agreement.

4.3 Payment

- (a) Subject to clause 4.3(b), the Operator must pay the amount of an invoice issued by AABCN under clause 4.2(a) to AABCN by the time specified in Item G of Schedule 1.
- (b) Where the Operator disputes any invoiced amount, the Operator must notify AABCN of any disputed amounts within 21 days from the date of the invoice. Notwithstanding any dispute in respect of the invoiced amount, the Operator must pay the invoiced amount in accordance with clause 4.3(a).
- (c) Where a payment dispute is resolved in the Operator's favour, AABCN must pay the determined amount to the Operator and will also be liable to pay interest on the

determined amount at the rate calculated under clause 4.5, from the date that such monies were originally due to have been paid until (and including) the date of payment of such monies.

4.4 Further Infrastructure and additional capacity

- (a) If AABCN, or any of its Related Bodies Corporate, adds Further Infrastructure to the Network, and AABCN and the Operator agree to the Operator being granted access to that Further Infrastructure as part of the Network for the purposes of this Agreement, then the Operator acknowledges that AABCN may charge the Operator by way of an adjustment to the Fixed Charge, as a term of AABCN agreeing to grant access to the Further Infrastructure, such amount as AABCN in its absolute discretion determines to be reasonable having regard to the following:
 - (i) AABCN's costs of constructing or procuring the Further Infrastructure and any Associated Facility related to or in connection with the Further Infrastructure, and AABCN's ability to recover such costs over the period the Further Infrastructure is available for use as part of the Network by all operators;
 - (ii) the location of the Further Infrastructure;
 - (iii) the number of operators (including the Operator) that AABCN estimates will be granted access to use the Further Infrastructure; and
 - (iv) any other considerations that AABCN determines to be relevant.
- (b) The Fixed Fee will not be adjusted and the Operator will not be required to pay any additional charge under clause 4.4(a) for access to Further Infrastructure if:
 - (i) AABCN, or any of its Related Bodies Corporate, increases the capacity of the Network to carry additional freight tasks by adding Further Infrastructure associated with the Network; and
 - (ii) the Operator's Scheduled Train Paths are varied under the Time-path Allocation and Reallocation Policy to include the Further Infrastructure as part of the Network other than as a result of a request by the Operator to vary such existing Scheduled Train Paths.
- (c) Nothing in this Agreement prevents or limits AABCN from negotiating arrangements with an operator or operators for funding the provision of additional capacity to the Network.
- (d) For clarity, the provisions of clause 14.1 regarding resolution of disputes do not apply to a determination made by AABCN under this clause 4.4.

4.5 Interest

If the Operator defaults in the due payment of any amount due to AABCN under this Agreement (including all amounts in an invoice), the Operator must pay interest on that amount, or any outstanding balance, until it is paid in full. The interest rate will be 4 percentage points above the prime lending rate charged by Australia and New Zealand Banking Group Limited at that time on overdrafts of \$100,000.00 or more. The interest will accrue and be recoverable from day to day.

4.6 GST

- (a) For the purposes of this clause 4.6:
 - (i) **GST** means 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*;
 - (ii) **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes other GST related legislation, as amended from time to time;
 - (iii) **Payment** includes all amounts (other than GST) payable by one party to the other under this Agreement, whether as fees, charges, costs, expenses, damages or as any other kind of payment; and
 - (iv) except for terms defined in this Agreement, capitalised terms used in this clause have the same meaning as in the *GST Act*.
- (b) Except when this Agreement provides otherwise (including in Schedule 4), all Payments are exclusive of GST.
- (c) If a party makes a Taxable Supply under or in connection with this Agreement to the other party, then the other party must pay the amount of any GST applying in respect of that Taxable Supply at the same time and in the same manner as the Payment relating to the Taxable Supply is to be paid.
- (d) AABCN will provide a Tax Invoice for each Taxable Supply made to the Operator as part of the billing cycle under this Agreement.
- (e) A party making any other Taxable Supply under this Agreement must provide a Tax Invoice for any Payment relating to that Taxable Supply.

4.7 Obligation to provide Security

- (a) The Operator must:
 - (i) if Item J indicates that Security is required to be provided as at the date of this Agreement, deliver such Security to AABCN within 7 days of the date of this Agreement; and
 - (ii) if at any time during the Term AABCN gives notice to the Operator requiring the Operator to provide Security, then the Operator must provide AABCN with such Security in the form required by AABCN within 7 days after receipt of such notice. AABCN may only serve such a notice on the Operator under this clause 4.7(b) if:
 - (A) the Operator has defaulted in the payment of any monies owed by it to AABCN under this Agreement and has not remedied that default before the expiry of seven (7) days; or
 - (B) AABCN has formed the view (acting reasonably) that there has been an increase in the credit risk of the Operator that justifies the provision of Security.

- (b) If the Operator fails to provide Security in accordance with sub-clause 4.7(a), 4.7(d), 4.7(e) or otherwise in accordance with its obligations under this Agreement, then AABCN may immediately suspend the Operator's right to access the Network and/or the Associated Facilities until such time as that Security has been provided.
- (c) The term of the Security must have an expiry date that is no earlier than the earlier of:
 - (i) 3 years after the date of issue; and
 - (ii) the later of the date that is 3 months after the expiry of the then current Term and the date that is forecast (acting reasonably) to be the date on which the Security is to be released by AABCN pursuant to clause 4.9.
- (d) If the Security provided by the Operator has an expiry date that is earlier than the date on which the Security is to be released by AABCN pursuant to clause 4.9, then at least 30 days before the expiry date of the Security the Operator must provide AABCN with a replacement Security:
 - (i) for the same amount as the Security being replaced; and
 - (ii) that otherwise complies with the requirements of this Agreement.
- (e) If the provider of the Security provided by the Operator ceases to hold a licence issued by the Australian Prudential Regulation Authority or ceases to hold an Acceptance Credit Rating, then the Operator must:
 - (i) immediately upon becoming aware of such fact, give notice to AABCN; and
 - (ii) within 7 days of becoming aware of such fact, provide AABCN a replacement Security that complies with the requirements of this Agreement.
- (f) The provision and continuance of Security in accordance with sub-clause 4.7(a), 4.7(d), 4.7(e) and otherwise in accordance with its obligations under this Agreement is a condition of the performance by AABCN of its obligations under this Agreement.
- (g) If, after Security has been provided in accordance with this clause, AABCN in its absolute discretion considers that the Security is no longer required, then AABCN may notify the Operator that the Security is no longer required and promptly following such notice release any remaining Security to the Operator. Nothing in this clause 4.7(g) precludes AABCN (acting reasonably) from exercising its rights under clause 4.7(a) to require further Security from the Operator during the Term.
- (h) The decision of AABCN to require Security under clause 4.7(a) or to no longer require Security under clause 4.7(g) is not subject to the dispute provisions in clause 14.1.

4.8 Exercise of Security

- (a) The Security will be held by AABCN as security for the performance of the obligations of the Operator under this Agreement and for the payment by the Operator for all amounts due from the Operator to AABCN under or in connection with this Agreement.
- (b) AABCN may immediately exercise or call on any Security provided by the Operator :

- (i) in any circumstances in which AABCN suffers or incurs Loss as a result of the Operator's (or any of its employee's, agent's or contractor's) fraud, default, negligence, or wrongful or wilful act or omission;
- (ii) upon any failure by the Operator to pay AABCN where AABCN has suffered or incurred any Loss in respect of which the Operator is required to indemnify AABCN in accordance with this Agreement;
- (iii) upon the occurrence of any failure by the Operator to pay AABCN an amount owing from the Operator to AABCN pursuant to the terms of this Agreement on or before the due date for such payment; and
- (iv) in the event that the Operator fails to replace any Security in accordance with the terms of this Agreement, in which case the proceeds will be held as cash security,

in each case, regardless of whether AABCN has incurred any Loss or expense or made any payment in connection with the same.

- (c) If AABCN exercises or calls on the Security, then:
 - (i) the Operator must promptly (and in any event within 7 days after such exercise or call) do all things necessary to restore the value of the Security held by AABCN so that AABCN holds Security that complies with the requirements of this Agreement which is equal to an aggregate amount of not less than the Security amount set out in Item J; and
 - (ii) in the case of an exercise or call made in the circumstances described in clause 4.8(b)(iv), subject to AABCN's right to have recourse to such cash security, the amount held as cash security will be refunded to the Operator upon the Operator providing a replacement Security that complies with the requirements of this Agreement which is equal to an aggregate amount of not less than the Security amount set out in Item J.
- (d) Any call or draw on the Security by AABCN is in addition to and without derogation from any other rights AABCN may exercise against the Operator by reason of a breach of this Agreement.
- (e) Nothing in clause 4.8 limits AABCN's entitlement to recover from the Operator the full amount of any amount owing from the Operator to AABCN under this Agreement or under any other agreement between the AABCN and the Operator (including any agreement that may have expired) or AABCN's Loss as a result of the Operator's default or otherwise.

4.9 Return of Security

- (a) Upon expiry or termination of this Agreement, AABCN must release the Security to the Operator provided that at such time:
 - (i) the Operator has no outstanding liabilities which are due and payable under or in connection with this Agreement or liability which have accrued but have either not been quantified or fallen due for payment; and
 - (ii) there is no unresolved dispute under this Agreement

5. Control and management of access to the Network

5.1 AABCN to control

As between AABCN and the Operator:

- (a) control of the Network and/or any Associated Facility; and
- (b) the management of access to the Network and/or any Associated Facility,

remains with AABCN at all times. AABCN warrants that it, or one of its Related Bodies Corporate, is entitled to grant access to the Network on the terms set out in this Agreement.

5.2 AABCN's obligations

AABCN agrees at all times during the Term:

- (a) to undertake or procure the function of Train Control;
- (b) to comply with AABCN's Network Rules;
- (c) in giving Train Control Directions (other than to the extent such a direction is to be issued pursuant to sub-clauses 5.7(d) and (e)), ensure that such directions are:
 - (i) considered by AABCN (acting reasonably) to be consistent with the Train Management Policy; and
 - (ii) made with a view to minimising the disruption to the Operator in a manner that is reasonable in the circumstances taking into account the valid objectives of AABCN in issuing the Instruction;
- (d) subject to this Agreement, to use reasonable endeavours to safely and efficiently operate the Network so that any permitted use of the Network by the Operator is facilitated promptly and effectively and in accordance with this Agreement;
- (e) to ensure that it has established one or more Train Control Centres and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system provided that at all times the Operator ensures that it fully complies with clause 5.5(j);
- (f) to use its reasonable endeavours to provide the Operator with details, as soon as reasonably practicable, of all operating incidents (including an Incident) that have affected or that are reasonably likely to affect:
 - (i) the ability of any Operator's Train to retain its allotted Train Path;
 - (ii) the Operator's Train's security or safety; or
 - (iii) the security and safety of the freight or passengers on an Operator's Train; and
- (g) to comply with all Applicable Law and other laws in any way applicable to AABCN's management, control and ownership of the Network and/or any Associated Facility.

5.3 Operator's obligations in relation to Rollingstock standards

- (a) The Operator must, as at the Commencement Date and at all times during the Term, maintain each Train operated by it on the Network in a good and safe operational condition, in a condition which is fit for use on the Network, and so that it is equipped with rail industry-approved electronic tags.
- (b) Notwithstanding that the Operator is in compliance with clause 5.3(a) and without limiting any other clause of this Agreement, the Operator is fully responsible for, and releases and indemnifies AABCN and the AABCN Indemnified Parties from and against, all injury, damage and Loss arising from or related to any spontaneous failure of or damage to the Operator's Rollingstock.

5.4 Operator's obligations in relation to Train Crew

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

- (a) is qualified under AABCN's Network Rules (and evidence of such qualifications must be provided to AABCN upon request) and has an appropriate track access permit in accordance with AABCN's Network Rules;
- (b) has knowledge and competency of the route over which the Train Crew will operate the Train and is familiar with any operational obligations under AABCN's Network Rules expected to be complied with by the Train Crew; and
- (c) is qualified in the operation of the Rollingstock used to operate the Train.

5.5 Operator's other obligations

The Operator must at all times during the Term:

- (a) comply with AABCN's Network Rules;
- (b) use its best endeavours to ensure that its use of the Network complies with the Train Paths applicable to each Service;
- (c) comply with all Train Control Directions within the time period set out in such directions, but if no time period is specified, as soon as reasonably practicable after the receipt of the same;
- (d) conduct itself in accordance with Instructions issued;
- (e) notify the Train Control Centre immediately if it becomes aware that material non-compliance by a Service with the applicable Scheduled Train Path (or any other Train Path that is provided) has occurred or is a reasonable possibility, including where a Service will be, or is likely to be, delayed by more than fifteen minutes;
- (f) 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 AABCN is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an Instruction);

- (g) comply with:
 - (i) all Applicable Law and other laws in any way applicable to operation of the Services or its use of the Network; and
 - (ii) all lawful notices, orders and directions issued or given by, or agreements with, a Government Authority that relate to the use of the Network;
- (h) obtain, comply with and maintain all approvals, licences or permits that may be necessary or appropriate (from time to time) for the use of, and operation of Rollingstock on, the Network by the Operator;
- (i) not change, alter, repair, deface, damage or otherwise affect any part of the Network, Associated Facilities, AABCN's property or the property of AABCN's Related Bodies Corporate or other third parties. For the avoidance of doubt, this sub-clause does not preclude normal and fair wear and tear of the Network caused by the Operator's access to the Network in compliance with this Agreement;
- (j) at its cost, provide and maintain communications equipment that is compatible with the equipment used in the Train Control Centre as at the Commencement Date and use such equipment to communicate with the Train Control Centre, and if AABCN proposes to change communications equipment in the Train Control Centre and that proposal will result in the Operator having to replace or upgrade its communications equipment:
 - (i) the Operator must in good faith co-operate with AABCN (and any Communications Provider), including by providing such information as may reasonably be requested, to ensure that each party is able to comply with its obligations under clauses 5.2, 5.3, 5.4 and this clause 5.5; and
 - (ii) AABCN will consult with the Operator and the Operator will, after such consultation and agreement with such proposal and after reasonable notice from AABCN to the Operator, at the Operator's cost, replace or upgrade the communications equipment to be compatible with the equipment used in the Train Control Centre;
- (k) subject to clause 17, provide to AABCN any information related to the operation of the Services (excluding commercial information) as AABCN requires to enable it to properly perform its functions and discharge its obligations to the Operator, other operators, its owner, government authorities or other competent authorities, the public and otherwise in accordance with this Agreement, Applicable Law and/or any other laws in any way applicable to AABCN's management, control and ownership of the Network and/or any Associated Facility;
- (l) provide to AABCN a Train Manifest in a format acceptable to AABCN for each Service not less than 15 minutes prior to that Service commencing use of the Network, and provide written notice of any detail of the Train Manifest that changes during the course of the operation of the Service over the Network;
- (m) inform AABCN as soon as practicable of any cancellation or intended cancellation by the Operator of any Service;
- (n) ensure that any item of freight or material, including minerals, bulk goods or commodities (in any form), being hauled on or in a Train operated by the Operator

does not fall, leak, spill, escape from, or become deposited on or adjacent to, the Network, and in such event the Operator must at its cost, promptly remediate any fall, leak, spill or any escaped or deposited matter, to AABCN's reasonable satisfaction; and

- (o) provide and maintain any Security required in accordance with clause 4.7 and Item J of Schedule 1.

5.6 Removal of Rollingstock from Network

- (a) Notwithstanding the Time-path Allocation and Reallocation Policy and the Train Management Policy, if:
 - (i) AABCN (acting reasonably) considers that a Train operated by the Operator is obstructing the Network; or
 - (ii) following its review of any data collected pursuant to clause 8.5, AABCN (acting reasonably) considers that:
 - (A) any one or more of the Rollingstock used by the Operator is loaded in excess of its rated carrying capacity or loaded in an unsafe or potentially unsafe manner;
 - (B) any one or more of the Rollingstock used by the Operator is not being properly maintained and safely operated on the Network; or
 - (C) there are faults and/or defects in any one or more of the Rollingstock used by the Operator; or
 - (D) there are potential faults and/or defects in any one or more of the Rollingstock used by the Operator which give rise to a concern for the safe operation of Network and/or the Rollingstock on the Network,

then upon notification to this effect by AABCN (which notification may be by electronic mail), the Operator must arrange, at its cost and expense, for the Train, and any freight being transported by the Train, to be moved by or at the time specified in the notice to either:

- (iii) another part or parts of the Network nominated by AABCN;
 - (iv) a siding nominated by AABCN;
 - (v) a location owned by, or under the control of, the Operator; and/or
 - (vi) the Operator Nominated Location set out in Item M of Schedule 1.
- (b) Subject to clause 5.6(c), if the Operator fails to comply with the notice referred to in clause 5.6(a), then the Operator consents to AABCN arranging for the Train, and any freight being transported by the Train, to be moved to any (or a combination) of the locations set out in clauses 5.6(a)(i) to (iv), at the Operator's cost and expense.
 - (c) Notwithstanding any other provision of this Agreement, the Operator releases and indemnifies AABCN and the AABCN Indemnified Persons from and against all injury

and Loss arising from or related to the removal of the Train, and any freight being transported by the Train, including where such injury or Loss is caused by AABCN's negligence.

5.7 Request for access to Approved Additional Infrastructure

- (a) The Operator may not access any rail infrastructure, terminals, yards and/or sidings that are owned and/or operated by AABCN but are not part of the Network, without the prior written consent of AABCN pursuant to sub-clause 5.7(d) below and then only when in full compliance with the terms and conditions of such consent.
- (b) The Operator may request access for a Train to access rail infrastructure, terminals, yards and/or sidings that are owned and/or operated by AABCN but are not part of the Network by issuing a written notice to AABCN:
 - (i) requesting such access;
 - (ii) specifying the Train(s) and any personnel (including all employees, agents, contractors or other third parties) that require such access;
 - (iii) specifying the rail infrastructure, terminals, yards and/or sidings that are owned and/or operated by AABCN but are not part of the Network to which the request relates;
 - (iv) specifying the period of time to which the request relates; and
 - (v) specifying the reasons why such access is being requested; and
 - (vi) including evidence which is sufficient to demonstrate that the relevant Train is a Healthy Train and the likely impact that the requested access will have on the status of the relevant Train and whether it will continue to be a Healthy Train.
- (c) The Operator must provide AABCN with such further information as AABCN may require (in its sole discretion) from time to time in order for it to assess the request submitted by the Operator under sub-clause 5.7(b) above.
- (d) Upon receiving a request from the Operator under sub-clause 5.7(b) above (and all information requested by it under sub-clause 5.7(c) above), AABCN will use reasonable endeavours to respond to such request as soon as reasonably practicable confirming (in its sole and absolute discretion) whether or not it is willing to consent to the requested access and if so:
 - (i) the specific rail infrastructure, terminals, yards and/or sidings that are owned and/or operated by AABCN but are not part of the Network to which AABCN will grant the Operator access (the **Approved Additional Infrastructure**);
 - (ii) the period for which access to the Approved Additional Infrastructure is granted; and
 - (iii) any terms and conditions (additional to those set out in this Agreement) which shall apply to the Operator's access to the Approved Additional Infrastructure (which AABCN shall be entitled to set at its sole and absolute discretion), including for example, that any third party or contractor to be

granted such access is fully compliant with all applicable requirements of the Rail Safety Acts.

- (e) Any consent of AABCN pursuant to sub-clause 5.7(d) above may only be issued as follows (and any consent purported to be issued pursuant to sub-clause 5.7(d) above which is not in the following manner shall be deemed invalid):
- (i) if:
 - (A) the Operator's Train which is the subject of the Operator's consent request under sub-clause 5.7(b) above is a Healthy Train;
 - (B) the Operator's Train which is the subject of the Operator's consent request under sub-clause 5.7(b) above will remain a Healthy Train notwithstanding any consent issued by AABCN pursuant to sub-clause 5.7(d) above; and
 - (C) the Operator's consent request under sub-clause 5.7(b) above does not involve any Rolling Stock being left at or on the Approved Additional Infrastructure for a period longer than [●],then a Train Control Direction setting out the matters in sub-clause 5.7(d) above shall be deemed to constitute written consent of AABCN pursuant to sub-clause 5.7(d); and
 - (ii) if any of the conditions required under sub-clauses 5.7(e)(i)(A), (B) or (C) are not satisfied then:
 - (A) a Train Control Direction setting out the matters in sub-clause 5.7(d) above shall not constitute written consent of AABCN pursuant to sub-clause 5.7(d); and
 - (B) only a written notice issued by the Access and Property Manager of AABCN setting out the matters in sub-clause 5.7(d) above shall constitute written consent of AABCN pursuant to sub-clause 5.7(d).
- (f) The Operator must indemnify and keep indemnified AABCN and its Related Bodies Corporate and each of the AABCN Indemnified Persons from and against all Claims and/or Losses of any nature suffered or incurred by, or made or brought against, an AABCN Indemnified Person in respect of or arising out of the use of any Associated Facility or any Approved Additional Infrastructure by the Operator (or any of its employees, agents, contractors or invitees) or their presence, or the presence of their property, on the Network or at any Associated Facility or at any Approved Additional Infrastructure.

6. Compliance with Instructions

- (a) The Operator must:
- (i) subject to clause 6(b), comply with all Instructions and must promptly inform all relevant Train Crew of those Instructions and any changes to them; and

(ii) generally inform all relevant Train Crew of AABCN's Network Rules (including any update to such rules) and any general notices and other information notified to the Operator by AABCN.

(b) If an Instruction:

(i) derogates from a Train Path; or

(ii) prevents the Operator from operating a Service of the nature of the Service contemplated as at the Commencement Date or as otherwise agreed by the AABCN and the Operator from time to time,

then unless such Instruction:

(iii) relates to safety;

(iv) is a Train Control Direction;

(v) implements or supports Network management principles;

(vi) is necessary to minimise or prevent the effect of a material breach of this Agreement;

(vii) relates to actions to be taken following a derailment on the Network; or

(viii) is otherwise authorised by this Agreement,

the Operator may, but is not required to, comply with such Instruction. If the Operator considers that it is not required to comply with an Instruction pursuant to this clause 6(b) and does not intend to comply with such Instruction, then it must promptly give notice to AABCN of such fact (including details of the relevant Instruction).

(c) If an Instruction:

(i) is a Train Control Direction, the Operator must comply with such direction immediately; or

(ii) is not a Train Control Direction, the Operator must, subject to clause 6(b), comply with the Instruction within the time required in the Instruction, or if no time for compliance is specified within the Instruction, within a reasonable time.

(d) To the extent the Operator is required to comply with an Instruction, the Operator must comply with that Instruction in such a way as to reasonably minimise disruption to any other operator's use of the Network.

(e) AABCN is not responsible for any delay suffered or cost incurred by the Operator in complying with an Instruction of AABCN and, without limiting the generality of clause 13, the Operator releases AABCN and AABCN's Related Bodies Corporate from any Claim arising from such compliance.

(f) The Operator is not responsible for any delay suffered or cost incurred by AABCN to the extent that such delay or cost is caused by the Operator complying with an Instruction of AABCN.

7. Accreditation

- (a) Each party warrants that during the Term each such party is Accredited and such Accreditation will be current at all times during the Term to the extent required by Applicable Law, including, in the case of the Operator, all Accreditation required by Applicable Law in relation to Rollingstock used by the Operator on the Network.
- (b) The Operator will not operate Rollingstock on the Network without being in strict compliance with clause 7(a).
- (c) AABCN and the Operator will notify each other of any notice received from any Government Authority which materially or adversely affects the relevant Accreditation.
- (d) If a third party audit of equipment or maintenance practices is requested by the relevant Accrediting authority with respect to the Operator's Accreditation, then the Operator must provide a copy of that audit to AABCN at the same time such audit report is given to that relevant Accrediting authority.
- (e) Each of AABCN and the Operator must on or before the Commencement Date provide to the other evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation must be provided by each of AABCN and the Operator to the other upon receiving written request from that party.
- (f) If at any time the Operator's Accreditation is cancelled, suspended or withdrawn, the Operator must immediately notify AABCN and cease all Train movements until:
 - (i) the Accreditation is reinstated; or
 - (ii) 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.
- (g) If a party loses all or part of its Accreditation, or has all or part of its Accreditation suspended or withdrawn, then:
 - (i) that party must use its best endeavours to regain, or have restored, its full Accreditation as soon as reasonably practicable; and
 - (ii) if that party is AABCN, AABCN's obligations under this Agreement are suspended until its Accreditation is reinstated.
- (h) Clauses 7(f) and 7(g) do not derogate from the parties' rights under clause 12.3 in respect of termination of this Agreement.

8. Inspection and audit by AABCN

8.1 Audit obligation

Subject to clause 8.3, AABCN may at any time upon giving the Operator at least 2 Business Days' advance notice require a particular Service of the Operator to undergo an audit for the purpose of assessing:

- (a) the Operator's compliance with the terms and conditions of this Agreement, including whether the Train Manifest provided by the Operator under clause 5.5(l) of this Agreement is correct;
- (b) in respect of freight Services only, whether any one or more of the individual wagons used by the Operator in the provision of a Service is loaded in excess of its rated carrying capacity;
- (c) in respect of freight Services only, whether any one or more of the individual wagons used by the Operator in the provision of the Service is loaded in an unsafe or potentially unsafe manner; or
- (d) whether in AABCN's opinion Rollingstock has been, or is being, sufficiently maintained in a state that enables it (or any part of it) to be safely operated on the Network, in accordance with AABCN's Network Rules, all Applicable Law and/or any other laws (including the Rail Safety Acts) in any way applicable to AABCN's management, control and ownership of the Network and/or any Associated Facility, and in material compliance with this Agreement.

8.2 Non-compliance

- (a) If the Operator is found (whether under clause 8.1(a) or otherwise) to have breached this Agreement by:
 - (i) understating the loading of Rollingstock in the Train Manifest but where the actual loading is within the axle load specifications for the relevant Train Path, AABCN may impose an overloading charge on the Operator equivalent to 2 times the Variable Rate for each tonne of excess loading above that stated in the Train Manifest over the entire Train Path; or
 - (ii) overloading Rollingstock above the axle load specifications for the relevant Train Path (whether or not the Operator has or has not understated the loading of the Rollingstock in the Train Manifest), AABCN may impose an overloading charge on the Operator equivalent to 10 times the Variable Rate for each tonne of excess loading above the specification for the Rollingstock over the entire Train Path,

(each such charge referred to in this clause 8.2(a) being an **Overloading Charge**).
- (b) If the circumstances in both clauses 8.2(a)(i) and 8.2(a)(ii) exist, then only the Overloading Charge in clause 8.2(a)(ii) will apply.
- (c) Overloading Charges will be included in invoices issued by AABCN in accordance with clause 4.2.
- (d) The Operator acknowledges and agrees that:
 - (i) overloading Rollingstock accelerates the need for repair of the Train Path;
 - (ii) it is not possible to estimate (in advance) the precise cost of those repairs; and
 - (iii) the Overloading Charge is a reasonable estimate of the cost of any such repairs.

- (e) If the Operator is found to have breached this Agreement as described in clauses 8.1(a) to 8.1(d) following an audit carried out pursuant to clause 8.1, then the Operator will be liable for the costs of that audit, an invoice for which will be issued by AABCN to the Operator in accordance with clause 4.2(a).
- (f) If the Operator is not found to have breached this Agreement as described in clauses 8.1(a) to 8.1(d) following an audit carried out pursuant to clause 8.1, then AABCN will be liable for the costs of that audit.
- (g) AABCN's rights under this clause are in addition to and do not derogate from any other rights AABCN has under this Agreement for breach of this Agreement by the Operator.

8.3 Limitations on audit

AABCN must use its reasonable endeavours in the conduct of such audits to minimise the disruption to the Operator's Service. The Operator must fully cooperate with AABCN in the conduct of such audits.

8.4 Instructions

In conducting an audit under clause 8.1, AABCN may give an Instruction to the Operator, including an Instruction to divert or delay a Service or make any part of a Train engaged in providing a Service available for inspection or weighing.

8.5 Monitoring Equipment

- (a) The Operator:
 - (i) acknowledges and agrees that AABCN may utilise and/or place, or procure that a third party utilises and/or places, Monitoring Equipment on or about the Network to take readings or measurements and/or collect data, including for the purpose of (but not limited to):
 - (A) monitoring the operation of Rollingstock;
 - (B) assessing whether any one or more of the Rollingstock used by the Operator is loaded in excess of its rated carrying capacity or loaded in an unsafe or potentially unsafe manner;
 - (C) assessing the safety and performance of the Rollingstock and/or the Network, including whether the Rollingstock is compliant with, and has been, or is being, properly maintained and safely operated on the Network in accordance with this Agreement, AABCN's Network Rules, all Applicable Law and/or any other laws (including the Rail Safety Acts) in any way applicable to AABCN's management, control and ownership of the Network and/or any Associated Facility; and
 - (D) identifying any faults and/or defects or potential faults and/or defects in the Rollingstock.
 - (ii) authorises and consents to AABCN appointing a third party (a **Third Party Monitoring Contractor**) to use such Monitoring Equipment, collect data from such Monitoring Equipment and analyse such data;

- (iii) authorises and consents to AABCN or such Third Party Monitoring Contractor:
 - (A) undertaking the monitoring referred to in clause 8.5(a)(i); and
 - (B) using such Monitoring Equipment, collecting data from such Monitoring Equipment and analysing such data; and
 - (iv) acknowledges and agrees that the Monitoring Equipment may or may not interact directly with the Rollingstock operations of the Operator.
- (b) The Operator acknowledges and agrees that:
- (i) data collected by AABCN, the Third Party Monitoring Contractor and/or the Monitoring Equipment belongs to AABCN, will constitute Confidential Information of AABCN and may be used by AABCN at its sole discretion;
 - (ii) AABCN is not required or obliged to provide access to the Operator to the data collected by AABCN, the Third Party Monitoring Contractor and/or the Monitoring Equipment and the Operator has no rights to access such data, systems or information;
 - (iii) if the Operator wishes to obtain access to the data collected by AABCN, the Third Party Monitoring Contractor and/or the Monitoring Equipment which is applicable to the safety and performance of the Rollingstock for the Operator's own purposes, AABCN may grant such access at its sole discretion on the terms and conditions required by AABCN; and
 - (iv) AABCN or the Third Party Monitoring Contractor may share data collected (and/or analysed) from any Monitoring Equipment with each other and with the Operator as provided for under sub-paragraph (iii) above and/or any other third party having an interest in the Rollingstock (including the owners of the Rollingstock).
- (c) AABCN makes no representation or warranty as to the accuracy of any of the data collected by AABCN, the Third Party Monitoring Contractor and/or the Monitoring Equipment and the Operator acknowledges and agrees that it uses any such data which is provided to it under this Agreement or any other agreement at its own risk.
- (d) In addition to AABCN's other rights to issue Train Control Directions set out in this Agreement, AABCN or the Third Party Monitoring Contractor may issue Train Control Directions if the data reviewed by it indicates that:
- (i) there is a potential safety risk;
 - (ii) there are one or more faults and/or defects (or potential faults and/or defects) in the Rollingstock; or
 - (iii) there are circumstances that are likely to be detrimental to the performance of the Network and/or the Rollingstock on the Network, or its employees, contractors or agents or the public.
- (e) The Operator must comply with Train Control Directions issued under clause 8.5(d) and take all appropriate action to mitigate the risk or circumstance.

- (f) Notwithstanding any other clause of this Agreement, AABCN, the Third Party Monitoring Contractor and any of their Related Bodies Corporate have no liability to the Operator or any other person in respect of, and the Operator releases AABCN, the Third Party Monitoring Contractor and their Related Bodies Corporate from all Claims and Losses suffered or incurred in respect of:
- (i) the existence or use of any Monitoring Equipment on or about the Network and/or the data collected by AABCN, the Third Party Monitoring Contractor and/or the Monitoring Equipment (including the false detection of any issues in respect of Rollingstock and any Instructions or other conduct of AABCN or the Third Party Monitoring Contractor in response to the same);
 - (ii) the failure of such Monitoring Equipment to detect any issues in respect of the Operator's Rollingstock and/or the failure of AABCN or the Third Party Monitoring Contractor to detect any issues in respect of the Operator's Rollingstock from analysing such data;
 - (iii) any failure by AABCN or the Third Party Monitoring Contractor to transmit any data collected by such Monitoring Equipment to the Operator or analyse such data; and/or
 - (iv) any information or data provided or which could have been provided to the Operator in connection with the use of the Monitoring Equipment.

9. Safety

9.1 Compliance

- (a) Each party (**First Party**) must:
- (i) comply with the Rail Safety Acts and all other Applicable Law dealing with safety issues;
 - (ii) comply with AABCN's Network Rules and all Instructions relating to safety issues;
 - (iii) comply with the Dangerous Goods Code;
 - (iv) comply with all Standards (including any safety-related codes of practice developed or implemented under the Standards); and
 - (v) in addition to the First Party's Accreditation, obtain such additional accreditation as is required by Applicable Law and ensure that such accreditation remains current at all times during the Term.
- (b) The Operator must, except as otherwise required by its Accreditation:
- (i) ensure that its employees, agents and subcontractors that are engaged in relation to the Services or this Agreement are appropriately qualified and competent, receive any applicable or appropriate training, and hold any applicable accreditation, and provide such evidence of the matters referred to in this clause 9.1(b)(i) as AABCN may request; and

- (ii) ensure that its employees, agents and subcontractors that are engaged in the use by the Operator of the Network submit to drug and alcohol testing or to such other testing as AABCN requires of its own employees, agents and subcontractors.

9.2 Breach notification

As soon as AABCN becomes aware of a breach by the Operator of compliance with any part of clause 9.1 occurring during or in connection with the Operator's use of the Network under this Agreement, AABCN will give written notice to the Operator detailing:

- (a) the time, location and nature of the breach;
- (b) the cause of the breach (in AABCN's opinion) and the identity or affiliation of persons considered by AABCN to be responsible for the breach;
- (c) the consequences of the breach, including its impact on the operation of the Services or the ability of other operators to access and use the Network;
- (d) without limiting AABCN's rights under clause 12.1 in respect of such breach, any action which AABCN intends to take (including remedial action in respect of the breach, modification to existing and/or introduction of new policies or procedures and/or AABCN's Network Rules); and
- (e) any Instruction requiring modification of the Operator's policies or procedures which in AABCN's opinion is required in relation to and/or as a result of the breach.

9.3 AABCN's Network Rules

Amendments, modifications or updates to AABCN's Network Rules will be made available via an AABCN website to be advised to the Operator, and AABCN will advise the Operator as and when such amendments, variations or updates are posted to that website.

10. Emergencies and Incidents

10.1 Plans for dealing with Incidents

- (a) AABCN will formulate and periodically review and update plans which are consistent with AABCN's Accreditation requirements for dealing with Incidents, and make such plans available to the Operator.
- (b) The Operator will formulate a plan for dealing with Incidents and provide it to AABCN within 7 days after the Commencement Date. The Operator's plan must be consistent with any plan prepared by AABCN under clause 10.1, and is subject to the approval of AABCN (not to be unreasonably withheld).

10.2 Compliance with plans and directions and with *Rail Safety Acts*

The Operator and AABCN will comply with:

- (a) the plans referred to in clause 10.1(a); and
- (b) the plan referred to in clause 10.1(b) once such plan has been approved by AABCN in accordance with clause 10.1(b); and

- (c) their respective obligations under the applicable *Rail Safety Act*.

10.3 Notification of Incidents

- (a) The Operator will notify AABCN of any Incident as soon as possible after it comes to its attention and in accordance with the plans referred to in clause 10.1.
- (b) AABCN may from time to time notify the Operator of any Incidents.

10.4 Investigation of Incidents

- (a) Incidents will be investigated as required by Applicable Law including in accordance with the applicable *Rail Safety Act*.
- (b) AABCN and the Operator will co-operate with an investigation under this clause and make available records and personnel relevant to the Incident.
- (c) AABCN and the Operator will consult with each other to determine any action to be taken as a result of any investigation.

10.5 Operator's report

Without limiting clause 10.3, if an Incident occurs which involves the Operator and in relation to which AABCN has given written notice to the Operator that a report is required or a report is required pursuant to the plans referred to in clauses 10.1(a) or 10.1(b) or the applicable Rail Safety Act, the Operator must promptly prepare and submit to AABCN a written report that 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 and Associated Facilities;
- (c) its view on what may have contributed to the cause of the loss or damage to the Operator's Train and to the Network and Associated Facilities (the parties acknowledging that such statement will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes) and any expert opinions obtained in respect of the Incident;
- (d) names of the Operator's staff (including agents, contractors and volunteers) in any way involved in the Incident either as principals or witnesses;
- (e) an analysis in printed format of speed recorder charts for the Operator's Train;
- (f) such other information which is required to be disclosed in a report to the administering authority under the applicable *Rail Safety Act*;
- (g) any other information required to be disclosed in a report under the Dangerous Goods Code; and
- (h) such other information as AABCN requests (acting reasonably).

10.6 No disposal of equipment

Subject to any conduct that AABCN considers appropriate in order to ensure the safe and efficient operation of the Network and/or the safety of its users or any contrary requirement under Applicable Law or conduct required of AABCN in connection with a pre-existing contract to which AABCN is a party, the Operator and AABCN must:

- (a) 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);
- (b) take reasonable steps to preserve any property or thing which may be required as evidence as to the cause of any Incident; and
- (c) will, on reasonable notice, give access to the other, at that other's cost, to such property or thing for the purposes of inspecting, photographing or testing such property or thing, to the extent reasonably required.

10.7 Responsibility for recovery

- (a) Notwithstanding the contents of any plan for dealing with Incidents approved by AABCN under clause 10.1 above, if an Incident occurs then the Operator will immediately comply with all instructions of AABCN in relation to recovery in respect of all above rail matters (including the Operator's Train and any freight being transported on such Train), including instructions to move such Train by or at the time specified in the instructions to:
 - (i) another part or parts of the Network nominated by AABCN;
 - (ii) a siding nominated by AABCN; and/or
 - (iii) a location owned by, or under the control of, the Operator or a third party.
- (b) If the Operator fails to comply with its obligations in relation to recovery in respect of all above rail matters (including the Operator's Train and any freight being transported on such Train) in accordance with this clause 10.7, then AABCN may arrange for such Train (and any freight being transported on such Train) to be moved to any (or a combination) of the locations set out in clause 10.7(a), at the Operator's cost and expense.
- (c) Notwithstanding any other provision of this Agreement, the Operator releases and indemnifies AABCN and the AABCN Indemnified Persons from and against all injury and Loss arising from or related to the removal of the Train, and any freight being transported by the Train, under clause 10.7(b) including where such injury or Loss is caused by AABCN's negligence.

10.8 Interim responsibility for recovery costs

Until fault is determined or agreed in relation to an Incident:

- (a) AABCN will be responsible for recovery costs in relation to the Network and any Associated Facilities; and

- (b) the Operator will be responsible for recovery costs in relation to all above-rail matters (including the Operator's Train and any freight being transported on such Train).

11. Environmental requirements; Dangerous Goods

11.1 Compliance with environmental requirements

- (a) Each party must comply with all environmental laws and with their respective environmental policies (to the extent that such policies do not conflict with Applicable Law), including all Applicable Law dealing with Dangerous Goods.
- (b) The Operator must:
 - (i) provide a copy of its environmental policy to AABCN upon request by AABCN; and
 - (ii) comply with AABCN's environmental policy (as may be amended by AABCN from time to time) to the extent such policy (and any amendments to such policy) has been provided to the Operator by AABCN or is otherwise publicly available.

11.2 Management plan

- (a) The Operator must prepare a management plan for dealing with the environmental effect of its operations on the Network, and provide it to AABCN as soon as practicable after the date of this Agreement.
- (b) The Operator's policy referred to in clause 11.2(a) must not be inconsistent with any equivalent policy maintained by AABCN, as advised to the Operator.

11.3 Notification of carriage of certain materials

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

11.4 Notification of Incident involving Dangerous Goods

Other than in the case of Trains which are wholly passenger Trains, the Operator will provide to AABCN details, at the earliest practicable time after the Operator becomes aware, of all incidents (including non-compliance with relevant codes, regulations, by-laws or other statutory provisions and irrespective of whether the same is an Incident), involving Dangerous Goods including any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

11.5 Notification of Environmental Condition

Where:

- (a) AABCN becomes aware that, as a result of the activities of the Operator under this Agreement, an Environmental Condition has occurred or is likely to occur and AABCN reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or

- (b) AABCN is given a direction by a Government Authority that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition that has occurred, or that may occur, as a result of the activities of the Operator under this Agreement,

then AABCN must inform the Operator, where practicable, of any actions or steps which AABCN reasonably considers will be necessary to prevent, mitigate or remedy the situation, and the Operator must immediately implement such actions or steps (and if applicable, undertake any other necessary action to comply with the requirements of a direction by a Government Authority) so that the Environmental Condition is no longer present (or has been prevented) and/or any associated Environmental Damage is rectified.

12. Termination

12.1 Termination for breach

- (a) If either AABCN or the Operator (**Defaulting Party**) materially defaults in the performance of any of its obligations under this Agreement, the non-defaulting party (**Aggrieved Party**) may give notice in writing (**Rectification Notice**) to the Defaulting Party requiring the Defaulting Party to:

- (i) rectify the default within a reasonable time specified by the Aggrieved Party having regard to all of the relevant circumstances; and
- (ii) respond in writing to the Aggrieved Party within 48 hours of the receipt of the Rectification Notice:
 - (A) indicating to the Aggrieved Party the steps to be taken to rectify the default within such reasonable time and a reasonable timetable for the completion of such steps; and
 - (B) confirming that the performance of the steps has commenced (**Rectification Response**).

- (b) If the Defaulting Party:

- (i) does not rectify the default within a reasonable time;
- (ii) does not provide a Rectification Response within the time specified in clause 12.1(a)(ii);
- (iii) does not provide a satisfactory Rectification Response meeting the requirements of clause 12.1(a)(ii)(A) and 12.1(a)(ii)(B); or
- (iv) does not comply with the timetable set out in the Rectification Response subject to clause 12.1(a),

then the Aggrieved Party may, at any time prior to the default being rectified, either:

- (v) suspend any or all rights of the Defaulting Party under this Agreement by giving not less than 3 days' written notice to the Defaulting Party; or
- (vi) terminate this Agreement by giving not less than 3 days' written notice to the Defaulting Party.

- (c) Notwithstanding that AABCN may be the Defaulting Party, nothing in clause 12.1(b) derogates from or affects AABCN's rights and powers to manage the Network and any of its other rights or powers under this Agreement or any other agreement with any other person, including any track access agreement with any other operator.

12.2 Immediate termination

Each of AABCN and the Operator has the right to immediately terminate this Agreement by notice in writing to the other if any of the following events occurs:

- (a) in the case of the Operator, AABCN breaches its obligations under clause 18.1;
- (b) in the case of AABCN, the Operator breaches its obligations under clause 18.2;
- (c) if any execution is levied against the assets of the other party which are necessary or material for the conduct of the Operator's business of running the Services, or if any such assets of the other party are taken or sold by an encumbrancer, or if the other party ceases to carry on business, stops payment or fails to maintain normal and continuous operation of its business for a period of in excess of 14 continuous days except for reasons wholly beyond its control;
- (d) if the other (and in the case of AABCN, if the Guarantor (if applicable)):
 - (i) becomes Insolvent;
 - (ii) has commenced against it court proceedings to appoint a provisional liquidator or liquidator or receiver or other controller to it or any of its property (otherwise than for the purpose of reconstruction or amalgamation whilst Solvent);
 - (iii) goes into provisional liquidation or liquidation or a meeting was called for the purpose of considering provisional liquidation or liquidation (otherwise than for the purpose of reconstruction or amalgamation whilst Solvent);
 - (iv) has a receiver or a receiver and a manager or other controller appointed over any of its property;
 - (v) proposes or enters into any scheme of arrangement or assignment or composition or like with its creditors or any class of them (otherwise than for the purpose of reconstruction or amalgamation whilst Solvent); or
 - (vi) has an administrator appointed pursuant to the provisions of the *Corporations Act* or any successor legislation.

12.3 Termination of this Agreement by reason of suspension or cancellation of Accreditation

If AABCN or the Operator's Accreditation is suspended for a continuous period of 6 months or cancelled for a continuous period of 1 month, then the other may terminate this Agreement by notice in writing to the party that has had its Accreditation so suspended or cancelled.

12.4 Suspension

- (a) Without in any way limiting the rights of a party under clause 12.2 or 12.3, if:

- (i) AABCN or the Operator is entitled to terminate this Agreement under any of those clauses, then it may elect instead to suspend the rights of the other party under this Agreement (subject to clause 12.4(c)) until such time as the cause giving rise to the right to terminate is remedied; and/or
 - (ii) any Incident occurs or the Operator defaults in the performance of any of its obligations under this Agreement and such default gives rise to any safety concerns or relates to safety, then AABCN may immediately suspend the rights of the Operator under this Agreement until such time as the cause giving rise to the right to suspend is remedied (and any compensation reasonably satisfactory to AABCN has been paid).
- (b) For the avoidance of doubt, any suspension of the Operator's rights under clauses 4.7(b), 12.1(b)(v), 12.4(a)(i) and/or 19.2 does not suspend the Operator's obligation to pay the Fixed Charges applicable to such period of suspension.
 - (c) An election referred to in clause 12.4(a) is revocable at any time by the party making it and has no effect upon rights (including the right to terminate this Agreement), obligations, debts or liabilities that have accrued before the election to suspend this Agreement.

12.5 Effect of termination, expiration and suspension

- (a) Upon termination, expiration or suspension of this Agreement, all rights of the Operator to use the Network will cease immediately.
- (b) Termination, expiration or suspension of this Agreement under any circumstances shall not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or suspension (as applicable) or arose out of such cause.
- (c) Upon termination, expiration or suspension of this Agreement, all covenants and agreements of AABCN and the Operator which by their terms or reasonable implication are to be performed in whole or in part after the termination, expiration or suspension of this Agreement shall survive such termination, expiration or suspension.

13. Indemnities

13.1 Indemnity by Operator

- (a) Subject to the other provisions of this clause 13, the Operator must indemnify and keep indemnified AABCN and its Related Bodies Corporate and each of their employees, agents, consultants, representatives, contractors and volunteers (**AABCN Indemnified Persons**) from and against all Claims and/or Losses of any nature suffered or incurred by, or made or brought against, an AABCN Indemnified Person in respect of or arising out of:
 - (i) the death or illness of, or injury to, any person; or
 - (ii) any loss of, damage to or destruction of any property of any person,
 to the extent caused by or contributed to by:

- (iii) any negligent, wrongful or wilful act or omission of the Operator (or any of its employees, agents, contractors or invitees); or
 - (iv) any material default under this Agreement by the Operator (or any of its employees, agents, contractors or invitees), provided that this clause 13.1(a)(iv) will only apply to AABCN and not any other AABCN Indemnified Persons; or
 - (v) the use of the Network or any Associated Facility or any Approved Additional Infrastructure by the Operator (or any of its employees, agents, contractors or invitees) or their presence, or the presence of their property, on the Network or at any Associated Facility or at any Approved Additional Infrastructure, in each case other than as contemplated by this Agreement.
- (b) Subject to the other provisions of this clause 13, the Operator must indemnify and keep indemnified the AABCN Indemnified Persons (other than AABCN) from and against any and all Claims and/or Losses of any nature suffered or incurred by, or made or brought against, an AABCN Indemnified Person (other than AABCN) in respect of or arising out of a breach by the Operator of any of its obligations, representations, warranties, covenants and undertakings under this Agreement.
- (c) AABCN receives the benefit, and is agent of the ABCN Indemnified Persons for the purposes of receiving on their behalf the benefits, of the indemnity given by the Operator in clause 13.1(a).
- (d) Notwithstanding clauses 13.1(a), 13.1(b), 13.1(c) and 13.2(a), the Operator is solely liable for and releases, indemnifies and will keep indemnified the ABCN Indemnified Persons against all Claims of any nature in respect of or arising out of this Agreement made or brought by a third party against an ABCN Indemnified Person in respect of:
- (i) the death or illness of, or injury to, any person; or
 - (ii) any loss of, damage to or destruction of any property of any person,
- except to the extent that such damage, loss, injury or death is caused by or contributed to (but only to the extent of the contribution) by the Wilful Default or negligence of ABCN.

13.2 Indemnity by ABCN

- (a) Subject to the other provisions of clause 13, ABCN must indemnify and keep indemnified the Operator from and against all Claims and/or Losses of any nature suffered or incurred by, or made or brought against, the Operator in respect of or arising out of:
- (i) the death of or injury to any person; or
 - (ii) any loss of, damage to or destruction of any property of any person,
- to the extent caused by or contributed to by:
- (iii) any negligent, wrongful or wilful act or omission of ABCN (or any of its employees, agents, contractors or invitees); or

- (iv) any material default by ABCN of its obligations under this Agreement.
- (b) Unless otherwise agreed in writing by ABCN, the Operator shall ensure that any exclusion or limitation offered by the Operator's conditions of carriage with its customers extends to ABCN and shall upon request by ABCN provide details of the Operator's conditions of carriage relevant to ABCN in place from time to time.

13.3 Limitation of Claims

Notwithstanding any other provision of this Agreement, neither ABCN nor the Operator shall make any Claim against the other under or in connection with this Agreement, including in relation to the indemnities in clauses 13.1(a), 13.1(b), 13.1(d) and 13.2(a), unless:

- (a) notice of a Claim has been given to the other within:
 - (i) 12 months from the date on which the relevant party becomes aware of, or ought reasonably to have become aware of the occurrence of, the event out of which such Claim arises; or
 - (ii) 3 months of receiving a third party claim; and
- (b) the amount of the Claim exceeds the amount specified at Item I of Schedule 1 in respect of any one occurrence or a series of related occurrences which are consequent upon or attributable to one source or original cause, provided that if this condition is satisfied then the party may proceed for the full amount of the Claim and is not limited to only so much of the Claim as exceeds the required threshold.

13.4 Continuance of Indemnities

The releases and indemnities contained in this clause 13 for the benefit of either ABCN or the Operator continue in full force and effect as to any Claims in relation to any event, act, omission or default occurring during the Term notwithstanding the termination of this Agreement whether by expiration of time or otherwise.

13.5 Duty to mitigate

Each party must use reasonable endeavours to mitigate the Losses the subject of an indemnity under this Agreement.

13.6 Defence of Claims

Each of ABCN and the Operator must render to the other party all reasonable assistance in the defence of any claim made against a party by a third party arising out any Incident or other event or events giving rise to a Claim.

13.7 Determination of Liability

- (a) In the event of an Incident involving the Operator or any other event which results or could result in a Claim by or against the Operator or ABCN, liability as between the Operator and ABCN shall be determined:
 - (i) as agreed between ABCN and the Operator;

- (ii) failing such agreement within one month of ABCN or the Operator giving notice to the other requiring agreement on liability, by a loss adjuster appointed pursuant to clause 13.8; or
 - (iii) where the amount of the Claim exceeds the sum of \$1,000,000 and either ABCN or the Operator is dissatisfied with the report of the loss adjuster, pursuant to the dispute resolution procedure in clause 14.1.
- (b) Subject to sub-clause 13.7(a)(iii), clause 14.1 does not apply to any dispute in relation to liability under this clause 13.7.

13.8 Loss adjuster

Where a matter is to be referred to a loss adjuster in accordance with clause 13.7, then the following provisions shall apply:

- (a) the loss adjuster shall be appointed by ABCN and the Operator, or in default of such appointment within 10 Business Days after the need to appoint a loss adjuster, by the President of the Australasian Institute of Chartered Loss Adjusters;
- (b) the loss adjuster shall:
 - (i) be a Fellow of the Australasian Institute of Chartered Loss Adjusters or have equivalent qualifications and experience;
 - (ii) have no interest or duty which conflicts or may conflict with their function as a loss adjuster, them being required to fully disclose any such interest or duty before their appointment; and
 - (iii) not be an employee of the Operator or ABCN or of a Related Body Corporate of the Operator or ABCN;
- (c) the loss adjuster appointed shall not be permitted to act until they have given written notice of the acceptance of their appointment to both ABCN and the Operator;
- (d) any loss adjuster appointed shall be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and the performance of their duties;
- (e) any person nominated as a loss adjuster will be deemed to be, and will act as, an expert and not an arbitrator and the law in relation to arbitration (including the *Commercial Arbitration Act 1984* (NSW)) shall not apply to them or their determination or the procedures by which they may reach their determination;
- (f) each of ABCN and the Operator must ensure to the best of its ability that the loss adjuster is given the opportunity to interview any employee or agent involved in or with knowledge of the Incident or event resulting in the Claim or with any other relevant information that may be of use to the loss adjuster;
- (g) subject to any claims for legal professional privilege, both ABCN and the Operator must promptly make available to the loss adjuster any files, documents, data, recording or other information that may be of use to, or is requested by, the loss adjuster for the purposes of their investigation;

- (h) the loss adjuster will determine the quantum of the relevant Claim and the liability of the Operator and/or ABCN in respect of such claim and shall provide a copy of their report on such matters to each of ABCN and the Operator within a reasonable time after their appointment; and
- (i) in the absence of fraud or manifest error, the decision of the loss adjuster shall be final and binding upon the parties where the total claims arising from the Incident or event giving rise to the Claim are equal to or less than the sum of \$1,000,000.

13.9 Costs

The costs of the loss adjuster appointed pursuant to clause 13.8 shall be borne by ABCN and the Operator in such proportions as liability is determined by the loss adjuster or, where the liability is determined by a court, in such proportions as liability is determined by the court.

13.10 Limited Liability

Except where expressly provided for in this Agreement, no party will be liable for any Indirect or Consequential Loss suffered or incurred by the other party in relation to this Agreement.

13.11 Exclusion to limitation

- (a) The limitation on Claims provided for in clause 13.3 shall not apply to a Claim against a party to the extent that the Claim has arisen from any fraud or Wilful Default of that party.
- (b) The limitation on Claims provided for in clause 13.3 shall not apply to a Claim if the loss, damage, cost or expense the subject of the Claim, when aggregated with any other Claims made (including Claims for loss, damage, costs or expenses which, but for clause 13.3, would be recovered under clauses 13.1(a) or 13.2(a) or otherwise) exceeds the sum of \$[●] in any one year (being the period commencing on the Commencement Date or the anniversary of the same and ending one year later). For the purposes of clarification, once the aggregation of Claims under this clause exceeds \$[●] in any one year, the limitation in clause 13.3 does not apply to any further Claims made during that year.

13.12 Liability – Network Standard

- (a) Notwithstanding any other provisions of this Agreement but without limiting clause 8.5(f), ABCN will not be liable to the Operator and the Operator will not have or make any Claim against ABCN or the ABCN Indemnified Persons in respect of any loss or damage to real or personal property, including property of the Operator, or personal injury or death of any person or any other damage, expense, injury, cost or loss whatsoever arising out of or in connection with:
 - (i) the standard of the Network or any Associated Facilities or any infrastructure related to the Network and/or any Associated Facilities; or
 - (ii) any failure or defect in the Network or any Associated Facilities or any infrastructure related to the Network and/or any Associated Facilities,

except to the extent that such loss, damage, injury, cost or expense results directly from ABCN's breach of its obligation to maintain the Network in accordance with this Agreement.

- (b) ABCN receives the benefit, and is agent of the ABCN Indemnified Persons for the purpose of receiving on their behalf the benefits, of clause 13.12(a).
- (c) The benefits contained in this clause 13.12 will continue in full force and effect as to any Claims relating to any event, act, omission or default occurring during the Term notwithstanding the termination of this Agreement whether by expiration of time or otherwise.

14. Insurance

14.1 Required insurance policies

- (a) The Operator must, at its expense, take out and subsequently maintain current at all times during the Term the policies of insurance required by this clause 14 from a reputable and solvent insurer that:
 - (i) is licensed to conduct insurance business in Australia; and
 - (ii) has a Standard & Poors' long term credit rating of at least A-.
- (b) The Operator must effect and maintain throughout the Term, the following insurance policies:
 - (i) Public Liability Insurance: a policy of insurance:
 - (A) to cover the legal liability of the insureds arising out of or in connection with their respective rights, interests and obligations, and covering all matters referred to, in this Agreement whether in respect of injury to or death of any person (other than the insured or an employee of the insured) or loss of or damage to any property (other than property owned by the insured) or otherwise, in an amount no less than that specified in Item L of Schedule 1 for any one occurrence in respect of each policy;
 - (B) to include 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 on a definitely identifiable date; and
 - (C) to cover the Operator's access and use of the Network and Associated Facilities;
 - (ii) a policy of insurance with respect to the Operator's liability to ABCN Indemnified Persons pursuant to the indemnity provisions contained in this Agreement, to the extent coverable by insurance (it being acknowledged that the Operator is not exempted from any liability in excess of the sum insured nor from any liability to which such insurance does not apply);
 - (iii) Carrier Liability Insurance: a policy of insurance covering any liability arising from:

- A. damage caused to goods transported by the Operator in a sum insured of not less than \$[●]; and
 - B. damage caused by goods transported by the Operator in a sum of not less than \$[●], provided that the Operator must give ABCN prompt and timely advance written notice of any Dangerous Goods to be transported by the Operator in which case ABCN will be entitled to require a higher level of such insurance not exceeding \$[●] as a condition of the transport of such Dangerous Goods;
- (iv) Workers Compensation: a policy of insurance against liability for death of, or injury to, persons employed (or deemed to be employed) by the Operator in relation to its rail operations, including liability ensuring under any statute or at common law, to at least the minimum cover prescribed by any statute or otherwise and the Operator will ensure that its contractors have the same type of insurances in place in relation to their employees (including deemed employees); and
 - (v) any other insurance required by Applicable Law.
- (c) The Operator acknowledges and agrees that:
 - (i) in respect of each policy of insurance referred to in this clause 14.1, the Operator is not exempted from any liability in excess of the sum insured nor from any liability to which such insurance does not apply; and
 - (ii) nothing in this clause 14.1 imposes a liability on ABCN or an ABCN Indemnified Person.

14.2 Disclosure of insurance policies

- (a) The Operator must provide to ABCN evidence of the insurance policies effected and maintained pursuant to this clause 14 (including evidence that the cover provided under those insurance policies complies with this clause 14 and of the currency of those insurance policies) to ABCN's reasonable satisfaction:
 - (i) within 10 Business Days after renewal of each insurance policy during the Term; and
 - (ii) within 10 Business Days after being requested to do so in writing by ABCN.
- (b) Without prejudice to ABCN's other rights and remedies in respect of such default, if the Operator fails to comply with clause 14.2(a) at any time and does not remedy that default within 10 Business Days after ABCN gives notice to the Operator requiring that default to be remedied, then ABCN may effect and maintain such insurance and pay the premiums and any amount so paid will be a debt due from the Operator to ABCN.

14.3 Minimum terms of policies

Each of the policies of insurance effected in accordance with this Agreement must, to the extent permitted by Applicable Law:

- (a) note the interests of the Operator and any contractor of the Operator engaged by the Operator in relation to the performance of the Operator's obligations under this Agreement;
- (b) include a principal's indemnity endorsement specifically noting ABCN and any Related Body Corporate of ABCN notified to the Operator by ABCN from time to time as an interested party in respect of its rights, interests and obligations, and covering all matters referred to, in this Agreement;
- (c) include a cross liability clause;
- (d) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely affects the cover provided without the prior written consent of ABCN (not to be unreasonably withheld or delayed);
- (e) contain provisions which are standard industry terms for railway operators;
- (f) provide that a notice of claim given to the insurer by one insured party will be accepted by the insurer as a notice of claim given by each of the insured parties; and
- (g) provide that a breach of or failure to observe and fulfil the terms of the policy by any party comprising the insured must not prejudice the rights of the remaining parties comprising the insured; and
- (h) contain provisions that require the insurer to give reasonable notice to the Operator of any proposed cancellation or material change to the terms of the insurance cover, such notice to be communicated promptly to ABCN by the Operator.

14.4 Operator not to render policy void

The Operator must not render any of the insurances effected in accordance with this clause 14 void or voidable or liable to refusal of any claim.

14.5 Compliance

The Operator must at all times comply with the terms and conditions of all insurance policies effected pursuant to this clause 14.

14.6 Notice of potential claims

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

- (a) notify ABCN as soon as practicable after the making of any Claim under any insurance policy required by this Agreement;
- (b) notify ABCN of the Claim in reasonable detail; and
- (c) keep ABCN informed of subsequent developments concerning any Claim,

to the extent that such Claim is in connection with this Agreement.

14.7 Operator to pay all excess/deductibles

- (a) The Operator must, in respect of any Claims by it or any other insured for which it is responsible, pay and bear all excesses/deductibles provided for in any insurances effected in accordance with this clause 14.
- (b) If the Operator fails to pay any excess/deductible provided for in any insurances effected in accordance with this clause 14, ABCN may pay the relevant excess/deductible and any amount so paid will be a debt due from the Operator to ABCN.

14.8 Settlement of claims

If:

- (a) ABCN makes a Claim against the Operator for damage to the Network and/or Associated Facilities;
- (b) the Claim is in respect of the same matter as the Operator claims under a policy required by this Agreement for damage to Network and/or Associated Facilities; and
- (c) the Operator has not disputed ABCN's Claim,

then upon settlement of the Operator's Claim, under such policy, the portion of monies owed by the Operator to ABCN must be paid to ABCN from the monies received by the Operator under the policy against which the Operator made a Claim.

15. Resolution of disputes

15.1 Procedure to settle disputes

- (a) If there is a dispute between ABCN on the one hand and the Operator and/or the Guarantor on the other relating to or arising out of this Agreement, then the disputing parties must use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
- (b) The procedure that is to be followed to settle a dispute arising under this Agreement is as follows:
 - (i) first, negotiation of the dispute under clause 15.2;
 - (ii) second, mediation of the dispute under clause 15.3; and
 - (iii) third, determination of the dispute under clause 15.5.
- (c) Notwithstanding anything to the contrary in this Agreement, the parties acknowledge and agree that any claims or proceedings to be brought by the Operator and/or the Guarantor against ABCN under or in connection with the terms of this Agreement must be instigated and pursued by the Operator. For the avoidance of doubt, this extends to any Claims being sought by the Guarantor against ABCN.

15.2 Negotiation

If there is a dispute between ABCN on the one hand and the Operator and/or Guarantor on the other relating to or arising out of this Agreement, then within 7 days of a party notifying the

other of a dispute, senior representatives from each party must meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.

15.3 Mediation

- (a) If a dispute arising under this Agreement is not resolved within 21 days of notification of the dispute under clause 15.2, the dispute will be referred:
 - (i) in the first instance, to the chief executive officers or chairpersons of the disputing parties who will attempt to resolve the dispute including by informal mediation; and
 - (ii) thereafter, if the dispute is not resolved by the chief executive officers or chairpersons of the disputing parties within 40 days of notification of the dispute under clause 15.2, to formal mediation in South Australia by a single mediator appointed by agreement of the disputing parties, or if they fail to agree, appointed by the President of the Institute of Arbitrators and Mediators Australia acting on the request of either of the disputing parties.
- (b) Unless the disputing parties otherwise agree:
 - (i) each disputing party may appoint a person, including a legally qualified person, to represent it or assist it in any mediation;
 - (ii) each disputing party will bear its own costs relating to the preparation for and attendance at the mediation;
 - (iii) the costs of the mediator will be borne equally by the disputing parties; and
 - (iv) the mediation shall be conducted by a mediator in accordance with any guidelines for mediation issued by the Resolution Institute.
- (c) Nothing in this clause 15.3 prohibits a disputing party from seeking and obtaining appropriate injunctive relief.

15.4 Appointment of expert

- (a) The parties agree to the appointment of an expert for the purpose of calculating any Financial Sums which are in dispute, except for those to be determined by the loss adjuster under clause 13.7 and provided that the relevant dispute was not resolved by negotiation between the chief executive officers or chairpersons of the disputing parties within 40 days of notification of the dispute under clause 15.2.
- (b) The expert shall be chosen jointly by the disputing parties, but in the absence of an agreement, shall be appointed by the president for the time being for the Institute of Chartered Accountants in South Australia acting on the request of a party to the dispute.
- (c) The costs of the expert will be met in the proportions determined by the expert.
- (d) The parties agree that decisions of the expert concerning the calculation of any Financial Sum are final and binding in the absence of fraud or manifest error.

15.5 Arbitration

- (a) If the dispute relating to or arising out of this Agreement is not settled under clause 15.3 within one (1) month of the appointment of the mediator, then either party to the dispute may terminate the mediation proceedings by written notice. The giving of such notice by a disputing party will, for the purposes of this Agreement, refer the dispute to be determined by arbitration under this clause 15.5.
- (b) The arbitrator shall be chosen by ABCN and the Operator, but in the absence of an agreement by ABCN and the Operator as to the arbitrator within 7 days of the notice referring the matter to arbitration, the arbitrator shall be a person appointed by the President of the Institute of Arbitrators and Mediators Australia acting on the request of either party to the dispute.
- (c) The arbitration will be conducted in accordance with the *Commercial Arbitration Act 1986* (SA) except that:
 - (i) it must be carried out with the provision relating to arbitration set out in the *Australasia Railway (Third Party Access) Act 1999* (Cth);
 - (ii) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
 - (iii) the arbitrator's decision will be final and binding on the disputing parties in the absence of fraud or manifest error;
 - (iv) a disputing party may appoint any person, including a legal practitioner, to represent it or assist it in the arbitration;
 - (v) the arbitrator does not have the power conferred by section 25 of the *Commercial Arbitration Act 1986* (SA);
 - (vi) the arbitrator must include in the arbitration award the findings on material questions of law and fact, including references to evidence on which the findings of fact were based; and
 - (vii) the parties consent to an appeal to the Supreme Court of South Australia on any questions of law arising in the court of arbitration or out of the arbitration award.

16. Guarantee

16.1 Consideration

The Guarantor acknowledges that:

- (a) it has requested ABCN and the Operator to enter into this Agreement; and
- (b) execution by ABCN and the Operator of this Agreement is good and valuable consideration for the obligations and liabilities of the Guarantor under this Agreement.

16.2 Guarantee and indemnity

The Guarantor unconditionally and irrevocably:

- (a) guarantees to ABCN the due and punctual performance and observance by the Operator of all of the obligations (including all financial obligations) contained in or implied under this Agreement that must be performed and observed by the Operator (**Guaranteed Obligations**);
- (b) undertakes with ABCN that, whenever the Operator does not pay any amount when due under or in connection with this Agreement (or anything which would have been due if this Agreement or the amount was enforceable, valid and not illegal), immediately on demand by ABCN the Guarantor shall pay that amount as if it was the principal obligor; and
- (c) indemnifies ABCN and will keep ABCN indemnified, against all Claims and Losses that ABCN or any ABCN Indemnified Persons may now or in the future suffer or incur (and any such amounts which would, but for such unenforceability, invalidity or illegality, have been payable by the Operator) consequent on or arising directly or indirectly out of any breach or non-observance by the Operator of a Guaranteed Obligation.

16.3 Extent of guarantee and indemnity

The obligations of the Guarantor under this clause 16 will not be affected by an act, omission, matter or thing which, but for this clause, would reduce, release or prejudice any of its obligations under this Agreement (without limitation and whether or not known to it or any party) including:

- (a) any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of this Agreement, whether with or without the Guarantor's knowledge or consent;
- (b) a rule of law or equity to the contrary;
- (c) an Insolvency event affecting a person or the death of a person;
- (d) a change in the constitution, membership, or partnership of a person;
- (e) the partial performance of the Guaranteed Obligations;
- (f) the exercise of a right by ABCN or the Operator without the Guarantor's knowledge;
- (g) the Guaranteed Obligations not being enforceable at any time (whether by reason of a legal limitation, disability or incapacity on the part of the Operator and whether this Agreement is void *ab initio* or is subsequently avoided) against the Operator;
- (h) ABCN granting any time or other indulgence or concession to, compounding or compromising with, or wholly or partially releasing the Operator or the Guarantor from an obligation; or
- (i) another thing happening that might otherwise release, discharge or affect the obligations of the Guarantor under this Agreement.

16.4 Principal and independent obligation

Clause 16 is:

- (a) a principal obligation and is not to be treated as ancillary or collateral to another right or obligation; and
- (b) independent of and not in substitution for or affected by another security interest (including, for the avoidance of all doubt, the Security) or guarantee or other document or agreement which ABCN or another person may hold concerning the Guaranteed Obligations.

16.5 Enforcement against Guarantor

ABCN may enforce clause 16 against the Guarantor without first having to resort to another guarantee or security interest or other agreement relating to the Guaranteed Obligations.

16.6 Warranties

- (a) The Guarantor represents and warrants that:
 - (i) it has obtained all necessary approvals or consents for its participation as a guarantor in accordance with the terms and conditions of this clause 16;
 - (ii) by executing this Agreement it will not be in breach of any approval, its constituent documents or any other agreement to which it is a party; and
 - (iii) it has available to it the financial resources to meet its obligations under this Agreement, the guarantee referred to in clause 16.2(a) and indemnity referred to in clause 16.2(c).
- (b) The Guarantor indemnifies ABCN and will keep ABCN indemnified against all Claims and Losses that ABCN or any ABCN Indemnified Persons may now or in the future suffer or incur consequent on or arising directly or indirectly out the breach by the Guarantor of any of the warranties in this clause 16.6.

16.7 Reinstatement

If any payment to or any discharge, release or arrangement given or entered into by ABCN (whether in respect of the obligations of the Operator or any security for those obligations or otherwise) is avoided or reduced for any reason (including as a result of Insolvency, breach of fiduciary or statutory duties or any similar event) in whole or in part, then the liability of the Guarantor under this clause 16 will continue or be reinstated as if the discharge, release or arrangement had not occurred and any relevant security shall be reinstated.

17. Confidentiality

17.1 Use and disclosure

- (b) Each party:
 - (a) acknowledges the commercial sensitivity of the Confidential Information;
 - (b) must use the Confidential Information of another party only for the purposes of this Agreement;

- (c) must keep confidential all Confidential Information of another party except for disclosure permitted under clause 17.2; and
- (d) must use best endeavours to ensure that the Confidential Information of a party is secure from theft, loss, damage or unauthorised access or alteration.

17.2 Permitted disclosure

- (a) Notwithstanding clause 17.1, a party may disclose the Confidential Information of another party:
 - (i) to its employees, legal advisers, financial advisers, auditors and its Related Bodies Corporate to the extent such persons require the Confidential Information and provided such persons are under an obligation to keep the Confidential Information confidential on terms consistent with this clause 17;
 - (ii) with the prior written consent of the other party;
 - (iii) if the Confidential Information is, at the date of this Agreement, lawfully in the possession of the recipient of the Confidential Information through sources other than the party who supplied the Confidential Information;
 - (iv) to the extent required by Applicable Law;
 - (v) if strictly and necessarily required in connection with legal proceedings relating to this Agreement; or
 - (vi) if the Confidential Information is publicly available other than as a result of breach of confidence or breach of this Agreement by the party receiving the Confidential Information.
- (b) If a party discloses any Confidential Information under clause 17.2(a) sub-clauses (iii) to (vi), then the disclosing party must promptly notify the other parties to this Agreement as to the disclosure advising to whom such Confidential Information has been made available and the purpose for which the Confidential Information has been disclosed.
- (c) If a party is required by Applicable Law to disclose any Confidential Information or disclose Confidential Information to a Government Authority, then the disclosing party must before doing so:
 - (i) notify the other parties to this Agreement; and
 - (ii) to the extent reasonably possible, give any affected party a reasonable opportunity to take any steps necessary to protect the confidentiality of that information.
- (d) The party disclosing information under clause 17.2(a) must use best endeavours to ensure that persons receiving the Confidential Information from it do not disclose the Confidential Information except in the circumstances permitted at clause 17.2(a).

17.3 Media

The Operator and, if applicable, the Guarantor must not release to the public any images, video or other media of any nature whatsoever depicting:

- (a) the Network infrastructure and/or any Associated Facilities; or
- (b) any of ABCN's or any other operator's operations or other activities on or in connection with the Network and/or any Associated Facilities,

without the prior written consent of ABCN and then must only do so to the extent approved by ABCN and in accordance with any conditions imposed on such release by ABCN.

17.4 Delivery of materials

Following termination or expiry of this Agreement, the Operator must on the request of ABCN immediately deliver to ABCN all documents or other materials containing or referring to Confidential Information which are:

- (a) in the Operator's possession, power or control (or the possession, power or control of the Guarantor); or
- (b) in the possession, power or control of persons who have received Confidential Information from the Operator.

18. Assignment or novation

18.1 By ABCN

- (a) Subject to the remaining sub-clauses of this clause 18.1, ABCN may not assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement, without the prior written consent of the Operator which consent will not be unreasonably withheld or delayed.
- (b) Without obtaining consent under clause 18.1(a), but subject to clause 18.1(c), ABCN may:
 - (i) assign or novate this Agreement, their interest in the subject matter of this Agreement or any right under this Agreement to a successor of ABCN or to any other person which takes over responsibility for the management of the Network or any relevant part of it; or
 - (ii) assign or novate this Agreement, their interest in the subject matter of this Agreement or any right under this Agreement, to a Related Body Corporate of ABCN.
- (c) If ABCN assigns or novates this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement under clauses 18.1(a) or 18.1(b), ABCN must ensure that the assignee or novatee first enters into a deed under which the assignee agrees to be bound by the terms of this Agreement.
- (d) Without obtaining consent under clause 18.1(a), ABCN may assign by way of security, mortgage, charge and/or otherwise create security in favour of any of its lenders, financiers or other debt, equity or credit providers (or any agent or trustee for

any of the same) over its right, title and interest in, under or derived from this Agreement.

- (e) The Operator undertakes to enter into any further documentation that may be reasonably required by ABCN in order to give effect to the transactions permitted by this clause 18.1.
- (f) The Operator and Guarantor acknowledge and agree that:
 - (i) ABCN may in its sole and absolute discretion enter into any sub-contracting or agency agreements or arrangements in relation to any of its functions or obligations under or in connection with this Agreement and any performance by a third party of such functions or obligations will constitute performance by ABCN of the same; and
 - (ii) nothing in this clause 18.1 prevents ABCN from doing so.

18.2 By the Operator and the Guarantor

- (a) The Operator and, if applicable, the Guarantor may not assign or novate this Agreement, each of its respective interest in the subject matter of this Agreement or any right under this Agreement:
 - (i) without the prior written consent of ABCN, which consent is not to be unreasonably withheld; and
 - (ii) unless on or before such assignment or novation, the Operator or the Guarantor (as applicable) notifies ABCN of the proposed assignment or novation and the assignee or novatee enters into a deed under which the assignee or novatee agrees to:
 - (A) be bound by the terms of this Agreement; and
 - (B) in the case of the Operator, if required by ABCN, provide (or replace the then current) Security in accordance with clause 4.7 and Item J of Schedule 1.
- (b) In the case of an assignment or novation by the Operator, ABCN agrees that it will not withhold its consent to an assignment or novation under clause 18.2(a) if it is satisfied (acting reasonably) that:
 - (i) the assignee or novatee is able to meet the Operator's obligations under this Agreement (including financial obligations, obligations relating to safety and obligation to hold the necessary Accreditation) and/or that the assignee or novatee has procured the replacement of the Guarantor if so required by ABCN;
 - (ii) the assignee or novatee is commercially viable; and
 - (iii) the Operator is not in breach of any of its obligations under this Agreement.

18.3 The effect of assignment or novation

Assignment or novation of this Agreement under clauses 18.1 or 18.2 will not abrogate, impair, release or extinguish any debt, obligation or liability of ABCN to the Operator, and/or of the Operator (or Guarantor as applicable) to ABCN, that may have accrued under this Agreement prior to the date of such an assignment or novation.

19. Force Majeure

19.1 Notice of Force Majeure

If, by reason of an event of Force Majeure, ABCN or the Operator is prevented from or delayed (or likely to be prevented or delayed) in performing its obligations under this Agreement, whether wholly or in part, then the affected party must, as soon as reasonably practicable after it becomes aware of the Force Majeure (and in any event, within 5 Business Days after it becomes aware of the Force Majeure), give the other party notice of the Force Majeure including:

- (a) details of the Force Majeure and (if applicable) the part of the Network and/or the Associated Facilities affected or likely to be affected; and
- (b) the details of the obligations affected or likely to be affected.

19.2 Suspension of obligations

- (a) Subject to compliance with clause 19.1, the obligations of an affected party under this Agreement are suspended during the time and to the extent that such party is prevented from or delayed in performing such obligations by reason of the event of Force Majeure.
- (b) If notice is not provided in accordance with clause 19.1 then the obligations of the affected party under this Agreement will be suspended on and from the date on which the notice requirements of clause 19.1 are satisfied.
- (c) A party's obligation to make payment under or in connection with this Agreement will not be suspended or otherwise relieved due to the occurrence of an event of Force Majeure.

19.3 Obligations of a party

If a party is prevented from or delayed in performing its obligations due to an event of Force Majeure, it must:

- (a) promptly and diligently take all reasonable endeavours to remedy or overcome the effect of the Force Majeure affecting its obligations under this Agreement, provided that such affected party is not obliged to settle any strike, lockout or other labour dispute; and
- (b) attempt to mitigate the effect of the Force Majeure.

19.4 Termination after prolonged Force Majeure

As a result of Force Majeure, if a party is prevented or hindered from complying with its obligations under this Agreement for a continuous period of 3 months, then:

- (a) ABCN and the Operator must negotiate in good faith and seek to agree a mutually satisfactory resolution to the issues arising from that Force Majeure; and
- (b) if after a further period of 1 month the ABCN and the Operator are unable to agree a resolution, then either ABCN or the Operator may terminate this Agreement on giving 10 Business Days' notice. The Agreement will terminate on expiry of that notice.

20. Governing law

20.1 Law of this Agreement

This Agreement and any non-contractual obligations arising out of or in connection with it are governed by the laws of South Australia.

20.2 Jurisdiction

The parties submit to the exclusive jurisdiction of the Courts of South Australia for all proceedings arising out of or in connection with this Agreement.

21. Change in Law

- (a) If a Change in Law occurs which affects the ability of ABCN or the Operator to comply with its obligations under this Agreement, then the affected party must as soon as reasonably practicable notify the other giving details of that Change in Law.
- (b) Within 7 days after a notice under clause 21(a) is given, the Operator and ABCN must meet and negotiate in good faith amendments to this Agreement required to comply with the Change in Law.
- (c) If the Operator and ABCN do not reach agreement within 30 days after the notice under clause 21(a), then the Operator or ABCN may refer the matter for resolution in accordance with clauses 15.3, 15.4 and 15.5.
- (d) If at any time after the date of this Agreement a Material Change occurs which affects the financial position of ABCN or the cost to ABCN of performing its obligations or exercising its rights under this Agreement and/or under Applicable Law, then ABCN must notify the Operator giving details of the Net Financial Effect on ABCN of the Material Change. Within 7 days after receipt of a notice under this clause 21(d), ABCN and the Operator must meet and negotiate in good faith any appropriate adjustments to the amounts payable under this Agreement to remove as far as practicable the Net Financial Effect on ABCN of the Material Change and return ABCN to the position it would have been in had it not been for the Material Change. If ABCN and the Operator have not agreed on the relevant amendments within 30 days after ABCN's notice, then either ABCN or the Operator may refer the matter to an expert for determination in accordance with clause 15.4.
- (e) Each party's obligations under this Agreement will continue despite the existence of a Change in Law or Material Change.

22. Variation

22.1 Variation and waiver

- (a) Variation of a provision of this Agreement will be ineffective unless in writing, signed by all parties.
- (b) A waiver of a provision of this Agreement by a party, or a party's consent to a departure from a provision by another party, is only effective if it is given in writing by the party waiving such provision or consenting to such departure.
- (c) No waiver of a provision, or consent to a departure from a provision, of this Agreement operates as a waiver of another departure from that provision or any other provision.

23. Severability

If any provision of this Agreement is voidable, illegal, or unenforceable, or if this Agreement would, if a particular provision were not omitted, be void, voidable, illegal or unenforceable, that provision shall (without in any way affecting the validity, legality and enforceability of the remainder of 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. Notices

24.1 Notice

A notice or other communication required or permitted to be given by a party to another party under this Agreement (other than Train Control Directions which may be delivered verbally or in any manner which is appropriate) must be in English, in writing and:

- (a) delivered personally to the relevant address referred to in clause 24.3;
- (b) sent to the relevant address referred to in clause 24.3 certified by mail; or
- (c) sent by email to the relevant address referred to in clause 24.3.

24.2 Deemed notice

A notice or other communication is deemed to be received:

- (a) if personally delivered, upon delivery;
- (b) if mailed to an address in Australia, 5 Business Days after the date it was mailed;
- (c) if sent by email, at the time sent (as recorded on the device from which the sender sent the message), unless the sender's information system receives a message that the email has not been delivered to the recipient or the recipient is out of office.

24.3 Addresses for service

Each party's address for service is:

- (a) in the case of ABCN:

Name: Access and Property Manager

Address: Aurizon Bulk Central Network Pty Ltd
Level 3, 33 Richmond Road
KESWICK SA 5035

PO Box 309
MARLESTON DC SA 5033

Email: Paul.Hollitt@1rail.com.au
with a copy to companysecretary@1rail.com.au

- (b) in the case of the Operator:
- the details specified at Item B of Schedule 1; and
- (c) in the case of the Guarantor (if any):
- the details specified at Item K of Schedule 1.

24.4 Change of address

A party may change its address for service by giving at least 14 days' written notice of that change to the other parties.

24.5 Twenty-four hour contact details

Each party must provide to the other parties, 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 parties.

24.6 Email notices

Notwithstanding anything to the contrary in this clause 24, notices issued pursuant to clause 14.1 may be sent by email but must also be personally delivered or sent by mail. The parties agree that any such notices issued pursuant to clause 14.1 sent by email only are not effective for the purposes of this Agreement.

25. Risk and cost of performing obligations

25.1 Risk and expense

Subject to this Agreement:

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

25.2 Legal Costs

Notwithstanding clause 25.1(b), the Operator agrees to pay any legal costs associated with the execution and stamping of this Agreement (and any document contemplated by the Agreement to which the Operator is a party), excluding ABCN's legal costs of preparing and executing this Agreement. The Operator will be responsible for all fees, fines and any penalties that may be imposed by any Government Authority for a failure by the Operator to ensure the stamping of this Agreement and any document contemplated by this Agreement to which the Operator is a party (where stamping is required by Applicable Law).

26. No partnership or agency and entire agreement

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

27. Other agreements

This Agreement comprises the whole agreement between the parties relating to use of the Network and/or the Associated Facilities, and, to the extent to which it is inconsistent with any existing agreement between the parties, will prevail over those existing agreements.

28. Counterparts

This Agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument. This Agreement may be circulated for signature through electronic transmission, including email, and all signatures so obtained and transmitted shall be deemed for all purposes under this Agreement to be original signatures until such time, if ever, as original counterparts are exchanged by the parties.

29. Special Conditions

The parties agree that, notwithstanding any other clause of this Agreement, the Special Conditions apply as provisions of this Agreement and prevail over this Agreement to the extent of any inconsistency with any other provisions of this Agreement.

SCHEDULE 1

**KEY DETAILS
(Clause 1.1)**

Ref	Item	Details
A	ABCN	Company Name: Aurizon Bulk Central Network Pty Ltd ABN: 92 144 081 774 Address: Level 3, 33 Richmond Road, Keswick SA 5035
B	Operator	Company Name: ABN: Contact name: [Street Address] [Postal Address]
C	Commencement Date	[insert]
D	Expiry Date	
E	Extension of Term (<i>clause 3.2</i>)	Extension period: [#to insert the period by which the Operator may request to renew the Agreement] Maximum number of times the Operator is entitled to request an extension of the Term: [#to insert maximum number of extensions the Operator is entitled to request.]
F	Conditions Precedent (<i>clause 3.3</i>)	(a) The Operator has provided ABCN with the Security as required under clause 4.7. (b) The Operator has provided ABCN with evidence that the insurances it is required to effect and maintain under clause 14 have been effected and are current (including evidence that the cover provided under those insurance policies complies with the requirements of clause 14). (c) The Operator has provided ABCN with evidence that it holds the required Accreditation. (d) The Operator has provided ABCN with a plan for dealing with Incidents as required under clause 10.1(b), and such plan has been approved by ABCN under clause 10.1(b). (e) The Operator has provided ABCN with a copy of its environmental policy (see clause 11.1(b)(i)). (f) The Operator has provided ABCN with a management plan for dealing with the environmental effect of its operations on the Network as required under clause 11.2(a).

Ref	Item	Details
G	Time for payment of Invoices	<p>[#ABCN to confirm time for payment of invoices]</p> <p>No later than 30 days following the end of the relevant calendar month.</p> <p>In the event that the Operator fails to pay an invoice on or before the due date for payment, then ABCN may (in its absolute discretion) by notice to the Operator require payment in advance for future invoices.</p>
H	Special Conditions	
I	Minimum Claim: (<i>clause 13.3</i>)	\$50,000.00
J	Security (<i>clause 4.7</i>)	\${insert}.
K	Guarantor	<p>Company Name:</p> <p>ACN:</p> <p>ABN:</p> <p>Contact name:</p> <p>[Street Address]</p> <p>[Postal Address]</p>
L	Operator's Insurance (<i>clause 14</i>)	\$250,000,000.00
M	Operator Nominated Location (<i>clause 5.6(a)(vi)</i>)	[insert address]

SCHEDULE 2

NETWORK

(Definition "Network" referred under clause 1.1)

Network means the railway network in South Australia and the Northern Territory (including related infrastructure) that is delineated, described or defined in paragraphs (1) through (5) below:

1. Northgate Interface—Alice Springs

Mainline railway corridor from 510.85 km mark to 1334.34 km (no. 3 signal) at Alice Springs.
2. Alice Springs

Mainline railway corridor (no. 2 road) from no. 3 signal to beyond switch to Abattoirs Siding at 1336.6 km.
3. Alice Springs—Darwin

Mainline railway corridor from 1336.6 km to 2756.1 km at end of Railway at Port Terminal, East Arm Wharf, Berrimah, Darwin (excluding facilities at Berrimah Freight Terminal).
4. All crossing loops within the railway corridor described in paragraphs 1 to 3 above.
5. All signals (electronic or otherwise) within the railway corridor described in paragraphs 1 to 3 above.

SCHEDULE 3

SCHEDULED TRAIN PATHS

(Definition "Scheduled Train Paths" referred under clause 1.1)

[To be confirmed]

SCHEDULE 4

CHARGES

(Definition "Charges" referred under clause 1.1)

The Operator will be charged the following Charges:

[To be confirmed]

SCHEDULE 5

REVIEW AND VARIATION OF CHARGES (Definition "Charges" referred under clause 1.1)

Variation of Charges

- (a) Unless otherwise agreed between ABCN and the Operator, the Charges will, on each 1 July after the Commencement Date (**Review Dates**) during the Term, be adjusted by the annual rate of inflation (provided that it may not, in any case, be decreased).
- (b) The annual rate of inflation referred to in paragraph (a) is to be determined by reference to the [to be inserted] Consumer Price Index.
- (c) ABCN and the Operator agree that the Charges will be reviewed by 31 May in each year subsequent to 1 July referred to in Schedule 5, paragraph (a) or such later time as may be mutually agreed.

SCHEDULE 6

INSTRUCTIONS

(Definition "Instructions" referred under clause 1.1)

Code of Practice for the Defined Interstate Rail Network.

One Rail Australia Addendum to the Code of Practice for the Defined Interstate Rail Network.

Network Operating Guide:

- Part A - Route Operating Protocols; and
- Part B - Facilities En-Route.

Advices for train running information, including speed restrictions and train notices of the following types:

- Daily, standing and temporary standing;
- Safeworking circulars; and
- Weekly operational notices.

Train Control Directions.

Signalling instructions.

Safety directions or instructions.

Response Plan for 'On Rail' Emergencies (RS-PRC-006).

Procedure for Incident Investigation and Reporting (RS-PRC-008).

Time-path Allocation and Reallocation Policy.

Service Quality Policy.

Train Management Policy.

SCHEDULE 7

KEY PERFORMANCE INDICATORS

(Definition "Key Performance Indicators" referred under clause 1.1 and clause 2.5)

Part A: ABCN KPIs

[To be inserted]

Part B: Operator KPIs

[To be inserted]

EXECUTED as an agreement

Executed by Aurizon Bulk Central

Network Pty Ltd)
ABN 92 144 081 774)
in accordance with section 127 of)
the *Corporations Act 2001*)
)
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Director/Company Secretary

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Director

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Name of Director/Company Secretary
(BLOCK LETTERS)

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Name of Director
(BLOCK LETTERS)

EXECUTED by)
[Company Name])
ABN)
in accordance with section 127 of)
the *Corporations Act 2001*)

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Director/Company Secretary

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Director

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Name of Director/Company Secretary
(BLOCK LETTERS)

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Name of Director
(BLOCK LETTERS)

[Delete the below signature block if there will be no guarantor]

EXECUTED by)
[Company Name])
ABN)
in accordance with section 127 of)
the *Corporations Act 2001*)

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Director/Company Secretary

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Director

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Name of Director/Company Secretary
(BLOCK LETTERS)

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