

# Grain Rail Haulage Operating Agreement

**The Director General  
of the Ministry of Transport**

**GrainCorp Operations Limited**

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## Table of Contents

<b>1.</b>	<b>Definitions and Interpretation</b>	<b>2</b>
1.1	Definitions	2
1.2	Interpretation	5
<b>2.</b>	<b>Not Used</b>	<b>6</b>
<b>3.</b>	<b>Term</b>	<b>6</b>
<b>4.</b>	<b>Director General's Rights and Obligations</b>	<b>6</b>
4.1	Transfer of Assets	6
4.2	Inspection and Delivery of Assets	7
4.3	No support	7
4.4	Unloading Facilities and Loading Facilities	7
<b>5.</b>	<b>Operator's Rights and Obligations</b>	<b>7</b>
5.1	Performance of Grain Rail Haulage Services	7
5.2	Track access	8
5.3	No compensation	8
5.4	Maintenance	9
5.5	Commercial arrangements	9
5.6	Alternate Use of PN Rolling Stock Assets	9
5.7	Disposal of PN Rolling Stock Assets	10
5.8	Subcontracting	10
5.9	Approvals and compliance	10
5.10	Good faith and price relativity	11
5.11	Pricing and insufficient demand	11
5.12	Provision of Personnel and Equipment	11
5.13	Condition of PN Rolling Stock Assets	11
5.14	Compatibility with Loading and Unloading Facilities	11
<b>6.</b>	<b>Warranties and Representations</b>	<b>11</b>
6.1	Exclusion of warranties	11
6.2	No warranty	11
6.3	Director General's warranties	12
6.4	Operator's acknowledgements and warranties	12
6.5	Transfer in as is condition	12
<b>7.</b>	<b>Indemnities</b>	<b>13</b>
7.1	Indemnity by Operator	13
7.2	Indemnity by Director General	13
7.3	Continuation of indemnities	13
<b>8.</b>	<b>Side Arrangement with Pacific National</b>	<b>Error! Bookmark not defined.</b>
<b>9.</b>	<b>Force majeure</b>	<b>14</b>
9.1	Excuse from performance of obligations	14
9.2	Notification	14
9.3	Industrial action	14

9.4	Termination	14
<b>10.</b>	<b>Assignment and Change in Control</b>	<b>14</b>
10.1	Assignment by Operator	14
10.2	Dealings by Operator	14
10.3	Change in control of Operator	14
10.4	Director General's consent to change in control	15
10.5	Assignment by Director General	15
<b>11.</b>	<b>Dispute Resolution</b>	<b>16</b>
11.1	Dispute resolution procedures	16
11.2	Negotiation	16
11.3	Expert determination	16
11.4	Arbitration	17
11.5	Qualification	17
11.6	Obligations to continue	17
11.7	Dispute resolution costs	17
<b>12.</b>	<b>Default and Termination</b>	<b>17</b>
12.1	Preservation of other rights	17
12.2	Director General's notice of default	17
12.3	Event of Default by Operator	17
12.4	Rights of Operator to remedy	18
12.5	Rights of Director General to terminate or remedy	18
12.6	Procedure on termination by Director General	19
12.7	Operator's Notice of Default	19
12.8	Event of Default by Director General	19
12.9	Requirements of Notice of Default by Director General	19
12.10	Rights of Director General to remedy	19
12.11	Rights of parties on termination	20
<b>13.</b>	<b>GST</b>	<b>20</b>
<b>14.</b>	<b>Confidentiality</b>	<b>20</b>
<b>15.</b>	<b>General</b>	<b>21</b>
15.1	Nominated Representatives	21
15.2	Notices	21
15.3	Entire Agreement	21
15.4	Amendment	22
15.5	Severability	22
15.6	No waiver	22
15.7	Further assurances	22
15.8	No merger	22
15.9	Costs	22
15.10	Stamp duty	22
15.11	Governing law and jurisdiction	22
15.12	Counterparts	22
15.13	Relationship	23
15.14	Joint and several obligations	23

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<b>Schedule 1</b>	<b>24</b>
Revised List of PN Rolling Stock Assets	24
<b>Schedule 2</b>	<b>27</b>
Spares 27	
<b>Schedule 3</b>	<b>29</b>
Branchline Network	29
<b>Schedule 4</b>	<b>31</b>
Network Reduction Metrics	31

<b>Date</b>	29 May	2009
<b>Parties</b>	<ol style="list-style-type: none"><li>1. <b>The Director General of the Ministry of Transport on behalf of the Crown in right of New South Wales</b> of Level 21, 227 Elizabeth Street, Sydney, NSW 2000 (<i>Director General</i>).</li><li>2. <b>GrainCorp Operations Limited</b> (ABN 52 003 875 401) of Tower 1, Level 17, 201 Sussex Street, Darling Park, Sydney, NSW 2000 (<i>Operator</i>).</li></ol>	
<b>Recitals</b>	<p>A The Director General and Freight Rail Corporation were parties to a Works Deed (Grain) dated on or about 30 October 2001 (<i>Works Deed</i>).</p> <p>B When Pacific National (NSW) Pty Limited (ACN 099 150 688) (<i>Pacific National</i>) assumed all the rights and obligations of Freight Rail Corporation in February 2002, it assumed all the rights and obligations of Freight Rail Corporation under the Works Deed. However, since that time, several matters under the Works Deed remained unresolved.</p> <p>C In order to resolve all the outstanding matters, the Director General and Pacific National became parties to a new deed dated on or around 30 June 2008 (<i>New Works Deed</i>) which replaced the Works Deed and the Works Deed was terminated with effect from that date.</p> <p>D The New Works Deed was amended by the parties by a Deed of Variation of New Works Deed (<i>Amending Deed</i>) dated on or around the date of this Agreement.</p> <p>E Under the New Works Deed, Pacific National must transfer specific rolling stock assets (<i>PN Rolling Stock Assets</i>) to a nominee of the Director General (<i>Nominee</i>) on or before 30 June 2009. The Nominee must then use the PN Rolling Stock Assets to provide grain rail haulage services (<i>Grain Rail Haulage Services</i>) on rail lines comprising the New South Wales branchline network.</p> <p>F On 10 December 2008 the Director General nominated the Operator to be the Nominee for the purposes of providing the Grain Rail Haulage Services on the Branchline Network for 5 years (<i>Operating Period</i>) commencing on and from 1 July 2009 on the terms and provisions of this Agreement.</p> <p>G The parties acknowledge that the primary objectives of the Director General in entering into this Agreement are to ensure the future of the Grain Rail Haulage Services so that a long term sustainable operator can be secured to provide ongoing surety to the industry.</p>	

**It is agreed** as follows.

## 1. Definitions and Interpretation

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### 1.1 Definitions

The following definitions apply unless the context requires otherwise.

**48 Class Locomotives** means 48 Class standard gauge locomotives and identified in Schedule 5 to the New Works Deed.

**Act or Omission** means any act, default, misconduct, neglect, negligence or omission of any kind of the Operator or the Operator's Agents.

**Affected Party** has the meaning given to it in clause 9.1.

**Agreement** means this agreement and any schedules to this Agreement.

**Approvals** means all authorities, consents, licences, permits, notifications, exemptions, registrations, accreditations and approvals required by any Law or lawfully required by any Government Authority.

**Arbitrator** means an arbitrator appointed in accordance with the IAMA's Rules.

**ARTC** means the Australian Rail Track Corporation Limited (ACN 081 455 754) in its own right and on behalf of the RIC.

**ABA** means Australian Bulk Alliance Pty Ltd (ACN 087 280 260).

**Assets** has the meaning given to it in clause 4.1(a).

**AWB** means AWB Limited (ACN 081 890 459).

**Bank** means an Australian bank carrying on business in Sydney, New South Wales.

**Branchline Network** means the New South Wales branchline rail network consisting of operational rail lines (even if those lines are upgraded) that service silos across New South Wales at:

- (a) the locations listed at clause 1.2 in Schedule 3 to this Agreement; and
- (b) any other locations in New South Wales (other than any locations on the Mainline Network) where new silos are established on or after the date of this Agreement.

**Business Day** means any day except a Saturday or Sunday or a day that is a public holiday throughout New South Wales.

**Commencement Date** means the date of this Agreement.

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

**Dispute** means any dispute, difference of opinion, disagreement, claim or contention between the parties in connection with, or related to, this Agreement or any decision, determination or exercise of discretion made in accordance with, under, or in breach of this Agreement.

**Event of Default** means any of the events listed in clauses 12.3 or 12.8 (as applicable).

**Event of Force Majeure** means the occurrence of an event or circumstances beyond the reasonable control of the parties and includes:

- (a) war (declared or undeclared), insurrection, civil commotion, military action, or an act of sabotage or vandalism;

- (b) a strike, lockout, blockade, picketing action or industrial action, dispute or disturbance of any kind;
- (c) an act of God;
- (d) a storm, tempest, fire, flood, earthquake or other natural calamity; or
- (e) an act or omission of a government or Government Authority beyond the reasonable control of the parties,

but it excludes failure on the part of the Operator to obtain the grant or renewal of accreditation by the Regulator as a railway transport operator.

**Expert** has the meaning given to that term in clause 11.3(a).

**Fair Freight Charges** means Freight Charges for the performance of the Grain Rail Haulage Services which are fair and reasonable having regard to Market Freight Rates and the Operator's cost of providing the Grain Rail Haulage Services, including track access fees and maintenance of the PN Rolling Stock Assets.

**Freight Charges** means those charges payable by a customer of the Operator.

**Government Authority** means any international, federal, state or local government, semi-government, quasi-government or other department, body or authority, statutory or otherwise (but in the case of the New South Wales Ministry of Transport only in its capacity as a statutory consent, regulatory or administrative authority).

**Grain** includes wheat, barley, canola, sorghum and other similar bulk rural products for export.

**Grain Rail Haulage Services** means the grain rail haulage services provided by the Operator on the Branchline Network to reach the nearest available Hub for the deposit of Grain (on route to port) carried out on the terms and provisions of this Agreement.

**Hub** means a specific location where:

- (a) there is an Unloading Facility and Loading Facility where Grain is tipped for re-loading, or for storage and re-loading; or
- (b) wagons are transferred from the Branchline Network to trains servicing the Mainline Network,

but, for the avoidance of doubt, does not include the Ports.

**IAMA** means the Institute of Arbitrators & Mediators Australia (New South Wales Division).

**Insolvency Event** means the happening of any of the following events in relation to the Operator or a holding company of the Operator:

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in section 459F(1) of the Corporations Act;
- (b) it is placed under external administration;
- (c) an application is made to a court for it to be wound up and the application is not formally objected to within one month or formally dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Act) of any of its assets;

(e) it proposes to enter into or enters into any form of arrangement (formal or informal) with its creditors or any class of creditors, including a deed of company arrangement; or

(f) it becomes insolvent under administration, as defined in the Corporations Act.

**Law** includes any requirement of any statute, rule, regulation, proclamation, ordinance or by-law, present or future, and whether state, federal or otherwise.

**Liabilities** means each and every cost, expense, liability and loss of any kind and all damages.

**Loading Facility** means the equipment and facilities used for loading Grain onto rolling stock at a Hub.

**Mainline Network** means any rail network in New South Wales other than the Branchline Network.

**Market Freight Rates** means freight rates being charged or offered in Australia at the relevant time by one or more bona fide commercial road or railway operators for the transport of Grain on routes similar to those being operated in accordance with this Agreement.

**Nominated Representative** has the meaning given to it in clause 15.1(a).

**Operator's Agents** means each and every of the Operator's contractors, agents, employees, invitees, licensees, sub-contractors and other persons claiming through or under the Operator.

**Operating Period** means the period commencing on the Transfer Date and expiring on the Termination Date.

**PN Rolling Stock Asset** means a Rolling Stock Asset identified in Schedule 1 of this Agreement.

**Port** means:

(a) the port at Newcastle; or

(b) the port at Port Kembla.

**Records** means all maintenance records and books relating to the PN Rolling Stock Assets.

**Regulator** means the New South Wales Independent Transport Safety and Reliability Regulator which is responsible for the strategic coordination of safety regulation across transport modes of rail, bus and ferry in New South Wales.

**Related Body Corporate** has the meaning given to it in the Corporations Act.

**Representative** means in relation to a person or entity, its officers, employees or agents.

**RIC** means the Rail Infrastructure Corporation as owner of the Branchline Network.

**Rolling Stock** means the rolling stock (including the locomotives, wagons and other equipment) used or to be used to perform the Grain Rail Haulage Services under this Agreement.

**Rolling Stock Asset** means any vehicle which is operated or used on a Track (excluding, at any time, a vehicle designed for both on-track and off-track use when that vehicle is not being operated or used on the Track at that time).

**Rules** means the IAMA's rules and guidelines for the conduct of commercial arbitration (as amended from time to time).

**Side Deed** has the meaning given to it in clause 8(a).

**Spare** means the locomotive and wagon spare parts for the PN Rolling Stock Assets identified in Schedule 2 of this Agreement.

**Termination Date** means 30 June 2014 (or any earlier date on which this Agreement is terminated in accordance with clauses 2.2, 9.4 or 12.5).

**Track** means the rails, ballast, sleepers and all items used to fix the rails to the sleepers and to the ground underneath and which together form the Branchline Network.

**Transfer** means to transfer legal and beneficial ownership unencumbered.

**Transfer Date** means 29 May 2009.

**Unloading Facility** means the equipment and facilities used for unloading Grain from Rolling Stock at a Hub.

## 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural, and the converse also applies.
- (b) A gender includes all genders.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a *person* includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (e) A reference to a *clause, schedule or annexure* is a reference to a clause of, or schedule or annexure to, this Agreement.
- (f) A reference to an *agreement or document* (including a reference to this Agreement) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this Agreement or that other agreement or document, and includes the recitals, schedules and annexures to that agreement or document.
- (g) A reference to *writing* includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form but excludes a communication by electronic mail.
- (h) A reference to a *party* to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (i) A reference to *legislation* or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (j) A reference to *conduct* includes an omission, statement or undertaking, whether or not in writing.
- (k) A reference to an *agreement* includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a *document* includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (l) A reference to *dollars* and \$ is to Australian currency.

- (m) A reference to a *right* or *obligation* of any two or more people comprising a single party confers that right, or imposes that obligation, as the case may be, on each of them severally and each two or more of them jointly. A reference to that party is a reference to each of those people separately (so that, for example, a representation or warranty by that party is given by each of them separately).
- (n) A reference to *month* is a reference to *calendar month*.
- (o) All references to time are to New South Wales time.
- (p) Mentioning anything after *includes*, *including*, *for example*, or similar expressions, does not limit what else might be included.
- (q) A reference to *maintain* and *maintenance* includes repair.
- (r) Nothing in this Agreement is to be interpreted against a party solely on the ground that the party put forward this Agreement or a relevant part of it.
- (s) Unless the context otherwise requires, words used in this Agreement (but not defined) have the meaning given to them in the New Works Deed.

## 2. Not Used

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## 3. Term

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This Agreement shall commence on the Commencement Date and shall expire on the Termination Date.

## 4. Director General's Rights and Obligations

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### 4.1 Transfer of Assets

- (a) On and from the Transfer Date the Director General must effect a Transfer of:
  - (i) the PN Rolling Stock Assets;
  - (ii) the Spares; and
  - (iii) the Records,(together, the *Assets*) to the Operator.
- (b) Once the Transfer referred to in paragraph (a) has been effected on the Transfer Date, the Operator will continue to have unencumbered legal and beneficial ownership of:
  - (i) the PN Rolling Stock Assets;
  - (ii) the Spares; and
  - (iii) the Records,beyond the expiration of the Operating Period and in perpetuity.

## 4.2 Inspection and Delivery of Assets

- (a) On or before the Transfer Date the Director General must (after having given opportunity to the Operator to inspect the PN Rolling Stock Assets before the Transfer Date) deliver to the Operator the PN Rolling Stock Assets being:
- (i) two Branchline Network trains, each consisting of four 48 Class Locomotives and 40 standard gauge Grain wagons (that is, in total eight 48 Class Locomotives and 80 standard gauge Grain wagons);
  - (ii) two Branchline Network trains, each consisting of four 48 Class Locomotives and 40 standard gauge Grain wagons (that is, in total eight 48 Class Locomotives and 80 standard gauge Grain wagons); and
  - (iii) two 48 Class Locomotives and 20 standard gauge Grain wagons
- in then operational working order and condition, and
- (iv) the Spares and the Records to a location to be agreed upon between the parties.
- The Director General has fulfilled its obligation to deliver the Assets to the Operator in accordance with paragraph (a)(i) to (iii) if, wherever the Assets are located as at the Transfer Date, the Assets are available to the Operator on the Transfer Date.
- (b) For the purposes of paragraph (a)(i) to (iii), the PN Rolling Stock Assets are in then operational working order and condition if they have been operated and maintained by Pacific National in the period prior to the Transfer Date.

## 4.3 No support

Despite any other provision of this Agreement, the Director General shall not be obliged to provide, at any time, any financial support, or business guarantees, or any form of preferential treatment to the Operator.

## 4.4 Unloading Facilities and Loading Facilities

The Director General shall not be responsible for the provision, operation and maintenance of any Unloading Facility or Loading Facility located at any Hub.

## 5. Operator's Rights and Obligations

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### 5.1 Performance of Grain Rail Haulage Services

- (a) On and from the Transfer Date, the Operator must use the PN Rolling Stock Assets to provide the Grain Rail Haulage Services on the Branchline Network (only using the Mainline Network where necessary to reach a Hub for the deposit of Grain or to reposition the PN Rolling Stock Assets).
- (b) In order to provide the Grain Rail Haulage Services referred to in paragraph (a) the Operator may select Hubs which meet the Operator's commercial purposes but must provide or, subject to clause 5.8, sub-contract crewing, equipment and all associated management services to receive and execute customer orders on the Branchline Network.
- (c) Despite paragraph (a), the Operator is not required to:

- (i) use all or part of the PN Rolling Stock; or
- (ii) provide the Grain Rail Haulage Services from time to time,  
if there is:
  - (iii) subject to clause 5.11, insufficient demand for the Grain Rail Haulage Services on the Branchline Network for the PN Rolling Stock to be operated at the Fair Freight Charges; or
  - (iv) an insufficient number of 48 Class Locomotives which are in operational working order and condition, provided that the Operator:
    - (A) has, subject to clause 5.8, entered into a contractual arrangement with a sub-contractor which sets out a minimum contracted take or pay fixed cost of ■ million per annum (which fixed cost may be reduced in proportion to the number of rail lines on the Branchline Network that are not operational, in accordance with clause 1.1(c) in Schedule 4 and the figures in column 3 of Table A in Schedule 4); or
    - (B) employs a minimum number of ■ qualified train crew members (which number may be reduced and rounded to the nearest whole number in proportion to the number of rail lines on the Branchline Network that are not operational, in accordance with clause 1.1(b) in Schedule 4 and the figures in column 2 of Table A in Schedule 4).
- (d) Despite paragraph (a), the Operator is not required to provide additional Rolling Stock if there is excess demand for the Grain Rail Haulage Services on the Branchline Network.
- (e) If a Track on the Mainline Network becomes unsuitable for 81 Class locomotives (*Unsuitable Track*) the Operator must use its reasonable endeavours to, on terms to be agreed between the Operator and Director General, use the PN Rolling Stock Assets to service the silos located on any Unsuitable Track.

## 5.2 Track access

- (a) The Operator, or subject to clause 5.8, any relevant sub-contractor, must negotiate Track access arrangements with the ARTC. The rates and charges relating to the access to and use of the Tracks shall be determined by the ARTC in its absolute discretion and the Director General makes no such undertaking to the Operator in relation to any such access or rates charged for that access.
- (b) The Operator, or subject to clause 5.8, any relevant sub-contractor, must obtain and maintain sufficient access to all parts of the Branchline Network and Mainline Network to enable the Operator to perform the Grain Rail Haulage Services and its other obligations under this Agreement.

## 5.3 No compensation

If, in carrying out its obligations under this clause 5, the Operator discovers that the supply of Grain for transportation along the Branchline Network does not meet the Operator's reasonable business expectations, the Operator may not make any claim for compensation from the Director General arising out of the Operator's failed business expectations and the Operator assumes the business risk

associated with customer revenue not covering variable costs of any under-supply or over-supply of Grain on the Branchline Network.

## 5.4 Maintenance

- (a) On and from the Transfer Date, the Operator must bear all expenses, costs and charges relating to the scheduled, fixed and routine maintenance and accreditation of the PN Rolling Stock Assets to ensure they are fit for purpose under the *Rail Safety Act 2008* (NSW) and may (at its own expense) upgrade the PN Rolling Stock as the Operator deems necessary from time to time.
- (b) The Operator must ensure that the carrying out of any maintenance referred to in paragraph (a) does not interfere with, or adversely effect, the performance of the Grain Rail Haulage Services in accordance with this Agreement.

## 5.5 Commercial arrangements

- (a) The Operator must enter into commercial arrangements with the owners of Grain, who are seeking Grain Rail Haulage Services on the Branchline Network.
- (b) Any such arrangement referred to in paragraph (a) must provide for:
  - (i) the provision of annual public tariff rates relating to Grain transportation from Operator (and non-Operator) silos on the Branchline Network to the chosen Hub;
  - (ii) the sale of Grain Rail Haulage Services to all owners of Grain at the Branchline Network silos in a commercial and equitable manner at no greater than the annual public tariff rates; and
  - (iii) equivalent rail service and non-discriminatory rail rates to non-Operator owned silos located on the Branchline Network to the chosen Hub.

## 5.6 Alternate Use of PN Rolling Stock Assets

- (a) The Operator may exchange the PN Rolling Stock Assets for the comparable Rolling Stock of an unrelated third party provided that:
  - (i) the Operator retains unencumbered legal and beneficial ownership of the PN Rolling Stock Assets throughout the Operating Period;
  - (ii) levels of the Grain Rail Haulage Services on the Branchline Network are either maintained or improved as a result of such exchange of comparable Rolling Stock;
  - (iii) the carrying capacity of the comparable Rolling Stock is equal to or better than the carrying capacity of the PN Rolling Stock Assets which have been exchanged; and
  - (iv) the cycle time achieved using the comparable Rolling Stock is equivalent to or better than the cycle time of the PN Rolling Stock Assets which have been exchanged.
- (b) If PN Rolling Stock Assets are unused in the circumstances set out in clause 5.1(c), the Operator may re-deploy the PN Rolling Stock Assets for any purpose (including contracting Track maintenance services to the ARTC).

## 5.7 Disposal of PN Rolling Stock Assets

- (a) During the Operating Period, the Operator must not dispose of any or all of the PN Rolling Stock without the consent of the Director General (to be withheld in its absolute discretion).
- (b) The Operator (subject to the consent of the Director General which shall not be unreasonably withheld) may use components of any PN Rolling Stock Assets as spares for the remaining operational PN Rolling Stock Assets so long as a minimum of 4 (by 40-wagon capacity) trains with accompanying tractive effort remain operational (which number of trains may be reduced and rounded to the nearest whole number in proportion to the number of rail lines on the Branchline Network that are not operational, in accordance with clause 1.1(a) in Schedule 4 and the figures in column 1 of Table A in Schedule 4).

## 5.8 Subcontracting

- (a) The Operator may sub-contract all or any part of the Grain Rail Haulage Services or its other obligations under this Agreement provided that:
  - (i) the terms of the sub-contract are entirely consistent with the Operator's fulfilment of its obligations under this Agreement; and
  - (ii) the sub-contract includes, and requires the sub-contractor to include in any sub-sub-contract, a provision (on terms approved by the Director General in its absolute discretion) which acknowledges that the Director General has no liability to, or any obligation in respect of, that sub-contractor or any sub-sub-contractor (as the case may be).
- (b) Despite any other provision of this Agreement, if the Operator sub-contracts any of its obligations under or in connection with this Agreement to any person (**Subcontractor**), whether or not the Director General has provided any consent in respect of the sub-contracting:
  - (i) the Operator shall remain fully responsible for the performance of the sub-contracted obligations;
  - (ii) any acts or omissions of any sub-contractor shall be taken to be Acts or Omissions of the Operator (including wilful default or negligence); and
  - (iii) anything within the reasonable control of any sub-contractor shall be taken to be within the reasonable control of the Operator.

## 5.9 Approvals and compliance

- (a) The Operator, or subject to clause 5.8, any relevant sub-contractor, shall obtain, maintain and ensure the Operator's Agents obtain and maintain all necessary Approvals in connection with the performance of the Grain Rail Haulage Services and the Operator's other obligations under this Agreement (including those required for the operation and maintenance of the PN Rolling Stock Assets).
- (b) The Operator, or subject to clause 5.8, any relevant sub-contractor, shall comply with all of the conditions and other restrictions imposed by the Approvals the Operator is required to obtain pursuant to paragraph 5.8(a) including those necessary for the operation and maintenance of the PN Rolling Stock Assets.

- (c) The Operator, or, subject to clause 5.8, any relevant sub-contractor, shall comply with all the Laws applicable to the Grain Rail Haulage Services and its rights and obligations under this Agreement.

## **5.10 Good faith and price relativity**

The Operator will use its reasonable endeavours to offer Fair Freight Charges for the Grain Rail Haulage Services it offers to owners of Grain on the Branchline Network and the Operator must act in good faith in negotiating those Freight Charges with customers of the Operator. The Operator must not act in a manner as to frustrate the intent of this clause 5.

## **5.11 Pricing and insufficient demand**

The Operator shall not use its rates and charges for the Grain Rail Haulage Services, taking into account the Fair Freight Charges to the chosen Hubs, in order to make claims of insufficient demand under clause 5.1(c)(iii) or any other provision of this Agreement.

## **5.12 Provision of Personnel and Equipment**

The Operator, or subject to clause 5.8, any relevant sub-contractor, must provide qualified, skilled and experienced personnel and all other plant, equipment, materials and labour so that the Operator can perform the Grain Rail Haulage Services and meets its other obligations under this Agreement.

## **5.13 Condition of PN Rolling Stock Assets**

The Operator, or subject to clause 5.8, any relevant sub-contractor, must ensure that the PN Rolling Stock Assets it uses:

- (a) comply at all times with all Laws and Approvals;
- (b) are fit for the performance of the Grain Rail Haulages Services; and
- (c) meets the requirements necessary to access the requisite rail lines.

## **5.14 Compatibility with Loading and Unloading Facilities**

The Operator, or subject to clause 5.8, any relevant sub-contractor, must provide and maintain the PN Rolling Stock Assets it uses so that they are at all times compatible with, and meet the requirements of, any Loading Facility and Unloading Facility.

## **6. Warranties and Representations**

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### **6.1 Exclusion of warranties**

All warranties or conditions expressed or implied by law, equity, statute or otherwise shall (to the fullest extent permitted by law) be excluded unless expressly set out in this Agreement.

### **6.2 No warranty**

Without limiting the generality of clause 6.1, the Director General does not warrant that:

- (a) the Branchline Network will be maintained at the standard current as at the date of this Agreement;
- (b) the Branchline Network will be open for the Operating Period; and

- (c) the supply of Grain for transportation will be available at any particular location at any particular time on the Branchline Network.

## 6.3 Director General's warranties

The Director General warrants that:

- (a) it has the power and authority to execute and enter into this Agreement; and
- (b) the PN Rolling Stock Assets are unencumbered.

## 6.4 Operator's acknowledgements and warranties

(a) The Operator acknowledges and agrees that:

- (i) in entering into this Agreement the Operator relies on its own investigations and has not relied on any statement, representation or warranty made by or on behalf of the Director General or persons associated with the Director General; and
- (ii) prior to signing this Agreement it has made its own investigations in relation to the PN Rolling Stock Assets and that the Operator has not relied on any warranty or statement made by the Director General or by any person on its behalf;
- (iii) the Operator shall not be entitled to claim any compensation from the Director General arising out of the state of repair or condition of the PN Rolling Stock Assets as at the Transfer Date.

(b) The Operator warrants that:

- (i) it is a corporation validly existing under the laws of the place of its incorporation;
- (ii) it has the power and authority to execute and to enter into this Agreement and perform and observe all its terms without the consent of any persons;
- (iii) each person signing this Agreement on behalf of the Operator, whether as an officer, agent or otherwise has full authority to execute this Agreement in that capacity; and
- (iv) the execution and performance by it of this Agreement and each transaction contemplated by this Agreement did not and will not violate in any respect a provision of:
  - (A) a Law binding on it;
  - (B) its constitution or constituent documents; or
  - (C) any other document or agreement which is binding on it.

## 6.5 Transfer in as is condition

Because the Operator will have the opportunity to conduct its own due diligence of the PN Rolling Stock Assets in accordance with clause 4.2, the PN Rolling Stock Assets are transferred to the Operator in an *as is* condition, with all faults or defects (if any), whether or not apparent, subject to the requirement in clause 4.2 that the PN Rolling Stock Assets are delivered in operational working order and condition as at the Transfer Date.



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## 9. Force majeure

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### 9.1 Excuse from performance of obligations

If a party (*Affected Party*) is prevented, hindered or delayed from performing any of its obligations under this Agreement by an Event of Force Majeure, then as long as those circumstances continue, that party shall be excused from performance of such obligation to the extent it is so prevented, hindered or delayed, and the time for performance of such obligation shall be extended accordingly.

### 9.2 Notification

Where the Affected Party suffers from an Event of Force Majeure, it shall immediately notify the other party of its occurrence and its effect or likely effect, and (subject to clause 9.3) use all reasonable endeavours to minimise the effect of the Event of Force Majeure and to bring it to an end.

### 9.3 Industrial action

The Affected Party shall not be obliged to settle any strike or other industrial action, dispute or disturbance of any kind, except on terms reasonably satisfactory to it.

### 9.4 Termination

If an Event of Force Majeure which materially affects a party's ability to perform its obligations under this Agreement:

- (a) continues uninterrupted for a continued period of more than 6 months; or
- (b) occurs over a cumulative period of 12 months in any 24 month period,

then either party may, by notice in writing to the other, terminate this Agreement (but that termination will be without prejudice to the rights of either party accruing as at the date of that termination) and the provisions of clause 12.6 shall apply (with the necessary changes being made).

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## 10. Assignment and Change in Control

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### 10.1 Assignment by Operator

Subject to the provisions of this clause 10, the Operator shall not assign all or any of its rights under this Agreement without the prior written consent of the Director General which consent shall not be unreasonably withheld.

### 10.2 Dealings by Operator

Subject to clause 5.7(a) the Operator may without the prior written consent of the Director General lease, licence, part with or share the possession of, or grant any licence affecting the PN Rolling Stock Assets.

### 10.3 Change in control of Operator

The Operator shall not permit a change in ownership of the Operator without the prior written consent of the Director General. For the purposes of this clause 10.3, a change in ownership of the Operator means:

- (a) a change in shareholding of the Operator or any company which is a holding company of the Operator; or
- (b) any other event occurs such that a change occurs in the control of the Operator or its holding company from that which existed at the date of this Agreement (whether occurring at one time or through a series or succession of share issues or transfers or other transactions); or
- (c) a change or alteration occurs in the corporate structure of the Operator or its holding company;

which results in a person other than the shareholders of the Operator or its holding company as at the date of this Agreement:

- (d) controlling the composition of the board of directors of the Operator;
- (e) controlling the voting power of the board of directors or any class of shareholders of the Operator or both; or
- (f) holding more than one half of the issued share capital (either beneficially or otherwise) of the Operator,

unless the change in ownership is effected by on-market dealings in securities listed on a recognised stock exchange in Australia.

#### **10.4 Director General's consent to change in control**

In respect of a proposed change in ownership of the Operator, within the meaning of clause 10.4, the Director General must not unreasonably withhold its consent and the Director General must not withhold its consent or impose conditions to its consent if:

- (a) the transferee has the financial capability to ensure the Operator can perform the obligations of the Operator under this Agreement;
- (b) the transferee has the technical expertise, resources and abilities which are necessary to ensure the Operator, or subject to clause 5.8, any relevant sub-contractor, can perform effectively the obligations of the Operator under this Agreement;
- (c) the direct or indirect consequences of the change in control do not and will not materially or adversely affect the Operator's (or subject to clause 5.8, any relevant sub-contractor, ability to fulfil its obligations under this Agreement; and
- (d) the transferee obtains all necessary Approvals in order to acquire the shares in the Operator (or subject to clause 5.8, any relevant sub-contractor).

#### **10.5 Assignment by Director General**

The Director General may assign the Director General's rights and benefits under this Agreement at any time to any agency, body or authority within the Federal or New South Wales governments.

## 11. Dispute Resolution

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### 11.1 Dispute resolution procedures

- (a) The parties must use their best endeavors to amicably resolve any Dispute arising between them under this Agreement.
- (b) Subject to paragraph (a) if a Dispute arises out of or relates to this Agreement or the breach, termination, validity or subject matter thereof, the parties agree to follow the procedures set out in this clause 11.

### 11.2 Negotiation

- (a) Within 7 days of a party notifying the other party in writing that a Dispute has arisen under this Agreement, the matter in dispute must be discussed between the parties' Nominated Representatives.
- (b) If the matter is not resolved pursuant to paragraph (a) within 28 days then:
  - (i) in the case of a Dispute concerning a matter of law, either party may refer the Dispute to arbitration in accordance with the procedures set out in clause 11.4; or
  - (ii) in the case of a Dispute concerning any other matter, either party may refer the Dispute for expert determination in accordance with the procedures set out in clause 11.3.

### 11.3 Expert determination

- (a) Within 28 days of the discussion referred to in clause 11.2(a), either party may, by written notice to the other party, call for the matter in dispute to be submitted to a suitably qualified independent expert (*Expert*). The Expert is to be agreed between the parties within 7 days of receipt of the notice calling for expert determination, failing which the Expert shall be nominated by the President of the Law Society of New South Wales (or other agreed party).
- (b) If a party, by written notice to the other party, calls for the submission of the Dispute to an Expert in accordance with paragraph (a), the parties must retain and brief the Expert within 7 days of the Expert being agreed or nominated in accordance with paragraph (a), and the Expert must expeditiously determine the Dispute in such manner as the Expert considers reasonable and notify the parties in writing of his or her determination.
- (c) Any person appointed as an expert will be deemed not to be an arbitrator but an expert and the law relating to arbitration will not apply to the Expert or the dispute or the process by which the Dispute is determined.
- (d) The Expert's determination of the Dispute pursuant to this clause will be final and binding on each of the parties unless either party issues to the other a written notice of dissatisfaction within 21 Business Days of receipt of the Expert's determination.
- (e) For the avoidance of doubt, a party may call for the submission of a Dispute to an Expert pursuant to paragraph (a) but the option to do so is at the discretion of the parties and not an obligation of either party under this Agreement. The parties may choose not to call for the submission of a Dispute to an Expert and pursue such other remedies as they see fit.

































