



## Licence to Use and Occupy Corridor Land

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

**Shire of Donnybrook-Balingup**  
ABN 88 470 935 824

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## Licence to Use Corridor Land and Railway Infrastructure

Date ▶

### Between the parties

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

**Licensee**               **Shire of Donnybrook-Balingup**  
ABN 88 470 935 824  
of PO Box 94, Donnybrook, WA, 6239

**Background**

- 1 Arc acts as agent of the Network Lessee in relation to the Network Lessee's rights under the Government Lease concerning the Corridor Land and Railway Infrastructure.
- 2 The Government Lease grants Arc a right to use and occupy the Corridor Land and a right of quiet enjoyment and use of the Railway Infrastructure for permitted uses and permits the Network Lessee to grant certain rights of use and occupation in respect of the Corridor Land and Railway Infrastructure for permitted uses, including to Local Governments for Civic Purposes.
- 3 Arc manages, and is responsible for rail safety in respect of, the Corridor Land and Railway Infrastructure and is an accredited rail transport operator under the Rail Safety National Law.
- 4 At the Licensee's request, Arc has agreed (as agent of the Network Lessee) to grant the right to use and occupy the Licensed Area to the Licensee on the terms and conditions set out in this Agreement.
- 5 The Licensee is a Local Government and the Permitted Use of the Licensed Area is for Civic Purposes.

**The parties agree as follows:**

# 1 Definitions and Interpretation

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## 1.1 Definitions

In this Agreement:

- (1) **Act** means the *Rail Freight System Act 2000 (WA)*.
  - (2) **Agreement** means this document, including any schedule or annexure to it.
  - (3) **Authorisation** means any authorisation, consent, approval, resolution, licence, exemption, filing, lodgement, registration, notification, recording, certificate, rating, reporting, permission, authority or right to do something:
    - (a) from, by or with any Government Agency, whether granted following positive action by the Government Agency or arising following the expiry of a period of time without intervention or action by a Government Agency; or
    - (b) in relation to anything which will be fully or partly prohibited or restricted by Law if a Government Agency intervenes or acts in any way within a specified period, the expiry of that period without intervention or action,
 

required under an Environmental Law or otherwise.
  - (4) **Arc Indemnified Parties** means:
    - (a) Arc and its Personnel; and
    - (b) each Related Body Corporate of Arc and their Personnel.
  - (5) **Business Day** means a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
  - (6) **Civic Purposes** means any purpose, other than a predominant purpose of deriving income or profits that the Minister considers to be beneficial to the public or a section of the public of Western Australia.
  - (7) **Claim** means any claim, demand, action or proceeding of any nature, whether actual or threatened and whether in an action in contract, tort (including negligence), in equity, product liability, under statute or any other basis.
  - (8) **Commencement Date** means the date specified in Item 1 of Schedule 1.
  - (9) **Condition Report** means a report agreed by the parties which notes the general condition of the Licensed Area, any Railway infrastructure and any buildings or structures on the Licensed Area including fittings and fixtures.
  - (10) **Confidential Information** means in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:
    - (a) is by its nature confidential;
    - (b) stated in this Agreement to be confidential;
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- (c) is designated by the disclosing party as being confidential; or
- (d) the receiving party knows or ought to know is confidential,

but excludes information which:

- (e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it;
  - (f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or
  - (g) has been independently developed or acquired by the receiving party.
- (11) **Consequential Loss** means any indirect or consequential loss, including any loss of or damage to any product, loss of contract, loss of profit, economic loss (except to the limited extent set out below in this definition), loss of use, loss of business reputation, loss of opportunities, loss of anticipated savings or wasted overheads, loss of production, loss of revenue, any port, shipping or demurrage costs or fees, or any special, indirect or consequential loss or damage (except to the limited extent set out below in this definition), howsoever arising and whether in any action in contract, tort (including negligence), in equity, product liability, under statute or any other basis but does not include:
- (a) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;
  - (b) the Licensee's liability to pay Arc any amount expressly provided for in this Agreement; or
  - (c) any loss, damage or cost arising out of or in connection with fraud or Wilful Default.
- (12) **Corporations Act** means the *Corporations Act 2001* (Cth).
- (13) **Corridor Land** means land designated as corridor land under Part 3 of the *Rail Freight System Act 2000* (WA).
- (14) **Default Rate** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ([www.rba.gov.au](http://www.rba.gov.au)) at that time plus 5% per annum.
- (15) **Dollars, A\$ and \$** means the lawful currency of the Commonwealth of Australia.
- (16) **Environmental Condition** means any Environmental Damage or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Damage and which in Arc's opinion (acting reasonably) could result in Arc or any other person incurring any material liability or being subjected to a direction of any competent authority.
- (17) **Environmental Damage** means any material injury or damage to persons, living organisms or property or any material pollution or impairment of the environment (including any land, air or water) resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration.
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- (18) **Environmental Law** means any Law, notice, decree, order or directive of any authority or otherwise, relating to the environment (as the term environment is defined in the *Environmental Protection Act 1986 (WA)*) or the enforcement or administration of any of those Laws, notices, decrees, orders or directives of any authority or otherwise, and includes:
- (a) the *Environmental Protection Act 1986 (WA)*; and
  - (b) any regulations or orders made under the *Environmental Protection Act 1986 (WA)*.
- (19) **Expiry Date** means 24.00 hrs on the last day of the Term.
- (20) **Fences** means the fences specified in **Error! Reference source not found.** of Schedule 1.
- (21) **Government Agency** means any government, parliament, governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.
- (22) **Government Lease** means, as the context requires, the:
- (a) Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease dated 17 December 2000 entered into by the Network Lessee and other parties; or
  - (b) Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease dated 17 December 2000 entered into by the Network Lessee and other parties.
- (23) **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.
- (24) **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and includes other GST related legislation.
- (25) **Insolvency Event** means the occurrence of any of the following events in relation to a party:
- (a) a judgment in an amount exceeding \$1,000,000 is obtained against the party, or any distress, attachment, execution in an amount exceeding \$1,000,000 is issued against, levied or enforced on any of the party's assets, and is not set aside or satisfied within 14 days or appealed against within the period permitted by the rules of the relevant court;
  - (b) the party suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act;
  - (c) the party enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them, other than for purpose of a bona fide reconstruction or amalgamation;
  - (d) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a party or over any of the party's assets or undertakings;
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- (e) an application or order is made for the winding up or dissolution of the party (other than an application which is stayed, withdrawn or dismissed within 14 days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the party, except for the purpose of an amalgamation or reconstruction;
- (f) the party is deregistered or any steps are taken to deregister the party under the *Corporations Act*;
- (g) the party ceases to carry on business; or
- (h) anything analogous or having a substantially similar effect to any of the events described above happens in connection with that party.

(26) **Law** means:

- (a) Commonwealth, state and local government legislation, including regulations and by-laws;
- (b) legislation of any other jurisdiction with which the relevant party must comply;
- (c) any law or legal requirement at common law or in equity;
- (d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and
- (e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.

(27) **Liability** means:

- (a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (on a full indemnity basis) and interest; and
- (b) any diminution in value or deficiency of any kind or character that a party pays, suffers or incurs or is liable for,

and, if the context permits also includes any claim or demand for the payment of money, whether liquidated or not.

- (28) **Licensed Area** means the area specified in Schedule 1 Item 1 of Schedule 1 including any Railway Infrastructure on that part of the Corridor Land.
- (29) **Licensee's Property** means any buildings or other improvements erected on the Licensed Area by the Licensee and any plant or equipment, fixtures or fittings, materials or other property which the Licensee affixes to or brings on to the Licensed Area, including all product the Licensee brings or causes to be on the Licensed Area.
- (30) **Local Government** means a local government established under the *Local Government Act 1995*.
- (31) **Month** means a calendar month.
- (32) **Network** means that part of the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies

Corporate and any other railway network and associated infrastructure controlled by Arc and notified to the Licensee from time to time.

- (33) **Network Lessee** means:
- (a) Brookfield StandardGauge Pty Ltd ABN 35 094 819 360; or
  - (b) Brookfield NarrowGauge Pty Ltd ABN 73 094 736 900,
- as the context requires.
- (34) **Permitted Use** means the use specified in Item 4 of Schedule 1.
- (35) **Personnel** means the directors, officers, employees, agents, contractors and licensees of a party.
- (36) **Railway Infrastructure** means facilities used in connection with the operation of a railway including:
- (a) railway track, ballast, sleepers, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway);
  - (b) tunnels, bridges, viaducts, culverts, pipes, conduits and drains;
  - (c) stations and platforms;
  - (d) train control systems, signalling systems and communication systems;
  - (e) electric traction infrastructure;
  - (f) buildings and workshops; and
  - (g) associated plant machinery and equipment.
- (37) **Railway Property** means any Railway Infrastructure and other equipment or facilities that:
- (a) form part of, or are used by Arc in connection with, the Corridor Land; or
  - (b) are used for the provision of Services,
- and which are located on or below the surface of the Licensed Area at any time.
- (38) **Rates and Taxes** includes all rates, taxes, property levies and any other charges of any kind imposed by a Government Agency in relation to the Licensed Area or other property which includes the Licensed Area.
- (39) **Related Body Corporate** has the meaning given to that expression in the Corporations Act.
- (40) **Reserved Area** means the area specified in Item 5 of Schedule 1.
- (41) **Services** means all services of any kind connected to or serving the Licensed Area or any property which includes the Licensed Area, including air conditioning, electric power, gas, other energy or utility services, water, sewerage and drainage services, telephone and telecommunications services, fire prevention and fire sprinkler services and safety services.
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- (42) **Services Supplier** means any Government Agency or privately owned company or other body which supplies, at Arc's request, a Service.
- (43) **Term** means the term specified in Item 2 of Schedule 1, as extended (if applicable) in accordance with clause 3.1.
- (44) **Third Party Rights** means any easements, licences or other similar rights of any person, granted by Arc or any other person or created in any other way, that:
  - (a) exist at the Commencement Date; or
  - (b) are granted or created at any time after the Commencement Date,
 in relation to the Corridor Land.
- (45) **Use Fee** means an annual charge specified in Item 3 of Schedule 1, as adjusted annually under clause 4.2.
- (46) **Wilful Default** means any wilful, intentional, wanton or reckless act or omission carried out or omitted to be done with a reckless disregard for and knowledge of the consequences of the act or omission.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- (1) singular words also have their plural meaning and vice versa;
- (2) a reference to one gender includes all genders;
- (3) a reference to a person includes a natural person, firm, body corporate, unincorporated association, partnership, joint venture and a Government Agency;
- (4) an obligation, liability, representation or warranty:
  - (a) in favour of 2 or more persons is for the benefit of them jointly and severally; and
  - (b) on the part of 2 or more persons binds them jointly and severally;
- (5) a reference to a party to a document includes that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (6) a reference to the consent of a party means the prior written consent of that party;
- (7) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (8) a reference to a clause, annexure or a schedule is a reference to a clause, annexure or schedule of this Agreement;
- (9) a thing (including any amount) is a reference to the whole and each part of it;
- (10) 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;
- (11) a reference to any Law includes:

- (a) that Law as amended or re-enacted;
  - (b) a statute, regulation or provision enacted in replacement of that Law;
  - (c) another regulation or other statutory instrument made or issued under that Law;  
and
  - (d) any amendment made to a statute, regulation or provision as a consequence of another statute, regulation or provision;
- (12) a reference to a clause, a schedule, an agreement or any other document, instrument, publication or code is a reference to the clause, schedule, agreement, document, instrument, publication or code as varied or replaced from time to time;
- (13) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (14) a reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not:
- (a) which ceases to exist; or
  - (b) whose powers or functions are transferred to another body,
- is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (15) a reference to "includes" or "including" must be construed without limitation;
- (16) where time is to be reckoned by reference to a day or event, that day or the day of the event will be excluded;
- (17) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day;
- (18) a reference to termination of this Agreement includes the expiry of the Term;
- (19) where a word or expression is defined, cognate words and expressions will be construed accordingly;
- (20) where the Licensee has agreed in this Agreement to procure another party to do or not do any act or thing, failure by the Licensee to so procure will constitute non-compliance with and a breach of the Licensee's obligations under this Agreement despite that it may have been beyond the Licensee's power and control to so procure; and
- (21) a reference to the "operation of the Network" includes the passage of rolling stock, safe working, rescue and inspection, maintenance, repair and upgrading of land and fixed assets.

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

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

## **2 Licence**

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### **2.1 Grant of licence**

Subject to:

- (1) *all Third Party Rights; and*
- (2) *the limitations and restrictions described in clauses 2.3,*

Arc (as agent for the Network Lessee) grants to the Licensee the right to use and occupy the Licensed Area for the Term on the terms and conditions of this Agreement.

### **2.2 No tenancy or other proprietary rights**

The rights granted to the Licensee under this Agreement are contractual rights only and not tenancy rights. The Licensee does not have any tenancy or other interest in the area from time to time comprising the Licensed Area.

### **2.3 Licensee's acknowledgments**

The Licensee acknowledges that:

- (1) *the rights granted to the Licensee by Arc under this Agreement are:*
  - (a) *limited to rights which Arc is authorised or permitted to grant under the Government Lease;*
  - (b) *limited by the restrictions and conditions relating to those rights in the Government Lease; and*
  - (c) *subject to all reservations in favour of, and any rights which may be exercised by, any party to the Government Lease in relation to the Licensed Area;*
- (2) *it does not have or acquire by this Agreement any greater interest in the Licensed Area than the Network Lessee has under the Government Lease;*
- (3) *this Agreement and the rights granted to the Licensee under this Agreement automatically terminate if the Government Lease terminates or for any other reason Arc ceases to be entitled to grant those rights to the Licensee;*
- (4) *for the Term of this Agreement and in respect of the Licensed Area, the Licensee will be the occupier of the premises for the purposes of the Occupier's Liability Act 1985; and*
- (5) *the risks associated with its presence on the Licensed Area and to the extent permitted by Law, the Licensee accepts the legal liability which applies to it as the occupier of the Licensed Area.*

### **2.4 Railway Property**

- (1) *Arc reserves the right to keep or use Railway Property on the Licensed Area during the Term.*
  - (2) *Subject to obtaining the Licensee's prior written consent (which must not unreasonably be refused or delayed) Arc reserves the right to bring onto or to install on the Licensed Area during the Term any other Railway Property provided such*
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Railway Property does not have any adverse material effect on the Licensee's Permitted Use of the Licensed Area.

- (3) Arc may at any time during the Term carry out repairs or maintenance or replacement work in relation to any Railway Property on the Licensed Area and may remove Railway Property at any time, but in doing so Arc must make good any damage caused by Arc to any of the Licensee's Property.
- (4) Save as otherwise permitted by this Agreement or with Arc's express prior approval, the Licensee must not damage or interfere with Railway Property on the Licensed Area and must take reasonable action to prevent damage or interference to the Railway Property by other persons.

## **2.5 Reserved Area**

Arc may, at any time, by giving 3 Months' prior notice to the Licensee, terminate the Licensee's rights of use and occupation in relation to the Reserved Area (without compensation for anything built on the Reserved Area), and each party is released from liability under this Agreement in relation to the Reserved Area after termination, but without affecting any liability which arises under this Agreement before or on termination.

## **2.6 Minerals, fossils and relics**

- (1) Any valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the Licensed Area, Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area shall as between the parties be and remain the property of the Network Lessee.
- (2) The Licensee must upon the discovery of these things immediately:
  - (a) take precautions to prevent their loss, removal or damage; and
  - (b) give Arc written notice of the discovery.

# **3 Term**

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## **3.1 Extension of Term**

- (1) If the Licensee wants to extend the Term, it must give written notice to Arc, no later than 3 Months prior to the Expiry Date, of the period of time that the Licensee wishes to extend the Term by.
- (2) Arc may, in its absolute discretion, elect whether or not to agree to an extension of the Term and the applicable terms and conditions for that extension.

## **3.2 Holding over**

If the Licensee continues to occupy the Licensed Area after the expiration of the Term with the written consent of Arc but has not otherwise:

- (1) been granted an extension of the Term; or
  - (2) entered into a new agreement governing the Licensee's use and occupation of the Licensed Area,
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then the Licensee does so subject to the terms of this Agreement except that Arc or the Licensee may terminate the Licensee's use and occupation of the Licensed Area at any time by written notice to the other party.

## 4 Use Fee

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### 4.1 Payment

On and from the Commencement Date, the Licensee must pay the Use Fee to Arc:

- (1) annually in advance; and
- (2) within 21 days of the date of a tax invoice issued by Arc for the Use Fee.

### 4.2 Consumer Price Index annual adjustment

On each 1 January in each year (commencing 2019), the Use Fee will be varied in accordance with the following formula:

$$R_n = R_o \times \left( 1 + \left( \frac{CPI_n - CPI_o}{CPI_o} \right) \right)$$

where:

- |         |   |  |
|---------|---|--|
| $R_n$   | = | the Use Fee to apply from 1 January of the applicable year.  |
| $R_o$   | = | the Use Fee applying on 1 January of the year prior to the applicable year.  |
| $CPI_n$ | = | The All Capitals Consumer Price Index (All Groups) for the quarter ending 30 September in the year prior to the applicable year.           |
| $CPI_o$ | = | The All Capitals Consumer Price Index (All Groups) for the quarter ending 30 September in the year two years prior to the applicable year. |

## 5 Other Payments

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### 5.1 Rates and Taxes

- (1) If applicable to the Licensed Area, the Licensee must pay an amount equal to the Licensee's Share of all Rates, and Taxes to Arc within 21 days of the date on which Arc requests payment.
- (2) In this clause 5.1, **Licensee's Share** means the proportion that the Licensed Area bears to the total land area the subject of the relevant Rates and Taxes notice or, where the Rates and Taxes relate to or are inclusive of a building or structure on the Licensed Area, then the Rates and Taxes that relate to the building or structure in addition to the proportion that the Licensed Area bears to the total land area the subject of the relevant Rates and Taxes notice.

### 5.2 Services

- (1) The Licensee must pay an amount equal to the Licensee's Share of all Service charges:
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- (a) direct to the relevant Services Supplier before those charges become overdue; or
  - (b) in the case of any such Service charges imposed on Arc, to Arc by the date requested by Arc.
- (2) The Licensee must also pay to Arc on the date and in the manner requested by Arc, an amount equal to the Liability incurred by Arc in connection with the supply of the Services to the Licensee, including Arc's administrative and operating costs reasonably incurred.
- (3) In this clause 5.2, **Licensee's Share** means:
- (a) if the Licensed Area has a separate consumption meter for the relevant Service, 100%; or
  - (b) if the Licensed Area does not have a separate consumption meter for the relevant Service, the relevant Service charges that relate to the Licensed Area (as reasonably determined by Arc) divided by the total Service charges.
- (4) A statement or invoice from Arc will be prima facie evidence of the amount payable in respect of any Service charges which are unmetered.
- (5) If, within 21 days from receiving written notice of a second demand for payment of an amount relating to the provision of any Service, the Licensee does not pay that amount, then Arc may, in its absolute discretion, discontinue the supply of the Service to the Licensed Area until the Licensee has paid in full that overdue amount and any accrued interest, fines, penalties and other charges relating to reconnection of supply of the Services.

## **6 Interest on Overdue Amounts**

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- (1) The Licensee must pay interest on any amounts due to Arc under this Agreement which are not paid by the Licensee when due.
- (2) Interest:
- (a) will accrue daily at the rate per annum equal to the Default Rate;
  - (b) will be computed from and including the day when the money on which interest is payable becomes owing to Arc by the Licensee until but excluding the day of payment of that money;
  - (c) will be calculated on the actual days elapsed based on a 365 day year; and
  - (d) must be paid by the Licensee to Arc on demand.

## **7 Payments**

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- (1) All payments by the Licensee under this Agreement must be made:
- (a) in immediately available funds and without deductions, counter claims, conditions, set off or withholdings;
  - (b) to Arc or any other person nominated by Arc;
  - (c) at the place and in the manner reasonably required by Arc; and
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- (d) no later than 5pm local time in the place where payment is to be made.
- (2) If the Licensee is compelled by Law to make a deduction or withholding from any payment, the Licensee must promptly pay to Arc the additional amount necessary so that the net amount received by Arc equals the full amount which would have been received by Arc if no deduction or withholding had been made.
- (3) Arc does not need to make a demand for payment of any amount required to be paid by the Licensee under this Agreement unless required by Law.
- (4) If:
  - (a) Arc in any notice requesting payment for any amount; or
  - (b) this Agreement,

does not specify when a payment is due, it is due within 21 days after Arc gives notice requesting payment.

## **8 Goods and Services Tax**

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- (1) Except where the context suggests otherwise, terms used in this clause 8 have the meanings ascribed to those terms by the GST Act.
  - (2) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 8.
  - (3) Unless otherwise expressly stated, all amounts due and payable under this Agreement are exclusive of GST. Any amounts that are specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 8.
  - (4) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
  - (5) Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
  - (6) If GST is payable on a supply made by a party (**Supplier**) under or in connection with this Agreement, the party providing consideration for that supply (**Recipient**) must pay an additional amount to the Supplier equal to the GST payable in relation to the supply.
  - (7) Any additional amount referred to in clause 8(6) must be paid by the Recipient at the same time as any other consideration is to be first provided for that supply and the Supplier must promptly provide to the Recipient a tax invoice complying with the relevant Law relating to that GST.
  - (8) Where this Agreement requires the Recipient to reimburse the Supplier for any loss, cost or expense, the Recipient must also at the same time pay and indemnify the Supplier against all GST incurred by the Supplier in respect of that loss, cost or expense to the extent the Supplier reasonably determines that it is not entitled to repayment or credit in respect of the GST.
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- (9) If the GST payable on a supply made under or in connection with this Agreement (not taking into account any consideration that is inclusive of GST) varies from the additional amount paid by the Recipient under clause 8(6) in respect of that supply (as adjusted to take account of any previous payment made pursuant to this paragraph) then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any amount payable under this clause 8(9) must be paid no later than 14 days after the Supplier provides an adjustment note to the other party.

## **9 Use of Licensed Area**

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### **9.1 Permitted Use**

The Licensee may only use the Licensed Area for the Permitted Use and must not use the Licensed Area for any other use unless Arc gives its prior written consent.

### **9.2 Licensee's own enquiries**

The Licensee has relied on its own enquiries about how the Licensed Area may be used and not on any representation from Arc.

### **9.3 No warranty by Arc in relation to the Licensed Area**

- (1) Arc does not give any warranty of any kind that the Licensed Area is suitable for any purpose for which the Licensee intends to use it (including for the Permitted Use).
- (2) Any warranty in relation to the Licensed Area which is implied by Law is excluded to the extent that the Law permits the warranty to be excluded.
- (3) The Licensee acknowledges and agrees that Arc is not obliged to repair or improve any buildings or improvements forming part of the Licensed Area or to carry out any other structural works.

### **9.4 No warranty by Arc in relation to the Services**

- (1) The Licensee acquires certain rights in relation to the Licensed Area with the benefit of all Services existing at the Commencement Date. However, Arc does not give any warranty that those Services are adequate or suitable for any purpose (including for the Permitted Use) for which the Licensee intends to use the Licensed Area.
- (2) Any warranty in relation to the Services which is implied by Law is excluded to the extent that the Law permits the warranty to be excluded.
- (3) The Licensee acknowledges and agrees that:
  - (a) Arc is not obliged to ensure that any of the Services are maintained; and
  - (b) any repair, replacement or other work relating to the provision of any Service is the responsibility of the Licensee.

### **9.5 Licensee to use and operate at own risk**

- (1) For the purposes of the Occupiers' Liability Act 1985 the Licensee is the occupier for the Term.
  - (2) The Licensee's use of the Licensed Area is at its own risk.
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## **10 Safety and Security Undertakings**

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### **10.1 Safety and security directions**

- (1) Arc may give directions to the Licensee concerning the safety or security of persons or property in relation to the Licensed Area.
- (2) The Licensee must promptly comply with all directions given by Arc in relation to the safety or security of persons or property in relation to the Licensed Area.

### **10.2 Safety rules**

- (1) Without limiting clause 10.1, the Licensee must comply with all safety requirements (including complying with standard practices, procedures and rules and obtaining any relevant accreditation) specified by Arc in Schedule 4 in connection with the Licensee's use of the Licensed Area or otherwise in connection with this Agreement.
- (2) Arc may by further notice vary or add to those safety requirements at any time.
- (3) The Licensee must also ensure that any such safety requirements, as varied or added to from time to time, are complied with, at all times, by the Licensee's Personnel using the Licensed Area.

## **11 Accidents and Emergencies Affecting the Network**

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- (1) If any accident or other event connected with the Licensed Area causes damage to, or adversely affects any part of the Network, the Licensee must:
  - (a) take no action which might jeopardise the safety of the operation of the Network;
  - (b) not, without Arc's prior consent, work on or interfere with any part of the Network which is damaged or otherwise affected by the relevant incident;
  - (c) notify Arc as soon as possible after the Licensee becomes aware of the damage;
  - (d) do everything reasonably possible (including complying with all requirements and directions from Arc) to enable Arc to repair the damage and restore the Network for use as quickly as possible; and
  - (e) promptly comply with all other directions and requirements of Arc in relation to the relevant incident.
- (2) Arc may close off any part of the Network which is damaged. The Licensee may not have access to the part which is closed off without first obtaining Arc's consent.
- (3) This clause 11 does not limit any Liability of the Licensee under any indemnity given to Arc or otherwise arising.

## **12 Environmental Undertakings**

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### **12.1 Licensee's general undertakings**

The Licensee must:

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- (1) comply with all Environmental Laws and Authorisations applicable to the Licensed Area or the Licensee;
- (2) obtain, at the appropriate time, and do all that is necessary to maintain in full force and effect all Authorisations relating to the Licensed Area or any activity in relation to the Licensed Area;
- (3) not do, or omit to do, anything which might directly or indirectly result in the revocation or suspension of an Authorisation in relation to the Licensed Area; and
- (4) immediately notify Arc on becoming aware of:
  - (a) the existence of any Environmental Condition on or affecting the Licensed Area; or
  - (b) the filing of a Claim against the Licensee in relation to an alleged failure to comply with an Environmental Law or an Authorisation in relation to the Licensed Area.

## **12.2 Licensee's remediation undertakings**

- (1) If at any time (including before or after the Commencement Date):
  - (a) the Licensed Area is affected or becomes affected by any Environmental Condition resulting from or in connection with the activities of the Licensee;
  - (b) the Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area is affected or becomes affected by any Environmental Condition resulting from or in connection with the activities of the Licensee; or
  - (c) the Licensee breaches any Environmental Law or any Authorisation relating to the Licensed Area or the Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area,

the Licensee must as soon as reasonably possible take all necessary action:

  - (d) to comply with all Environmental Laws and Authorisations relating to the Licence Area; and
  - (e) so that the Environmental Condition is no longer present and any Environmental Damage is rectified.
- (2) The Licensee's obligations under this clause continue after the Expiry Date until all Environmental Damage has been rectified and all Environmental Laws and Authorisations complied with.

## **13 General Undertakings**

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### **13.1 Positive undertakings**

The Licensee must:

- (1) use the Licensed Area in a safe and proper manner;
  - (2) where there are buildings or other structures on the Licensed Area, comply with the undertakings set out in Schedule 3;
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- (3) where there are buildings or other structures on the Licensed Area, maintain them to a standard not worse than set out in the Condition Report, fair wear and tear excepted;
- (4) take all measures reasonably necessary to protect people and property in the Licensed Area;
- (5) comply with all relevant requirements of any Government Agency and all Laws in connection with the Licensed Area;
- (6) promptly give Arc a copy of any notice received by the Licensee which relates to the Licensed Area;
- (7) immediately notify Arc if the Licensee becomes aware of any threat to the Licensed Area and comply with all of Arc's directions given for the purpose of protecting property or persons in relation to the Licensed Area; and
- (8) promptly inform Arc after becoming aware of any accident affecting the Licensed Area or any other damage to Licensed Area.

### **13.2 Negative undertakings**

The Licensee must not (and must use its best endeavours to procure that no other person), except with Arc's consent:

- (1) interfere with or obstruct the operation of the Network;
- (2) store or use flammable or explosive substance in the Licensed Area;
- (3) do anything which is dangerous, offensive or illegal or which is or may become a nuisance or annoyance to anyone;
- (4) interfere with or obstruct access to or overload the Services;
- (5) modify or interfere with the facilities for the provision of Services or any equipment connected to those facilities;
- (6) use the Licensed Area as a residence;
- (7) permit any other person to take possession of or use the Licensed Area, including permitting any other person to carry on business on or from the Licensed Area;
- (8) vacate the Licensed Area, except as required by this Agreement, or abandon the Licensed Area;
- (9) grant any right or interest of any kind, including a security interest over or in relation to this Agreement or the Licensed Area; or
- (10) fix or place signs, notices or advertisements on or near the outside of the Licensed Area which are not related to safety or other Network requirements.

## **14 Insurance Undertakings**

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### **14.1 Licensee's insurance undertakings**

- (1) The Licensee must, at its expense, take out and maintain at all times during the Term and on terms and conditions satisfactory to Arc (acting reasonably):
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- (a) public liability insurance which covers the liability of the Licensee and its Personnel to any person arising out of or in connection with this Agreement or the Licensed Area, including any part of the Corridor Land used for access, use of any Railway Infrastructure adjacent to the Licensed Area and use of the Railway Property, with a sum insured of not less than \$20,000,000 for any one occurrence or series of occurrences arising from one originating cause and having an excess set at a reasonably acceptable level having regard to what is commercially available in the then current insurance market;
- (b) workers' compensation insurance and employer's indemnity insurance which complies with the relevant Laws against all Claims in respect of any personal injury to, or death of, any person employed or engaged by the Licensee which arises out of, or is cause or contributed to by, the performance or non-performance of this Agreement by the Licensees which insurance must provide cover;
- (c) in respect of common law claims, for an amount not less than \$50,000,000 for each occurrence; and
- (d) for compulsory statutory workers' compensation insurance claims, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981* (WA) or any other application legislation,  
  
and the Licensee must ensure that each of its contractors, subcontractors and consultants also effects and maintains insurance under any applicable workers' compensation Laws;
- (e) insurance adequately covering loss of or damage to the Licensee's Property;
- (f) any insurance required by Law as a result of the Licensee's use of the Licensed Area, including any part of the Corridor Land used for access, use of any Railway Infrastructure adjacent to the Licensed Area and use of the Railway Property; and
- (g) any other insurance which is reasonably necessary to adequately protect Arc's interests under this Agreement, having regard to the terms of this Agreement,

(each, an **Insurance Policy**) and each such Insurance Policy must be placed with an insurance company or companies approved by the Australian Prudential Regulation Authority to underwrite insurance business in Australia and must have a credit rating of at least "A-" by Standard and Poors Rating Group or such other reputable rating agency which is equivalent to a rating "A-" by Standard & Poors Rating Group.

(2) The Licensee must:

- (a) pay each premium due under the Insurance Policies before the due date and, when reasonably requested by Arc, provide evidence of payment;
- (b) when reasonably requested by Arc, provide copies of the Insurance Policies and copies of certificates of currency for each Insurance Policy certified by the insurer;
- (c) immediately notify Arc if:
  - (i) an event occurs which:
    - (A) may give rise to a claim under any Insurance Policy; or

- (B) could materially affect Arc's interests under this Agreement; or
  - (ii) an Insurance Policy is cancelled;
  - (d) if required by Arc, make and pursue a claim under any Insurance Policy; and
  - (e) if required by Arc, ensure that Arc's interests are noted on the policy of public liability insurance.
- (3) Unless Arc consents, the Licensee must not:
- (a) do or allow anything to be done which could adversely affect any insurance taken out by Arc in connection with the Licensed Area or which could increase the cost of obtaining that insurance; or
  - (b) settle, compromise or waive any claim under any Insurance Policy.

#### **14.2 Variation of Sum Insured**

Arc may give notice to the Licensee at any time requiring the Licensee to increase the maximum cover for the Licensee's public liability insurance if in the circumstances it is reasonable that the cover be increased.

### **15 Access to Services and Telecommunications Undertakings**

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#### **15.1 Services**

The Licensee must, at all times, allow any Government Agency (including its Personnel) or any third party authorised by Arc access to any Services over, under or on the Licensed Area for any purpose lawfully required by the Government Agency.

#### **15.2 Telecommunications facilities**

- (1) The Licensee must allow Arc or any third party authorised by Arc access to any telecommunications equipment or facility and associated materials over, under or on the Licensed Area at any time.
- (2) The Licensee must not interfere with or disturb any telecommunications equipment or facility or associated materials over, under or on the Licensed Area.

### **16 Entry and Rectification by Arc**

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#### **16.1 Right to enter**

Arc may enter the Licensed Area at any time without notice:

- (1) for all railway related purposes or anything which Arc is required to do by Law or is permitted to do under this Agreement or under the Government Lease; and
  - (2) to deal with any emergency or dangerous situations on or adjacent to the Licensed Area.
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**16.2 Arc may rectify**

Arc may enter the Licensed Area without notice and at any time for the purpose of doing anything which should have been done by the Licensee under this Agreement but which has not been done or has not been done properly.

**17 Indemnity and Limit of Liability**

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**17.1 Indemnity by Licensee**

Subject to the other provisions of this clause 17, the Licensee must promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against a Arc Indemnified Party in respect of:

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

arising out of or as a consequence of:

- (3) any failure by the Licensee to comply with the requirements of any Law or a Government Agency in so far as they relate to the Licensed Area;
- (4) a breach or non-performance of any of the obligations of the Licensee including the requirement to return the Licensed Area in a condition not worse than the condition in Schedule 2B under this Agreement or any reasonable action properly taken by Arc to remedy that failure; or
- (5) any negligent act or omission, fraud or Wilful Default of the Licensee or its Personnel,

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

**17.2 Arc not liable**

The parties agree that to the extent permitted by Law, Arc is not liable to the Licensee and the Licensee must not make a Claim against Arc in respect any accident, death, injury, damage (including water damage), malfunction or other event in or affecting the Licensed Area or the Licensee's Property except to the extent caused by fraud, a Wilful Default or negligent act or omission of an Arc Indemnified Party.

**17.3 Arc's limit of liability**

- (1) The Licensee acknowledges and agrees that, to the extent permitted by Law and subject to clause 17.3(2), the total liability of the Arc Indemnified Parties to the Licensee for all Claims in connection with this Agreement is limited in aggregate to an amount equal to the aggregate Use Fee actually received by Arc over the term of this Agreement.
  - (2) The limit of liability in clause 17.3(1) does not apply to a Claim made by the Licensee against Arc:
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- (a) under any provision of any Law which expressly prohibits the limitation of liability for Liability arising from a breach of that Law; or
- (b) in respect of Liability arising from:
  - (i) the death of or personal injury to any person; or
  - (ii) any criminal acts, fraud or Wilful Default by Arc or its Personnel.

#### **17.1 Liability for Consequential Loss**

*Notwithstanding any other provisions to the contrary in this Agreement and to the extent permitted by Law, neither party is liable to the other party in any circumstances for any Consequential Loss.*

### **18 Assignment, Transfer and Encumbrances**

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#### **18.1 Consent required**

The Licensee must not and must not agree or attempt to:

- (1) assign, or attempt to assign, any of its rights;
- (2) sublicense any of its rights;
- (3) novate, otherwise transfer or attempt to transfer, any of its rights or obligations; or
- (4) grant, attempt to grant or allow to exist, a mortgage, charge or other security interest or encumbrance over any of its rights, title and interest,

*under this Agreement, without the prior written consent of Arc (which may be withheld in its absolute discretion).*

#### **18.2 Exclusion of statutory provisions**

The operation of sections 80 and 82 of the *Property Law Act 1969* (WA) are excluded from this Agreement.

### **19 Termination**

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#### **19.1 Termination by Arc**

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

- (1) the Licensee repudiates this Agreement;
  - (2) the Licensee abandons the Licensed Area;
  - (3) the Licensee does not pay on the due date, the Use Fee or any amount due to Arc under this Agreement and such failure is not remedied within 14 days of Arc giving notice to the Licensee of the failure;
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- (4) the Licensee fails to comply with any of its other obligations under this Agreement and that failure is not remedied within 30 days of Arc giving notice to the Licensee requiring the failure to be remedied; or
- (5) an Insolvency Event occurs in respect of the Licensee.

## **19.2 Termination by Arc where railway to become operational**

If at any time during the Term, Arc requires a change of the status of the railway within the Licensed Area from non-operational to operational:

- (1) Arc will provide the Licensee with six (6) months' prior written notice that the railway is to become operational (**Operational Notice**), such notice to include the date upon which Arc anticipates that the railway will commence operations (**Operations Commencement Date**);
- (2) the Licensee must use all reasonable endeavours to complete an ALCAM assessment of any level crossings within the Licensed Area within two (2) months of the date of the Operational Notice;
- (3) the Licensee will pay the costs of any ALCAM assessment referred to in clause 19.2(1)(b);
- (4) the Licensee must, at its cost entirely and not later than two (2) months' prior to the Operations Commencement Date, engage Arc to install any active protection or other measures at any level crossing deemed necessary by the Operational Railway Crossing Protection Sub-Committee;
- (5) the Licensee must, within 30 days of the date of its receipt of the Operational Notice and at its cost entirely, engage Arc (or Arc's nominated rail accredited contractor) to reinstate all Railway Infrastructure, including formation, within the Licensed Area in accordance with Arc's then current code of practice.

## **19.3 Effect of termination**

- (1) If Arc terminates this Agreement pursuant to this clause 19 it will be entitled to damages as if the Licensee had repudiated this Agreement and that repudiation had been accepted.
- (2) Termination of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or arose out of such cause.

## **19.4 Licensee's obligations on termination**

Unless otherwise notified in writing by Arc, the Licensee must vacate the Licensed Area leaving it in a condition no worse than when it took over possession of the Licensed Area and remove all the Licensee's Property by the Expiry Date or, if this Agreement is terminated before the Expiry Date, as soon as reasonably possible after this Agreement is terminated.

## **19.5 Abandonment by the Licensee**

- (1) If the Licensee does not remove all of the Licensee's Property in accordance with clause 19.4, Arc may demolish or otherwise remove and dispose of any of the Licensee's Property.



- (2) The Licensee must promptly on demand indemnify Arc against any Liability incurred by Arc in demolishing, removing and disposing of any of the Licensee's Property in accordance with this clause.

## **19.6 Risk**

The Licensee's Property, including the security of it is at the Licensee's risk at all times, including after the termination of this Agreement.

## **19.7 Damage caused by vacating**

- (1) If damage to the Licensed Area, the Corridor Land, Railway Property or any Railway Infrastructure is caused by the Licensee:

- (a) using the Licensed Area;
- (b) vacating the Licensed Area; or
- (c) removing the Licensee's Property,

Arc will, at the Licensee's cost undertake any required repair work.

- (2) Arc will invoice the Licensee for the costs of any repair work incurred by it in accordance with clause 19.7 (1) and the Licensee must pay Arc the amount specified on the tax invoice within 30 days of the date of the invoice.
- (3) The Licensee's obligations under this clause continue after the Expiry Date until all damage to the Licensed Area, the Corridor Land, Railway Property or any Railway Infrastructure caused by the Licensee has been repaired by Arc.

## **20 Costs and Expenses**

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### **20.1 Preparation of this Agreement**

The Licensee will pay Arc's costs and expenses (including legal costs and expenses limited to \$1000.00) incurred in connection with the preparation, negotiation and signing of this Agreement.

### **20.2 Managing agent's fees**

The Licensee must, as and when required by Arc, pay or reimburse Arc for any fees or other expenses payable by Arc to any managing agents that are appointed to manage the Licensed Area on behalf of Arc.

### **20.3 Amendment and enforcement costs**

The Licensee must, as and when required by Arc, pay or reimburse Arc for all of Arc's costs and expenses (including legal costs and expenses on a full indemnity basis) incurred in relation to:

- (1) any document assigning, varying or surrendering this Agreement;
  - (2) giving any waiver, consent or approval under this Agreement at the Licensee's request;
  - (3) any default under this Agreement by the Licensee; or
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- (4) the enforcement of, or the preservation of any rights under, this Agreement.

#### **20.4 Government imposts**

The Licensee must pay when due or earlier if required in writing by Arc or reimburse Arc for, all duty, registration fees and other government imposts (including fines and penalties attributable to an act or omission of the Licensee) payable in connection with this Agreement and all other documents referred to in this Agreement.

### **21 Confidentiality**

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#### **21.1 Acknowledgment of confidentiality**

Each party acknowledges that the terms of this Agreement and all information provided by one party to the other under this Agreement are secret and must be treated as confidential. Any Confidential Information provided by a party to the other remains the property of the party providing it.

#### **21.2 Confidentiality obligation**

- (1) A party must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media release or other publicity relating to the other party's Confidential Information without the prior written consent of the other party.
- (2) A party must not, without the prior written consent of the other party:
  - (a) use Confidential Information of the other party other than as necessary for the performance of this Agreement; or
  - (b) other than as permitted under clause 21.3, disclose Confidential Information of the other party.

#### **21.3 Permitted disclosure**

- (1) Subject to compliance with clauses 21.3(2) and 21.3(3), a party may disclose Confidential Information of the other party:
    - (a) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
    - (b) if required by Law or the rules of any stock exchange or any Government Agency;
    - (c) as required or permitted by this Agreement;
    - (d) to a ratings agency;
    - (e) to its insurers, auditors, legal advisors or other advisors or consultants under a duty of confidence;
    - (f) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
    - (g) to enable a party to perform its obligations under or in connection with this Agreement;
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- (h) in relation to the enforcement of its rights under or in connection with this Agreement;
  - (i) to its Related Bodies Corporate and its and their respective Personnel;
  - (j) to its Personnel to enable a party to perform its obligations under this Agreement or to make or defend any claim under this Agreement;
  - (k) in any proceeding arising out of or in connection with this Agreement; or
  - (l) with the prior written consent of the other party, which must not be unreasonable withheld.
- (2) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (a) otherwise keep the Confidential Information confidential; and
  - (b) use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 21.
- (3) Before making any disclosure pursuant to clause 14(1)(b), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (a) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
  - (b) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.

#### 21.4 Survival

This clause 21 survives termination of this Agreement.

## 22 Dispute Resolution

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### 22.1 Procedure to settle disputes

- (1) If a bona fide dispute arises between the parties in relation or in connection with this Agreement (**Dispute**) a party claiming that a Dispute has arisen must give notice to the other party or parties to the Dispute specifying the Dispute and requesting its resolution in accordance with this clause 22 (**Notice of Dispute**).
  - (2) Subject to clause 22.1(3) the procedure that the parties must strictly follow to settle a Dispute is as follows:
    - (a) first, negotiation of the Dispute in accordance with clause 22.2;
    - (b) second, mediation of the Dispute in accordance with clause 22.3; and
    - (c) third, litigation of the Dispute in accordance with clause **Error! Reference source not found.**
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- (3) Nothing in this clause 2:
  - (a) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 22; or
  - (b) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (4) The parties' obligations under this Agreement will continue notwithstanding any Dispute between the parties or the submission of a Dispute to mediation or referral of a Dispute to litigation under this clause 22.
- (5) This clause 22 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (6) This clause 22 applies even where the Agreement is otherwise void or voidable.

## 22.2 Negotiation

- (1) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.
- (2) If the Dispute is not resolved within 14 days after the Notice of Dispute is given, the Dispute will be referred to the chief executive officers of the parties who must meet, within 21 days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.

## 22.3 Mediation

- (1) If the Dispute is not resolved within 28 days after the Notice of Dispute is given, the Dispute is by this clause submitted to mediation.
- (2) The mediation must be conducted in Perth, Western Australia by a single mediator. The Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules (at the date of this Agreement) as amended by this clause 21 apply to the mediation, except where they conflict with this clause 21.
- (3) If the parties have not agreed upon the mediator and the mediator's remuneration within 5 Business Days of the Dispute being referred to mediation:
  - (a) the mediator is the person appointed by; and
  - (b) the remuneration of the mediator is the amount or rate determined by,

the President of the Institute of Arbitrators & Mediators Australia (WA Chapter) (**Principal Appointor**) or the Principal Appointor's nominee, acting on the request of either party.
- (4) 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 must bear its own costs relating to the preparation for and attendance at the mediation; and
- (c) the costs of the mediator will be borne equally by the parties.

#### **22.4 Litigation**

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

### **23 Notices**

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#### **23.1 Notices in connection with this Agreement**

- (1) A notice, approval, consent nomination, direction or other communication (**Notice**) in connection with this Agreement:
  - (a) must be in legible writing and in English addressed as shown in Item 6 of Schedule 1 or as specified to the sender by a party by notice;
  - (b) may be given by:
    - (i) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee;
    - (ii) post, in which case the Notice is regarded as given by the sender and received by the addressee 2 Business Days from the date of postage; or
    - (iii) a copy of the Notice may be sent by email, in which case the Notice is regarded as being given by the sender and received by the addressee when the email 'read receipt' is received by the sender, which 'read receipt' must be retained to evidence receipt of the email Notice

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and
  - (c) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (2) A Notice sent or delivered in a manner provided by clause 23.1(1)(b) must be treated as validly given to and received by the party to which it is addressed even if:
  - (a) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
  - (b) the Notice is returned unclaimed.
- (3) In this clause 23.1, a reference to an addressee includes a reference to an addressee's Personnel.

#### **23.2 Change of address**

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

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## **24 Governing Law**

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### **24.1 Law of this Agreement**

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

### **24.2 Jurisdiction**

- (1) The parties submit to the exclusive jurisdiction of the courts exercising jurisdiction in the State of Western Australia.
- (2) Arc and the Licensee irrevocably waive any objection to the venue of any legal process brought in the courts exercising jurisdiction in the State of Western Australia on the basis that the process has been brought in an inconvenient forum.

## **25 Risk and Cost of Performing Obligations**

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### **25.1 Risk and cost**

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

### **25.2 Arc may appoint agents**

Arc may appoint any person or persons to represent it in relation to this Agreement and any person so authorised by Arc may exercise the rights and powers of Arc under this Agreement.

### **25.3 Licensee's Liability**

The Licensee is liable for the acts and omissions of the Licensee's Personnel and other persons authorised by the Licensee (including without limitation members of the public) to enter onto or use the Licensed Area (including Corridor Land used for access), as if those acts or omissions were those of the Licensee.

## **26 General**

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### **26.1 Survival of obligations**

Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the relevant party and survives termination of this Agreement.

### **26.2 Civil Liability Act**

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

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**26.3 Exercise of rights**

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

**26.4 Remedies cumulative**

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

**26.5 Further assurances**

*Each party agrees, at its own expense, on the request of the other party, to do everything reasonably necessary to give effect to this Agreement and the transactions contemplated by it, including the signing of documents.*

**26.6 Variation**

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

**26.7 Severability**

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

**26.8 No partnership or agency**

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

**26.9 Counterparts**

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

**26.10 Execution by attorney**

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

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**26.11 Suspension**

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

**26.12 Survival**

Clauses 2, 7, 19, 19 and 26 and any rights or obligations which accrued in respect of a prior breach of this Agreement, survive the expiry or termination of this Agreement.

**26.13 Entire understanding**

This Agreement:

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

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## Schedule 1 Details

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**Item 1 Licensed Area**

That part of the Corridor Land delineated in red on the plan in Schedule 2 and includes any Railway Infrastructure on that part of the Corridor Land, together with a right to pass over Corridor Land as is necessary for the purpose of access to and from that part of the Corridor Land delineated in red on the plan in Schedule 2 but excluding any Reserved Area if Arc has exercised its rights under clause 2.5.

**Item 1 Commencement Date**

1 September 2017

**Item 2 Term**

10 years from the Commencement Date.

**Item 3 Use Fee**

\$1000.00 per annum

**Item 4 Permitted Use**

Fenced skateboard park, playground and picnic area, community garden, community centre and workshop, carnival grounds and bushfire brigade shed and related community purposes subject to the erection (if necessary) and maintenance of adequate signage advising that the railway lines are operational. Signage is to be erected and maintained in accordance with Arc safety guidelines.

**Item 5 Reserved Areas**

n/a

**Item 6 Address for service of each party**

(1) Arc's postage address for service is:

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

Email: Legal@arcinfra.com

Attention: Legal

(2) Licensee's postage address for service is:

Address: PO Box 94, Donnybrook, WA 6239

Email: ben.rose@donnybrook.wa.gov.au

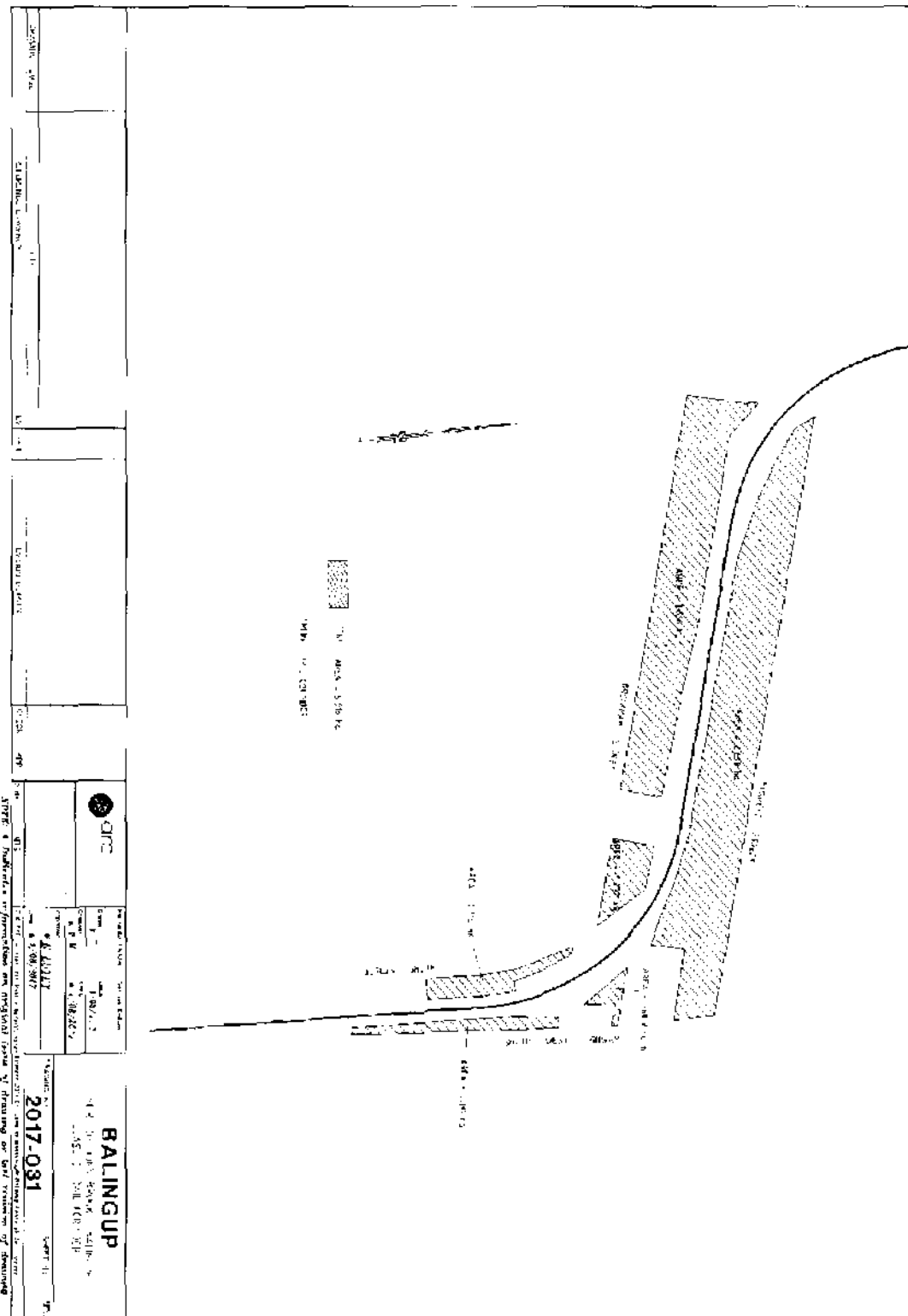
Attention: Chief Executive Officer

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## Schedule 2 Licensed Area



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**Signing page**

**Executed as an Agreement**

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

sign here ► \_\_\_\_\_  
Director

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

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

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

The seal of the **Shire of Donnybrook-Balingup** ABN 88 479 935 824 was hereunto  
affixed in the presence of:

..... Signature of Chief Executive Officer	..... Signature of Shire President
---	---------------------------------------

..... Name of Chief Executive Officer	..... Name of Shire President
--	----------------------------------

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**Schedule 3 Buildings and other structures on Licensed Area**

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n/a

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## Licence to Use and Occupy Corridor Land

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

**Shire of Donnybrook-Balingup**  
ABN 88 470 935 824

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## Licence to Use Corridor Land and Railway Infrastructure

Date ►

### Between the parties

Arc

**Arc Infrastructure Pty Ltd**

ABN 42 094 721 301

of Level 3, 1 George Wiencke Drive Perth Airport, WA, 6105

Licensee

## Shire of Donnybrook-Balingup

ABN 88 470 935 824

of PO Box 94, Donnybrook, WA, 6239

## Background

- 1 Arc acts as agent of the Network Lessee in relation to the Network Lessee's rights under the Government Lease concerning the Corridor Land and Railway Infrastructure.
- 2 The Government Lease grants Arc a right to use and occupy the Corridor Land and a right of quiet enjoyment and use of the Railway Infrastructure for permitted uses and permits the Network Lessee to grant certain rights of use and occupation in respect of the Corridor Land and Railway Infrastructure for permitted uses, including to Local Governments for Civic Purposes.
- 3 Arc manages, and is responsible for rail safety in respect of, the Corridor Land and Railway Infrastructure and is an accredited rail transport operator under the Rail Safety National Law.
- 4 At the Licensee's request, Arc has agreed (as agent of the Network Lessee) to grant the right to use and occupy the Licensed Area to the Licensee on the terms and conditions set out in this Agreement.
- 5 The Licensee is a Local Government and the Permitted Use of the Licensed Area is for Civic Purposes.

**The parties agree as follows:**

# 1 Definitions and Interpretation

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## 1.1 Definitions

In this Agreement:

- (1) **Act** means the *Rail Freight System Act 2000 (WA)*.
  - (2) **Agreement** means this document, including any schedule or annexure to it.
  - (3) **Authorisation** means any authorisation, consent, approval, resolution, licence, exemption, filing, lodgement, registration, notification, recording, certificate, rating, reporting, permission, authority or right to do something:
    - (a) from, by or with any Government Agency, whether granted following positive action by the Government Agency or arising following the expiry of a period of time without intervention or action by a Government Agency; or
    - (b) in relation to anything which will be fully or partly prohibited or restricted by Law if a Government Agency intervenes or acts in any way within a specified period, the expiry of that period without intervention or action,  
 required under an Environmental Law or otherwise.
  - (4) **Arc Indemnified Parties** means:
    - (a) Arc and its Personnel; and
    - (b) each Related Body Corporate of Arc and their Personnel.
  - (5) **Business Day** means a day on which banks are open for business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.
  - (6) **Civic Purposes** means any purpose, other than a predominant purpose of deriving income or profits that the Minister considers to be beneficial to the public or a section of the public of Western Australia.
  - (7) **Claim** means any claim, demand, action or proceeding of any nature, whether actual or threatened and whether in an action in contract, tort (including negligence), in equity, product liability, under statute or any other basis.
  - (8) **Commencement Date** means the date specified in Item 1 of Schedule 1.
  - (9) **Condition Report** means a report agreed by the parties which notes the general condition of the Licensed Area, any Railway Infrastructure and any buildings or structures on the Licensed Area including fittings and fixtures.
  - (10) **Confidential Information** means in respect of a party, the terms of this Agreement, all information provided by that party to the other under this Agreement and any information that concerns the business, operations, finances, plans or customers of that party (or that party's Related Bodies Corporate) which is disclosed to, or otherwise acquired by, the other party and which:
    - (a) is by its nature confidential;
    - (b) stated in this Agreement to be confidential;
- 
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- (c) is designated by the disclosing party as being confidential; or
  - (d) the receiving party knows or ought to know is confidential,
- but excludes information which:
- (e) is in the public domain at the time of disclosure other than through the fault of the party receiving it or of anyone to whom the party receiving it has disclosed it;
  - (f) is in the possession of the receiving party without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by that party; or
  - (g) has been independently developed or acquired by the receiving party.
- (11) **Consequential Loss** means any indirect or consequential loss, including any loss of or damage to any product, loss of contract, loss of profit, economic loss (except to the limited extent set out below in this definition), loss of use, loss of business reputation, loss of opportunities, loss of anticipated savings or wasted overheads, loss of production, loss of revenue, any port, shipping or demurrage costs or fees, or any special, indirect or consequential loss or damage (except to the limited extent set out below in this definition), howsoever arising and whether in any action in contract, tort (including negligence), in equity, product liability, under statute or any other basis but does not include:
- (a) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;
  - (b) the Licensee's liability to pay Arc any amount expressly provided for in this Agreement; or
  - (c) any loss, damage or cost arising out of or in connection with fraud or Wilful Default.
- (12) **Corporations Act** means the *Corporations Act 2001* (Cth).
- (13) **Corridor Land** means land designated as corridor land under Part 3 of the *Rail Freight System Act 2000* (WA).
- (14) **Default Rate** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ([www.rba.gov.au](http://www.rba.gov.au)) at that time plus 5% per annum.
- (15) **Dollars, A\$ and \$** means the lawful currency of the Commonwealth of Australia.
- (16) **Environmental Condition** means any Environmental Damage or any event, circumstance, condition, operation or activity which is reasonably foreseeable to be likely to result in Environmental Damage and which in Arc's opinion (acting reasonably) could result in Arc or any other person incurring any material liability or being subjected to a direction of any competent authority.
- (17) **Environmental Damage** means any material injury or damage to persons, living organisms or property or any material pollution or impairment of the environment (including any land, air or water) resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration.
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- (18) **Environmental Law** means any Law, notice, decree, order or directive of any authority or otherwise, relating to the environment (as the term environment is defined in the *Environmental Protection Act 1986* (WA)) or the enforcement or administration of any of those Laws, notices, decrees, orders or directives of any authority or otherwise, and includes:
- (a) the *Environmental Protection Act 1986* (WA); and
  - (b) any regulations or orders made under the *Environmental Protection Act 1986* (WA).
- (19) **Expiry Date** means 24.00 hrs on the last day of the Term.
- (20) **Fences** means the fences specified in **Error! Reference source not found.** of Schedule 1.
- (21) **Government Agency** means any government, parliament, governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity of any kind.
- (22) **Government Lease** means, as the context requires, the:
- (a) Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease dated 17 December 2000 entered into by the Network Lessee and other parties; or
  - (b) Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease dated 17 December 2000 entered into by the Network Lessee and other parties.
- (23) **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.
- (24) **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes other GST related legislation.
- (25) **Insolvency Event** means the occurrence of any of the following events in relation to a party:
- (a) a judgment in an amount exceeding \$1,000,000 is obtained against the party, or any distress, attachment, execution in an amount exceeding \$1,000,000 is issued against, levied or enforced on any of the party's assets, and is not set aside or satisfied within 14 days or appealed against within the period permitted by the rules of the relevant court;
  - (b) the party suspends payment of its debts generally, or is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act;
  - (c) the party enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them, other than for purpose of a bona fide reconstruction or amalgamation;
  - (d) a receiver, receiver and manager, administrator, liquidator, trustee or similar official is appointed, or a resolution to appoint is passed, to a party or over any of the party's assets or undertakings;
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- (e) an application or order is made for the winding up or dissolution of the party (other than an application which is stayed, withdrawn or dismissed within 14 days), or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the party, except for the purpose of an amalgamation or reconstruction;
  - (f) the party is deregistered or any steps are taken to deregister the party under the Corporations Act;
  - (g) the party ceases to carry on business; or
  - (h) anything analogous or having a substantially similar effect to any of the events described above happens in connection with that party.
- (26) **Law** means:
- (a) Commonwealth, state and local government legislation, including regulations and by-laws;
  - (b) legislation of any other jurisdiction with which the relevant party must comply;
  - (c) any law or legal requirement at common law or in equity;
  - (d) Government Agency requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals); and
  - (e) any decision, rule, ruling, binding order, interpretative decision, directive, guideline, request or requirement of any Government Agency or other authority with which the relevant party is legally required to comply.
- (27) **Liability** means:
- (a) any cost, expense, liability, claim, charge, loss, outgoing or payment of any kind, including legal fees and disbursements (on a full indemnity basis) and interest; and
  - (b) any diminution in value or deficiency of any kind or character that a party pays, suffers or incurs or is liable for,
- and, if the context permits also includes any claim or demand for the payment of money, whether liquidated or not.
- (28) **Licensed Area** means the area specified in Schedule 1 Item 1 of Schedule 1 including any Railway Infrastructure on that part of the Corridor Land.
- (29) **Licensee's Property** means any buildings or other improvements erected on the Licensed Area by the Licensee and any plant or equipment, fixtures or fittings, materials or other property which the Licensee affixes to or brings on to the Licensed Area, including all product the Licensee brings or causes to be on the Licensed Area.
- (30) **Local Government** means a local government established under the *Local Government Act 1995*.
- (31) **Month** means a calendar month.
- (32) **Network** means that part of the railway network and associated infrastructure in Western Australia under the ownership or control of Arc or its Related Bodies
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Corporate and any other railway network and associated infrastructure controlled by Arc and notified to the Licensee from time to time.

(33) **Network Lessee** means:

- (a) Brookfield StandardGauge Pty Ltd ABN 35 094 819 360; or
- (b) Brookfield NarrowGauge Pty Ltd ABN 73 094 736 900,

as the context requires.

(34) **Permitted Use** means the use specified in Item 4 of Schedule 1.

(35) **Personnel** means the directors, officers, employees, agents, contractors and licensees of a party.

(36) **Railway Infrastructure** means facilities used in connection with the operation of a railway including:

- (a) railway track, ballast, sleepers, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway);
- (b) tunnels, bridges, viaducts, culverts, pipes, conduits and drains;
- (c) stations and platforms;
- (d) train control systems, signalling systems and communication systems;
- (e) electric traction infrastructure;
- (f) buildings and workshops; and
- (g) associated plant machinery and equipment.

(37) **Railway Property** means any Railway Infrastructure and other equipment or facilities that:

- (a) form part of, or are used by Arc in connection with, the Corridor Land; or
- (b) are used for the provision of Services,

and which are located on or below the surface of the Licensed Area at any time.

(38) **Rates and Taxes** includes all rates, taxes, property levies and any other charges of any kind imposed by a Government Agency in relation to the Licensed Area or other property which includes the Licensed Area.

(39) **Related Body Corporate** has the meaning given to that expression in the Corporations Act.

(40) **Reserved Area** means the area specified in Item 5 of Schedule 1.

(41) **Services** means all services of any kind connected to or serving the Licensed Area or any property which includes the Licensed Area, including air conditioning, electric power, gas, other energy or utility services, water, sewerage and drainage services, telephone and telecommunications services, fire prevention and fire sprinkler services and safety services.

- (42) **Services Supplier** means any Government Agency or privately owned company or other body which supplies, at Arc's request, a Service.
- (43) **Term** means the term specified in Item 2 of Schedule 1, as extended (if applicable) in accordance with clause 3.1.
- (44) **Third Party Rights** means any easements, licences or other similar rights of any person, granted by Arc or any other person or created in any other way, that:
  - (a) exist at the Commencement Date; or
  - (b) are granted or created at any time after the Commencement Date,
 in relation to the Corridor Land.
- (45) **Use Fee** means an annual charge specified in Item 3 of Schedule 1, as adjusted annually under clause 4.2.
- (46) **Wilful Default** means any wilful, intentional, wanton or reckless act or omission carried out or omitted to be done with a reckless disregard for and knowledge of the consequences of the act or omission.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- (1) singular words also have their plural meaning and vice versa;
- (2) a reference to one gender includes all genders;
- (3) a reference to a person includes a natural person, firm, body corporate, unincorporated association, partnership, joint venture and a Government Agency;
- (4) an obligation, liability, representation or warranty:
  - (a) in favour of 2 or more persons is for the benefit of them jointly and severally; and
  - (b) on the part of 2 or more persons binds them jointly and severally;
- (5) a reference to a party to a document includes that party's executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (6) a reference to the consent of a party means the prior written consent of that party;
- (7) headings are for convenient reference only and do not affect the interpretation of this Agreement;
- (8) a reference to a clause, annexure or a schedule is a reference to a clause, annexure or schedule of this Agreement;
- (9) a thing (including any amount) is a reference to the whole and each part of it;
- (10) 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;
- (11) a reference to any Law includes:

- (a) that Law as amended or re-enacted;
  - (b) a statute, regulation or provision enacted in replacement of that Law;
  - (c) another regulation or other statutory instrument made or issued under that Law; and
  - (d) any amendment made to a statute, regulation or provision as a consequence of another statute, regulation or provision;
- (12) a reference to a clause, a schedule, an agreement or any other document, instrument, publication or code is a reference to the clause, schedule, agreement, document, instrument, publication or code as varied or replaced from time to time;
- (13) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (14) a reference to a body (including an institute, association or authority), other than a party to this Agreement, whether statutory or not:
- (a) which ceases to exist; or
  - (b) whose powers or functions are transferred to another body,
- is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (15) a reference to "includes" or "including" must be construed without limitation;
- (16) where time is to be reckoned by reference to a day or event, that day or the day of the event will be excluded;
- (17) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day;
- (18) a reference to termination of this Agreement includes the expiry of the Term;
- (19) where a word or expression is defined, cognate words and expressions will be construed accordingly;
- (20) where the Licensee has agreed in this Agreement to procure another party to do or not do any act or thing, failure by the Licensee to so procure will constitute non-compliance with and a breach of the Licensee's obligations under this Agreement despite that it may have been beyond the Licensee's power and control to so procure; and
- (21) a reference to the "operation of the Network" includes the passage of rolling stock, safe working, rescue and inspection, maintenance, repair and upgrading of land and fixed assets.

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

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

## **2 Licence**

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### **2.1 Grant of licence**

Subject to:

- (1) all Third Party Rights; and
- (2) the limitations and restrictions described in clauses 2.3,

Arc (as agent for the Network Lessee) grants to the Licensee the right to use and occupy the Licensed Area for the Term on the terms and conditions of this Agreement.

### **2.2 No tenancy or other proprietary rights**

The rights granted to the Licensee under this Agreement are contractual rights only and not tenancy rights. The Licensee does not have any tenancy or other interest in the area from time to time comprising the Licensed Area.

### **2.3 Licensee's acknowledgments**

The Licensee acknowledges that:

- (1) the rights granted to the Licensee by Arc under this Agreement are:
  - (a) limited to rights which Arc is authorised or permitted to grant under the Government Lease;
  - (b) limited by the restrictions and conditions relating to those rights in the Government Lease; and
  - (c) subject to all reservations in favour of, and any rights which may be exercised by, any party to the Government Lease in relation to the Licensed Area;
- (2) it does not have or acquire by this Agreement any greater interest in the Licensed Area than the Network Lessee has under the Government Lease;
- (3) this Agreement and the rights granted to the Licensee under this Agreement automatically terminate if the Government Lease terminates or for any other reason Arc ceases to be entitled to grant those rights to the Licensee;
- (4) for the Term of this Agreement and in respect of the Licensed Area, the Licensee will be the occupier of the premises for the purposes of the *Occupier's Liability Act 1985*; and
- (5) the risks associated with its presence on the Licensed Area and to the extent permitted by Law, the Licensee accepts the legal liability which applies to it as the occupier of the Licensed Area.

### **2.4 Railway Property**

- (1) Arc reserves the right to keep or use Railway Property on the Licensed Area during the Term.
  - (2) Subject to obtaining the Licensee's prior written consent (which must not unreasonably be refused or delayed) Arc reserves the right to bring onto or to install on the Licensed Area during the Term any other Railway Property provided such
- 
-

Railway Property does not have any adverse material effect on the Licensee's Permitted Use of the Licensed Area.

- (3) Arc may at any time during the Term carry out repairs or maintenance or replacement work in relation to any Railway Property on the Licensed Area and may remove Railway Property at any time, but in doing so Arc must make good any damage caused by Arc to any of the Licensee's Property.
- (4) Save as otherwise permitted by this Agreement or with Arc's express prior approval, the Licensee must not damage or interfere with Railway Property on the Licensed Area and must take reasonable action to prevent damage or interference to the Railway Property by other persons.

## **2.5 Reserved Area**

Arc may, at any time, by giving 3 Months' prior notice to the Licensee, terminate the Licensee's rights of use and occupation in relation to the Reserved Area (without compensation for anything built on the Reserved Area), and each party is released from liability under this Agreement in relation to the Reserved Area after termination, but without affecting any liability which arises under this Agreement before or on termination.

## **2.6 Minerals, fossils and relics**

- (1) Any valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the Licensed Area, Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area shall as between the parties be and remain the property of the Network Lessee.
- (2) The Licensee must upon the discovery of these things immediately:
  - (a) take precautions to prevent their loss, removal or damage; and
  - (b) give Arc written notice of the discovery.

# **3 Term**

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## **3.1 Extension of Term**

- (1) If the Licensee wants to extend the Term, it must give written notice to Arc, no later than 3 Months prior to the Expiry Date, of the period of time that the Licensee wishes to extend the Term by.
- (2) Arc may, in its absolute discretion, elect whether or not to agree to an extension of the Term and the applicable terms and conditions for that extension.

## **3.2 Holding over**

If the Licensee continues to occupy the Licensed Area after the expiration of the Term with the written consent of Arc but has not otherwise:

- (1) been granted an extension of the Term; or
  - (2) entered into a new agreement governing the Licensee's use and occupation of the Licensed Area,
- 
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then the Licensee does so subject to the terms of this Agreement except that Arc or the Licensee may terminate the Licensee's use and occupation of the Licensed Area at any time by written notice to the other party.

## 4 Use Fee

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### 4.1 Payment

On and from the Commencement Date, the Licensee must pay the Use Fee to Arc:

- (1) annually in advance; and
- (2) within 21 days of the date of a tax invoice issued by Arc for the Use Fee.

### 4.2 Consumer Price Index annual adjustment

On each 1 January in each year (commencing 2019), the Use Fee will be varied in accordance with the following formula:

$$R_n = R_o \times \left( 1 + \left( \frac{CPI_n - CPI_o}{CPI_o} \right) \right)$$

where:

- |         |   |  |
|---------|---|--|
| $R_n$   | = | the Use Fee to apply from 1 January of the applicable year.  |
| $R_o$   | = | the Use Fee applying on 1 January of the year prior to the applicable year.  |
| $CPI_n$ | = | The All Capitals Consumer Price Index (All Groups) for the quarter ending 30 September in the year prior to the applicable year.           |
| $CPI_o$ | = | The All Capitals Consumer Price Index (All Groups) for the quarter ending 30 September in the year two years prior to the applicable year. |

## 5 Other Payments

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### 5.1 Rates and Taxes

- (1) If applicable to the Licensed Area, the Licensee must pay an amount equal to the Licensee's Share of all Rates, and Taxes to Arc within 21 days of the date on which Arc requests payment.
- (2) In this clause 5.1, **Licensee's Share** means the proportion that the Licensed Area bears to the total land area the subject of the relevant Rates and Taxes notice or, where the Rates and Taxes relate to or are inclusive of a building or structure on the Licensed Area, then the Rates and Taxes that relate to the building or structure in addition to the proportion that the Licensed Area bears to the total land area the subject of the relevant Rates and Taxes notice.

### 5.2 Services

- (1) The Licensee must pay an amount equal to the Licensee's Share of all Service charges:
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- (a) direct to the relevant Services Supplier before those charges become overdue; or
  - (b) in the case of any such Service charges imposed on Arc, to Arc by the date requested by Arc.
- (2) The Licensee must also pay to Arc on the date and in the manner requested by Arc, an amount equal to the Liability incurred by Arc in connection with the supply of the Services to the Licensee, including Arc's administrative and operating costs reasonably incurred.
- (3) In this clause 5.2, **Licensee's Share** means:
- (a) if the Licensed Area has a separate consumption meter for the relevant Service, 100%; or
  - (b) if the Licensed Area does not have a separate consumption meter for the relevant Service, the relevant Service charges that relate to the Licensed Area (as reasonably determined by Arc) divided by the total Service charges.
- (4) A statement or invoice from Arc will be prima facie evidence of the amount payable in respect of any Service charges which are unmetered.
- (5) If, within 21 days from receiving written notice of a second demand for payment of an amount relating to the provision of any Service, the Licensee does not pay that amount, then Arc may, in its absolute discretion, discontinue the supply of the Service to the Licensed Area until the Licensee has paid in full that overdue amount and any accrued interest, fines, penalties and other charges relating to reconnection of supply of the Services.

## **6 Interest on Overdue Amounts**

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- (1) The Licensee must pay interest on any amounts due to Arc under this Agreement which are not paid by the Licensee when due.
- (2) Interest:
- (a) will accrue daily at the rate per annum equal to the Default Rate;
  - (b) will be computed from and including the day when the money on which interest is payable becomes owing to Arc by the Licensee until but excluding the day of payment of that money;
  - (c) will be calculated on the actual days elapsed based on a 365 day year; and
  - (d) must be paid by the Licensee to Arc on demand.

## **7 Payments**

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- (1) All payments by the Licensee under this Agreement must be made:
- (a) in immediately available funds and without deductions, counter claims, conditions, set off or withholdings;
  - (b) to Arc or any other person nominated by Arc;
  - (c) at the place and in the manner reasonably required by Arc; and
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- (d) no later than 5pm local time in the place where payment is to be made.
- (2) If the Licensee is compelled by Law to make a deduction or withholding from any payment, the Licensee must promptly pay to Arc the additional amount necessary so that the net amount received by Arc equals the full amount which would have been received by Arc if no deduction or withholding had been made.
- (3) Arc does not need to make a demand for payment of any amount required to be paid by the Licensee under this Agreement unless required by Law.
- (4) If:
  - (a) Arc in any notice requesting payment for any amount; or
  - (b) this Agreement,

does not specify when a payment is due, it is due within 21 days after Arc gives notice requesting payment.

## **8 Goods and Services Tax**

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- (1) Except where the context suggests otherwise, terms used in this clause 8 have the meanings ascribed to those terms by the GST Act.
  - (2) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 8.
  - (3) Unless otherwise expressly stated, all amounts due and payable under this Agreement are exclusive of GST. Any amounts that are specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purpose of this clause 8.
  - (4) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.
  - (5) Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
  - (6) If GST is payable on a supply made by a party (**Supplier**) under or in connection with this Agreement, the party providing consideration for that supply (**Recipient**) must pay an additional amount to the Supplier equal to the GST payable in relation to the supply.
  - (7) Any additional amount referred to in clause 8(6) must be paid by the Recipient at the same time as any other consideration is to be first provided for that supply and the Supplier must promptly provide to the Recipient a tax invoice complying with the relevant Law relating to that GST.
  - (8) Where this Agreement requires the Recipient to reimburse the Supplier for any loss, cost or expense, the Recipient must also at the same time pay and indemnify the Supplier against all GST incurred by the Supplier in respect of that loss, cost or expense to the extent the Supplier reasonably determines that it is not entitled to repayment or credit in respect of the GST.
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- (9) If the GST payable on a supply made under or in connection with this Agreement (not taking into account any consideration that is inclusive of GST) varies from the additional amount paid by the Recipient under clause 8(6) in respect of that supply (as adjusted to take account of any previous payment made pursuant to this paragraph) then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any amount payable under this clause 8(9) must be paid no later than 14 days after the Supplier provides an adjustment note to the other party.

## **9 Use of Licensed Area**

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### **9.1 Permitted Use**

The Licensee may only use the Licensed Area for the Permitted Use and must not use the Licensed Area for any other use unless Arc gives its prior written consent.

### **9.2 Licensee's own enquiries**

The Licensee has relied on its own enquiries about how the Licensed Area may be used and not on any representation from Arc.

### **9.3 No warranty by Arc in relation to the Licensed Area**

- (1) Arc does not give any warranty of any kind that the Licensed Area is suitable for any purpose for which the Licensee intends to use it (including for the Permitted Use).
- (2) Any warranty in relation to the Licensed Area which is implied by Law is excluded to the extent that the Law permits the warranty to be excluded.
- (3) The Licensee acknowledges and agrees that Arc is not obliged to repair or improve any buildings or improvements forming part of the Licensed Area or to carry out any other structural works.

### **9.4 No warranty by Arc in relation to the Services**

- (1) The Licensee acquires certain rights in relation to the Licensed Area with the benefit of all Services existing at the Commencement Date. However, Arc does not give any warranty that those Services are adequate or suitable for any purpose (including for the Permitted Use) for which the Licensee intends to use the Licensed Area.
- (2) Any warranty in relation to the Services which is implied by Law is excluded to the extent that the Law permits the warranty to be excluded.
- (3) The Licensee acknowledges and agrees that:
  - (a) Arc is not obliged to ensure that any of the Services are maintained; and
  - (b) any repair, replacement or other work relating to the provision of any Service is the responsibility of the Licensee.

### **9.5 Licensee to use and operate at own risk**

- (1) For the purposes of the *Occupiers' Liability Act 1985* the Licensee is the occupier for the Term.
  - (2) The Licensee's use of the Licensed Area is at its own risk.
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## **10 Safety and Security Undertakings**

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### **10.1 Safety and security directions**

- (1) Arc may give directions to the Licensee concerning the safety or security of persons or property in relation to the Licensed Area.
- (2) The Licensee must promptly comply with all directions given by Arc in relation to the safety or security of persons or property in relation to the Licensed Area.

### **10.2 Safety rules**

- (1) Without limiting clause 10.1, the Licensee must comply with all safety requirements (including complying with standard practices, procedures and rules and obtaining any relevant accreditation) specified by Arc in Schedule 4 in connection with the Licensee's use of the Licensed Area or otherwise in connection with this Agreement.
- (2) Arc may by further notice vary or add to those safety requirements at any time.
- (3) The Licensee must also ensure that any such safety requirements, as varied or added to from time to time, are complied with, at all times, by the Licensee's Personnel using the Licensed Area.

## **11 Accidents and Emergencies Affecting the Network**

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- (1) If any accident or other event connected with the Licensed Area causes damage to, or adversely affects any part of the Network, the Licensee must:
  - (a) take no action which might jeopardise the safety of the operation of the Network;
  - (b) not, without Arc's prior consent, work on or interfere with any part of the Network which is damaged or otherwise affected by the relevant incident;
  - (c) notify Arc as soon as possible after the Licensee becomes aware of the damage;
  - (d) do everything reasonably possible (including complying with all requirements and directions from Arc) to enable Arc to repair the damage and restore the Network for use as quickly as possible; and
  - (e) promptly comply with all other directions and requirements of Arc in relation to the relevant incident.
- (2) Arc may close off any part of the Network which is damaged. The Licensee may not have access to the part which is closed off without first obtaining Arc's consent.
- (3) This clause 11 does not limit any Liability of the Licensee under any indemnity given to Arc or otherwise arising.

## **12 Environmental Undertakings**

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### **12.1 Licensee's general undertakings**

The Licensee must:

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- (1) comply with all Environmental Laws and Authorisations applicable to the Licensed Area or the Licensee;
- (2) obtain, at the appropriate time, and do all that is necessary to maintain in full force and effect all Authorisations relating to the Licensed Area or any activity in relation to the Licensed Area;
- (3) not do, or omit to do, anything which might directly or indirectly result in the revocation or suspension of an Authorisation in relation to the Licensed Area; and
- (4) immediately notify Arc on becoming aware of:
  - (a) the existence of any Environmental Condition on or affecting the Licensed Area; or
  - (b) the filing of a Claim against the Licensee in relation to an alleged failure to comply with an Environmental Law or an Authorisation in relation to the Licensed Area.

## **12.2 Licensee's remediation undertakings**

- (1) If at any time (including before or after the Commencement Date):
  - (a) the Licensed Area is affected or becomes affected by any Environmental Condition resulting from or in connection with the activities of the Licensee;
  - (b) the Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area is affected or becomes affected by any Environmental Condition resulting from or in connection with the activities of the Licensee; or
  - (c) the Licensee breaches any Environmental Law or any Authorisation relating to the Licensed Area or the Corridor Land, Railway Property or any Railway Infrastructure adjacent to the Licensed Area,

the Licensee must as soon as reasonably possible take all necessary action:

  - (d) to comply with all Environmental Laws and Authorisations relating to the Licence Area; and
  - (e) so that the Environmental Condition is no longer present and any Environmental Damage is rectified.
- (2) The Licensee's obligations under this clause continue after the Expiry Date until all Environmental Damage has been rectified and all Environmental Laws and Authorisations complied with.

## **13 General Undertakings**

### **13.1 Positive undertakings**

The Licensee must:

- (1) use the Licensed Area in a safe and proper manner;
- (2) where there are buildings or other structures on the Licensed Area, comply with the undertakings set out in Schedule 3;

- (3) ~~where there are buildings~~ or other structures on the Licensed Area, maintain them to a standard not worse than set out in the Condition Report, fair wear and tear excepted;
- (4) take all measures reasonably necessary to protect people and property in the Licensed Area;
- (5) comply with all relevant requirements of any Government Agency and all Laws in connection with the Licensed Area;
- (6) promptly give Arc a copy of any notice received by the Licensee which relates to the Licensed Area;
- (7) immediately notify Arc if the Licensee becomes aware of any threat to the Licensed Area and comply with all of Arc's directions given for the purpose of protecting property or persons in relation to the Licensed Area; and
- (8) promptly inform Arc after becoming aware of any accident affecting the Licensed Area or any other damage to Licensed Area.

### **13.2 Negative undertakings**

The Licensee must not (and must use its best endeavours to procure that no other person), except with Arc's consent:

- (1) interfere with or obstruct the operation of the Network;
- (2) store or use flammable or explosive substance in the Licensed Area;
- (3) do anything which is dangerous, offensive or illegal or which is or may become a nuisance or annoyance to anyone;
- (4) interfere with or obstruct access to or overload the Services;
- (5) modify or interfere with the facilities for the provision of Services or any equipment connected to those facilities;
- (6) use the Licensed Area as a residence;
- (7) permit any other person to take possession of or use the Licensed Area, including permitting any other person to carry on business on or from the Licensed Area;
- (8) vacate the Licensed Area, except as required by this Agreement, or abandon the Licensed Area;
- (9) grant any right or interest of any kind, including a security interest over or in relation to this Agreement or the Licensed Area; or
- (10) fix or place signs, notices or advertisements on or near the outside of the Licensed Area which are not related to safety or other Network requirements.

## **14 Insurance Undertakings**

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### **14.1 Licensee's insurance undertakings**

- (1) The Licensee must, at its expense, take out and maintain at all times during the Term and on terms and conditions satisfactory to Arc (acting reasonably):
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- (a) public liability insurance which covers the liability of the Licensee and its Personnel to any person arising out of or in connection with this Agreement or the Licensed Area, including any part of the Corridor Land used for access, use of any Railway Infrastructure adjacent to the Licensed Area and use of the Railway Property, with a sum insured of not less than \$20,000,000 for any one occurrence or series of occurrences arising from one originating cause and having an excess set at a reasonably acceptable level having regard to what is commercially available in the then current insurance market;
- (b) workers' compensation insurance and employer's indemnity insurance which complies with the relevant Laws against all Claims in respect of any personal injury to, or death of, any person employed or engaged by the Licensee which arises out of, or is cause or contributed to by, the performance or non-performance of this Agreement by the Licensees which insurance must provide cover:
- (c) in respect of common law claims, for an amount not less than \$50,000,000 for each occurrence; and
- (d) for compulsory statutory workers' compensation insurance claims, to such amount as prescribed from time to time by the *Workers' Compensation and Injury Management Act 1981* (WA) or any other application legislation,  
  
and the Licensee must ensure that each of its contractors, subcontractors and consultants also effects and maintains insurance under any applicable workers' compensation Laws;
- (e) insurance adequately covering loss of or damage to the Licensee's Property;
- (f) any insurance required by Law as a result of the Licensee's use of the Licensed Area, including any part of the Corridor Land used for access, use of any Railway Infrastructure adjacent to the Licensed Area and use of the Railway Property; and
- (g) any other insurance which is reasonably necessary to adequately protect Arc's interests under this Agreement, having regard to the terms of this Agreement,

(each, an **Insurance Policy**) and each such Insurance Policy must be placed with an insurance company or companies approved by the Australian Prudential Regulation Authority to underwrite insurance business in Australia and must have a credit rating of at least "A-" by Standard and Poors Rating Group or such other reputable rating agency which is equivalent to a rating "A-" by Standard & Poors Rating Group.

(2) The Licensee must:

- (a) pay each premium due under the Insurance Policies before the due date and, when reasonably requested by Arc, provide evidence of payment;
- (b) when reasonably requested by Arc, provide copies of the Insurance Policies and copies of certificates of currency for each Insurance Policy certified by the insurer;
- (c) immediately notify Arc if:
  - (i) an event occurs which:
    - (A) may give rise to a claim under any Insurance Policy; or



- (B) could materially affect Arc's interests under this Agreement; or
- (ii) an Insurance Policy is cancelled;
- (d) if required by Arc, make and pursue a claim under any Insurance Policy; and
- (e) if required by Arc, ensure that Arc's interests are noted on the policy of public liability insurance.
- (3) Unless Arc consents, the Licensee must not:
  - (a) do or allow anything to be done which could adversely affect any insurance taken out by Arc in connection with the Licensed Area or which could increase the cost of obtaining that insurance; or
  - (b) settle, compromise or waive any claim under any Insurance Policy.

#### **14.2 Variation of Sum Insured**

Arc may give notice to the Licensee at any time requiring the Licensee to increase the maximum cover for the Licensee's public liability insurance if in the circumstances it is reasonable that the cover be increased.

### **15 Access to Services and Telecommunications Undertakings**

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#### **15.1 Services**

The Licensee must, at all times, allow any Government Agency (including its Personnel) or any third party authorised by Arc access to any Services over, under or on the Licensed Area for any purpose lawfully required by the Government Agency.

#### **15.2 Telecommunications facilities**

- (1) The Licensee must allow Arc or any third party authorised by Arc access to any telecommunications equipment or facility and associated materials over, under or on the Licensed Area at any time.
- (2) The Licensee must not interfere with or disturb any telecommunications equipment or facility or associated materials over, under or on the Licensed Area.

### **16 Entry and Rectification by Arc**

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#### **16.1 Right to enter**

Arc may enter the Licensed Area at any time without notice:

- (1) for all railway related purposes or anything which Arc is required to do by Law or is permitted to do under this Agreement or under the Government Lease; and
  - (2) to deal with any emergency or dangerous situations on or adjacent to the Licensed Area.
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**16.2 Arc may rectify**

Arc may enter the Licensed Area without notice and at any time for the purpose of doing anything which should have been done by the Licensee under this Agreement but which has not been done or has not been done properly.

**17 Indemnity and Limit of Liability**

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**17.1 Indemnity by Licensee**

Subject to the other provisions of this clause 17, the Licensee must promptly on demand, indemnify and keep indemnified each Arc Indemnified Party from and against all Claims and Liabilities suffered or incurred by or made or brought against a Arc Indemnified Party in respect of:

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

arising out of or as a consequence of:

- (3) any failure by the Licensee to comply with the requirements of any Law or a Government Agency in so far as they relate to the Licensed Area;
- (4) a breach or non-performance of any of the obligations of the Licensee including the requirement to return the Licensed Area in a condition not worse than the condition in Schedule 2B under this Agreement or any reasonable action properly taken by Arc to remedy that failure; or
- (5) any negligent act or omission, fraud or Wilful Default of the Licensee or its Personnel,

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

**17.2 Arc not liable**

The parties agree that to the extent permitted by Law, Arc is not liable to the Licensee and the Licensee must not make a Claim against Arc in respect any accident, death, injury, damage (including water damage), malfunction or other event in or affecting the Licensed Area or the Licensee's Property except to the extent caused by fraud, a Wilful Default or negligent act or omission of an Arc Indemnified Party.

**17.3 Arc's limit of liability**

- (1) The Licensee acknowledges and agrees that, to the extent permitted by Law and subject to clause 17.3(2), the total liability of the Arc Indemnified Parties to the Licensee for all Claims in connection with this Agreement is limited in aggregate to an amount equal to the aggregate Use Fee actually received by Arc over the term of this Agreement.
  - (2) The limit of liability in clause 17.3(1) does not apply to a Claim made by the Licensee against Arc:
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- (a) under any provision of any Law which expressly prohibits the limitation of liability for Liability arising from a breach of that Law; or
- (b) in respect of Liability arising from:
  - (i) the death of or personal injury to any person; or
  - (ii) any criminal acts, fraud or Wilful Default by Arc or its Personnel.

#### **17.1 Liability for Consequential Loss**

Notwithstanding any other provisions to the contrary in this Agreement and to the extent permitted by Law, neither party is liable to the other party in any circumstances for any Consequential Loss.

### **18 Assignment, Transfer and Encumbrances**

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#### **18.1 Consent required**

The Licensee must not and must not agree or attempt to:

- (1) assign, or attempt to assign, any of its rights;
- (2) sublicense any of its rights;
- (3) novate, otherwise transfer or attempt to transfer, any of its rights or obligations; or
- (4) grant, attempt to grant or allow to exist, a mortgage, charge or other security interest or encumbrance over any of its rights, title and interest,

under this Agreement, without the prior written consent of Arc (which may be withheld in its absolute discretion).

#### **18.2 Exclusion of statutory provisions**

The operation of sections 80 and 82 of the *Property Law Act 1969* (WA) are excluded from this Agreement.

### **19 Termination**

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#### **19.1 Termination by Arc**

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

- (1) the Licensee repudiates this Agreement;
  - (2) the Licensee abandons the Licensed Area;
  - (3) the Licensee does not pay on the due date, the Use Fee or any amount due to Arc under this Agreement and such failure is not remedied within 14 days of Arc giving notice to the Licensee of the failure;
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- (4) the Licensee fails to comply with any of its other obligations under this Agreement and that failure is not remedied within 30 days of Arc giving notice to the Licensee requiring the failure to be remedied; or
- (5) an Insolvency Event occurs in respect of the Licensee.

#### **19.2 Termination by Arc where railway to become operational**

If at any time during the Term, Arc requires a change of the status of the railway within the Licensed Area from non-operational to operational:

- (1) Arc will provide the Licensee with six (6) months' prior written notice that the railway is to become operational (**Operational Notice**), such notice to include the date upon which Arc anticipates that the railway will commence operations (**Operations Commencement Date**);
- (2) the Licensee must use all reasonable endeavours to complete an ALCAM assessment of any level crossings within the Licensed Area within two (2) months of the date of the Operational Notice;
- (3) the Licensee will pay the costs of any ALCAM assessment referred to in clause 19.2(1)(b);
- (4) the Licensee must, at its cost entirely and not later than two (2) months' prior to the Operations Commencement Date, engage Arc to install any active protection or other measures at any level crossing deemed necessary by the Operational Railway Crossing Protection Sub-Committee;
- (5) the Licensee must, within 30 days of the date of its receipt of the Operational Notice and at its cost entirely, engage Arc (or Arc's nominated rail accredited contractor) to reinstate all Railway Infrastructure, including formation, within the Licensed Area in accordance with Arc's then current code of practice.

#### **19.3 Effect of termination**

- (1) If Arc terminates this Agreement pursuant to this clause 19 it will be entitled to damages as if the Licensee had repudiated this Agreement and that repudiation had been accepted.
- (2) Termination of this Agreement under no circumstances will abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this Agreement, including any such debt, obligation or liability which was the cause of termination or arose out of such cause.

#### **19.4 Licensee's obligations on termination**

Unless otherwise notified in writing by Arc, the Licensee must vacate the Licensed Area leaving it in a condition no worse than when it took over possession of the Licensed Area and remove all the Licensee's Property by the Expiry Date or, if this Agreement is terminated before the Expiry Date, as soon as reasonably possible after this Agreement is terminated.

#### **19.5 Abandonment by the Licensee**

- (1) If the Licensee does not remove all of the Licensee's Property in accordance with clause 19.4, Arc may demolish or otherwise remove and dispose of any of the Licensee's Property.

- (2) The Licensee must promptly on demand indemnify Arc against any Liability incurred by Arc in demolishing, removing and disposing of any of the Licensee's Property in accordance with this clause.

#### **19.6 Risk**

The Licensee's Property, including the security of it is at the Licensee's risk at all times, including after the termination of this Agreement.

#### **19.7 Damage caused by vacating**

- (1) If damage to the Licensed Area, the Corridor Land, Railway Property or any Railway Infrastructure is caused by the Licensee:

- (a) using the Licensed Area;
- (b) vacating the Licensed Area; or
- (c) removing the Licensee's Property,

Arc will, at the Licensee's cost undertake any required repair work.

- (2) Arc will invoice the Licensee for the costs of any repair work incurred by it in accordance with clause 19.7 (1) and the Licensee must pay Arc the amount specified on the tax invoice within 30 days of the date of the invoice.
- (3) The Licensee's obligations under this clause continue after the Expiry Date until all damage to the Licensed Area, the Corridor Land, Railway Property or any Railway Infrastructure caused by the Licensee has been repaired by Arc.

### **20 Costs and Expenses**

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#### **20.1 Preparation of this Agreement**

The Licensee will pay Arc's costs and expenses (including legal costs and expenses limited to \$1000.00) incurred in connection with the preparation, negotiation and signing of this Agreement.

#### **20.2 Managing agent's fees**

The Licensee must, as and when required by Arc, pay or reimburse Arc for any fees or other expenses payable by Arc to any managing agents that are appointed to manage the Licensed Area on behalf of Arc.

#### **20.3 Amendment and enforcement costs**

The Licensee must, as and when required by Arc, pay or reimburse Arc for all of Arc's costs and expenses (including legal costs and expenses on a full indemnity basis) incurred in relation to:

- (1) any document assigning, varying or surrendering this Agreement;
  - (2) giving any waiver, consent or approval under this Agreement at the Licensee's request;
  - (3) any default under this Agreement by the Licensee; or
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- (4) the enforcement of, or the preservation of any rights under, this Agreement.

#### **20.4 Government imposts**

The Licensee must pay when due or earlier if required in writing by Arc or reimburse Arc for, all duty, registration fees and other government imposts (including fines and penalties attributable to an act or omission of the Licensee) payable in connection with this Agreement and all other documents referred to in this Agreement.

### **21 Confidentiality**

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#### **21.1 Acknowledgment of confidentiality**

Each party acknowledges that the terms of this Agreement and all information provided by one party to the other under this Agreement are secret and must be treated as confidential. Any Confidential Information provided by a party to the other remains the property of the party providing it.

#### **21.2 Confidentiality obligation**

- (1) A party must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media release or other publicity relating to the other party's Confidential Information without the prior written consent of the other party.
- (2) A party must not, without the prior written consent of the other party:
  - (a) use Confidential Information of the other party other than as necessary for the performance of this Agreement; or
  - (b) other than as permitted under clause 21.3, disclose Confidential Information of the other party.

#### **21.3 Permitted disclosure**

- (1) Subject to compliance with clauses 21.3(2) and 21.3(3), a party may disclose Confidential Information of the other party:
    - (a) to any financier in connection with the provision or potential provision of financial accommodation to that party or any Related Body Corporate of that party;
    - (b) if required by Law or the rules of any stock exchange or any Government Agency;
    - (c) as required or permitted by this Agreement;
    - (d) to a ratings agency;
    - (e) to its insurers, auditors, legal advisors or other advisors or consultants under a duty of confidence;
    - (f) in connection with the management and control of trains on the Network or the efficiency of the Network generally;
    - (g) to enable a party to perform its obligations under or in connection with this Agreement;
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- (h) in relation to the enforcement of its rights under or in connection with this Agreement;
  - (i) to its Related Bodies Corporate and its and their respective Personnel;
  - (j) to its Personnel to enable a party to perform its obligations under this Agreement or to make or defend any claim under this Agreement;
  - (k) in any proceeding arising out of or in connection with this Agreement; or
  - (l) with the prior written consent of the other party, which must not be unreasonable withheld.
- (2) Even if a party is entitled to disclose Confidential Information of the other party without the prior written consent of the other party, the first party must:
- (a) otherwise keep the Confidential Information confidential; and
  - (b) use reasonable endeavours to ensure that the recipient of the Confidential Information is made aware that the Confidential Information must remain confidential at all times in accordance with this clause 21.
- (3) Before making any disclosure pursuant to clause 14(1)(b), a party must, if reasonably practicable and to the extent possible without breaching any Law or rules of any relevant stock exchange:
- (a) give the other party details of the reasons for the disclosure and a copy of the information it proposes to disclose; and
  - (b) provide the other party with all assistance and co-operation which the other party considers reasonably necessary to minimise the extent or effect of the disclosure, including by making such amendments (if any) as requested by the other party to the terms of the disclosure.

#### 21.4 Survival

This clause 21 survives termination of this Agreement.

## 22 Dispute Resolution

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### 22.1 Procedure to settle disputes

- (1) If a bona fide dispute arises between the parties in relation or in connection with this Agreement (**Dispute**) a party claiming that a Dispute has arisen must give notice to the other party or parties to the Dispute specifying the Dispute and requesting its resolution in accordance with this clause 22 (**Notice of Dispute**).
  - (2) Subject to clause 22.1(3) the procedure that the parties must strictly follow to settle a Dispute is as follows:
    - (a) first, negotiation of the Dispute in accordance with clause 22.2;
    - (b) second, mediation of the Dispute in accordance with clause 22.3; and
    - (c) third, litigation of the Dispute in accordance with clause **Error! Reference source not found.**
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- (3) Nothing in this clause 2:
  - (a) prevents either party seeking urgent injunctive or declaratory relief from a court in connection with the Dispute without first having to attempt to negotiate and settle the Dispute in accordance with this clause 22; or
  - (b) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party.
- (4) The parties' obligations under this Agreement will continue notwithstanding any Dispute between the parties or the submission of a Dispute to mediation or referral of a Dispute to litigation under this clause 22.
- (5) This clause 22 continues in force even where this Agreement has been fully performed, terminated or rescinded or where the parties or any of them have been discharged from the obligation to further perform this Agreement for any reason.
- (6) This clause 22 applies even where the Agreement is otherwise void or voidable.

## 22.2 Negotiation

- (1) Senior representatives from each party must meet, within 5 Business Days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.
- (2) If the Dispute is not resolved within 14 days after the Notice of Dispute is given, the Dispute will be referred to the chief executive officers of the parties who must meet, within 21 days after the Notice of Dispute is given, and act in good faith to try and resolve the Dispute by joint discussions.

## 22.3 Mediation

- (1) If the Dispute is not resolved within 28 days after the Notice of Dispute is given, the Dispute is by this clause submitted to mediation.
- (2) The mediation must be conducted in Perth, Western Australia by a single mediator. The Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules (at the date of this Agreement) as amended by this clause 21 apply to the mediation, except where they conflict with this clause 21.
- (3) If the parties have not agreed upon the mediator and the mediator's remuneration within 5 Business Days of the Dispute being referred to mediation:
  - (a) the mediator is the person appointed by; and
  - (b) the remuneration of the mediator is the amount or rate determined by,

the President of the Institute of Arbitrators & Mediators Australia (WA Chapter) (**Principal Appointor**) or the Principal Appointor's nominee, acting on the request of either party.
- (4) 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 must bear its own costs relating to the preparation for and attendance at the mediation; and
- (c) the costs of the mediator will be borne equally by the parties.

## 22.4 Litigation

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

## 23 Notices

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### 23.1 Notices in connection with this Agreement

- (1) A notice, approval, consent nomination, direction or other communication (**Notice**) in connection with this Agreement:
  - (a) must be in legible writing and in English addressed as shown in Item 6 of Schedule 1 or as specified to the sender by a party by notice;
  - (b) may be given by:
    - (i) delivery in person, in which case the Notice is regarded as given by the sender and received by the addressee when delivered to the addressee;
    - (ii) post, in which case the Notice is regarded as given by the sender and received by the addressee 2 Business Days from the date of postage; or
    - (iii) a copy of the Notice may be sent by email, in which case the Notice is regarded as being given by the sender and received by the addressee when the email 'read receipt' is received by the sender, which 'read receipt' must be retained to evidence receipt of the email Notice

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and
  - (c) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.
- (2) A Notice sent or delivered in a manner provided by clause 23.1(1)(b) must be treated as validly given to and received by the party to which it is addressed even if:
  - (a) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
  - (b) the Notice is returned unclaimed.
- (3) In this clause 23.1, a reference to an addressee includes a reference to an addressee's Personnel.

### 23.2 Change of address

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

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## **24 Governing Law**

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### **24.1 Law of this Agreement**

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

### **24.2 Jurisdiction**

- (1) The parties submit to the exclusive jurisdiction of the courts exercising jurisdiction in the State of Western Australia.
- (2) Arc and the Licensee irrevocably waive any objection to the venue of any legal process brought in the courts exercising jurisdiction in the State of Western Australia on the basis that the process has been brought in an inconvenient forum.

## **25 Risk and Cost of Performing Obligations**

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### **25.1 Risk and cost**

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

### **25.2 Arc may appoint agents**

Arc may appoint any person or persons to represent it in relation to this Agreement and any person so authorised by Arc may exercise the rights and powers of Arc under this Agreement.

### **25.3 Licensee's Liability**

The Licensee is liable for the acts and omissions of the Licensee's Personnel and other persons authorised by the Licensee (including without limitation members of the public) to enter onto or use the Licensed Area (including Corridor Land used for access), as if those acts or omissions were those of the Licensee.

## **26 General**

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### **26.1 Survival of obligations**

Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the relevant party and survives termination of this Agreement.

### **26.2 Civil Liability Act**

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

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**26.3 Exercise of rights**

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

**26.4 Remedies cumulative**

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

**26.5 Further assurances**

Each party agrees, at its own expense, on the request of the other party, to do everything reasonably necessary to give effect to this Agreement and the transactions contemplated by it, including the signing of documents.

**26.6 Variation**

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

**26.7 Severability**

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

**26.8 No partnership or agency**

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

**26.9 Counterparts**

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

**26.10 Execution by attorney**

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

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**26.11 Suspension**

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

**26.12 Survival**

Clauses 2, 7, 19, 19 and 26 and any rights or obligations which accrued in respect of a prior breach of this Agreement, survive the expiry or termination of this Agreement.

**26.13 Entire understanding**

This Agreement:

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

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## Schedule 1 Details

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**Item 1 Licensed Area**

That part of the Corridor Land delineated in red on the plan in Schedule 2 and includes any Railway Infrastructure on that part of the Corridor Land, together with a right to pass over Corridor Land as is necessary for the purpose of access to and from that part of the Corridor Land delineated in red on the plan in Schedule 2 but excluding any Reserved Area if Arc has exercised its rights under clause 2.5.

**Item 1 Commencement Date**

1 September 2017

**Item 2 Term**

10 years from the Commencement Date.

**Item 3 Use Fee**

\$1000.00 per annum

**Item 4 Permitted Use**

Fenced skateboard park, playground and picnic area, community garden, community centre and workshop, carnival grounds and bushfire brigade shed and related community purposes subject to the erection (if necessary) and maintenance of adequate signage advising that the railway lines are operational. Signage is to be erected and maintained in accordance with Arc safety guidelines.

**Item 5 Reserved Areas**

n/a

**Item 6 Address for service of each party**

(1) Arc's postage address for service is:

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

Email: Legal@arcinfra.com

Attention: Legal

(2) Licensee's postage address for service is:

Address: PO Box 94, Donnybrook, WA 6239

Email: ben.rose@donnybrook.wa.gov.au

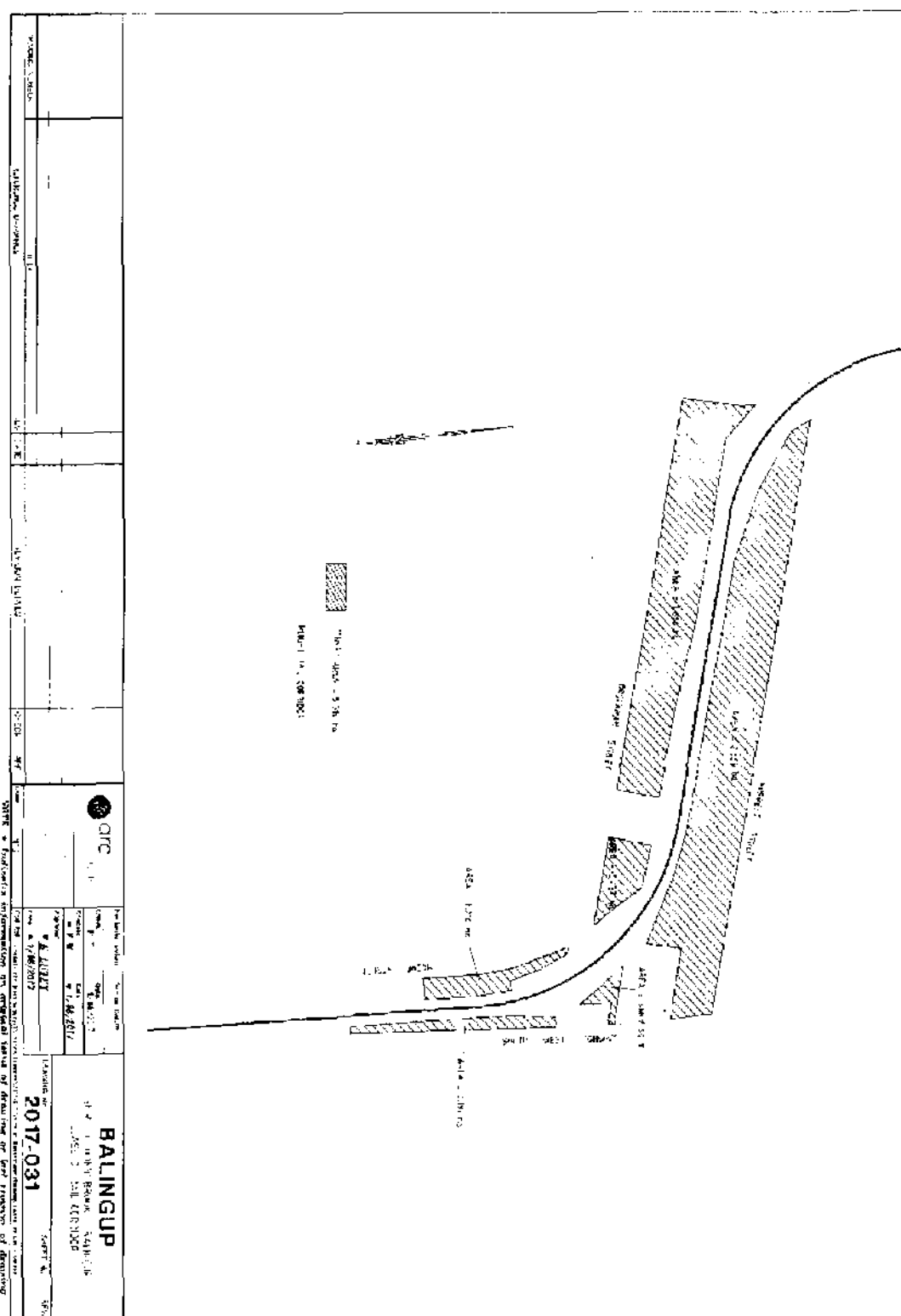
Attention: Chief Executive Officer

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## Schedule 2 Licensed Area



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## Signing page

### Executed as an Agreement

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

sign here ► \_\_\_\_\_  
 Director

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

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

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

The seal of the **Shire of Donnybrook-Balingup** ABN **88 479 935 824** was hereunto  
 affixed in the presence of:

.....  
 Signature of Chief Executive Officer

.....  
 Signature of Shire President

.....  
 Name of Chief Executive Officer

.....  
 Name of Shire President

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**Schedule 3 Buildings and other structures on Licensed Area**

n/a