

Access and Supply of Services Agreement – Appleton Rail Terminal, Port of Melbourne

ACFS Logistics Pty Ltd ACN 603 120 047

Access Holder ACN

Date:

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Parties **ACFS Logistics Pty Ltd** ACN 603 120 047 of Unit 1, 2 Simblist Road,
Port Botany NSW 2036
(RTO)

Access Holder

(Access Holder)

Background

- A.** The RTO provides Open and Non-discriminatory Access to port rail operators at the Appleton Rail Terminal in Port of Melbourne through its container interchange facility..
- B.** The RTO operates a container interchange facility along with an Empty Container Park, which will supply empty containers to the Access Holder as directed by the Shipping Lines engaged by the exporter or the importer. In addition to this, the RTO will also provide transport services of collecting (or delivering) empty containers from any other empty container park as directed by the Access Holder, and deliver (or collect) full containers to any Port Terminal in the Port of Melbourne.
- C.** It is intended that the RTO provide the Services to Access Holder and complies with certain performance standards defined in this agreement.
- D.** This agreement sets out the terms on which the RTO will contract with the Access Holder in accordance with the Port Rail Access Principles.

Provisions

1 Definitions and Interpretation

1.1 Definitions

In this agreement:

Access Holder Representative	means the person nominated, for the time being, by the Access Holder to be its representative in accordance with clause 4.1.
Ad-hoc Access Holder	an Access Holder that has entered into an agreement with the RTO for an Ad-hoc Service.
Allocated Capacity	Windows at the Terminal allocated to an Access Holder by the RTO.
Annual TEU Throughput	the TEU throughput of the Terminal during the last 12 months, calculated on a rolling basis each month.
Approval	any permit, licence, consent, certificate, accreditation, authority, registration, project approval, management plan, performance agreement, environmental audit program, compliance plan or other document or instrument obtained or required to be obtained from a Government Agency and any conditions of anything mentioned above.
Available Capacity	the availability of Windows at the Terminal and capability of providing Services after taking into account requirements to accommodate Access Holders' existing Access Rights and any requirements to reserve Capacity for the prudent operation of the

	Terminal in accordance with all applicable standards and Good Industry Practice.
Body	this agreement except for the Schedules.
Business Day	a day on which banks are open for business in Melbourne, Victoria excluding a Saturday, Sunday or public holiday in that city.
CAP	the Capacity Allocation Protocol contained in Schedule 4 and published by PoM, as amended from time to time as set out in the live link in item 4.1 of Schedule 4.
Capacity	the capability of the Terminal to provide Reference Services (expressed in TEUs), including as increased or expanded in the future as the case may be.
Capacity Expansion Objective	that the Capacity of the Terminal is allocated, managed and expanded efficiently and prudently including in anticipation of sustainable increases in demand, so far as practicable, to avoid Capacity constraints.
Capacity Expansion Principles	<ul style="list-style-type: none"> a) reasonably anticipated demand for additional Capacity is sufficient to support the expansion under the Expansion Plan; b) sufficient capacity is available on relevant rail networks and at the Port of Melbourne to support the increased utilisation of the Terminal allowed by the expansion; and c) the incremental revenue that is anticipated to be generated by the expansion is sufficient to cover the incremental cost of the expansion plus a reasonable commercial return satisfactory to the RTO (acting reasonably), having regard to the business, commercial and regulatory risks for the Terminal development and operation.
Claim	includes a claim, cause of action, notice, demand, action, proceeding, litigation or investigation, however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise and whether involving a third party or a party to this agreement.
Commencement Date	means the date on which this agreement commences specified in Item 3 of Schedule 1 .
Confidential Information	<ul style="list-style-type: none"> a) any and all documents, information and communications provided to, made available to or disclosed to a Party in connection with this agreement (whether in oral, visual, electronic or written form or recorded in any other medium and including information relating to a Party's business or trade secrets and confidential knowhow); b) the terms of this agreement (including the identity of the parties); c) that part of any note, calculation, conclusion, summary or other material derived or produced partly or wholly from or which contains any confidential information described in paragraphs (a) or (b); and d) the terms and conditions or the status of any proposed or completed contractual agreements to be entered into by either Party in relation to this agreement.

Constrained Path Freight Trains	scheduled broad gauge freight Trains operating on some sections of the rail network which are required to operate within strict passenger timetable limitations with little flexibility (which as at the date of this agreement, relate to Trains operating on the South-East rail network).
Container	at any time a freight container (including, without limitation, empty or full) as defined under AS3711.2:2020 Freight Containers – Terminology, as amended and replaced from time to time and which is recognised at the time as a standard container by international stevedoring standards and which is transported from, or is to be transported to, a destination outside of Australia.
Container Interchange Service	providing the capability where containers to/from third parties are efficiently received and dispatched from the Licensed Area, including loading Containers onto and unloading Containers from Trucks.
Control	of an entity includes the power to directly or indirectly: <ul style="list-style-type: none"> a) determine the management or policies of the entity; b) control the membership of the board or other governing body of the entity; or c) control the casting of more than one half of the maximum number of votes that may be cast at a general meeting of the entity.
Controller	has the meaning it has in the <i>Corporations Act</i> .
Corporations Act	the <i>Corporations Act 2001</i> (Cth).
Cost or Costs	all costs, expenses, losses, charges and payments including any fees payable to consultants, agents or contractors, legal fees (on a 'solicitor and own client' or full indemnity basis) and administration costs, whether of an operating or capital or other nature.
Disclose	includes discussion (or any other communication) or disclosure, by whatever means, and Disclosed and Disclosure are to be construed accordingly.
Facility	means the facilities described in Item 5 of Schedule 1 .
Fees	means the fees payable by the Access Holder for the Services as specified in Item 6 of Schedule 1 and further described in Schedule 3 and Error! Reference source not found., where applicable.
Force Majeure Event	means any event or circumstance (or any combination of events or circumstances): <ul style="list-style-type: none"> (a) which is (are) beyond the control of the party purporting to rely upon it (or them) for the purposes of clause 17.1; and (a) which could not have been avoided by the taking of any precaution which might reasonably be expected to have been taken by the party purporting to rely upon it for the purposes of clause 17.1. <p>Notwithstanding the above, the following events and circumstances are not to be treated as Force Majeure Events:</p> <ul style="list-style-type: none"> (a) any weather condition, other than a condition constituting an act of God;

- (b) any breakdown in any plant, machinery, equipment or computer hardware or software;
- (c) any industrial dispute (including strikes) which affects only the party seeking to rely on clause 17.1; and
- (d) any unavailability, non-supply, delayed supply or partial supply of goods (including plant, machinery, equipment or computer hardware or software), services or utilities necessary to enable the party seeking to rely on clause 17.1 to perform its obligations under this agreement.

Fuel Levy

Means the fuel levy calculated in accordance with Schedule 6.

Good Industry Practice

the practices, methods and skills generally expected from a reasonably skilled and experienced operator of an open access rail terminal and which would be expected to result in reliable, safe, economical and efficient performance.

Government Agency

any government or any public, statutory, governmental, semi-governmental, local governmental or judicial body, entity or authority and includes a Minister of the Crown (in any right), the Crown, municipality and any person, body, entity or authority exercising a power under an Act of Parliament.

Healthy Train

a Train arriving at the start time (or within 20 minutes) of its Window and that is configured with a locomotive and number of wagons carrying a number of containers substantially consistent with that Window.

Insolvent

A person is Insolvent if:

- (a) the person is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (b) the person is in liquidation, in provisional liquidation, under administration or wound up or has had a Controller appointed to its property;
- (c) the person is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved;
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of the things described in paragraphs (a), (b) or (c);
- (e) the person is taken (under section 459(F)(1) of the Corporations Act) to have failed to comply with a statutory demand;
- (f) the person is the subject of an event described in section 459(C)(2)(b) or section 585 of the Corporations Act;
- (g) the person is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to any of the things described in paragraphs (a) to (g) happens in

	connection with that person under the Law of any jurisdiction.
GST	means the tax imposed by the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and the related imposition legislation of the Commonwealth, States or Territories.
KPIs	the key performance indicators set out in Schedule 7.
Laws	any statute, regulation, notice, order, rule, subordinate legislation or other instrument or principle enforceable under any statute, regulation, order, rule or subordinate legislation or by a court.
Liabilities	includes all liabilities, losses, damages and Costs, direct or indirect, however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort (including negligence), statute or otherwise including where arising under any Claim.
Licensed Area	has the meaning given in the ROL.
Metro Train	a Train that has a Melbourne metropolitan origin or destination.
Minimum Usage Requirement	65% of Allocated Capacity under an Access Agreement.
Open and Non-Discriminatory Access	has the meaning given in Item 3.1 of Schedule 1 of the Rail Management Agreement a copy of which has been provided to the Access Holder as amended from time to time in accordance with that agreement.
Permitted Purpose	means, in respect of any party, the purpose of the exercise or enforcement of any right or remedy by that party, the performance of any obligation by that party under this agreement, or the bringing or defending of any action or claim for breach of this agreement.
Personnel	of a party means officers, employees, agents and contractors of that party.
Port	<ul style="list-style-type: none"> (a) the area defined as the port of Melbourne in the Port Management Act 1995 (Vic); and (b) any other area owned, controlled or managed by PoM.
Port Rail Access Infrastructure	<ul style="list-style-type: none"> (a) the Port Rail Network; (b) the Terminal and other port rail terminals at the Port; and (c) other infrastructure located within the boundaries of the Port that is used in connection with the provision of Services, including: <ul style="list-style-type: none"> (i) rail infrastructure; (ii) loading and unloading facilities; (iii) signalling and communications infrastructure; and (iv) container interchange facilities.
Port Rail Access Principles	has the meaning given in Item 1 of Schedule 1 of the Rail Management Agreement a copy of which has been provided to the Access Holder, as amended from time to time in accordance with that agreement.

Port Rail Access System	the system established pursuant to the Port Rail Access Principles to coordinate access to, and operation of, the Port Rail Access Infrastructure and the interfaces between the elements of the Port Rail Access Infrastructure, which may in the future include the Port Rail Manager coordinating Rail Paths across port rail terminal operators.
Port Rail Manager	PoM or its subcontractor responsible for management of the Port Rail Network, as notified by PoM to the RTO from time to time (which at the date of this agreement is Australian Rail Track Corporation Limited).
Rail Management Agreement	Means the rail management agreement entered into by the Port of Melbourne Operations Pty Ltd as trustee for the Port of Melbourne Unit Trust and ACFS.
RTO Representative	means the person nominated, for the time being, by the RTO to be its representative in accordance with clause 4.2.
Port Rail Network	the rail infrastructure within the boundaries of the Port of Melbourne (excluding any rail infrastructure within the boundaries of a tenant's lease or licence).
Port Rail Operating Protocols	the business rules for the use of the Port Rail Network from time to time which, as at the date of this agreement, are managed on a day to day basis by the Port Rail Manager on behalf of PoM, and may in the future be managed by PoM or a replacement manager.
Rail Infrastructure Management Accreditation	accreditation as a rail infrastructure manager under the Rail Safety National Law.
Rail Mode Shift Target	the State's objective that, within 5 years after the Commencement Date, no less than 10% of Containers with an international or Melbourne metropolitan origin are transported by rail between the Port of Melbourne and Melbourne metropolitan intermodal terminals.
Rail National Safety Law	the Rail Safety National Law (Victoria) as in force under the <i>Rail Safety Law Application Act 2013</i> (Vic).
Rail Path	a right to access the Port Rail Network or any rail infrastructure connected directly or indirectly to the Port Rail Network (as the context requires).
Ramp Up Period	the first 6 months of a Scheduled Service while the Access Holder is building demand, which may be extended for up to a further 3 months by mutual agreement of the RTO and the Access Holder.
Reference Prices	the standard pricing for the Reference Services set and published by the RTO in accordance with this agreement from time to time.
Reference Services	<ul style="list-style-type: none"> (a) allocation and access management of train services (arrival and departure) at the Terminal; (b) loading Containers onto and unloading Containers from Trains; (c) Container Interchange Services;

	(d) any other Reference Services introduced by the RTO from time to time, including empty container services where the RTO provides such services on the Licensed Area.
Regional Train	a Train that has an origin or destination outside of metropolitan Melbourne.
Related Body Corporate	has the meaning given in the Corporations Act.
ROL or Rail Operating Licence	the rail operating licence from PoM to the RTO.
Rolling Stock	any vehicle that operates on or uses a railway track including a locomotive, light inspection vehicle, road/rail vehicle, trolley, carriage, diesel multiple unit and wagon (but does not include a vehicle designed to operate both on and off a railway track when the vehicle is not operating on a railway track).
RTO's Associates	each of: <ul style="list-style-type: none"> (a) the RTO's officers, employees, agents, contractors, consultants; and (b) the RTO's invitees, sub-licensees, customers and visitors to the Terminal or the Licensed Area.
Sites	means the sites specified in Item 2 of Schedule 1 .
Schedule	a schedule of allocated and available Windows at the Terminal published by the RTO, which includes at a minimum: <ul style="list-style-type: none"> (c) all Windows potentially available to an Access Seeker or Access Holder within the Terminal's operating hours; (d) details of any Windows that are already subject to an Access Agreement, including at a minimum, indication of whether: <ul style="list-style-type: none"> (i) the agreed turn-around time exceeds three hours; and (ii) the relevant Access Agreement is due to expire within the next 12 months (which must be assessed each month on a rolling basis).
Scheduled Access Holder	an Access Holder that has entered into an agreement with the RTO for a Scheduled Service.
Scheduled Service	Access to Available Capacity on a scheduled basis.
Services	the Services listed in Schedule 2
Short Term Storage Allowance	a reasonable period of time (which must be at least 24 hours) during which the RTO must provide storage in conjunction with the supply of a Reference Service, after which time the RTO may offer a Storage Service.
State	the State of Victoria through the Department of Transport.
Storage Services	storage related services offered to port users at the Licensed Area, including storage and pre-positioning of Containers for a period which exceeds the Short Term Storage Allowance.
TAA	a terminal access arrangement required to be published by the RTO.
Term	the period starting on the Commencement Date and ending on the Expiry Date.

Terminal	Appleton Rail Terminal at 23-57 Appleton Dock Road, West Melbourne
Terminal Operating Protocol	Means the Terminal Operating Protocol set out in Schedule 4 of the Rail Management Agreement, a copy of which has been provided to the Access Holder.
TEU	twenty-foot equivalent unit.
Third Party	a person other than PoM or the RTO.
TOP	a terminal operating protocol required to be published by the RTO.
Train	several units of Rolling Stock coupled together to operate as a single unit.
Unhealthy Train	a Train that is not a Healthy Train.
Voluntary Reduction	a voluntarily relinquishment by an Access Holder of any Allocated Capacity for a specified period of time for reallocation by the RTO.
Window	an access slot at the Terminal, being a defined time of arrival at the Terminal for servicing.
Work in Progress	means all materials, information and technology of any nature and in any form created in connection with the RTO's provision of the Services.

1.2 Interpretation

In this agreement:

- (a) the schedules and annexures to it are an integral part of it and any reference to this agreement includes a reference to the schedules and annexures;
- (b) the headings in it are used for ease of reference only and are not to be taken into account for the purposes of construing it;
- (c) any reference to it or any other document or instrument includes any variation or replacement of any of them;
- (d) any reference to clauses, and schedules and annexures are references to the clauses, and the schedules and the annexures contained in it;
- (e) the words **including** and **include** are to be construed without limitation;
- (f) reference to a **person** may be construed to include any individual, firm, company or other body corporate, government agency, unincorporated association or joint venture or association or partnership (whether (by reason of incorporation or otherwise) or not being a separate legal entity);
- (g) reference to a **party** may be construed to include reference to any executor, administrator, successor, substitute (including any person taking by notation) or permitted assignee of it;
- (h) a party is **affected** by a Force Majeure Event if that party is prevented from performing the relevant obligation by that Force Majeure Event;
- (i) any reference to legislation, to a provision in legislation or to a definition or meaning set out in legislation, includes any regulation and statutory instruments made under it and any amendments, consolidations, modifications, re-enactment or replacement of any of them; and

- (j) a derivative term of any defined or interpreted word or phrase will be construed in accordance with the relevant definition or interpretation provision.

2 Term

2.1 Provision of Services

This agreement commences on the Commencement Date and expires on the Expiry Date, unless terminated earlier in accordance with the terms of this agreement.

2.2 Option

The Initial Term may be extended for a further 12 months if the Access Holder provides the RTO notice in writing no later than three (3) months prior to the Expiry Date, that it wishes to extend the agreement by a further 12 months from the Expiry Date.

2.3 Interdependence

If either of the Rail Operating Licence or the Related Lease are terminated between the RTO and Port of Melbourne Operations Pty Ltd as trustee for the Port of Melbourne Unit Trust, this agreement will be taken to have been terminated.

3 Services and the RTO's principal obligations

3.1 Provision of Services

On and from the Commencement Date, the RTO must provide the Services in accordance with this agreement.

3.2 RTO's principal obligations

The RTO must:

- (a) provide all labour, materials, plant and equipment necessary to provide the Services;
- (b) perform all Services:
 - (i) at the locations within the Facility specified in **Schedule 2**;
 - (ii) at the times specified in **Schedule 2**.
- (c) provide the Services:
 - (i) in a professional and competent manner;
 - (ii) efficiently, with due care and skill and to the best of its knowledge and expertise;
 - (iii) in accordance with all Laws;
 - (iv) without breaching any obligation to any other person; and
 - (v) in accordance with all relevant Australian Standards or industry standards and
- (d) ensure that whenever working on a Sites, the RTO's Personnel:
 - (i) are suitably attired with appropriate clothing for the Services to be performed;
 - (ii) are adequately trained and accredited in all aspects of vehicle surveys and inspection;

- (iii) have the requisite qualifications, skill, competence, knowledge and experience to provide the Services and will be appropriately licensed and accredited and certified and will maintain all licences, accreditations, certifications and approvals required for the provision of the Services;
- (iv) are supervised in the performance of the function for which that person was engaged by a person who has the requisite qualifications to supervise that person; and
- (v) take, and ensure its Personnel take, all reasonable care while entering, leaving and while on or about the Sites.

3.3 Acknowledgements regarding the CAP

The parties acknowledge and agree that the RTO must comply with, and that Access under this agreement will be provided subject to, the CAP (as amended from time to time) and any terms of this agreement taken from the CAP will be deemed to have their amended form.

4 Representatives

4.1 The Access Holder Representative

The Access Holder must nominate, and notify the RTO as soon as reasonably possible of the name and contact details of the person who will be its representative for any issues relating to the Services.

4.2 RTO Representative

The RTO must nominate, and notify the Access Holder as soon as reasonably possible of the name and contact details of the person who will be its representative for any issues relating to the Services.

5 Access

5.1 General principles of Access

The RTO will grant the Access Holder non-exclusive Access at the Terminal and will provide the Services, Open and Non-Discriminatory Access in accordance with the Port Rail Access Principles and the CAP.

5.2 Non-utilisation

- (a) Subject to the RTO complying with Open and Non-Discriminatory Access, excepting Access Agreements during the Ramp Up Period of that Access Agreement, and in order to encourage the optimum use of the Terminal, the RTO must withdraw Capacity allocated to an Access Holder, and reallocate that Capacity to another Access Seeker (in accordance with the CAP), where the Access Seeker consents in writing (such consent not to be unreasonably withheld, denied or delayed).
- (b) The Access Seeker will be considered to have unreasonably withheld or denied its consent and may have its Capacity reallocated involuntarily by the RTO where any of the following factors apply:
 - (i) the Access Holder does not satisfy, over any 3 month period, its Minimum Usage Requirement and the RTO is:

- (A) satisfied (acting reasonably) that:
 - I) the Access Holder does not have a reasonable justification for failing to meet its Minimum Usage Requirement; and
 - II) it is commercially feasible to re-allocate the Capacity to another Access Seeker such that the Capacity will be more highly utilised; or
- (B) directed to withdraw that Capacity by the Port Rail Manager;
- (ii) there are repeated breaches of safety requirements of the Access Agreement, relevant legislation, or a standard specified in the Terminal Operating Protocol by the Access Holder; or
- (iii) the Access Holder no longer holds appropriate on and off port Rail Paths that are aligned with the proposed Window.
- (c) Where Capacity is withdrawn due to a third party causing a Rail Path to be lost:
 - (i) the Access Holder may request an alternative Window from the RTO; and
 - (ii) if requested, the RTO must negotiate in good faith with the RTO under the process and terms of this CAP to identify a suitable alternative Window and must use best endeavours to allocate that Window to the Access Holder.
- (d) The RTO must notify the Access Holder in writing of its intention to withdraw the Allocated Capacity under (b) above, and this notice must:
 - (i) require the Access Holder to demonstrate its ability to utilise, or fully utilise that Access Holder's allocated Windows or otherwise to show cause in writing why the RTO should not require the surrender of the Access Holder's allocated Windows the subject of the notice;
 - (ii) state the date by which the Access Holder is required to provide a written response to the RTO; and
 - (iii) state that if the Access Holder does not show reasonable cause in writing by the stated date, the RTO may by written notice to the Access Holder require the surrender of the Access Holder's allocated Windows that is the subject of the notice.
- (e) The RTO will provide the Access Holder with 10 Business Days to demonstrate its ability to utilise, or fully utilise that Allocated Capacity or otherwise to show cause in writing why the RTO should not withdraw the Allocated Capacity the subject of the notice. In considering any response from the Access Holder to a notice given by the RTO under this provision, the RTO will act reasonably.

5.3 Breach

- (a) The RTO may permanently vary or withdraw the Allocated Capacity of an Access Holder following breach by the Access Holder of relevant legislation, or an industry or the RTO standard, or the Terminal Operating Protocol or a requirement relating to the operation or safety requirements applicable to the Terminal.
- (b) The RTO must notify the Access Holder in writing of its intention to permanently vary or withdraw the Allocated Capacity, which notice must state:
 - (i) the alleged breach;
 - (ii) that the Access Holder is required to show cause in writing why the RTO should not require the permanent variation or surrender of the Access Holder's allocated Windows the subject of the alleged breach;

- (iii) the date by which the Access Holder is required to show cause; and
 - (iv) that if the Access Holder does not show reasonable cause by the stated date, the RTO may by written notice to the Access Holder permanently vary or require the surrender of the Access Holder's allocated Windows the subject of the notice.
- (c) The RTO will provide the Access Holder with 10 Business Days to show reasonable cause why the RTO should not vary or withdraw Capacity as specified in the notice.
- (d) Where such breach creates a risk of injury to persons or damage to property, including damage to equipment or infrastructure at the Terminal, the RTO may withdraw the Access Holder's allocated Windows immediately until the Access Holder has addressed the risk to the reasonable satisfaction of the RTO acting reasonably.

6 Access Holder acknowledgements

6.1 Allocation of Windows

The Access Holder acknowledges that with respect to Windows to be allocated to Access Holders, the RTO will only allocate a Window to an Access Holder if the Access Holder is able to demonstrate that it holds, or has the benefit of, Rail Paths that will, if properly exercised by the Access Holder, enable the Access Holder's Train to enter and depart the Terminal in accordance with the proposed Window;

6.2 Access to the Port Rail Network

The parties acknowledge and agree that:

- (a) The Port Rail Manager will not provide Access to the Port Rail Network unless Access Holders comply with the following principles:
 - (i) not hoarding off-port Rail Paths, complying with any off-port use it or lose it obligations, including voluntarily giving up off-port Rail Paths if they are not being productively used and not gaming off-port rail (Off-port Access Principles);
 - (ii) holding all appropriate licences and accreditations, including any necessary interface agreements; and
 - (iii) negotiating a relevant Window at a port rail terminal that aligns with a corresponding off-port rail path.
- (b) Where an Access Holder has been provided with access to the Port Rail Network, this access may be revoked where the Port Rail Manager (at its absolute discretion) considers that the Off-port Access Principles have been breached.
- (c) Refusal or revocation of access by the Port Rail Manager will be regarded by the RTO as a termination event.

6.3 Constrained Path Freight Train

The parties acknowledge and agree that:

- (a) State policy is currently that passenger services have priority and that on time passenger performance to timetables is a State imperative;
- (b) provided that the State gives PoM and the RTO reasonable prior notice of the timetable limitations of Constrained Path Freight Trains (**Priority**

Notification), the RTO will use reasonable endeavours to accommodate Windows for Constrained Path Freight Train services within the timetable limitations applicable to those trains;

- (c) for the purposes of clause (b) only, reasonable endeavours includes negotiating any necessary amendments to an existing Access Agreement with the Access Holder, but only where any necessary amendments are commercially acceptable to the RTO (acting reasonably) and the relevant Access Holder; and
- (d) PoM and the RTO will work cooperatively to consult with the State in relation to any potential Priority Notification, including in relation to the impact of a Priority Notification on the RTO's operations and the feasibility of managing any potential timetable changes.

7 Access

7.1 Principles of Access with Access Holders

The RTO acknowledges as follows:

- (a) allocation of Windows is to be made on the basis of Open and Non-discriminatory Access;
- (b) If Windows are not used or are underutilised:
 - (i) Windows may be reallocated or withdrawn; or
 - (ii) if Windows are not reallocated, the Access Holder may initiate a dispute with the RTO;
- (c) a commitment by the RTO to achieve a minimum standard as agreed with the Access Seeker; and
- (d) if a Train becomes an Unhealthy Train due to a delay caused by:
 - (i) an act or omission of the RTO, additional costs must not be charged and the RTO must service the Access Holder's Train to make up time; or
 - (ii) a reason other than an act or omission of the RTO, the RTO may recover additional reasonable costs of servicing the Access Holder's Train to make up time, and the RTO must service the Access Holder's Train to make up time;
- (e) The RTO must use best endeavours to maximise throughput of the Terminal during operating hours, including turning around Trains as efficiently as possible and catching up on any delays to the Schedule as soon as reasonably practicable (regardless of the cause of the delay).

8 Sites and separate contractors

8.1 Sites

The Access Holder acknowledges that the Sites forms part of the Facility which will continue to operate during the Term of this agreement. In particular, the Access Holder must:

- (a) ensure that its activities and the activities of subcontractors and other persons within the Access Holder's control do not materially interfere with the operation of the Facility except as authorised by the RTO in writing;

- (b) ensure that its activities and the activities of subcontractors and other persons within the Access Holder's control do not materially interfere with the activities of businesses or persons occupying land adjacent to or in the vicinity of the Sites or within the Facility;
- (c) maintain safe access to the Facility for the RTO, its employees and other persons requiring access to the Facility;
- (d) minimise nuisance to occupants and users of the Facility, to ensure their safety and comfort, and to ensure that the Access Holder's activities do not place the RTO in breach of its obligations under the relevant workplace health and safety legislation;
- (e) where appropriate, protect the occupants and users of the Facility against weather, dust, dirt, water and other nuisance by temporary hoardings and the like; and
- (f) maintain fire egress at all times in accordance with the relevant building codes and fire safety law.

8.2 Separate contractors

- (a) The RTO acknowledges that the Access Holder has entered into and may enter into contracts with separate contractors within the Facility on or near the Sites. In carrying out the Services the RTO must:
 - (i) permit separate contractors to carry out their work;
 - (ii) fully co-operate with separate contractors;
 - (iii) carefully co-ordinate and interface the Services with the work or services carried out or to be carried out by separate contractors; and
 - (iv) carry out the Services so as to avoid interfering with, disrupting or delaying the work of separate contractors.
- (b) Without limiting paragraph (a), the RTO must give access to the Sites, as reasonably required, to any separate contractor engaged by the Access Holder to carry out certain work on the Sites (execution of which is not included in this agreement) concurrently with the execution by the RTO of the Services, provided that the RTO has received reasonable prior notice.
- (c) the Access Holder must ensure that any separate contractor is obliged to comply with the reasonable site requirements, instructions and procedures of the RTO including as to matters concerning industrial relations, site safety, noise levels, insurance and hours of working.

9 Key Performance Indicators

9.1 Obligation to achieve KPIs

- (a) The RTO must use best endeavours to achieve each KPI, and for the purpose of this agreement, achieving a KPI means that, for that KPI, the relevant event must occur, or must not occur (as applicable) within the frequency and over the timeframe specified for that KPI in Schedule Schedule 6.

9.2 Failure to achieve KPIs

- (a) If the RTO does not achieve one or more of the KPIs, the Access Holder may, acting reasonably, require further information from the RTO relating to any or all of the failed KPIs, or the cause of such a failure, and the RTO must promptly comply with that request.

- (b) The Access Holder may also, in addition to seeking further information under clause 9.2(a), issue a notice to the RTO which requires the RTO to issue a plan in respect of any or all of the failed KPIs.
- (c) The RTO must provide to the Access Holder a plan within 21 days of receipt of a notice under clause 9.2(b) which sets out in a reasonable level of detail the steps that the RTO is going to take, and the timeframes in which it is going to take them, to ensure that the failed KPIs are not failed in the future.
- (d) The Access Holder may, acting reasonably, request the RTO make amendments to the plan as provided under clause 9.2(c), and the RTO must comply with that request and submit an amended plan to the Access Holder within 7 days of that request, and this clause 9.2(d) applies again.
- (e) Once the Access Holder is satisfied with the plan provided under clause 9.2(d), it must give written notice to the RTO to that effect.
- (f) The RTO must act in good faith to implement the plan that is the subject of the Access Holder's notice under clause 9.2(e) and must report to PoM on its progress in doing so in accordance with the Access Holder's reasonable requirements.

10 Payment

10.1 Payment

The RTO must:

- (a) invoice the Access Holder for an aggregate amount equal to the Fees and the Fuel Levy payable under this agreement;
- (b) issue invoices weekly (unless the Access Holder specifies otherwise);
- (c) ensure that each invoice:
 - (i) identifies the identification number of this agreement and the Services to which the invoice relates;
 - (ii) identifies the the Access Holder Representative; and
 - (iii) identifies any other information that may reasonably be required by the Access Holder from time to time.

10.2 Timing of payment

Subject to clauses 10.3, the Access Holder must pay the RTO's invoices issued under clause 10.1 within 30 days from the invoice date.

10.3 Dispute of payment

If the Access Holder disputes any amount purportedly owed by it to the RTO under this agreement (including any invoices rendered pursuant to clause 10.1) the Access Holder must nevertheless pay the amount (if any) which is not disputed and notify the Access Holder of the amount in dispute and the reasons for disputing it.

11 Taxation and GST

11.1 Definitions and interpretation

- (a) Except where the context suggests otherwise, terms used in this clause 11 have the meanings ascribed to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended from time to time).
- (b) Any part or progressive or periodic component 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 11.
- (c) Any consideration that is 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 11.
- (d) Unless stated otherwise, any consideration expressed in, or in connection with, the Contract is exclusive of GST.

11.2 GST

- (a) If a party is required under this agreement to reimburse or pay another party an amount calculated by reference to a cost, expense, or amount paid or incurred by that other party, the reimbursement or payment will be limited to the total cost, expense or amount less the amount of any input tax credit entitlement arising in respect of any acquisition to which that cost, expense or amount relates.
- (b) If GST is payable on a supply made by a party (referred to in this clause 11 as the **“Supplier”**) under or in connection with this agreement, then 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 on the later of:
 - (i) the date that any other consideration is to be first provided for that supply; or
 - (ii) 5 days after the Supplier has provided the Recipient with a valid tax invoice for the relevant supply.
- (c) If the GST payable on a supply made by the Supplier (within the meaning in subclause ((b)) under or in connection with this agreement varies from the additional amount paid by the Recipient under subclause ((b)) such that a further amount of GST is payable in relation to the supply or a refund or credit of GST is obtained in relation to the supply, 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 payment, credit or refund under this subclause ((c)) is deemed to be a payment, credit or refund of the additional amount payable under subclause ((b)).

12 Limitation of liability

12.1 Limitation of liability – consequential loss

Subject to clause 12.3, each party agrees that neither party will be liable to the other party in respect of any breach of this agreement for indirect or consequential loss.

12.2 Limitation of liability – freight damage

Subject to clause 12.3, each party agrees that neither party will be liable to the other party in respect of any loss or damage to freight contained in a Container.

12.3 Exclusions

Nothing in this agreement excludes or limits liability of a party:

- (a) if it deliberately breaches any provision of this agreement, commits wilful misconduct or is grossly negligent;
- (b) under any provision of this agreement which provides for that party to make a payment to the other party;
- (c) if it or any of its agents is negligent and such negligence causes death or personal injury; or
- (d) in respect of any loss or damage which is recoverable under a relevant insurance policy required to be taken out and maintained under this agreement.

13 Insurance

13.1 Insurance

The RTO must effect and maintain with an insurer with an S&P rating of at least A, at its cost:

- (a) public liability insurance for an amount specified in the table set out in **Schedule 1** (or if no amount is specified \$20 million) for any one occurrence or series of occurrences arising from any one event and in the aggregate in respect of any personal injury or death and damage, destruction or loss of any real or personal property;
- (b) professional indemnity insurance for an amount specified in the table set out in **Schedule 1** for any one occurrence or series of occurrences arising from any one event and in the aggregate;
- (c) workers' compensation insurance as required by Law; and
- (d) any other insurances required by Law.

13.2 Period of Insurance

The insurances referred to in clause 13.1 must be effected and maintained:

- (a) in respect of professional indemnity insurance, for the Term and for a period of 6 years after the Term; and
- (b) in respect of all other insurances, for the Term.

13.3 Certificate of currency

The RTO must, upon receipt of a reasonable request from the Access Holder, provide certificates of currency from the relevant insurer for each policy of insurance required pursuant to this clause 13.2 and a statement under applicable workers compensation legislation or to the reasonable satisfaction of the Access Holder as to payment of workers compensation premiums.

14 Incidents

- (a) The Access Holder must notify the RTO as soon as reasonably practicable after it becomes aware of an obstruction or any incident that may impact the Terminal.
- (b) The RTO must notify the Access Holder as soon as reasonably practicable after it becomes aware of all incidents involving the Access Holder's rolling stock.

- (c) The RTO will be responsible for the overall coordination and management of the response to an incident, so that full restoration is effected as soon as practicable. Both parties will use reasonable endeavours to ensure that disruption of the Access Rights and Services is minimised.
- (d) Each party agrees to co-operate with any investigation of an incident and agrees to make available records and personnel, as relevant to the investigation. In the event an incident occurs at the Terminal or during the provision of the Services by the RTO to the Access Holder, the RTO will be entitled to take such action as it deems necessary to overcome and alleviate the cause and consequences of the incident and the Access Holder must assist the RTO.
- (e) The RTO will provide to the Access Holder all information necessary for the safe operation of Access Holder's Trains within the Terminal.
- (f) The Access Holder must also ensure that all rolling stock, plant and equipment admitted to the Terminal is safe and is operated in a safe manner; and comply with all instructions given by the RTO from time to time to protect the Terminal, property and individuals.

15 Termination

15.1 Termination by a party

This agreement may be terminated by a party, by notice to the other party:

- (a) if the other party breaches any provision of this agreement and does not remedy that breach within sixty (60) days after receiving notice to do so; or
- (b) if the other party is Insolvent.

15.2 Termination by the RTO

This agreement may be terminated by the RTO, by notice to the Access Holder:

- (a) If the RMA is terminated for any reason by either the PoM or the RTO; or
- (b) if the Port Rail Manager refuse or revokes access.

15.3 Effect of termination

Termination of this agreement will not affect:

- (a) the rights, powers, remedies, obligations, duties and Liabilities of either party under this agreement that have accrued to the date of termination, which rights, powers, remedies, obligations, duties and Liabilities will continue to be enforceable; or
- (b) the Related Lease.

15.4 RTO's obligations on termination

On termination, the RTO must stop providing the Services and minimise its loss.

16 Dispute resolution

16.1 Notice of dispute

If a dispute arises between the parties in relation to this agreement, a party may notify the other party of the dispute giving details of the nature of the dispute.

16.2 Meeting of representatives

Within seven days (or such longer period as may be agreed between the parties) after a notice of dispute has been given under clause 16.1, the RTO Representative and the the Access Holder Representative must meet and attempt to resolve the dispute.

16.3 Appointment of delegate

If the RTO Representative and the Access Holder Representative do not resolve the dispute, within 14 days (or such longer period as may be agreed between the parties) after a notice of dispute has been given under clause 16.1, the Chief Executive Officers of each party must each appoint a delegate to attempt to resolve the dispute.

16.4 Mediation

If those delegates do not resolve the dispute under clause 16.3 within 28 days after a notice of dispute has been given under clause 16.1 (or such longer period as may be agreed between the parties), the parties must refer the dispute for mediation by a mediator appointed by the parties. If the parties do not agree on a mediator within 35 days after a notice of dispute has been given under clause 16.1, the mediator will be a person appointed by the President, for the time being, of the Law Institute of Victoria.

16.5 Court proceedings

If the dispute is not resolved under clause 16.4 within 30 days (or such longer period as may be agreed between the parties) after the mediator is appointed, either party may initiate proceedings in a court. Until such time, neither party may initiate court proceedings except for urgent interlocutory applications.

16.6 Costs

Each party must bear its own costs of complying with this clause 16 and the cost of the mediator will be shared equally.

17 Matters beyond the control of the parties

17.1 Force Majeure

Subject to this clause, if by reason of a Force Majeure Event, a party is affected in the performance of any obligation under this agreement, that party will not be liable under this agreement to the other party for not performing, or for the manner of its performance of, such obligation to the extent to which, and for the period of time during which, that party is so affected.

17.2 No release or discharge

No Force Majeure Event will release or discharge the party affected by it from the obligation to perform the obligation which is so affected which obligation will, subject to clause 17.1, continue.

17.3 Obligations of affected party

A party affected by a Force Majeure Event must (from the time it first became aware of the Force Majeure Event) use its best endeavours:

- (a) to mitigate and overcome the effect of the Force Majeure Event; and
- (b) to perform each obligation affected by the Force Majeure Event in such other way as may be possible.

17.4 Notification of Force Majeure

A party affected by a Force Majeure Event must as soon as possible following its becoming affected by the Force Majeure Event, notify the other party that it has been so affected. Every such notice must specify:

- (a) the nature of the Force Majeure Event;
- (b) to the extent assessable, the expected duration of the Force Majeure Event and (if different) the period of time which the party serving the notice expects to rely on clause 17.1;
- (c) the obligations affected by the Force Majeure Event and the extent to which the performance of them is affected thereby, and the steps being taken (or to be taken) to mitigate and overcome the effects of the Force Majeure Event pursuant to clause 17.3(a); and
- (d) the manner in which it is proposed to seek to perform the obligations affected by the Force Majeure Event pursuant to clause 17.3(b).

18 Assignment

18.1 No assignment

Neither party may assign, transfer, charge or deal in any other way with the benefit of any right (or agree to do so), or create or declare (or agree to do so), or allow to arise, any trust in respect of the benefit of any right conferred by or arising under this agreement without the prior consent of the other.

19 Subcontractors

19.1 Subcontractors

RTO must ensure that each subcontractor appointed by it complies with the provisions of this agreement to the extent required to enable that party to perform its obligations in accordance with this agreement.

19.2 RTO remains liable

The RTO will remain primarily liable for the performance of its subcontractors.

20 Relationship

Nothing in this agreement constitutes any relationship of employer and employee, principal and agent or partnership between the Access Holder and the RTO or the Access Holder and any of the RTO's Personnel.

21 Variation and waiver

21.1 Variation

The terms of this agreement may be varied only by written agreement between the parties.

21.2 Waiver

No right or remedy under or arising from this agreement may be waived other than in writing executed by all the parties. Accordingly, any non-exercise or partial exercise of, or any delay in exercising any right or remedy does not constitute a waiver of that right or remedy.

22 Notices

22.1 Notices

Other than as contemplated by clause 22.2, every notice, approval, consent or other communication in connection with this agreement:

- (a) must be in writing and signed by a duly authorised person;
- (b) must be marked for the attention of:
 - (i) the Senior Legal Counsel, in respect of the Access Holder; and
 - (ii) the person described in Item 1 of **Schedule 1** in respect of the RTO;
- (c) must be left at the address of the addressee, or sent by prepaid ordinary post to the address of the addressee or sent by facsimile to the facsimile number of the addressee which is specified in this clause or if the addressee notifies another address or facsimile number then to that address or facsimile number.

The address and facsimile number of each party is:

Access Holder

The details described in Item 1 of **Schedule 1**.

RTO

The details described in Item 1 of **Schedule 1**.

22.2 Notice to a representative

Where in this agreement a notice, approval, consent or other communication is to be sent to the Access Holder Representative or the Customer Representative, it must be in writing and sent to that person at the address or facsimile number notified for the time being by the addressee to the sender.

22.3 Time of receipt

A notice, approval, consent or other communication takes effect from the time it is received, unless a later time is specified in it.

22.4 Deemed receipt

Subject to clause 22.3, a letter or facsimile is taken to be received:

- (a) in the case of a posted letter, on the second day after posting; and
- (b) in the case of facsimile, on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.

23 Further actions

Each party must:

- (a) use its best efforts to do all things necessary or desirable to give full effect to this agreement; and
- (b) refrain from doing anything that might hinder performance of this agreement.

24 Counterparts

The Contract may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

25 Costs, expense, stamp duty

Each party must pay its own costs and expenses in relation to the negotiation, preparation, execution, carrying into effect and enforcement of this agreement. the RTO must pay any stamp duty payable in respect of this agreement.

26 Governing law

This agreement and the transactions contemplated by this agreement are governed by the law in force in the jurisdiction described in Item 11 of **Schedule 1**, or, if no jurisdiction is described, Victoria and the parties submit to the non-exclusive jurisdiction of the courts of that jurisdiction and all courts competent to hear appeals from the courts of that jurisdiction in respect of all proceedings arising in connection with this agreement.

27 Entire agreement

This agreement constitutes the entire agreement of the parties about its subject matter and any previous agreement, understanding and negotiation on that subject matter cease to have any effect.

Schedule 1 - Agreement details

Item 1	Party contact details	RTO: ACFS Logistics Pty Ltd ACN 603 120 047 of Unit 1, 2 Simblist Road, Port Botany NSW 2036 Access Holder:
Item 2	Sites	Appleton Rail Terminal at 23-57 Appleton Dock Road, West Melbourne
Item 3	Commencement Date	TBU
Item 4	Term	TBU
Item 5	Facility	Appleton Rail Terminal at 23-57 Appleton Dock Road, West Melbourne
Item 6	Fees	See Schedule 3.
Item 7	Defects Liability Period	Not applicable.
Item 8	Pre-existing material	Not applicable.
Item 9	Public liability insurance	\$20 million
Item 10	Professional indemnity insurance	Not required.
Item 11	Governing law	Victoria

Schedule 2 - Services Schedule

Services provided to the Access Holder:

2.1 Rail Terminal Access

- provision of access by a Train into the Terminal;
 - allocation of the Train to a track for unloading and loading; and
 - facilitating the departure of a Train from the Terminal.
-

2.2 Rail Terminal Loading and Unloading Service

2.2.1 Full containers:

- unloading / loading of containers from / on to wagons on to / off the ground or an internal transfer vehicle in the Terminal;
 - internal transfer of containers within the Terminal;
 - loading / unloading of containers from / to the ground on to / off a truck;
 - 48 hour free container storage within the Terminal area including aggregation for further transport, if the vessel is currently receiving / from gate in date;
 - 24 hour free container storage for reefers within the Terminal area including aggregation for further transport, if the vessel is currently receiving / from the gate in date; and
 - Storage charges apply if an export is delivered to the RTO but the vessel is currently not receiving.
-

2.2.2 Empty containers:

- Unloading / loading of containers from / on to a truck on to / off the ground;
 - internal transfer of containers within the Terminal;
 - loading / unloading of containers from / off the ground or storage area to / off Train wagons; and
 - 24 hour container storage within the Terminal area including aggregation for loading on to Train wagons.
-

Schedule 3– Fees

DRAFT

Schedule 4 - Capacity Allocation Protocol

4.1 Link to live CAP

To be published

4.2 Procedure for the allocation of capacity

- (a) On receipt of an Access Request, the RTO must, acting reasonably, make an assessment as to whether there is sufficient Available Capacity at the Terminal to meet the Access Seeker's request, taking into account the following considerations:
 - (1) whether the Access Seeker's proposed Window is within the operating hours of the terminal;
 - (2) whether the Access Seeker's proposed Window is unutilised, including:
 - (3) in the case of a request for:
 - (A) a Scheduled Service, the proposed Window is not already allocated to an existing Scheduled Service; or
 - (B) an Ad-hoc Service, the proposed Window is not already allocated to an existing Scheduled Service or Ad-hoc Service;
 - (4) if the proposed Window is already allocated to an existing Service but a suitable Window can be made available by:
 - (A) varying the relevant Service in accordance with the terms of this CAP; or
 - (B) achieving a faster turnaround time than is required by the Access Agreement for the relevant Service;
 - (5) any requirements to reserve Capacity for the prudent operation of the Terminal in accordance with all applicable standards and good industry practice.
- (b) The RTO must provide Access to the Access Seeker in accordance with the Access Seekers proposed Window if:
 - (1) the RTO determines in accordance with clause 4.1 that there is sufficient Available Capacity;
 - (2) the Access Seeker holds appropriate on and off port Rail Paths that are aligned with the proposed Window; and
 - (3) the Access Seeker has accepted, and complied with, the terms of the TOP.
- (c) The RTO must not allocate a Window to an Access Seeker where the Access Seeker does not hold appropriate on and off port Rail Paths that are aligned with the proposed Window.
- (d) If the RTO, acting reasonably, determines that there is insufficient Available Capacity to satisfy an Access Request it must:
 - (1) make an assessment of whether part of the Access Request can be satisfied by the Available Capacity (and if so, offer to satisfy that part of the Access Request); and
 - (2) provide a written explanation to the Access Seeker as to why the application cannot be satisfied in full (including, in the case of a request for a Scheduled Service, providing information in relation to any potential expansions that might satisfy the Access Request).

4.3 Rail constraints

- (e) The RTO must consult with the Port Rail Manager in the process of assessing and allocating Available Capacity and, to the extent that any Rail Path constraints impact Available Capacity, the RTO must use its best endeavours to coordinate with the Port Rail Manager to address the constraints.
- (f) For avoidance of doubt, the phrase 'best endeavours' in this Schedule does not require the RTO to bear any of the costs (other than as commercially agreed between the parties) relating to the resolution or relief of such constraints.

4.4 Mutually exclusive requests for Capacity

- (g) Where the RTO receives an Access Request and reasonably foresees that it will receive a mutually exclusive Access Request within 14 days, it may delay consideration of the initial Access Request until the later of:
 - (1) the receipt of the mutually exclusive Access Request; or
 - (2) the expiry of the 14 day period.
- (h) In circumstances where two or more Access Seekers are seeking mutually exclusive Access Rights:
 - (1) if the mutually exclusive request is between an Access Request which relates to a Constrained Path Freight Train and an Access Request which does not relate to a Constrained Path Freight Train, Access must be granted to the Access Seeker which has the Access Request which relates to a Constrained Path Freight Train; and
 - (2) otherwise, Access must be granted to the Access Seeker which in the opinion of the RTO (acting reasonably) has the Access Request which:
 - (A) is most consistent with the principle of maximising the efficient and most valuable use of the Terminal in accordance with the Port Rail Access Principles;
 - (B) best reflects the commercial impact on the RTO's business of the relative potential utilisation of Capacity; and
 - (C) maximises the overall efficiency of the Port Rail Network and throughput at the Port of Melbourne.
- (i) When determining the priority of allocation of Available Capacity for mutually exclusive requests, including the commercial impact of Access on the RTO's business, the RTO must have regard to the following considerations:
 - (1) whether either Access Request relates to a Constrained Path Freight Train;
 - (2) volume of service, including both Train size and proposed Access Agreement duration;
 - (3) operational efficiency, including system wide factors such as Rail Path availability;
 - (4) safety and security;
 - (5) promotion of throughput at the Terminal; and
 - (6) the highest present value of future returns to the RTO after considering all risks associated with the Access Agreement (excluding the value of any returns earned on Access Agreements not entered into on arms-length terms).

4.5 Capacity becoming available

If the Capacity of the Terminal has been reached, and Capacity subsequently becomes or is made available, the RTO must simultaneously notify PoM, the Port Rail Manager and all Access Seekers who have requested Access within the past two years, of the availability.

4.6 Varying Capacity

- (a) The RTO must allocate Capacity to an Access Seeker on a “use it or lose it” basis and Access Seeker’s will not be permitted to bank Windows to prevent use by other Access Seekers.
- (b) The RTO may determine and adjust the scheduling of Windows to optimise the use of the Terminal including for operational efficiency and safety reasons or as otherwise agreed between the RTO and impacted Access Holders, but must:
 - (1) not interfere with an existing Access Right;
 - (2) take into account the reasonable operational and commercial requirements of any impacted Access Holders; and
 - (3) have regard to the availability of aligned Rail Paths and assist the impacted Access Holder to obtain aligned Rail Paths.
- (c) The RTO may temporarily vary Allocated Capacity (including cancelling Services), at any time, but must take into account the reasonable operational and commercial requirements of any impacted Access Holders, give reasonable notice to any affected parties and only vary Allocated Capacity for the following reasons:
 - (1) to repair, maintain, upgrade, extend, construct or make alterations to the Terminal;
 - (2) for reasons of safety or for the prevention of injury or damage to the Port Rail Network or the Terminal or to other persons or property; or
 - (3) following a request in writing from an Access Seeker.
- (d) Scheduled Access Holders may offer a Voluntary Reduction of Allocated Capacity to the RTO in accordance with the following principles:
 - (1) the RTO must attempt to reallocate the Voluntary Reduction to other Access Seekers or Access Holders;
 - (2) if any or all of the Voluntary Reduction is successfully reallocated by the RTO to other Access Seekers or Access Holders, the RTO must reduce the Scheduled Access Holder’s Allocated Capacity for the period of time for which the Capacity is reallocated; and
 - (3) the RTO may (subject to the terms of the Access Agreement with the Scheduled Access Holder) require the Scheduled Access Holder to retain and remain liable to pay for, any fixed costs (including take or pay costs) relating to the portion of the Voluntary Reduction that is not reallocated for the duration of the Access Agreement.

4.7 Capacity withdrawals

- (a) Subject to clause 1.1(b) and the RTO complying with Open and Non-Discriminatory Access, and in order to encourage the optimum use of the Terminal, the RTO must withdraw Capacity allocated to an Access Holder where:
 - (1) the Access Holder does not satisfy, over any 3 month period, its Minimum Usage Requirement and the RTO is:
 - (A) satisfied (acting reasonably) that:

- (aa) the Access Holder does not have a reasonable justification for failing to meet its Minimum Usage Requirement; and
 - (ab) it is commercially feasible to re-allocate the Capacity to another Access Seeker such that the Capacity will be more highly utilised; or
- (B) directed to withdraw that Capacity by the Port Rail Manager;
- (2) there are repeated breaches of safety requirements of the Access Agreement, relevant legislation, or a standard specified in the Terminal Operating Protocol by the Access Holder; or
- (3) the Access Holder no longer holds appropriate on and off port Rail Paths that are aligned with the proposed Window.
- (b) Clause 1.1(a)(1) does not apply to an Access Agreement during the Ramp Up Period of that Access Agreement.
- (c) Where Capacity is withdrawn under clause 1.1(a)(3) due to a third party causing a Rail Path to be lost:
 - (1) the Access Holder may request an alternative Window from the RTO; and
 - (2) if requested, the RTO must negotiate in good faith with the RTO under the process and terms of this CAP to identify a suitable alternative Window and must use best endeavours to allocate that Window to the Access Holder.

Schedule 5 – Terminal Operating Protocols

5.1 Capacity Allocation

The RTO agrees to undertake the following in relation to Capacity allocation:

- (a) The RTO will publish a schedule of all Windows (including those that are unavailable), including identifying the expected turnaround time of each allocated Window.
- (b) Capacity allocation will be carried out and managed in line with CAP and the applicable terms of the Port Rail Access Principles.
- (c) The RTO will use all reasonable endeavours to allocate the Available Capacity at the Terminal to an Access Seeker in response to the receipt of an Access Request. This will include, where relevant, committing to service an Access Holder faster than their allocated Window (and making any necessary schedule variations) where doing so would free up a Window that satisfies the Access Request.

5.2 Provision of information

Access Holders will provide the RTO with any documents or information reasonably required by the RTO (in a format reasonably requested by the RTO) to provide Access or as part of its compliance requirements, including without limitation:

- (a) relevant certificates and approvals;
- (b) safety audits; and
- (c) technical data.

5.3 Train load/unload requirements

- (a) Within the agreed timeframe between the RTO and the Access Holder (and where no timeframe is agreed, at least 24 hours prior to departure time of a train), Access Holders will provide the RTO with load plans, which will include:
 - (i) train configuration, number and sequence of wagons, type of wagons and wagon weights required;
 - (ii) marshalling requirements;
 - (iii) return loading plan; and
 - (iv) container bookings.
- (b) Access Holders must provide reasonable information requested by the RTO.

5.4 Daily Variations

- (a) Access Holders will use best endeavours to provide 24 hours' notice to the RTO if a Train is likely to arrive before or after its scheduled arrival time.
- (b) For Train arrivals:
 - (i) at or before the scheduled arrival time, the RTO will provide the Services and use best endeavours to ensure the Train departs on time.
 - (ii) after the scheduled arrival time, when possible, the RTO will allocate resources and amend its operating plan to service Access Holders' late

arriving Trains in a timely fashion, subject to its obligation to use best endeavours to maximise throughput of the Terminal during operating hours;

- (c) Access Holders may request the RTO to give priority to the provision of Services to certain of their Trains, vary the Cut-Off Times or Train departure times to accommodate variations, and prioritise the container loading to meet customer expectations. The RTO will use best endeavours to comply with such requests as long as there are no negative impacts on others from doing so.
- (d) If a Train cannot be completed on schedule, the RTO will advise Access Holders and the Port Rail Manager no later than two hours prior to the scheduled departure time and use best endeavours to recover the schedule as rapidly as possible on terms included in the TAA.
- (e) If a Train fails within the Terminal, the RTO will (or will use best endeavours to procure that the appropriate party) clear the failed Train as soon as is practical.
- (f) If a Train becomes an Unhealthy Train, regardless of whether the delay was caused by or was the fault of the RTO, the RTO must take all reasonable steps to make up time (including servicing the Train at the next available Window), having regard to minimising the detriment to other Healthy Trains.

5.5 Terminal Schedule

- (a) The RTO will prepare a Schedule for the Terminal which it will publish on its website and manage in accordance with the CAP.
- (b) The RTO will use all reasonable endeavours to facilitate the operation of the Terminal in accordance with the Schedule.
- (c) The RTO may vary the Schedule from time to time in accordance with the CAP (and variations must not impact existing Access Rights).

5.6 In Gate/ Out Gate

- (a) The RTO will publish Terminal Operating Hours from time to time. The RTO will provide reasonable notice of any change to the Terminal Operating Hours to Access Holders.
- (b) The RTO will provide standard freight opening and closing receipt times for each of Access Holders' Train services that will be consistent across all Access Seekers. For the purpose of maximising slot utilisation, Access Holders may request that the RTO receive containers prior to the opening and closing times.
- (c) The RTO will notify Access Holders of any exceptions in data or load integrity that may impact on the successful gating of Access Holders containers.

5.7 Safety

- (a) The RTO will publish a Safety Interface Agreement in Schedule 8, which the RTO and Access Holders are each required to follow and which will include obligations for all relevant parties to have and maintain appropriate interface agreements.
- (b) The RTO will provide to Access Holders all information necessary for the safe operation of Access Holders' Trains within the Terminal.
- (c) Access Holders will develop and provide a safety management plan for its rail operation that is consistent with requirements of the RTO's safety management plan.

Schedule 6 – Fuel Levy

- (a) The Fuel Surcharge is used to recover the cost of movements in fuel price above a benchmark level of \$1.352/litre, being the national average diesel base rate in Calendar Year 2019
- (b) The Fuel Surcharge results from multiplying the current Fuel Surcharge Percentage by the relevant Rates.
- (c) The Fuel Surcharge Percentage is based on the average monthly \$ price of fuel, (based on the published metro rates by Motor Mouth¹) and a Fuel Factor (being 13.2%) representing the percentage required to recover the cost of fuel above the benchmark price.
- (d) The Access Holder will be notified of the Fuel Surcharge Percentage for a given calendar month in the first week of that calendar, along with a revised calculation and supporting evidence of fuel rates.
- (e) The Fuel Surcharge Percentage is calculated by applying the Fuel Factor to the percentage increase in actual fuel price above the benchmark price of \$0.7701 /litre as follows:
- (f) Fuel Surcharge Percentage = current Fuel Factor x $\left(\frac{R}{B} - 1\right)$, where:
 - (i) R = Revised Fuel Index (\$ price per barrel)
 - (ii) B = Base Fuel Index \$1.352
- (g) Where the Fuel Surcharge Percentage is equal to zero it will be the previous period in which it was equal to greater than zero.
- (h) The Fuel Factor applying from 1 March 2020 is 13.2%.
- (i) The Fuel Levy will only be applied for road leg charges to and from an ACFS terminal.

¹ <https://aip.com.au/historical-ulp-and-diesel-tgp-data>

Schedule 7 - KPIs

Item	Description	Measure	KPI	Minimum Service Offering
1.	No of LTIs (Rail Related)	Quantity	TBU	No LTI's
2.	Scheduled windows missed	Missed healthy train scheduled arrival or departure due to RTO related issue	TBU	On time arrival and departure
3.	600m Train	Turn Around Time from arrival time (train stops) to departure (train departs)	TBU	On time arrival and departure
4.	1200m Train	Turn Around Time from arrival time (train stops) to departure (train departs)	TBU	On time arrival and departure
5.	1500m Train	Turn Around Time from arrival time (train stops) to departure (train departs)	TBU	On time arrival and departure
6.	1800m Train	Turn Around Time from arrival time (train stops) to departure (train departs)	TBU	On time arrival and departure

DRAFT

Signing Section

Executed as an agreement.

Executed by **ACFS Logistics Pty Ltd** (ACN 603 120 047) in accordance with section 127(1) of the Corporations Act 2001:

Director/Secretary

Director

Name

Name

Executed by **Access Holder** in accordance with section 127(1) of the Corporations Act 2001:

Director/Secretary

Director

Name

Name