

TRACK ACCESS AGREEMENT

PARTIES



GWA (NORTH) PTY LTD
ABN 92 144 081 774
(GWAN)

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

**the party specified at Item F of Schedule 1
(Guarantor)**

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DATE:

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PARTIES: **GWA (NORTH) PTY LTD** ABN 92 144 081 774 of Level 3, 33 Richmond Road, Keswick SA 5035 (**GWAN**)

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

AND the party specified at Item F of Schedule 1 (**Guarantor**)

INTRODUCTION:

- A.** GWAN is entitled to grant to third parties access rights in respect of the Network.
- B.** Under arrangements with (and as agent for) GWAN, GWA is the accredited Rail Transport Operator.
- C.** At the Operator's request, GWAN has agreed to grant to the Operator access rights to the Network on the terms and conditions in this Agreement.
- D.** The Operator has entered into this Agreement with GWAN to confirm the terms and conditions which apply to the Operator's access rights.
- E.** The Guarantor has agreed to guarantee the performance by the Operator of the Operator's financial and other obligations under this Agreement.

AGREEMENT:

1. Interpretation

1.1 Definitions

In this Agreement unless the context otherwise requires:

- (1) **Accreditation** means to be an Accredited Person under the applicable *Rail Safety Act* (and **Accredited** and **Accrediting** bear a corresponding meaning).
- (2) **Accredited Person** has the meaning in the applicable *Rail Safety Act*.
- (3) **Agreement** means this agreement.
- (4) **Associated Facilities** means all associated track structures, over and under structures, supports (including supports for equipment or items associated with the use of the Network), tunnels, bridges, Train Control systems, signalling systems, communication systems and associated plant, machinery and equipment from time to time but only to the extent that such assets are related to or connected with the Network (but does not include any sidings or yards), and **Associated Facility** means any one of them.

- (5) **Business Day** means any day other than a Saturday, Sunday or public holiday in South Australia.
- (6) **Charges** means the charges set out in Schedule 4 as varied from time to time under Schedule 5.
- (7) **Claim** means all claims, legal actions and demands (including the costs and expenses of defending or settling any claims, legal actions and demands).
- (8) **Code** 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, respectively.
- (9) **Commencement Date** means, subject to the Special Conditions, the date on which the Operator first uses one of its Scheduled Train Paths or another date agreed by the parties in writing.
- (10) **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 Network Train management system.
- (11) **Confidential Information** means any information in any form that is:
 - (a) by its nature confidential; or
 - (b) stated in this Agreement to be confidential; or
 - (c) designated by a party in writing as being confidential.
- (12) **Corporations Act** means the *Corporations Act 2001* (Cth).
- (13) **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.
- (14) **Environmental Condition** means any Environmental Damage or any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Damage and which in GWAN's reasonable opinion could result in GWAN (or any of its Related Bodies Corporate) or any other person incurring any material liability or being subjected to a direction of any competent authority.
- (15) **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.
- (16) **Expiry Date** means the date specified at Item B of Schedule 1 or as otherwise adjusted by the parties.

- (17) **Financial Sum** means an amount of money which is to be calculated in accordance with principles agreed between the parties or determined by arbitration in accordance with clause 15.4 and which does not include any amount payable as an access charge.
- (18) **Force Majeure** means any circumstance beyond the reasonable control of a party which occurs without the negligence of that party and includes inevitable accident, derailment, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, act of terrorism, security-related matters, nuclear ionisation or radioactivity, 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), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property, but does not include breakdown or delay of any Trains or Rollingstock operated by the Operator.
- (19) **Further Infrastructure** means further infrastructure added to or included in the Network, at GWAN's cost, which at the Commencement Date does not form part of the Network.
- (20) **Guarantor** means the party (if any) specified at Item F of Schedule 1.
- (21) **GWA** means Genesee & Wyoming Australia Pty Ltd ABN 17 079 444 296, a Related Body Corporate of GWAN, acting in its capacity as a Rail Infrastructure Manager and the Rail Transport Operator, and as the agent for and on behalf of GWAN.
- (22) **GWAN's Network Rules** means:
- (a) the Code of Practice for the Defined Interstate Rail Network;
 - (b) the GWA Addendum to the Code of Practice for the Defined Interstate Rail Network; and
 - (c) all policies, procedures, directions, Instructions and notices issued by GWAN to the Operator for the purpose of ensuring the safe use of the Network,
- as notified by GWAN to the Operator, and in each case as amended from time to time.
- (23) **Incident** means a breakdown, derailment, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:
- (a) material damage to or interference with the Network or any Associated Facility managed by GWAN (or any authorised delegate);
 - (b) material damage to property;

- (c) material personal injury to any person;
 - (d) an Environmental Condition;
 - (e) notifiable occurrences as defined in the regulations to the applicable *Rail Safety Act*;
 - (f) an incident which requires notification under the Standards;
 - (g) an incident requiring notification under the Dangerous Goods Code.
- (24) **Indirect or Consequential Loss** includes:
- (a) economic loss, consequential loss, loss of profits, loss of business opportunity and the payment of liquidated sums, penalties or damages under any agreement (other than this Agreement); but
 - (b) does not include property damage or losses from third party claims for property damage, personal injury, nervous shock, death and clean up and remediation costs resulting from toxic or hazardous substances.
- (25) **Insolvent** has the meaning given by the *Corporations Act* (and **Insolvency** has a corresponding meaning)
- (26) **Instructions** means all instructions and directions issued by GWAN from time to time (including, without limitation, the instructions and directions listed in Schedule 6) other than instructions which:
- (a) derogate from a Train Path; or
 - (b) prevent the Operator from operating a Service of the nature of the Service contemplated as at the Commencement Date or as otherwise agreed by the parties from time to time;
- unless those instructions:
- (c) relate to safety;
 - (d) are Train Control Directions;
 - (e) implement or support Network management principles;
 - (f) are necessary to minimise or prevent the effect of a material breach of this Agreement; or
 - (g) are otherwise authorised by this Agreement.
- (27) **kGTK Rate** means the rate as specified in Schedule 2 point 1(b) and as adjusted by Schedule 5.
- (28) **KPIs** means the key performance indicators set out in Schedule 7 as varied from time to time by agreement of the parties.

- (29) **Network** means the railway network in South Australia and the Northern Territory (including related infrastructure) which is delineated, described or defined in Schedule 2.
- (30) **Operator** means the party specified at Item A of Schedule 1.
- (31) **party** means a party to this Agreement (and **parties** means both of them).
- (32) **Rail Infrastructure Manager** has the meaning in the *Rail Safety Act 2007* (SA).
- (33) **Rail Safety Acts** means the *Rail Safety Act 2007* (SA) and the *Northern Territory Rail Safety Act* (NT), 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).
- (34) **Rail Transport Operator** has the meaning in the *Rail Safety Act 2007* (SA).
- (35) **Related Body Corporate** has the meaning in the *Corporations Act*.
- (36) **Rollingstock** means a locomotive, carriage, wagon or other vehicle suitable for use on a railway.
- (37) **Scheduled Train Paths** means the 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.
- (38) **Service** means a Train run by the Operator using the Network by which the Operator provides railway freight or passenger services.
- (39) **Service Quality Policy** means the service quality policy set out in Schedule 8 as amended from time to time.
- (40) **Solvent** has the meaning in the *Corporations Act*.
- (41) **Special Conditions** means the conditions set out at Item C of Schedule 1.
- (42) **Standards** means the Australian Standard AS4292.1 *Rail Safety Management (General Requirements)*, and any other principles and standards prepared, approved and published by the Standards Association of Australia in relation to rail safety.
- (43) **Term** means the period from the Commencement Date to the Expiry Date unless terminated under clause 12.2 or extended by agreement of the parties.
- (44) **Time-path Allocation and Reallocation Policy** means the time-path allocation and re-allocation policy set out in Schedule 9 as amended from time to time.
- (45) **Train** means one or more units of Rollingstock coupled together, at least one of which is a locomotive or other self-propelled unit.

- (46) **Train Control** means the control of Trains by GWAN on the Network.
- (47) **Train Control Centre** means the facility or facilities maintained and operated by GWAN for the purposes of Train Control.
- (48) **Train Control Directions** means all Instructions issued by GWAN relating to management, continuity and safe operation of Train movements on the Network, including without limitation Instructions concerning the actual movement, deployment or placement of Trains, but only to the extent such Instructions:
- (a) are considered by GWAN (acting reasonably) to be consistent with the Train Management Policy; and
 - (b) are made with a view to minimising the disruption to the Operator in a manner which is reasonable in the circumstances taking into account the valid objectives of GWAN in issuing the Instruction,
- which will be complied with by the Operator immediately.
- (49) **Train Crew** means a person or persons in charge of operating a Train.
- (50) **Train Management Policy** means the policy set out in Schedule 10 as amended from time to time.
- (51) **Train Manifest** means a written notice (including, if agreed, 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;
 - (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 (as described in the Dangerous Goods Code) carried on the vehicle.

(52) **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 to the Network which are provided by GWAN (or its authorised delegate) to the Operator on the terms set out in this Agreement and otherwise on such terms as GWAN (or its authorised delegate) may stipulate in accordance with this Agreement or as otherwise agreed between the parties.

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- (1) singular words will also have their plural meaning and vice versa;
- (2) a reference to one gender includes all genders;
- (3) a reference to a person includes companies and associations;
- (4) a reference to a party is to a party to this agreement includes the party's executors, administrators, successors, agents, permitted assigns and substitutes;
- (5) a reference to the consent of a party means the prior written consent of that party;
- (6) 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;
- (7) 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;
- (8) a reference to time is to Adelaide, Australia time;
- (9) a reference to **A\$, \$A, dollar** or **\$** is to Australian currency;
- (10) 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;

- (11) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur no later than the prior Business Day.
- (12) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (13) a reference to a clause or a Schedule is a reference to a clause or Schedule of this Agreement;
- (14) where any party comprises more than one person, then all of those persons together as well as each of them individually must comply with that party's obligations under this Agreement; and
- (15) notices that are required to be given in writing by the Operator to GWAN, may, if so agreed by GWAN, be provided in electronic form.

1.3 Capacity

- (1) Subject to clause 1.3(2), a reference in this Agreement to GWAN includes (where the context requires) a reference to GWA in its capacity as Rail Transport Operator, Rail Infrastructure Manager and as agent for and on behalf of GWAN, and GWA is authorised to exercise any of GWAN's functions under this Agreement.
- (2) For the avoidance of all doubt, a reference in clauses 12, 13.3, 13.4 and 14 to GWAN excludes GWA.

2. Track Access Rights

2.1 Grant to Operator of Train Paths

GWAN grants to the Operator during the Term of this Agreement, the use and availability of the Train Paths and the use of the Network for this purpose upon the terms and conditions set out in this Agreement (including the Special Conditions).

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 in any way other than is authorised by this Agreement.

2.3 Use of a Train Path is not Exclusive

The Operator's rights to the Train Paths do not give the Operator an exclusive right to any Train Path. However, GWAN 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 Scheduled Train Paths and 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 through negotiated ad hoc entitlements as referred to in paragraph (c) of the definition of "Train Paths".

2.5 Key Performance Indicators

- (1) The KPIs described in Schedule 7 are relevant to both parties, each of which will monitor them from the Commencement Date.
- (2) The parties will meet regularly for the purpose of discussing the actual performance against the KPIs.

2.6 Exclusion of Liability

- (1) Notwithstanding any other clause in this Agreement, GWAN excludes liability and the Operator releases GWAN from all losses, costs, expenses or other damage 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 by reason of any of the matters described in clause 2.1, or as a result of GWAN varying a Train Path for the purpose of preventing any actual or potential:
 - (a) breach of safety requirements in relation to the Network;
 - (b) breach by another Train operator of the terms and conditions of that operator's access to and use of the Network;
 - (c) material damage to the Network or any associated facility;
 - (d) injury to any person or damage to any property; or
 - (e) delay to the progress of Trains that have priority over the Operator's Trains

except to the extent that such unavailability or failure to deliver is caused or contributed to by GWAN's negligent or deliberate act or omission.

3. Term of Agreement

This Agreement commences on the Commencement Date and, unless terminated earlier under clause 12 or extended by agreement of the parties, will continue until 23:59 hours on the Expiry Date.

4. Charges and Payment

4.1 Charges

The Operator must pay the Charges to GWAN on the terms and subject to the conditions specified in this Agreement and the GWAN invoices.

4.2 Invoices

- (1) GWAN may invoice for the Charges to the Operator not more frequently than is specified in Schedule 4.
- (2) Each invoice will itemise the Charges payable for each Scheduled Train Path and any other charges payable in accordance with Schedule 4.

4.3 Invoices and Payment

- (1) The Operator must pay all invoiced Charges on the 21st day of the month following the month in which the Service to which the invoice relates commenced operations.
- (2) Where the Operator disputes any invoiced Charges, the Operator must notify GWAN of any disputed amounts within 21 days from the date of issue of the invoice, and the Operator must pay the undisputed amount in accordance with clause 4.3(1). The disputed amount may be withheld until the dispute is resolved.
- (3) Where a payment dispute is resolved in GWAN's favour, the Operator must pay the disputed amount to GWAN and will also be liable to pay interest at the rate calculated under clause 4.6, from the date that such monies should have been paid.

4.4 Review and Variation of Charges

The Charges are to be varied in accordance with Schedule 5.

4.5 Further Infrastructure & Additional Capacity

- (1) If GWAN adds Further Infrastructure to the Network, and the parties agree to the Operator being granted access to that Further Infrastructure as part of the Network for the purposes of this Agreement, the Operator acknowledges that GWAN may charge the Operator, as a term of GWAN agreeing to grant access to the Further Infrastructure, such amount as GWAN in its absolute discretion determines to be reasonable, having regard to the following:
 - (a) GWAN's costs of constructing or procuring the Further Infrastructure, and GWAN's ability to recover such costs over the period the Further Infrastructure is available for use as part of the Network by all operators;
 - (b) the location of the Further Infrastructure on the Network;

- (c) the number of operators (including the Operator) that GWAN estimates will be granted access to use the Further Infrastructure; and
 - (d) any other considerations that GWAN determines to be relevant.
- (2) If GWAN increases the capacity of the Network to carry additional freight tasks as a result of the improvement of infrastructure (including Further Infrastructure) associated with the Network, and 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, the Operator will not be required to pay any additional charge under clause 4.5(1) for access to the Further Infrastructure. GWAN is not prevented from negotiating arrangements with an operator or operators for funding the provision of additional capacity to the Network.
- (3) For clarity, the operation of clause 15 does not apply to a determination made by GWAN under this clause 4.5.

4.6 Interest

If the Operator defaults in the due payment of any amount due to GWAN 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 2 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.

4.7 GST

- (1) In this clause:
- (a) **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*;
 - (b) **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;
 - (c) **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
 - (d) except for terms defined in this Agreement, terms used in this clause have the same meaning as in the *GST Act*.
- (2) Except when this Agreement provides otherwise, all Payments are exclusive of GST.
- (3) 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.

- (4) GWAN will provide a Tax Invoice for each Taxable Supply made to the Operator as part of the billing cycle under this Agreement.
- (5) A party making any other Taxable Supply under this Agreement must provide a Tax Invoice for any Payment relating to that Taxable Supply.

4.8 **Obligation to Grant Security**

- (1) Subject to clause 4.8(2), the Operator must, at GWAN's request and at its absolute discretion, deliver to GWAN and keep current at all times during the Term, security for the Operator's obligations under this Agreement in the form and for the amount specified at Item E of Schedule 1, or in any other form agreed by GWAN ("**Security**"), and containing such other terms and conditions as are acceptable to GWAN.
- (2) The term of the Security must be for the same or a greater period than the Term.
- (3) The Security is in addition to and without derogation from any other rights GWAN may exercise against the Operator by reason of a breach of the Agreement.
- (4) The provision of the Security is a condition of the performance by GWAN of its obligations under this Agreement.
- (5) The decision of GWAN when to exercise the Security under clause 4.9(1) is not subject to clause 15.
- (6) If, after Security has been provided in accordance with this clause, the Operator has not been in default in the payment of monies owed by it to GWAN under this Agreement for a continuous period of 3 months, GWAN may at its discretion, upon request of the Operator, notify it that the Security is no longer required and forthwith release the Security to the Operator. Nothing in this clause 4.8(6) precludes GWAN (acting reasonably) from exercising its rights under clause 4.8(1) to request further Security from the Operator.
- (7) Upon expiry of the Term, GWAN will release the Security to the Operator if at that time the Operator is not in default in the payment of any monies owed to GWAN by the Operator under this Agreement, in which case the Security will be returned to the Operator less any money (disputed or undisputed) owing by the Operator to GWAN.

4.9 **Exercise of Security**

- (1) The Security will be held by GWAN as security for the performance of the obligations of the Operator under this Agreement and under any other agreement between the parties, including any agreement which may have expired. The Security may be called upon by GWAN in any circumstances in

which GWAN suffers loss as a result of a default by the Operator of its obligations under this Agreement.

- (2) If GWAN exercises or draws on the Security, the Operator must provide replacement security within 7 days for the amount drawn or exercised by GWAN against the Security and otherwise on the same terms as the Security.
- (3) Nothing in clause 4.9 limits GWAN's entitlement to recover the full amount of GWAN's loss as a result of default by the Operator under this Agreement or under any other agreement between the parties, including any agreement which may have expired.

5. Control and Management of Access to the Network

5.1 GWAN to Control

Control of the Network and management of access to the Network remains with GWAN at all times. GWAN warrants that it is entitled to grant access to the Network.

5.2 GWAN's Obligations

GWAN agrees at all times during the Term:

- (1) to undertake or procure the function of Train Control;
- (2) to comply with GWAN's Network Rules;
- (3) 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;
- (4) to provide access to one or more Train Control Centres and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system;
- (5) to use its reasonable endeavours to provide the Operator with details, as soon as reasonably practicable, of all operating incidents (including an Incident) which have affected or which are reasonably likely to affect the ability of any Operator's Train to retain its Train Path, or else affect the Operator's Train's security or safety or the security and safety of the freight or passengers on an Operator's Train; and
- (6) to comply with all applicable Acts of the Commonwealth, South Australia and the Northern Territory, subordinate legislation, municipal by-laws and other laws in any way applicable to GWAN's management, control and ownership of the Network.

5.3 Operator's Obligations in Relation to Rollingstock Standards

The Operator must maintain each Train operated by it on the Network in a good and safe operational condition, and equipped with rail industry-approved electronic tags.

5.4 Operator's Obligations in Relation to Train Crew

- (1) 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 which:
 - (a) is qualified under GWAN's Network Rules and has an appropriate track access permit in accordance with GWAN's Network Rules;
 - (b) has knowledge of the route over which the Train Crew will operate the Train in accordance with the Operator's procedures; and
 - (c) is qualified in the operation of the Rollingstock used to operate the Train in accordance with the Operator's procedures.

5.5 Operator's Other Obligations

The Operator must at all times during the Term:

- (1) comply with GWAN's Network Rules;
- (2) use its best endeavours to ensure that its use of the Network complies with the Train Paths applicable to each Service;
- (3) comply with all GWAN's 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;
- (4) conduct itself in accordance with Instructions issued;
- (5) 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 which is provided) has occurred or is a reasonable possibility;
- (6) 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 GWAN is not prevented or delayed (other than through use of the Network in accordance with this Agreement or through proper compliance with an Instruction validly given);
- (7) comply with:
 - (a) all applicable Acts of the Commonwealth, South Australia and the Northern Territory, subordinate legislation, municipal by-laws and other laws in any way applicable to operation of the Services or its use of the Network;

- (b) all lawful notices, orders and directions issued or given by, or agreements with, a government agency which relate to the use of the Network;
- (8) obtain, comply with and maintain all approvals, licences or permits which may be necessary or appropriate (from time to time) for the use of, and operation of Rollingstock on, the Network by the Operator;
- (9) not materially change, alter, repair, deface, damage or otherwise affect any part of the Network, Associated Facilities, GWAN's property or the property of third parties, provided that the obligation of the Operator in this clause extends only to such matters to the extent that they were caused or contributed to by the Operator or Services it conducts and does not include normal wear and tear of the Network where the Operator is accessing the Network in accordance with the terms of this Agreement;
- (10) at its cost, provide and maintain communications equipment which 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 GWAN 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:
 - (a) the Operator must in good faith co-operate with GWAN (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
 - (b) GWAN will consult with the Operator and the Operator will, after such consultation and agreement with such proposal and after reasonable notice from GWAN 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;
- (11) subject to clause 17, provide to GWAN any information related to the operation of the Services (excluding commercial information) as GWAN 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 the law;
- (12) provide to GWAN a Train Manifest in a format acceptable to GWAN 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 which changes during the course of the operation of the Service over the Network;
- (13) inform GWAN as soon as practicable of any cancellation or intended cancellation by the Operator of any Service; and
- (14) ensure that any item of freight or material, including, without limitation, 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 such fall, leak, spill or any escaped or deposited matter, to GWAN's reasonable satisfaction.

5.6 Removal of Rollingstock from Network

- (1) Notwithstanding the Time-path Allocation and Reallocation Policy and the Train Management Policy, if GWAN (acting reasonably) considers that a Train operated by the Operator is obstructing the Network, then upon notification to this effect by GWAN (which notification may, notwithstanding clause 23, be by electronic mail), the Operator must arrange for the Train to be moved by or at the time specified in the notice, to another part or parts of the Network nominated by GWAN.
- (2) Subject to clause 5.6(3), if the Operator fails to comply with the notice referred to in clause 5.6(1) then the Operator consents to GWAN arranging for the Train to be removed from or moved to another part or parts of the Network, at the Operator's costs and expense.
- (3) Notwithstanding any other provision of this Agreement, the Operator releases and indemnifies GWAN (and its employees, servants, agents, contractors and volunteers) for all injury, loss and damage arising from or related to the removal of the Train, including where such injury, loss and damage is caused by GWAN's negligence, or that of its employees, servants, agents, contractors and volunteers.

6. Compliance with Instructions

6.1 Compliance by the Operator with Instructions and Train Control Directions

- (1) Subject to clause 6.1(4), the Operator must comply with all Instructions and must promptly inform all relevant Train Crew of those Instructions and any changes to them.
- (2) The Operator will also generally inform all relevant Train Crew of GWAN's Network Rules and any general notices and other information notified to the Operator by GWAN, and will promptly inform the Operator of any changes made by GWAN.
- (3) If an Instruction is a Train Control Direction, it must be complied with immediately.
- (4) Unless the Train Control Centre gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it is given within a reasonable time before the required time for compliance.
- (5) The Operator must comply with all Instructions in such a way as to reasonably minimise disruption to any other operator's use of the Network.

- (6) Subject to clause 13, GWAN is not responsible for any delay suffered or cost incurred by the Operator in complying with an Instruction of GWAN, and the Operator releases GWAN from any Claim arising from such compliance.
- (7) Subject to clause 13, the Operator is not responsible for any delay suffered or cost incurred by GWAN in the Operator complying with an Instruction of GWAN, and GWAN releases the Operator from any such Claim arising from such compliance.

7. Accreditation

- (1) Each party warrants that during the Term each such party has and will maintain Accreditation to the extent required by law, including, in the case of the Operator, all Accreditation required by law in relation to Rollingstock used by the Operator on the Network.
- (2) The Operator will not operate Rollingstock on the Network in breach of clause 7(1).
- (3) The parties will notify each other of any notice received from any government authority affecting Accreditation.
- (4) If a third party audit of equipment or maintenance practices is requested by the relevant Accrediting authority with respect to the maintenance of the Operator's Accreditation, the Operator must provide a copy of that audit to GWAN at the same time such audit report is given to that relevant Accrediting authority.
- (5) Each party must on or before the Commencement Date (and in the case of Accreditation which is obtained for the first time after the Commencement Date, then as soon as practicable after such Accreditation is obtained) provide to the other party evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation must be provided by a party to the other party on the written request of the other party.
- (6) If at any time the Operator's Accreditation is suspended or withdrawn, the Operator must immediately notify GWAN and cease all Operator Train movements until:
 - (a) the Accreditation is reinstated; or
 - (b) 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,and if a party loses all or part of its Accreditation, or has all or part of its Accreditation suspended or withdrawn, then that party must use its best endeavours to regain, or have restored, its full Accreditation as soon as reasonable practicable.

- (7) Clause 7(6) does not derogate from the parties' rights under clause 12.4 in respect of termination of this Agreement.

8. Inspection and Audit by GWAN

8.1 Audit Obligation

Subject to clause 8.3, GWAN may at any time, by Instruction to the Operator, require a particular Service of the Operator which is using the Network to undergo an audit for the purpose of assessing:

- (1) 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(12) of this Agreement is correct;
- (2) 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;
- (3) 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
- (4) whether in GWAN'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 GWAN's Network Rules and all applicable legislation (including without limitation the *Rail Safety Acts*).

8.2 Non-compliance

- (1) If, under clause 8.1(1), the Operator is found to have breached this Agreement by:
 - (a) 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, GWAN may impose an overloading charge on the Operator equivalent to 2 times the kGTK Rate for each tonne of excess loading above that stated in the Train Manifest over the entire Train Path; or
 - (b) overloading Rollingstock contrary to the axle load specifications for such Rollingstock (whether or not the Operator has or has not understated the loading of the Rollingstock in the Train Manifest), GWAN may impose an overloading charge on the Operator equivalent to 10 times the kGTK Rate for each tonne of excess loading above the specification for the Rollingstock over the entire Train Path,
- (2) (each such charge referred to in this clause 8.2(1) being an "**Overloading Charge**") If the circumstances in both clauses 8.2(1)(a) and 8.2(1)(b) exist, then only the Overloading Charge in clause 8.2(1)(b) will apply.
- (3) An Overloading Charge is payable within 14 days of written notification by GWAN to the Operator.

- (4) The Operator acknowledges and agrees that:
 - (a) overloading Rollingstock accelerates the need for repair of the Train Path;
 - (b) it is not possible to estimate (in advance) the precise cost of those repairs; and
 - (c) the Overloading Charge is a reasonable estimate of the cost of any such repairs.
- (5) If the Operator is found to have breached this Agreement as described in clauses 8.1(1) to 8.1(4) following an audit carried out pursuant to clause 8.1, the Operator will be liable for the costs of that audit, an invoice for which will be provided to the Operator by GWAN.
- (6) If the Operator is not found to have breached this Agreement as described in clauses 8.1(1) to 8.1(4) following an audit carried out pursuant to clause 8.1, GWAN will be liable for the costs of that audit.
- (7) GWAN's rights under this clause are in addition to and do not derogate from any other rights GWAN has under this Agreement for breach of this Agreement by the Operator.

8.3 Limitations on Audit

GWAN must:

- (1) subject to clause 8.3(2), carry out not more than the number of audits under clause 8.1 that are reasonably necessary in all the circumstances; and
- (2) use its best endeavours in the conduct of such audits to minimise the disruption to the Operator's Service.

8.4 Instructions

In conducting an audit under clause 8.1, GWAN 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

GWAN may place or may procure the placement, on or about its Network, monitoring equipment which will take readings or measurements with the purpose of monitoring the operation of Rollingstock and assessing the Operator's compliance with clause 8.1. The Operator authorises GWAN to undertake and consents to GWAN undertaking such monitoring and the collection of data from such monitoring equipment. GWAN will ensure that systems are put into effect whereby any data collected by it or any approved person on behalf of GWAN is transmitted or forwarded directly to GWAN, and will constitute "**Confidential Information**" of GWAN (as defined in clause 17) for the sole purpose of GWAN monitoring the Operator's compliance with clause 8.1, and may not be disclosed to any other person without the

prior written consent of GWAN. GWAN must provide the Operator with a copy of this information, at the Operator's cost, but only as the Operator reasonably requires.

8.6 Audit by Operator

- (1) Subject to clause 8.6(2), the Operator may at any time, at its cost and risk, audit any of the railway track and lines comprising the Network for the purpose of monitoring GWAN's compliance with the Service Quality Policy.
- (2) The Operator's audit under clause 8.6(1) is:
 - (a) subject to the ability of GWAN to issue an Instruction to the Operator at any time during the audit to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and other operators; and
 - (b) to be conducted in a manner that does not cause any disruption to any service of any other operator granted access to the Network by GWAN, or the provision of services by GWAN to such operators.

9. Safety

9.1 Compliance

Each party (**First Party**) will:

- (1) comply with the *Rail Safety Acts* and all other applicable laws and regulations dealing with safety issues;
- (2) comply with GWAN's Network Rules and all Instructions relating to safety issues;
- (3) comply with the Dangerous Goods Code;
- (4) comply with all Standards (including any safety-related codes of practice developed or implemented under the Standards);
- (5) in addition to the First Party's Accreditation, obtain and maintain such additional accreditation as is required by law;
- (6) except as otherwise required by the First Party's Accreditation, ensure that the First Party's employees, agents and subcontractors that are engaged in relation to the Services or this Agreement, are appropriately qualified and competent, and receive (whether or not from the First Party) and maintain any applicable or appropriate accreditation and training, and to provide such evidence of the matters referred to in this clause 9.1(6) as the other party (**Second Party**) may request; and
- (7) except as otherwise required by the First Party's Accreditation, ensure that the First Party's 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 GWAN (or the Operator) requires of its own employees, agents and subcontractors.

9.2 **Breach Notification**

As soon as GWAN 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, GWAN will give written notice to the Operator detailing:

- (1) the time, location and nature of the breach;
- (2) the cause of the breach (in GWAN's opinion) and the identity or affiliation of persons considered by GWAN to be responsible for the breach;
- (3) the consequences of the breach, in terms of the operation of the Services of the ability of other operators to access and use the Network;
- (4) any action which GWAN intends to make (including without limitation, remedial action in respect of the breach, modification to existing, or introduction of new, policies, procedures or GWAN's Network Rules); and
- (5) any Instruction requiring modification of the Operator's policies or procedures which in GWAN's opinion is required in relation to and/or as a result of the breach.

9.3 **GWAN's Network Rules**

Amendments, modifications or updates to GWAN's Network Rules will be made available via a GWAN website to be advised to the Operator, and GWAN 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**

- (1) In consultation with the Operator, GWAN will formulate and periodically review and update plans which are consistent with GWAN's Accreditation requirements for dealing with Incidents, and make such plans available to the Operator.
- (2) The Operator will formulate a plan for dealing with Incidents and provide it to GWAN. The Operator's plan must be consistent with any plan prepared by GWAN under clause 10.1, and is subject to the approval of GWAN (not to be unreasonably withheld).

10.2 **Compliance with Plans and Directions and with *Rail Safety Acts***

The Operator and GWAN will follow any plan of the type referred to in clause 10.1 and will comply with their respective obligations under the applicable *Rail Safety Act*.

10.3 Notification of Incidents

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

10.4 Investigation of Incidents

- (1) Incidents will be investigated as required by law and, in the absence of a requirement by law, in accordance with the applicable *Rail Safety Act*.
- (2) Each party will co-operate with an investigation under this clause and make available records and personnel relevant to the incident.
- (3) The parties 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 GWAN has given written notice to the Operator that a report is required, the Operator must promptly prepare and submit to GWAN a written report which must include the following (to the extent relevant to the Incident and reasonably possible for the Operator to ascertain):

- (1) the time and location of the Incident;
- (2) available details of all loss or damage to the Operator's Train and to the Network and Associated Facilities;
- (3) the factors which 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 (notwithstanding the terms of any insurance policy to the contrary));
- (4) names of the Operator's staff (including agents, contractors and volunteers) in any way involved in the Incident either as principals or witnesses;
- (5) an analysis in printed format of speed recorder charts for the Operator's Train;
- (6) such other information which is required to be disclosed in a report to the administering authority under the applicable *Rail Safety Act*, and
- (7) any other information required to be disclosed in a report under the Dangerous Goods Code.

10.6 No Disposal of Equipment

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

- (1) 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);
- (2) take reasonable steps to preserve any property or thing which may be required as evidence as to the cause of any Incident; and
- (3) will, on reasonable notice, give access to the other party, at that other party'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 Interim Responsibility for Recovery Costs

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

11. Environmental Requirements; Dangerous Goods

11.1 Compliance with Environmental Requirements

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

11.2 Management Plan

- (1) The Operator must prepare a management plan for dealing with the environmental effect of its operations on the Network, and provide it to GWAN as soon as practicable after the Commencement Date.
- (2) The Operator's policy referred to in clause 11.2(1) must not be inconsistent with any equivalent policy maintained by GWAN, 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 GWAN (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 GWAN 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, whether or not an Incident) involving dangerous goods including but not limited to any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

11.5 Notification of Environmental Condition

Where:

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

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

12. Termination

12.1 Termination

This Agreement shall terminate at 23:59 hours on the Expiry Date, unless terminated under clause 12.2. or extended by agreement between the parties.

12.2 Termination for Breach

- (1) If a party (**Defaulting Party**) materially defaults in the performance of any of its obligations under this Agreement, the other party (**Aggrieved Party**) may give notice in writing (**Rectification Notice**) to the Defaulting Party requiring the Defaulting Party to:
 - (a) rectify the default within a reasonable time; and
 - (b) respond in writing to the Aggrieved Party, within 48 hours of the receipt of the Rectification Notice:
 - (i) 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
 - (ii) confirming that the performance of the steps has commenced (**Rectification Response**).
- (2) If the Defaulting Party:
 - (a) does not rectify the default within a reasonable time;

- (b) does not provide a Rectification Response within the time specified in clause 12.2(1)(b);
- (c) does not provide a satisfactory Rectification Response meeting the requirements of clause 12.2(1)(b)(i) and 12.2(1)(b)(ii); or
- (d) does not comply with the timetable set out in the Rectification Response subject to clause 12.2(1);

the Aggrieved Party may at any time suspend any rights of the Defaulting Party under this Agreement which must be suspended to prevent a continuation of the default by giving not less than:

- (e) 7 days written notice in relation to a default relating to safety; or
 - (f) 14 days written notice in relation to defaults other than relating to safety.
- (3) If the Defaulting Party does not within a reasonable time after the suspension of this Agreement under clause 12.2(2) rectify the default, this Agreement may be terminated by giving not less than the period of notice described in clauses 12.2(2)(e) and 12.2(2)(f).
- (4) Notwithstanding that GWAN may be the Defaulting Party, nothing in clause 12.2(2) derogates from or affects GWAN'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.

12.3 Immediate Termination

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

- (1) the other party assigns or attempts to assign this Agreement in breach of clause 18;
- (2) 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;
- (3) if the other party:
 - (a) becomes Insolvent;
 - (b) 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);

- (c) 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);
- (d) has a receiver or a receiver and a manager or other controller appointed over any of its property;
- (e) 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
- (f) has an administrator appointed pursuant to the provisions of the *Corporations Act* or any successor legislation.

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

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

12.5 Suspension

- (1) Without in any way limiting the rights of a party under clause 12.3 or 12.4, a party that is entitled to terminate this Agreement under any of those clauses may elect instead to suspend the obligations of both parties under this Agreement (subject to clause 12.5(2)) until such time as the cause giving rise to the right to terminate is remedied.
- (2) An election referred to in clause 12.5(1) is revocable at any time by the party making it and has no effect upon obligations, debts or liabilities which have accrued before the election to suspend this Agreement.

12.6 Effect of Termination or Suspension

- (1) Upon termination or suspension of this Agreement, all rights of the Operator to use the Network will cease immediately.
- (2) Termination or suspension of this Agreement under any circumstances shall not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including without limitation any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (3) Upon termination or suspension of this Agreement under any circumstances, all covenants and agreements of GWAN and the Operator which by their

terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this Agreement, shall survive such termination or suspension.

13. Indemnities

13.1 Indemnity by Operator

Subject to the other provisions of this clause 13, the Operator must indemnify and keep indemnified GWAN from and against all Claims by GWAN or for which GWAN is liable arising out of:

- (1) the death of or injury to any person; or
- (2) any loss of, damage to or destruction of any property of any person,
caused by or contributed to by (to the extent of the contribution):
- (3) any negligent or wilful act or omission of the Operator in the course of or relating to the Operator's use of the Network; or
- (4) any negligent or wilful act or omission of the Operator's employees, agents, contractors or invitees in the course of or relating to their use of the Network, or their presence, or the presence of their property, on the Network.

13.2 Limitation of Operator's Indemnity

The indemnity given by the Operator in clause 13.1 does not apply to the extent that any Claims:

- (1) are caused or contributed to (to the extent of the contribution) by GWAN, its Related Bodies Corporate, employees, agents, contractors or invitees; or
- (2) are for Indirect or Consequential Loss.

13.3 Indemnity by GWAN

Subject to the other provisions of clause 13, GWAN must indemnify and keep indemnified the Operator from and against all Claims by the Operator or for which the Operator is liable arising out of:

- (1) the death of or injury to any person; or
- (2) any loss of, damage to or destruction of any property of any person,
caused by or contributed to by (to the extent of the contribution):
- (3) any negligent or wilful act or omission of GWAN in the course of or relating to GWAN's operation of the Network; or

- (4) any material default by GWAN of its obligations under this Agreement.

13.4 **Limitation of GWAN's Indemnity**

The indemnity given by GWAN in clause 13.3 does not apply to the extent that any Claims:

- (1) are caused or contributed to (to the extent of the contribution) by the Operator, its Related Bodies Corporate, employees, agents, contractors or invitees;
- (2) are for Indirect or Consequential Loss.

13.5 **Limitation of Claims**

If the amount of all Claims by a party (**First Party**) against the other party related to the loss of, damage to or destruction of property arising out of or in connection with one event or a series of related events does not in the aggregate exceed the amount specified at Item D of Schedule 1, then the indemnities in clause 13.1 and 13.3, respectively, do not apply and the First Party is responsible for its own Claims and Claims by third parties in respect of that event or series of events, except to the extent that any Claim is caused by the negligence or wilful or deliberate act or omission of the other party.

13.6 **Cost of Recovery**

For the purposes of the indemnities given in this clause 13, the property of a person includes that person's costs of recovery of any property damaged or affected by the relevant loss, damage or destruction.

13.7 **Further Action**

Nothing in this clause 13 is intended to prevent, limit, restrict or otherwise prejudice the rights of GWAN or the Operator to recover loss or damage or contribution from a third party.

13.8 **Defence of Claims**

- (1) Each party 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.
- (2) To the extent that a party (**Responsible Party**) is obliged to indemnify the other party (**Indemnified Party**) against a Claim by a third party against the Indemnified Party, the Responsible Party may, subject only to the terms of any applicable insurance which the Indemnified Party may have, at its own expense, defend and settle any action or proceedings in the name of the Indemnified Party and execute such documents in the action or proceedings as the Responsible Party sees fit. The Responsible Party indemnifies the Indemnified Party in respect of all costs, expenses and losses which the Indemnified Party may incur on account of the action or proceedings.

14. Insurance

14.1 Operator's Insurance

- (1) The Operator must during the Term of this Agreement:
 - (a) take out and maintain:
 - (i) a public liability insurance policy; and
 - (ii) a policy of insurance with respect to the Operator's liability to GWAN pursuant to the indemnity provisions contained in clause 13.1, to the extent coverable by insurance (it being acknowledged that such indemnity provisions exclude the liability of the Operator for loss of or damage to the Network except to the extent that the same was caused or contributed (to the extent of such contribution) by any act or omission of the Operator) with a reputable and solvent insurer for an amount no less than that specified in Item G of Schedule 1 for any one occurrence in respect of each policy,

in each case containing provisions which are standard industry terms for railway operators; and
 - (b) deliver to GWAN when reasonably requested by GWAN a copy of such parts of the policies as are relevant to the insurances required under this Agreement and the certificates of currency in relation to the policies referred to in clauses 14.1(1)(a)(i) and 14.1(1)(a)(ii), subject to the details of such policies being kept confidential by GWAN (other than for the purpose of seeking indemnification under them).
- (2) The Operator acknowledges and agrees that:
 - (a) in respect of each policy of insurance referred to in 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
 - (b) nothing in this clause 14.1 imposes a liability on GWAN.

14.2 GWAN's Insurance

GWAN will during the Term of this Agreement:

- (1) take out and maintain:
 - (a) a public liability insurance policy; and
 - (b) a policy of insurance with respect to GWAN's liability to the Operator pursuant to the indemnity provisions contained in clause 13.3, to the extent coverable by insurance (it being acknowledged that such indemnity provisions exclude GWAN's liability for loss of or damage to

the Network except to the extent that the same was caused or contributed (to the extent of such contribution) by any act or omission of GWAN) with a reputable and solvent insurer for an amount of \$250,000,000 for any one occurrence in respect of each policy; and

- (2) deliver to the Operator when reasonably requested by the Operator a copy of such parts of the policies as are relevant to the insurances required under this Agreement and the certificates of currency in relation to the policies referred to in clauses 14.2(1)(a) and 14.2(1)(b) subject to the details of such policies being kept confidential by the Operator (other than for the purpose of seeking indemnification under them).

15. Resolution of Disputes

15.1 Procedure to settle disputes

- (1) If there is a dispute between the parties relating to or arising out of this Agreement, the parties must use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
- (2) The procedure that is to be followed to settle a dispute arising under this Agreement is as follows:
 - (a) first, negotiation of the dispute under clause 15.2;
 - (b) second, mediation of the dispute under clause 15.3; and
 - (c) third, determination of the dispute under clause 15.5.

15.2 Negotiation

If there is a dispute between the parties 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

- (1) 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:
 - (a) in the first instance, to the chief executive officers or chairpersons of the parties, who will attempt to resolve the dispute including by informal mediation;
 - (b) thereafter, if the dispute is not resolved within 14 days, to formal mediation in South Australia by a single mediator appointed by agreement of the 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 party.

- (2) Unless the parties otherwise agree:
 - (a) each party may appoint a person, including a legally qualified person to represent it or assist it in the meditations;
 - (b) each party will bear its own costs relating to the preparation for and attendance at the mediation;
 - (c) the costs of the mediator will be borne equally by the parties;
 - (d) the mediation shall be conducted by a mediator in accordance with any guidelines for mediation issued by the Law Society of South Australia (whether or not the mediator is a legal practitioner).
- (3) Nothing in this clause 15.3 prohibits a party from seeking and obtaining appropriate injunctive relief.

15.4 **Appointment of expert**

- (1) The parties agree to the appointment of an expert for the purpose of the calculation of any Financial Sums which are in dispute.
- (2) The expert shall be chosen by the parties, but in the absence of an agreement by the parties, shall be appointed by the president for the time being for the Institute of Chartered Accountants in South Australia acting on the request of either party.
- (3) The costs of the expert will be met in the proportions determined by the expert.
- (4) The parties agree that decisions of the expert concerning the calculation of any Financial Sum are final and binding in the absence of manifest error.

15.5 **Arbitration**

- (1) 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, either party may terminate the mediation proceedings by written notice. The giving of such notice by a party will, for the purposes of this Agreement, refer to dispute to be determined by arbitration under this clause 15.5.
- (2) The arbitrator shall be chosen by the parties, but in the absence of an agreement by the parties 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
- (3) The arbitration will be conducted in accordance with the *Commercial Arbitration Act 1986* (SA) except that:
 - (a) it must be carried out with the provision relating to arbitration set out in the *Australasia Railway (Third Party Access) Act 1999* (Cth);

- (b) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
- (c) the arbitrator's decision will be final and binding on the parties;
- (d) a party may appoint any person, including a legal practitioner, to represent it or assist it in the arbitration;
- (e) the arbitrator does not have the power conferred by section 25 of the *Commercial Arbitration Act 1986* (SA);
- (f) 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
- (g) 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:

- (1) it has requested GWAN and the Operator to enter into this Agreement; and
- (2) execution by GWAN 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:

- (1) **Guarantee** - guarantees to GWAN 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**); and
- (2) **Indemnity** - indemnifies GWAN and will keep GWAN indemnified, against all Claims, losses, damages, costs and expenses which GWAN may now or in the future suffer or incur 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

This clause 16 applies and the obligations of the Guarantor remain unaffected despite:

- (1) an amendment of this Agreement, whether with or without the Guarantor's knowledge or consent; or
- (2) a rule of law or equity to the contrary; or
- (3) an Insolvency event affecting a person or the death of a person; or
- (4) a change in the constitution, membership, or partnership of a person; or
- (5) the partial performance of the Guaranteed Obligations; or
- (6) 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; or
- (7) GWAN 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
- (8) another thing happening that might otherwise release, discharge or affect the obligations of the Guarantor under this Agreement.

16.4 Principal and independent obligation

This clause 16 is:

- (1) a principal obligation and is not to be treated as ancillary or collateral to another right or obligation; and
- (2) 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 GWAN or another person may hold concerning the Guaranteed Obligations.

16.5 Enforcement against Guarantor

GWAN may enforce this 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

- (1) The Guarantor warrants as at the date of this Agreement, that:
 - (a) 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;
 - (b) 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

- (c) it has available to it the financial resources to meet its obligations under this Agreement, the guarantee referred to in clause 16.2(1) and indemnity referred to in clause 16.2(2).
- (2) The Guarantor indemnifies GWAN and will keep GWAN indemnified against all Claims, losses, damages, costs and expenses which GWAN 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.

17. Confidentiality

17.1 Acknowledgment of Confidentiality

Each party acknowledges, subject to clause 17.3, that the terms of this Agreement and all information provided by one party to the other under and for the purpose of this Agreement are secret and must be treated as confidential. Any Confidential Information provided by a party (**Disclosing Party**) to the other party (**Recipient Party**) remains the property of the Disclosing Party.

17.2 Confidentiality Obligation

If a Recipient Party is given Confidential Information by the Disclosing Party or otherwise receives or gains access to Confidential Information relating to this Agreement, the Recipient Party must treat that Confidential Information as secret and confidential and must not use that Confidential Information for any purpose other than the provisions of this Agreement allow.

17.3 Exclusions from Confidential Information

For the purposes of this clause 17, **Confidential Information** does not include information which is:

- (1) in the public domain at the time of disclosure other than through the fault of the Recipient Party;
- (2) obtained lawfully from a third party without restriction on use or disclosure;
- (3) required to be made public by operation of law, including without limitation information required by any stock exchange;
- (4) required to be made available under the Code;
- (5) the amount of the Charges disclosed by the Operator to its customers or potential customers; or
- (6) information reasonably necessary to be disclosed:
 - (a) by the Operator to customers or potential customers in the course of and for the purposes of furthering its business; or

- (b) by GWAN in connection with any of the matters described in clause 17.1.

18. Assignment or Novation

18.1 By GWAN

- (1) Subject to clauses 18.1(2) and 18.1(3), GWAN may not licence, assign or novate this Agreement, its interest in the subject matter of this Agreement or any right under this Agreement (in this Agreement, "**Assign**"), without the prior written consent of the Operator which consent will not be unreasonably withheld or delayed.
- (2) Without obtaining consent under clause 18.1(1), but subject to clause 18.1(3), GWAN may:
 - (a) Assign this Agreement, to a successor of GWAN or to any other person which takes over responsibility for the management of the Network or any relevant part of it; or
 - (b) Assign this Agreement, to a Related Body Corporate of GWAN.
- (3) If this Agreement is Assigned under clauses 18.1(1) or 18.1(2), GWAN must ensure that the assignee first enters into a deed under which the assignee agrees to be bound by the terms of this Agreement.
- (4) Nothing in clause 18.1 prevents GWAN from entering into any sub-contracting or agency agreements or arrangements in relation to any of its functions. For the avoidance of doubt, the Operator expressly acknowledges that GWA (in its capacity as Rail Transport Operator and a Rail Infrastructure Manager) acts as agent for GWAN in respect of the performance by GWAN of its obligations under this Agreement.

18.2 By the Operator

- (1) Subject to the following provisions of this clause 18.2, the Operator may not Assign this Agreement:
 - (a) without the prior written consent of GWAN, which consent is not to be unreasonably withheld; and
 - (b) unless on or before such Assignment, the assignee enters into a track access agreement or other agreement with GWAN on such terms not inconsistent with this Agreement as GWAN may reasonably determine.
- (2) The Operator may without obtaining consent under clause 18.2(1)(a) Assign this Agreement to a Related Body Corporate of the Operator if on or before such Assignment that Related Body Corporate enters into a track access agreement or other agreement with GWAN on such terms not inconsistent with this Agreement as GWAN may reasonably determine.

18.3 The effect of Assignment

Assignment of this Agreement under clauses 18.1 or 18.2 will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other party which may have accrued under this Agreement prior to the date of such an Assignment.

19. Force Majeure

19.1 Suspension of Obligations

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

19.2 Obligations of a Party

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

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

20. Governing Law

20.1 Law of the Agreement

The law of this Agreement is the law of South Australia.

20.2 Jurisdiction

The parties submit themselves to the exclusive jurisdiction of the Courts of South Australia for all proceedings arising from this Agreement.

21. Variation

21.1 Variation to be in Writing

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

21.2 **Change of Circumstances**

The parties agree that if circumstances relevant to this Agreement materially change, the parties will meet in good faith and consider the future arrangements between the parties under this Agreement.

22. **Severability**

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

23. **Notices**

23.1 **Notice**

A notice or other communication required or permitted to be given by a party to another must be in writing and:

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

23.2 **Deemed Notice**

A notice or other communication is deemed given if:

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

23.3 **Addresses for Service**

Each party's address for service is:

- (1) in the case of GWAN:

Name: Access and Property Manager

Address: GWA (North) Pty Ltd
Level 3, 33 Richmond Road
KESWICK SA 5035

PO Box 309
MARLESTON DC SA 5033

Facsimile: +61 8 8343 5454

(2) in the case of the Operator:

the details specified at Item A of Schedule 1;

(3) and in the case of the Guarantor:

the details specified at Item F of Schedule 1.

23.4 Change of Address

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

23.5 Twenty-four hour contact details

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

24. Risk and Cost of Performing Obligations

24.1 Subject to this Agreement:

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

24.2 Notwithstanding clause 24.1(1), the Operator agrees to pay (if payable) any legal costs of the execution of this Agreement (including stamp duty, fees, fines and any penalties) and in respect of any document contemplated by this Agreement, excluding GWAN's legal costs of preparing or executing this Agreement.

25. No Partnership or Agency

- (1) 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 GWAN for any purpose whatever, and the Operator has no authority or power to bind GWAN or to contract in its name or to create a liability against it in any way or for any purpose.
- (2) For the avoidance of doubt, the Operator acknowledges that nothing in this Agreement creates a contractual relationship, or shall constitute or be deemed to constitute a partnership, between GWA and the Operator or constitute or be deemed to constitute GWA as agent, joint venturer, employee or contractor of the Operator for any purpose whatever.

26. Other Agreements

Subject to clause 28, this Agreement comprises the whole agreement between the parties relating to use of the Network, and to the extent to which it is inconsistent with any existing agreement between the parties, will prevail over those existing agreements.

27. Counterparts

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

28. Special Conditions

The parties agree that notwithstanding any other clause of this Agreement, the following apply as provisions of this Agreement and prevail over this Agreement (in the following order) to the extent of any inconsistency with any other provisions of this Agreement:

- (1) the Special Conditions;
- (2) the Time-path Allocation and Reallocation Policy;
- (3) the Train Management Policy; and
- (4) the Service Quality Policy.

**Schedule 1
(Clauses 1.1(43) and 1.1(41))**

A	Operator:	Company Name: ACN: ABN: Contact name: [Street Address] [Postal Address]
B	Expiry Date:	
C	Special Conditions:	
D	Minimum Claim (clause 13.5):	\$50,000.00
E	Security:	Unconditional bank guarantee in the amount of \$xx which will be reviewed annually.
F	Guarantor	Company Name: ACN: ABN: Contact Name: [Street Address] [Postal Address]
G	Operator's Insurance	\$250,000,000.00

Schedule 2

Network (Clause 1.1(29))

1. Northgate Interface—Alice Springs
From 510.85 km mark to 1334.34 km (no. 3 signal) at Alice Springs
2. Alice Springs
Mainline track (no. 2 road) from no. 3 signal to beyond switch to Abattoirs Siding at 1336.6 km.
3. Alice Springs—Darwin
From 1336.6 km to 2756.1 km at end of Railway at Port Terminal, East Arm Wharf, Berrimah, Darwin (excluding GWAN's facilities, or those of GWA, at Berrimah Freight Terminal).
4. All crossing loops within the corridor described in items 1 and 3 above.
5. All signals (electronic or otherwise) within the corridor described in items 1 and 3 above.

Schedule 3

**Scheduled Train Paths
(Clause 1.1(37))**

Schedule 4

Charges (Clause 1.1(5))

1. The Operator shall be charged
 - (a) Flagfall of \$xxx per km per service plus
 - (b) Variable rate of \$xxx per kGTK
2. Charges shall be raised monthly.

Schedule 5

Review and Variation of Charges (Clause 4.4)

1. Fee Variation

- (a) Unless otherwise agreed between parties, 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 clause (a) is to be determined by reference to the All Groups Consumer Price Index (Weight Average of Eight Capital Cities) statistics published for the preceding March quarter.
- (c) The parties agree that the Charges will be reviewed by 31 May in each year subsequent to 1 July referred to in Schedule 5 Clause 1(a) or such later time as may be mutually agreed.

Schedule 6

Instructions (Clause 1.1(26))

1. Code of Practice for the Defined Interstate Rail Network.
2. Genesee and Wyoming Australia Addendum to the Code of Practice for the Defined Interstate Rail Network
3. Network Operating Guide
 - Part A - Route Operating Protocols
 - Part B - Facilities En-Route
4. Advices for train running information, including speed restrictions and train notices of the following types:
 - Daily, standing and temporary standing
 - Safeworking circulars
 - Weekly operational notices
5. Train Control Directions.
6. Signalling instructions.
7. Safety directions or instructions.
8. GWA Response Plan for 'On Rail' Emergencies (RS-PRC-006)
9. GWA Procedure for Incident Investigation and Reporting (RS-PRC-008).
10. GWAN Time-path Allocation and Reallocation Policy.
11. GWAN Service Quality Policy.
12. GWAN Train Management Policy.

Schedule 7

**Key Performance Indicators
(Clause 1.1(28); clause 2.5)**

Schedule 8

**Service Quality Policy
(Clause 1.1(39))**

Schedule 9

**Time-path Allocation and Reallocation Policy
(Clause 1.1(44))**

Schedule 10

**Train Management Policy
(Clause 1.1.40)**

EXECUTED as an agreement

Executed by GWA (North) 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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