

Dated

2004

**NATIONAL RAIL ACCESS
AGREEMENT**

between

**HER MAJESTY THE QUEEN IN RIGHT OF
NEW ZEALAND acting by and through her
Minister of Finance
(Crown)**

and

**TOLL NZ CONSOLIDATED LIMITED
(Toll Rail)**

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PARTIES

- (1) **HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND** acting by and through her Minister of Finance (“**Crown**”)
- (2) **TOLL NZ CONSOLIDATED LIMITED** (“**Toll Rail**”)

INTRODUCTION

- A. Contemporaneously and conditional on entering into this Agreement, the parties have agreed to enter into the Sale Agreement for the sale and purchase of the Rail Network and associated assets and certain other Transaction Documents.
- B. The Access Provider has agreed to grant, and Toll Rail has agreed to pay for, access to the Rail Network to enable Toll Rail to continue to operate freight and certain passenger rail services on that Rail Network, on the terms of this Agreement.

AGREEMENT

1. INTERPRETATION

- 1.1 **Definitions:** In this Agreement, unless the context otherwise requires:

“**Access Provider**” means the Crown or its successors or permitted assigns (and successors or permitted assigns thereof).

“**Access Rights**” means an Operator’s rights to use the Rail Network as granted to it by the Access Provider in accordance with this Agreement.

“**Agreement**” means this agreement and any Schedule attached to it (including the Common Access Terms).

“**Ancillary Movements**” means the repositioning of Vehicles necessary for the purpose of providing freight or passenger rail services, the testing or servicing of locomotives, movements of Vehicles for maintenance, sanding, fuelling, driver training or cleaning purposes, and emergency retrievals, including other similar necessary movements required to provide freight or passenger rail services.

“**Annual Period**” means a period from 1 July and ending on 30 June the following year.

“**Auckland Access Agreement**” means the Amended and Restated Tranz Rail Access Agreement dated 13 May 2002, as amended from time to time.

“Auckland Network” has the meaning given in the Auckland Access Agreement.

“Authority” includes every minister, department of state, government authority, regional council, territorial authority or other statutory or regulatory authority having jurisdiction or authority to perform or exercise functions or powers.

“Best Endeavours” means, in relation to either party agreeing to achieve an outcome, the prompt and diligent use of all reasonable resources available to that party to effect that outcome as soon as possible, except that (and without limiting clause 22.11) the best endeavours of the Access Provider do not include the exercise by it or the use of any regulatory or legislative powers in order to influence or effect an outcome.

“Bill Rate” means in respect of any day the mid or “FRA” rate for 90 day bank accepted bills (expressed as a percentage) as quoted on Reuters page BKBM (or any successor page) at or about 10:45am on that day;

“Business Day” means a day (other than a Saturday, Sunday or public holiday) on which registered banks are open for business in Auckland and Wellington.

“Codes” has the meaning given in the Common Access Terms.

“Commencement Date” means the date of Completion under the Sale Agreement.

“Common Access Terms” means the common access terms attached as Schedule 3, as amended from time to time.

“Core Lease” means the memorandum of lease dated 20 December 1991 entered into between the Crown and NZRC, collectively the lessor, and Toll Rail as lessee, varied on or around the date of this Agreement by memorandum of variation of lease between the same parties and including any subsequent variations or amendments made in accordance with the terms of the lease.

“Crown Transferee” means NZRC, or any other entity owned by the Crown that is responsible for the long term operation and maintenance of the Rail Network.

“Existing Access Agreements” means the agreements or arrangements under which the Taieri Gorge Operator and Heritage Operators (and any other rail operators properly using or having rights to use the Rail Network on 6 June 2003 or as at the date of this Agreement) have or had access to the Rail Network, and any renewals or replacements of those agreements for the same or no better Access Rights (including any new access agreement for the same or no better Access Rights), provided any such renewed or replacement access agreement is between the Access Provider and an Existing Operator or any Heritage Operator.

“Existing Operator” means a rail services operator granted access rights under an Existing Access Agreement.

“Force Majeure Event” has the meaning given in the Common Access Terms.

“Freight Forwarder” means any person providing transport services in New Zealand.

“**GST**” means goods and services tax payable under the New Zealand Goods and Services Tax Act 1985.

“**Heritage Charter Services**” means a “one-off” train service organised for or by rail heritage enthusiasts, and “**Heritage Operator**” means the rail heritage enthusiasts organising or operating such a service.

“**Incident**” has the meaning given in the Common Access Terms.

“**Infrastructure**” means rails, sleepers, and associated formation and ballast, tunnels and bridges together with any associated signalling and communications equipment (which are required for the Network Controller to provide network control services) forming part of the Rail Network.

“**Insolvency Event**” means, in respect of a party, that party:

- (a) being placed into receivership or having a receiver, trustee, manager, administrator or similar (including a statutory manager) appointed in respect of all or any of its business or property;
- (b) being unable, or is presumed to be unable, to pay its debts as they fall due;
- (c) entering into an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors;
- (d) being subject to a resolution or any proceeding for the winding up or liquidation of that party (whether on a voluntary or involuntary basis) other than for a bona fide reconstruction; or
- (e) being subject to any event which is analogous to those listed in paragraphs (a) to (d).

“**Line Segment**” means a rail line (or part of a rail line) specified in Schedule 2, and includes the Surrender Land on which the rail line (or part rail line) is situated to the extent to which the Surrender Land between the end points of the rail line (or part rail line) needs to be used for the operation of rail services.

“**LTSA**” means the Land Transport Safety Authority, or any successor entity with responsibility for safety standards within the rail transport system.

“**Network Assets**” has the meaning given in the Sale Agreement.

“**Network Controller**” means the Access Provider acting in the role of network controller to control train movements, manage incidents and undertake the other roles specified in the Common Access Terms in respect of the Rail Network (and includes, where the context so requires, the Network Controller's train controllers and local authorised representatives including signalmen and maintenance crews).

“New Access Agreement” means an agreement that the Access Provider is permitted to enter into under this Agreement that grants Access Rights to an Operator, and any renewals or replacements of that agreement for the same or no better Access Rights (including any new access agreement for the same or no better Access Rights or capacity to an expired or terminated New Access Agreement).

“New Operator” means a rail services operator granted access rights under a New Access Agreement.

“NZRC” means New Zealand Railways Corporation and its successors and permitted assigns.

“Operator” means an Existing Operator, any New Operator, and includes Toll Rail, but excludes any permitted sub-licensee under clause 20 or any sub-licensee of another Operator.

“party” means a party to this Agreement.

“Personnel” has the meaning given in the Common Access Terms.

“Rail Network” means the rail network made up of the Line Segments (including all Infrastructure and associated infrastructure making up those Line Segments) and any other additions or extensions to that rail network notified in writing by the Access Provider to Toll Rail as forming part of the Rail Network subject to Toll Rail’s Access Rights. “Rail Network” includes, to the extent reasonably necessary for the operation of the Services, marshalling yards, train storage and shunting areas on the:

- (a) Released Land until it is released; and
- (b) Surrender Land, provided that this does not prevent the Access Provider from:
 - (i) moving, reconfiguring, or otherwise altering those yards or areas; or
 - (ii) selling, or exercising other rights as owner over, any part of the Surrender Land, if the Access Provider provides alternative arrangements agreed in consultation with Toll Rail (acting reasonably) that provide Toll Rail with reasonably equivalent functionality.

“rail service” means freight and passenger rail services, including Ancillary Movements and Shunts.

“Released Land” has the meaning given in the Sale Agreement.

“Relevant Retained Land” means those relevant parts of the Retained Land under the Core Lease which adjoin or relate to the Surrender Land.

“Retained Land” has the meaning given in the Sale Agreement.

“Sale Agreement” means the Agreement for Sale and Purchase of Rail Network and Associated Asset between the Crown, Toll Rail and Toll NZ Limited entered into on or about the date of this Agreement.

“Service Levels” means the service levels to be set under clause 8.

“Services” means rail services operated by Toll Rail on the Rail Network at any time.

“Shunts” means untimetabled freight services operated by Toll Rail solely for the purpose of moving rolling stock to and from sidings and freight yards adjoining the Rail Network.

“Subsidiary” has the meaning given in the Companies Act 1993.

“Surrender Land” has the meaning given in the Sale Agreement.

“Taieri Gorge Operator” means Taieri Gorge Limited including its successors or permitted assigns.

“Term” means the term of this Agreement as defined in clause 3.1.

“Timetable” means the timetable developed from time to time under clause 4 of the Common Access Terms.

“Toll NZ Group” means Toll NZ Limited, Toll Rail, all of the Subsidiaries of those companies, and includes any related company (as that term is defined in section 2(3) of the Companies Act 1993) of Toll Rail.

“Track Access Charges” and **“TAC”** means the charges payable by Toll Rail for access to the Rail Network in accordance with clause 13.

“Transaction Documents” has the meaning given in the Sale Agreement.

“Transitional Period” has the meaning given in the Sale Agreement.

“Variation Proposal” means a proposal for a new line or subsidy in respect of which Toll Rail has a first right of refusal under clause 6.1.

“Vehicles” means locomotives and rolling stock used by an Operator to provide rail services, and any vehicle necessary to maintain any part of the Rail Network as used by the Access Provider (or any person contracted by the Access Provider) to provide maintenance services in respect of the Rail Network.

1.2 **Interpretation:** In this Agreement, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) references to a month or a year are references to a calendar month or year, as the case may be;
- (c) references to dates and times are to dates and times in New Zealand; and
- (d) references to **“\$”** or **“dollars”** are references to New Zealand currency.

1.3 **Further interpretation:** In this Agreement:

- (a) a reference to a **“party”** is a reference also to that party’s successors and permitted assigns;
- (b) a reference to a **“person”** includes an individual, firm, company, corporation or unincorporated body of persons, or any Authority, in each case whether or not having separate legal personality, and a reference to a **“company”** includes a person;
- (c) headings are for convenience only and do not affect interpretation;
- (d) references to clauses and schedules are references to clauses and schedules of this Agreement unless specifically stated otherwise;
- (e) a reference to a statute or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (f) **“including”** and similar words do not imply any limitation;
- (g) where a party, or the parties, are required by this Agreement to consult on a matter, the party or parties will carry out that consultation in good faith acting reasonably; and
- (h) where a party puts a proposal under this Agreement to the other party in good faith acting reasonably, the other party will consider that proposal in good faith.

2. **BACKGROUND, OBJECTIVES AND GENERAL PRINCIPLES**

2.1 **Background:** This Access Agreement is entered into by the Crown and Toll Rail as part of and is conditional on completion of the package of transactions and arrangements governing the transfer of the Rail Network from Toll Rail to the Crown, including the:

- (a) sale of the Rail Network and associated assets by Toll Rail to the Crown under the Sale Agreement;
- (b) surrender by Toll Rail to the Crown and NZRC of its leasehold interest under the Core Lease (which included a right of exclusive possession) in the land on which the Rail Network is situated, on the terms of the Partial Surrender and Variation of Lease forming part of the Transaction Documents;
- (c) amendment of the Core Lease to govern the remainder of the land that continues to be leased to Toll Rail;
- (d) grant to Toll Rail pursuant to section 12 of the New Zealand Railways Corporation Restructuring Act 1990 of exclusive Access Rights to use the Rail Network for the operation of Toll Rail’s Services on the terms of this Access Agreement (it being acknowledged that Toll Rail would not have sold the Rail Network and surrendered part of the Core Lease on the terms of this transaction if the exclusive Access Rights for 66 years had not been granted), for the same term as Toll Rail would otherwise have enjoyed under the Core Lease prior to the foregoing transactions, and the agreement by Toll Rail to meet the Access Provider’s costs of providing such Access Rights (including the cost of operating, maintaining

and renewing the Rail Network) via the access fees payable by Toll Rail under this Agreement. The Access Provider and Toll Rail acknowledge that the exclusive Access Rights granted to Toll Rail under this Agreement were an integral element of the transfer of the Rail Network and have been provided as part of ensuring a strong nationwide freight service is provided and to encourage long term investment. The Crown, in entering into this Agreement, has been motivated by public interest considerations in having a strong nationwide rail infrastructure; and

- (e) commitment to a significant capital investment programme by the Crown in the Rail Network and by Toll Rail in its Vehicles, as specified in clause 14,

and the parties confirm their agreement that their respective rights and obligations under this Agreement (including Toll Rail's rights of exclusivity and the Access Provider's right to recover appropriate costs of operating, maintaining and renewing the Rail Network) are reasonable as part of those transactions and arrangements.

2.2 **Mutual objective:** The Access Provider and Toll Rail record their mutual objective of ensuring that the Rail Network is operated, maintained and renewed in an efficient and effective manner at a reasonable cost.

2.3 **General principles:** The parties acknowledge that this is a long term Agreement governing complex operational and commercial inter-relationships and interdependencies, and agree that if they are to achieve their objectives throughout the Term they need to work together at all times in a co-operative and collaborative manner. In view of this, the parties agree to at all times in connection with this Agreement:

- (a) act:
 - (i) reasonably and in good faith; and
 - (ii) openly and constructively; and
- (b) use reasonable endeavours to assist the other party to:
 - (i) perform their obligations and exercise their rights under this Agreement; and
 - (ii) achieve the objective set out in clause 2.2.

3. TERM

3.1 **Term:** This Agreement commences on the Commencement Date and continues in force until the earlier of:

- (a) its termination either in whole or part in accordance with clause 19 of this Agreement; or
- (b) 31 December 2070,

("Term").

4. GRANT OF ACCESS

- 4.1 **Access Rights:** The Access Provider grants Toll Rail a licence to operate its Vehicles on the Rail Network during the Term for the purposes of operating rail services. Subject to the terms of this Agreement, this licence:
- (a) is exclusive; and
 - (b) permits Toll Rail to make unrestricted use of the Rail Network for the purposes permitted under this clause.
- 4.2 **Exclusivity:** The Access Provider must not grant any Access Rights under New Access Agreements unless those rights are granted:
- (a) in accordance with clause 4.6;
 - (b) in respect of Line Segments for which Toll Rail has lost its exclusivity under clause 5; or
 - (c) in accordance with clause 6.4.
- 4.3 **Platforms:** The licence in clause 4.1 includes a licence to access all platforms and overpasses on the Rail Network for the purposes of Toll Rail's passenger services stopping at those platforms and overpasses to allow passengers to board and detrain those services, provided that:
- (a) any Toll Rail passenger on a platform or overpass is subject to the Access Provider's direction; and
 - (b) nothing in this clause prevents the Access Provider from moving, removing or demolishing a platform or overpass from the Rail Network provided that the Access Provider gives 3 months prior written notice to Toll Rail.
- 4.4 **Limitations:** Toll Rail's Access Rights (including Toll Rail's right of exclusivity and access rights to platforms) are at all times subject to:
- (a) The rights of Existing Operators. Toll Rail must act reasonably so that those Operators can make reasonable use of those rights, provided that when an Existing Access Agreement is renewed or replaced by the Access Provider, the Existing Operator must be under, and comply with, a similar obligation.
 - (b) The rights of New Operators under New Access Agreements entered into in accordance with clause 4.2. Subject to a New Operator being under, and complying with, a similar obligation, Toll Rail must act fairly and reasonably so that the New Operator can make reasonable use of its Access Rights provided that such access does not discriminate against or unfairly prejudice Toll Rail's Access Rights.

- (c) All limitations, restrictions and other defects that existed in Toll Rail's title or interest in or to, or rights in respect of, the Rail Network prior to the transfer of the Rail Network to the Access Provider under the Sale Agreement ("**Defects**"). The Access Provider has no liability whatsoever to Toll Rail for any failure to comply with its obligations under this Agreement arising out of or in connection with any Defect. Without limiting any rights that the Access Provider may have under the Sale Agreement:
 - (i) if requested by Toll Rail, the Access Provider must use its reasonable endeavours to remedy, at Toll Rail's cost, any Defect; and
 - (ii) at the Access Provider's request, Toll Rail must assist the Access Provider, at the Access Provider's cost, to remedy any Defect identified by either party.
- (d) Any Access Rights that the Access Provider grants to Heritage Operators. Subject to a Heritage Operator being under a similar obligation, Toll Rail must act fairly and reasonably so that the Heritage Operator can make reasonable use of its Access Rights.

4.5 **Documents and policies:** Toll Rail acknowledges and agrees that, as at the Commencement Date, all of the documents and policies referred to in clause 3.3 of the Common Access Terms apply on a non-discriminatory basis as between different types of services operating on the Rail Network, whereby the differences applicable to different types of services are due to the particular operational requirements of undertaking such services. If such documents and policies apply on a discriminatory basis in favour of Toll Rail then any other Operator will have the benefit of being treated in no worse a position than Toll Rail. If such documents apply on a discriminatory basis in favour of any other Operator, including taking into account Toll Rail's obligations to operate services across the entire Rail Network, then appropriate adjustments will be made, either to the other Operator's access agreement or to Toll Rail's Access Rights so that Toll Rail is in no worse a position than the other Operator.

4.6 **Breach of law:** If the Access Provider or Toll Rail would be in breach of any law if the Access Provider refuses or fails to grant access to the Rail Network to another rail service operator, the Access Provider may, subject to clause 4.8(a), grant that operator access on terms which:

- (a) incorporate the Common Access Terms; and
- (b) are:
 - (i) granted only to the extent required to rectify or avoid the breach of law; and
 - (ii) to the extent permissible by law, no more favourable than those on which access is provided to Toll Rail, having regard to the relative volume and scope of services respectively provided by Toll Rail and the new operator for the Line Segments in relation to which the access is being granted.

- 4.7 **Allegation of breach of law:** If any third party alleges that the Access Provider or Toll Rail is in breach of any law as a result of the Access Provider refusing or failing to grant, or being prevented under this Agreement from granting, another rail service operator access to the Rail Network and that third party issues or commences any proceeding or similar legal process in or before any Court, tribunal or authority of competent jurisdiction in respect of that alleged breach ("**Challenge**"):
- (a) the party to whom the allegation or Challenge is made must promptly notify the other party in writing of the allegation or Challenge and provide the details available to it of the allegation or Challenge;
 - (b) Toll Rail must, within 20 Business Days of either party giving any such notice, determine (acting reasonably) whether to challenge or defend the Challenge (as the case may be) and must give written notice to the Access Provider of its intention to challenge or defend the Challenge; and
 - (c) if Toll Rail challenges or defends a Challenge (including appealing a decision in respect of the Challenge), that challenge or defence must be at Toll Rail's cost and it must, at all times, act reasonably and:
 - (i) not pursue a challenge, defence, or appeal that is, or in a manner that is, trivial, vexatious, or not in good faith;
 - (ii) advance proceedings expeditiously (including promptly filing appropriate documents in the relevant Court, tribunal or authority of competent jurisdiction to give legal effect to that challenge or defence or deciding whether to appeal a decision about the Challenge);
 - (iii) provide all reasonable information relating to the status of proceedings requested by the Access Provider; and
 - (iv) if requested by the Access Provider, consult the Access Provider on all key decisions concerning the challenge or defence.

4.8 **Pending resolution of Challenge:**

- (a) Subject at all times to clause 4.8(b), while Toll Rail is challenging or defending a Challenge in accordance with clause 4.7, the Access Provider must not:
 - (i) grant access to the Rail Network to a rail service operator to which the Challenge relates; or
 - (ii) except to the extent required by law:
 - (1) encourage or aid the party making the Challenge; or
 - (2) take worse than a neutral position in any proceedings concerning the Challenge.

- (b) Clause 4.8(a) does not apply if:
 - (i) the Access Provider is legally required to grant access by an order of a Court or authority of competent jurisdiction (including the Commerce Commission); or
 - (ii) Toll Rail:
 - (1) determines not to challenge or defend the Challenge or fails to file appropriate documents within the time period set out in clause 4.7(b);
 - (2) loses its challenge or defence and fails to expeditiously appeal the relevant decision;
 - (3) loses its challenge or defence after exhausting its appeal rights;
 - (4) discontinues proceedings, or settles or withdraws the proceedings on terms which require the Access Provider to grant access to the Rail Network; or
 - (5) notifies the Access Provider that it may grant access to another operator under this clause 4.8.

5. USE IT OR LOSE IT

5.1 **Use it or lose it:** Toll Rail's right of exclusivity in respect of individual Line Segments is on a "use it or lose it" basis as follows:

- (a) Toll Rail's right of exclusivity terminates in respect of:
 - (i) freight services on a Line Segment if its average annual freight levels over any rolling 3 Annual Periods fall below the threshold for that Line Segment set out in Schedule 2;
 - (ii) Wellington metro Line Segments (as defined in Schedule 2) if its passenger levels fall below those specified in Schedule 2;
 - (iii) passenger services between city pairs that Toll Rail operates as at the date of this Agreement to the extent to which those services are within the Rail Network, if Toll Rail ceases to operate a regular passenger service for that city pair for a 12 month period or longer. For the purposes of this subclause, "**regular passenger service**" means a passenger service that operates at least 3 times per week in each direction in respect of that city pair;
 - (iv) passenger services between any other city pair within the Rail Network if:
 - (1) Toll Rail does not commence a regular passenger service for that city pair within 3 years of the date of this Agreement. For the purposes of this subclause, "**regular passenger service**" means a passenger service that operates at least once a week in each direction in respect of that city pair; or

(2) after commencing such a service within that 3 year period, Toll Rail ceases to operate a regular passenger service (as defined in sub-clause (1)) in respect of that city pair for a 12 month period or longer;

(b) if in any Annual Period there is:

- (i) a material negative economic event affecting the New Zealand economy as a whole, or affecting a particular region or industry of New Zealand (for example a major economic downturn), that materially reduces Toll Rail's freight levels; or
- (ii) a material Force Majeure Event that has a material adverse effect on Toll Rail's ability to meet the thresholds on a particular Line Segment(s) (for example an earthquake causing major track damage on a Line Segment); or
- (iii) a material non-performance of the Access Provider under this Agreement that has a material adverse effect on Toll Rail's ability to meet the thresholds on a particular Line Segment(s); or
- (iv) a Defect (as defined in clause 4.4(c)) or any other fault or defect of the Rail Network which does not amount to a breach of this Agreement, but which has a material adverse effect on Toll Rail's ability to meet the thresholds on a particular Line Segment(s),

then for the purposes of the calculation in clause 5.1(a), at Toll Rail's request within 90 days of the end of an Annual Period, a fair and reasonable adjustment must be made by the parties to Toll Rail's freight levels for that Annual Period for the affected Line Segment(s) to take account of that event(s); and

(c) for the purposes of the calculation in clause 5.1(a), at Toll Rail's request within 90 days of the end of an Annual Period, a fair and reasonable adjustment must also be made by the parties to Toll Rail's freight levels in an Annual Period if Toll Rail establishes, on the balance of probabilities, that a major customer of Toll Rail has withdrawn freight from Toll Rail on a Line Segment in that Annual Period with the intention of triggering the loss of Toll Rail's exclusivity on that Line Segment under clause 5.1(a).

5.2 **Disputes:** If the parties (acting reasonably) cannot reach agreement on adjustments to be made to Toll Rail's freight levels under clause 5.1(c) within a reasonable period, the matter will be referred to expert determination under clause 21.2. The role of the expert is to determine the reasonable adjustment to the relevant freight levels on the basis of what he or she considers fair and reasonable in the circumstances.

5.3 **No recovery:** Once Toll Rail has lost rights of exclusivity in respect of any Line Segment, it shall not as of right regain those rights if its traffic or passenger levels subsequently increase above the thresholds levels in clause 5.1.

5.4 **Provision of information:** Toll Rail must supply to the Access Provider in writing on a confidential basis particulars of the levels of annual rail freight traffic on each Line Segment, of passenger levels for the Wellington metro Line Segments, and of passenger services for relevant city pairs within 60 days of the end of each Annual Period and at other times upon reasonable request in writing by the Access Provider.

5.5 **Notice of loss of exclusivity:**

- (a) The Access Provider must provide Toll Rail at least 10 Business Days' prior written notice of a loss of Toll Rail's exclusivity. That notice must specify the Line Segment(s) to which the notice relates.
- (b) Prior to issuing a notice under clause 5.5(a), the Access Provider must:
 - (i) inform Toll Rail of its intention to issue such notice and the basis for it and to which Line Segment(s) the notice will relate;
 - (ii) give Toll Rail 40 Business Days to provide to the Access Provider in writing any reasonable plans or proposals of Toll Rail for that Line Segment(s) (if any); and
 - (iii) consider (acting reasonably) those plans or proposals provided by Toll Rail in accordance with clause 5.5(b)(ii) and consider and respond to Toll Rail in respect of those plans or proposals within 30 Business Days of receipt.

5.6 **New Access Agreements:** If the Access Provider enters into a New Access Agreement as a result of Toll Rail losing exclusivity under this clause 5, the Access Provider must grant the New Operator access on terms which are no more favourable than those on which access is provided to Toll Rail, having regard to the relative volume and scope of services respectively provided by Toll Rail and the New Operator for the Line Segments in relation to which access is being granted.

6. NEW LINES AND SUBSIDIES

6.1 **First right of refusal:** Toll Rail has a first right of refusal to Access Rights and the ability to operate Services in respect of:

- (a) any new line constructed to form part of the Rail Network or capacity created on the Rail Network (at the Access Provider's own cost) by the Access Provider (it being acknowledged that if Toll Rail takes up its first right of refusal it will get exclusive Access Rights); and
- (b) any Line Segment in relation to which this Access Provider offers a subsidy where Toll Rail:
 - (i) has lost exclusivity in respect of that Line Segment within the preceding 5 years; and
 - (ii) prior to losing exclusivity, requested a subsidy and the Access Provider either declined to offer Toll Rail a subsidy or the subsidy offered to Toll Rail was (after adjustment for CPI) lower than the subsidy offered under this clause 6.1,

("Variation") on the terms set out in clauses 6.2 and 6.3.

- 6.2 **Variation Proposal:** The Access Provider must give a written Variation Proposal to Toll Rail in respect of each Variation proposed by it in respect of which Toll Rail has a first right of refusal under clause 6.1, containing the following information:
- (a) details of the proposed Variation, including the method and timetable for its implementation; and
 - (b) the terms that the Access Provider proposes will apply to the Variation including (as applicable) an estimate of the likely changes to the Track Access Charges as a result of the extension of the Rail Network to include the new line and details of the conditions attaching to any subsidy,
- in sufficient detail to enable Toll Rail to give reasonable consideration to the Variation Proposal.
- 6.3 **Toll Rail response:** Toll Rail must advise the Access Provider in writing within 30 days of receipt of a Variation Proposal whether it:
- (a) accepts the Variation Proposal;
 - (b) wishes to propose alternative terms to the Access Provider in respect of the Variation, in which case Toll Rail's response must set out full details of its proposed alternative terms and the Access Provider must consider Toll Rail's alternative proposal in good faith; or
 - (c) declines the Variation Proposal. Toll Rail is deemed to have so declined if it has failed to provide written advice to the Access Provider under this clause within the 30 day period referred to above.
- 6.4 **Offer to third parties:** If Toll NZ declines a Variation Proposal under clause 6.3(c), or if Toll Rail seeks to vary the terms of a Variation Proposal under clause 6.3(b) and the parties are unable to reach agreement in writing on the Variation Proposal within 30 days of Toll Rail giving notice under that clause, the Access Provider may offer such Access Rights or subsidy (together with Access Rights to enable the relevant rail services to be provided) to third parties including any other Existing Operator, provided that the Access Provider may not offer such Access Rights to a third party on terms more favourable than those offered to Toll Rail having regard to the relative volume and scope of services respectively provided by Toll Rail and the operator for the Line Segments in relation to which the access is being granted. Toll Rail must provide access and services to such new operators in accordance with clause 7 (interconnection).
- 6.5 **Toll bids:** Where Toll Rail does not have a right of first refusal in respect of a subsidy offered by the Access Provider, the Access Provider must allow Toll Rail to tender on no less favourable terms for that subsidy along with other Operators or potential operators.

6.6 **Subsidy terms:** Where a person other than Toll Rail is offered or provided a subsidy in accordance with this clause 6 and Toll Rail's rights under clause 6, that subsidy shall not be taken into account in determining under clause 4.6 or 5.6 whether the terms on which the relevant operator is granted access are more favourable than those on which access is provided to Toll Rail.

7. INTERCONNECTION AND FREIGHT FORWARDERS

7.1 **Access to facilities:** Toll Rail acknowledges that in order for an Existing Operator or a New Operator to make reasonable use of their Access Rights to any Line Segment, they may need to access Toll Rail (or Toll NZ Group) facilities and services. If requested, Toll Rail must, and must procure other companies in the Toll NZ Group to, provide an Existing Operator or a New Operator with:

- (a) reasonable access to its facilities in any of its adjacent terminals and infrastructure (including all facilities and stations on the land subject to the Core Lease), including access and egress rights to that Operator (and its licensees, including passengers) to platforms on the Rail Network; and
- (b) services (other than IT services) and interchange (including reasonable running rights to and use of the nearest interchange, marshalling yards and other facilities),

on fair and reasonable terms (provided that the access and egress rights to platforms are provided free of charge to passenger services passengers and personnel), to the extent such access and services are reasonably necessary to enable the Operator to effectively and efficiently exercise its rights. Such rights will be reasonable having regard to scale of Toll Rail's operation on the relevant Line Segment in comparison to the scale of the other Operator's operation on the relevant Line Segment, and such rights will be subject to periodic review on the same basis as set out in this clause.

7.2 **Freight Forwarders:** Toll Rail must from 1 January 2005 provide a transparent pricing schedule to all Freight Forwarders (including any freight forwarding business of any company in the Toll NZ Group), such pricing regime to provide equal pricing and services (including service levels and service quality) to all such Freight Forwarders relative to volumes, nature of activities and incentives to promote rail transport. On request, Toll Rail must provide to the Access Provider a copy of its pricing schedule.

7.3 **Not exclusive:** Any access rights or services granted by the Access Provider to an Existing Operator or New Operator must be on a non-exclusive basis.

7.4 **Reciprocity:** Each New Access Agreement must include reciprocal provisions to those contained in clauses 7.1 to 7.3 for Toll Rail's benefit.

7.5 **Disputes:** If Toll Rail and an Existing Operator or a New Operator cannot reach agreement on any matter connected with clauses 7.1 to 7.3 within a reasonable period of time, either party may refer the matter to expert determination under clause 21.2. The matters that may be referred for dispute

include the scope of the facilities or services to be made available by Toll Rail, and the terms on which those facilities and services are provided by Toll Rail.

7.6 **Contracts Privity:** This clause 7 confers a benefit on, and is enforceable by, Existing Operators and New Operators under the Contracts (Privity) Act 1982.

8. SERVICE LEVELS

8.1 **Development:** The parties must use their Best Endeavours to agree Service Levels and a bonus and penalty regime applicable to those Service Levels, based on the principles in Schedule 4, by 30 June 2005 or any later date agreed by the parties.

8.2 **Dispute resolution:** If the parties have not agreed those Service Levels or the bonus and penalty regime within the time set in clause 8.1, either party may refer the matters not agreed upon to expert determination under clause 21.2.

8.3 **Meet Service Levels:** Each party must use its Best Endeavours to meet or exceed the Service Levels applicable to it.

8.4 **Review:** The parties must (unless agreed otherwise) review the Service Levels and bonus and penalty regime at 5 yearly intervals, the first review to be concluded by 31 March 2009 and any amendments to be implemented by 30 June 2009 (or such other date agreed by the parties). If the parties cannot agree on changes to be made to Service Levels or the bonus and penalty regime within a reasonable period of time, either party may refer the matter to expert determination under clause 21.2.

8.5 **Additional Toll Rail Service Levels :** The Access Provider has a right to procure additional service level commitments from Toll Rail, for example (but without limit) in relation to the number, frequency, configuration or timetable of services on particular Line Segments, as follows:

- (a) the Access Provider may issue a written request ("**Service Level Request**") for additional Service Level commitments from Toll Rail. The Service Level Request must describe the proposed Service Level(s) in sufficient detail to enable Toll Rail to reasonably respond to the Service Level Request;
- (b) subject to clause 8.7, Toll Rail must use Best Endeavours to respond to a Service Level Request with a submission ("**Service Level Submission**") as soon as practicable after receiving the Service Level Request but in any event within 40 Business Days of receiving the Service Level Request, unless otherwise agreed in writing by the Access Provider (acting reasonably having regard to the nature and complexity of the Service Level Request). The Service Level Submission must:
 - (i) be in writing;
 - (ii) set out Toll Rail's understanding of the Service Level Request; and

- (iii) set out fair and reasonable terms for the Service Level(s). Those terms must include any fees that Toll Rail proposes to charge in respect of the Service Level(s), which must be no more than on a full cost recovery basis;
- (c) the Access Provider must advise Toll Rail within 20 Business Days of receipt of a Service Level Submission whether it:
- (i) accepts the Service Level Submission;
 - (ii) wishes to negotiate the terms of the Service Level Submission; or
 - (iii) declines the Service Level Submission;
- (d) where the Access Provider wishes to negotiate the terms of the Service Level Submission under clause 8.5(c)(ii), then the parties must promptly negotiate in good faith to agree the terms. If the parties are unable to agree the terms within 10 Business Days, either party may refer those parts of the terms that are in dispute to expert determination under clause 21.2. The role of the expert in the dispute is to determine the terms that are in dispute on the basis of what he or she considers to be fair and reasonable in the circumstances; and
- (e) a new Service Level(s) under this clause 8.5 and the terms for that Service Level(s) takes effect on, and is incorporated into, this Agreement from:
- (i) the date both parties sign and date an agreed Service Level Submission; or
 - (ii) if the matter is referred to expert determination, 20 Business Days after the date of the expert's determination (or such other date set out in the terms or agreed by the parties).

To avoid doubt, additional service levels under this clause 8.5 are not limited to the types of Service Levels agreed under clause 8.1.

8.6 Additional Access Provider Service Levels : Toll Rail has a right to procure additional service level commitments from the Access Provider, for example (but without limit) in relation to network control and Rail Network maintenance, as follows:

- (a) Toll Rail may issue a written request ("**Service Level Request**") for additional Service Level commitments from the Access Provider. The Service Level Request must describe the proposed Service Level(s) in sufficient detail to enable the Access Provider to reasonably respond to the Service Level Request;
- (b) subject to clause 8.7, the Access Provider must use Best Endeavours to respond to a Service Level Request with a submission ("**Service Level Submission**") as soon as practicable after receiving the Service Level Request but in any event within 40 Business Days of receiving the Service Level Request, unless otherwise agreed in writing by Toll Rail (acting reasonably having regard to the nature and complexity of the Service Level Request). The Service Level Submission must:
 - (i) be in writing;

- (ii) set out the Access Provider's understanding of the Service Level Request; and
 - (iii) set out fair and reasonable terms for the Service Level(s). Those terms must include any increase in the TAC which must be no more than on a full cost recovery basis;
- (c) Toll Rail must advise the Access Provider within 20 Business Days of receipt of a Service Level Submission whether it:
- (i) accepts the Service Level Submission;
 - (ii) wishes to negotiate the terms of the Service Level Submission; or
 - (iii) declines the Service Level Submission;
- (d) where Toll Rail wishes to negotiate the terms of the Service Level Submission under clause 8.6(c)(ii), then the parties must promptly negotiate in good faith to agree the terms. If the parties are unable to agree the terms within 10 Business Days, either party may refer those parts of the terms that are in dispute to expert determination under clause 21.2. The role of the expert in the dispute is to determine the terms that are in dispute on the basis of what he or she considers to be fair and reasonable in the circumstances; and
- (e) a new Service Level(s) under this clause 8.6 and the terms for that Service Level(s) takes effect on, and is incorporated into, this Agreement from:
- (i) the date both parties sign and date an agreed Service Level Submission; or
 - (ii) if the matter is referred to expert determination, 20 Business Days after the date of the expert's determination (or such other date set out in the terms or agreed by the parties).

To avoid doubt, additional service levels under this clause 8.6 are not limited to the types of Service Levels agreed under clause 8.1.

8.7 Right of refusal: Either party (acting reasonably) may refuse a Service Level Request, by giving written notice to the other party setting out in reasonable detail the reasons for its refusal, if the additional proposed Service Level commitments in the Service Level Request:

- (a) would place that party in breach of any applicable law;
- (b) are not technically or operationally feasible; or
- (c) adversely affect the safety and integrity of the Rail Network.

If the party that issued the Service Level Request disputes (acting reasonably) the refusal, that party may refer the issue to expert determination under clause 21.2.

8.8 Reporting: The Service Level regime to be developed by the parties must include regular reporting and verification requirements (including annual third party audit) to enable the parties to implement, support and operate the Service Level regime.

8.9 **Compliance to be made public:** The Service Levels, and each party's performance against those Service Levels in any Annual Period, will be made public by Toll Rail and the Access Provider by 30 September in each year.

9. ACCESS PROVIDER'S OBLIGATIONS

9.1 **Maintenance:** The Access Provider must use its Best Endeavours to ensure that the Rail Network or any Line Segment is maintained to standards and conditions equal to or better than those as at the Commencement Date.

9.2 **Other obligations:** Without limiting the Access Provider's obligations under the Common Access Terms, the Access Provider is also responsible for:

- (a) Incident management and investigation functions required in relation to the occurrence of Incidents on the Rail Network;
- (b) network control functions required to operate the Rail Network, including signalling and train control;
- (c) maintaining an approved safety system in respect of the operation (including network control) and maintenance of the Rail Network as required by applicable law;
- (d) implementing, co-ordinating and maintaining the Codes for the Rail Network (subject to the Codes' terms, and LTSA and any other regulatory approval where required); and
- (e) implementing, co-ordinating and maintaining any certification system required in respect of the ownership, operation and maintenance of the Rail Network, including in respect of the Access Provider's Vehicles and personnel (subject to LTSA and any other regulatory approval where required).

9.3 **Exclusion of warranty:** Subject to the Access Provider's obligations in this clause and in clause 8 (Service Levels), the Access Provider gives no warranty (and is under no obligation to ensure) that the Rail Network is free of faults or defects or that Toll Rail's use of the Rail Network will be continuous or uninterrupted, and all implied warranties and warranties by operation of law or otherwise are excluded to the maximum extent permitted by law. To avoid doubt, Toll Rail agrees and represents that it is acquiring its Access Rights for the purpose of a business and that the Consumer Guarantees Act 1993 does not apply to the Access Provider making available the Rail Network to Toll Rail or this Agreement.

9.4 **Platforms and clearances:** In respect of the Rail Network, the Access Provider may not:

- (a) decrease the clearances between platform edges and the track centre lines;
- (b) increase the vertical difference or gap between the rails and the top edge of the platform; or
- (c) decrease the clearances between the track and any new or existing overbridges,

without Toll Rail's consent (such consent not to be unreasonably withheld). The Access Provider must give Toll Rail 6 months notice of any such works and must consult with Toll Rail to minimise disruption to the operation of Toll NZ's business.

- 9.5 **Transitional Period:** During the Transitional Period, Toll Rail is managing the operation and maintenance of the Rail Network for the Access Provider under Schedule 10 of the Sale Agreement. During that period, the Access Provider has no liability to Toll Rail in respect of any breach of this Agreement or for any loss, damage, liability or costs ("**Loss**") suffered or incurred by Toll Rail in connection with this Agreement or Toll Rail's use of the Rail Network to the extent that such Loss arises out of or in connection with Toll Rail's performance of its obligations or functions under the Sale Agreement, except to the extent that such Loss arises out of or in connection with the negligence or default of the Crown.

10. POST COMPLETION OBLIGATIONS

- 10.1 **Additional services:** If either party requires services from the other that are not provided for in the Transaction Documents and are:

- (a) in the case of the Access Provider, necessary or desirable for the operation, maintenance, inspection, or development of the Rail Network or Network Assets (including hook and pull services to be provided by Toll Rail); or
- (b) in the case of Toll Rail, necessary or desirable for the operation of Services on the Rail Network,

then the party with the ability to provide those services must do so on fair and reasonable terms to enable the other party to undertake its operations in the ordinary course of business.

- 10.2 **Training:** Without limiting clause 10.1(a) and to the extent that Toll Rail remains the only qualified person in New Zealand comprehensively providing these services, Toll Rail must make available on fair and reasonable terms to the Access Provider and other Operators, and their Personnel that need access to the Rail Network, training (including driver training) to enable the Access Provider, the other Operator or their Personnel (as the case may be) to conduct operations (including maintenance) on or around the Rail Network in accordance with all applicable laws and the Codes.
- 10.3 **Disputes:** If the parties (or Toll Rail and another Operator, as the case may be) cannot reach agreement to any matter in this clause 10 within a reasonable period of time, either party (or the Operator) may refer the matter to expert determination under clause 21.2. The matters that may be referred to determination include the scope of the services to be provided and the terms on which those services are provided.
- 10.4 **Contracts privity:** Clauses 10.2 and 10.3 confer a benefit on, and are enforceable by, Existing Operators and New Operators under the Contracts (Privity) Act 1982.

11. LAND AND FACILITY RIGHTS

- 11.1 **Mutual rights:** For the term of this Agreement, the Access Provider and Toll Rail have the land and facility rights set out in Schedule 5 to this Agreement.
- 11.2 **RMA consents:** The Access Provider may not as the owner or occupier of the Rail Network, without the prior written consent of Toll Rail (such consent not to be unreasonably withheld or delayed), grant its consent under the Resource Management Act 1991 to any person seeking to use land immediately adjacent to the Surrender Land unless the proposed use would not have or is not likely to have a material adverse impact on the rights of Toll Rail under this Agreement (including Toll Rail's provision of its Services).
- 11.3 **Owner rights:** Nothing in this Agreement restricts the Access Provider (and where the Access Provider is not the owner of the Rail Network, the owner of the Rail Network) from exercising any right (including sale or granting any easement, lease, licence, right of use, or other encumbrance) or taking any action in respect of the Rail Network and the Surrender Land (including carrying on any work including construction work upon, over and under the Rail Network and the Surrender Land), provided that such right or action does not have a material adverse impact on the rights of Toll Rail under this Agreement (including Toll Rail's provision of its Services).

12. TOLL RAIL INPUT

- 12.1 **Access Provider acknowledgement:** The Access Provider acknowledges that it is important for Toll Rail as the exclusive Operator on the Rail Network to have appropriate avenues of input into the manner in which the Access Provider performs its operational functions both as maintainer of the Rail Network and as Network Controller. This clause 12 sets out those avenues.
- 12.2 **Appointment of director:**
- (a) If the Crown assigns or transfers its rights and obligations under this Agreement to a Crown Transferee, Toll Rail may nominate an appropriately skilled employee or Toll Rail director who the Crown must ensure is appointed to the Crown Transferee's Board, subject to:
 - (i) the Crown consenting to the identity of that nominated individual (such consent not to be unreasonably withheld); and
 - (ii) conditions and limitations satisfactory to the Crown (acting reasonably) being applied to that appointment in respect of conflicts of interest and confidentiality.
 - (b) Toll Rail must ensure that the director participates on the Board, notwithstanding that the Access Provider may not be a company under the Companies Act 1993, in accordance with the director's duties in sections 131 to 138 and 145 of the Companies Act 1993 as if the Access Provider was a company.
 - (c) The Crown, after consulting Toll Rail, may require Toll Rail to cause that director to resign and to nominate a replacement (in which case clause 12.2(a) applies) if the Crown considers

(acting reasonably) that the director is not complying with clause 12.2(b), and Toll Rail must comply promptly with that requirement.

- (d) Toll Rail may exercise its right under clause 12.2(a) from time to time provided that it ensures that the Toll Rail director currently on the Crown Transferee Board resigns prior to the new nominee being appointed.

12.3 **Feedback:** Toll Rail at any time may review and provide reasonable submissions to the Access Provider on the Access Provider's operational performance, including submissions on opportunities for the Access Provider to improve the efficiency and utilisation of the Rail Network for the benefit of Operators. The Access Provider must take reasonable account of such submissions.

12.4 **Secondment:** At the request of Toll Rail, the Access Provider agrees that Toll Rail may second an appropriately skilled train controller and/or scheduling expert to the Access Provider on reasonable secondment terms, provided that the operational control of the Rail Network remains with the Access Provider.

13. TRACK ACCESS CHARGES

13.1 **Amount:** The Track Access Charges payable by Toll Rail in each Annual Period shall be determined in accordance with Schedule 1.

13.2 **Payment of access fee:** Toll Rail must pay to the Access Provider the Track Access Charges determined under clause 13.1 plus GST in monthly instalments. Payment is due on the fourth day of the month following the month in which a valid tax invoice is received by Toll Rail provided that the invoice is received no later than the 15th day of that month of receipt. An invoice in accordance with this clause must be paid in full without deduction or set-off.

13.3 **Default interest:** If Toll Rail fails to pay Track Access Charges or any other amount due under this Agreement in full by the due date for payment, Toll Rail must pay interest on the outstanding amount from the due date until payment at the rate of 2% above the Bill Rate on the day on which interest commences to accrue in respect of such amount.

14. INVESTMENT OBLIGATIONS

14.1 Access Provider investment:

- (a) In the period from the Commencement Date to 30 June 2008, the Access Provider must expeditiously invest at least \$100,000,000 plus GST on upgrading the Rail Network, in order to improve its performance, efficiency, safety and reliability.
- (b) The sum in clause 14.1(a) is in addition to the replacement capital expenditure of \$100,000,000 plus GST referred to in section 1.3(b)(i) of Schedule 1, which the Access Provider is obliged to expend by 30 June 2007. It is acknowledged that the capital expenditure amounts paid to Toll Rail pursuant to clauses 4.4(c) and 3.2(b) of the Sale Agreement and paragraph 9.2 of Schedule 10 to the Sale Agreement form part of the

\$100,000,000 plus GST referred to in section 1.3(b)(i) of Schedule 1. It is also agreed that no more than \$25,000,000 plus GST of that replacement capital expenditure amount shall be capital expenditure in relation to the Midland line.

14.2 Toll Rail investment: Toll Rail must invest at least \$100,000,000 plus GST in the period from Completion (as that term is defined in the Sale Agreement) to 30 June 2008 in the upgrading of its rolling stock and locomotives.

14.3 Consultation: The parties shall establish a working party in order to consult on the expenditure of the sums set out in clauses 14.1 and 14.2 with the objective of maximising the economic benefits of the investments to be made by the parties. For the purposes of clause 14.1(a) the parties have agreed a project list attached as Schedule 6, which shall be the guiding factor for the working party. Each party shall be entitled to appoint and remove two members of the working party. The working party shall meet at least twice annually and may make recommendations to the parties, including recommendations relating to:

- (a) investment projects (and the timing of them) that the parties may make under clauses 14.2;
- (b) prioritisation of different investment projects;
- (c) project resources;
- (d) sourcing of materials; and
- (e) project management.

The parties must have regard to the recommendations of the working party (acting reasonably and in good faith) in making their decisions about the expenditure of the sums set out in clauses 14.1 and 14.2, and may only materially depart from those recommendations after notifying the working party of that departure and the reasons for doing so. Each party acknowledges that investment decisions made in this regard should have regard to the full and optimum utilisation of the Rail Network and the interdependence of each party's investment decision. Notwithstanding the foregoing, each party retains the final right of decision over such investments.

14.4 Reporting on investment: The Access Provider and Toll Rail must each provide a report to the other party within 30 days of the end of their respective financial years setting out the investments they have made in that financial year in accordance with clauses 14.1 and 14.2.

14.5 Capital replacement and upgrade expenditure outside clause 14.1: The Access Provider must provide a report to Toll Rail quarterly setting out the capital replacement and upgrade expenditure in respect of which it intends to claim a return on capital, it being agreed that prior to committing to such expenditure, it shall have consulted with Toll Rail.

15. INFORMATION EXCHANGE

15.1 Provision of information: Each party must provide the other with any information reasonably requested from time to time by the other party to assist that other party to exercise its rights, and perform its obligations, under this Agreement. Each party ("**the First Party**") will advise the other

party of any proposed activity on or in connection with the Rail Network or any parcel of land adjoining, or closely connected to, the Rail Network as soon as reasonably practicable after becoming aware of that activity (if at all) if that activity would have or would be likely to have a material adverse impact on the other party's rights and obligations under this Agreement, unless that proposed activity relates to the exercise of the First Party's rights under Agreement.

- 15.2 **Parties to be kept informed:** Each party must use its Best Endeavours to advise the other party of its future plans and programmes relating to the Rail Network. This clause 15.2 does not oblige the Access Provider to disclose any information relating to Government or proposed Government policy.
- 15.3 **Data downloads:** On a quarterly basis, the Access Provider must provide to Toll Rail data downloads from the Access Provider's AVI/CIMW vehicle detection and in motion weighing equipment situated on the Rail Network.
- 15.4 **Confidentiality:** Any information provided by a party to the other under this clause 15 may be subject to reasonable and appropriate confidentiality undertakings.

16. COMMON ACCESS TERMS

- 16.1 **Common Access Terms to prevail:** The parties agree to be bound by and comply with the Common Access Terms. For the avoidance of doubt, where there is any inconsistency between this Agreement and the Common Access Terms, the provisions of the Common Access Terms prevail unless any specific provision of this Agreement or the Common Access Terms expressly states otherwise.
- 16.2 **Other Operators:** The Access Provider must not grant any New Operator Access Rights to the Rail Network (or sell or grant any lease, proprietary or other interest under which a third party could exercise rights of access, as an operator of rail service vehicles, to the Rail Network) without that New Operator also being bound in all material respects by the Common Access Terms. The Access Provider must not waive or vary any material provision of the Common Access Terms (other than the provisions referred to in clause 2.3 of the Common Access Terms) in any material respect in respect any access agreement with that Operator without Toll Rail's consent, such consent not to be unreasonably withheld.

17. AUCKLAND NETWORK

- 17.1 **No application:** Except to the extent described in section 1.8 of Schedule 1, this Agreement does not apply to the Auckland Network (as defined in the Auckland Access Agreement).

18. RESTORATION OF RAIL NETWORK

- 18.1 **Restoration of Rail Network:** Where the Rail Network, or part of the Rail Network, has been partially or totally damaged or destroyed due to the occurrence of a Force Majeure Event or an Incident, the Access Provider will promptly consult with Toll Rail as to appropriate and necessary

actions and shall advise Toll Rail of the various options and alternatives for restoration and make reasonable endeavours to restore the Rail Network within a reasonable period to at least the condition or reasonably equivalent condition that existed immediately prior to the occurrence of the Force Majeure Event or, as the case may be, the Incident. Toll Rail must provide such assistance as is reasonably requested by the Access Provider regarding such restoration. In making a decision not to restore any part of the Rail Network which may have been damaged or destroyed, the Access Provider will take into account the current and anticipated use of the relevant part of the Rail Network and the consequences for Toll Rail of that part of the Rail Network not being restored.

19. DEFAULT, SUSPENSION AND TERMINATION

19.1 Default:

- (a) The following events constitute an event of default in relation to Toll (each a **"Toll Rail Event of Default"**):
- (i) Toll Rail ceases to be authorised for a continuous period of six months to be an operator of trains for the provision of Services (including, without limitation, the revocation of its rail services licence);
 - (ii) any breach by Toll Rail of any material provision of this Agreement (including to avoid doubt any assignment or deemed assignment by Toll Rail of any of its rights or obligations under this Agreement in breach of this Agreement) and written notice has been provided to Toll Rail and the breach has not been remedied within 40 Business Days of that notice;
 - (iii) repeated material failure by Toll Rail to meet any Service Level established under clause 8 (except to the extent the Service Level regime agreed under that clause specifies otherwise);
 - (iv) any amount payable (other than an amount disputed on reasonable grounds between the parties) by Toll Rail under this Agreement remains unpaid for more than 40 Business Days after notice has been given by the Access Provider;
 - (v) any ongoing or repeated breach of this Agreement which will or is likely to result in material financial loss to the Access Provider or result in material disruption to the operation of the Rail Network or to Vehicle operations of the Access Provider or other Operators (or their sub-licensees) on the Rail Network and of which notice has been provided to Toll Rail and the breach has not been remedied with 40 Business Days of that notice;
 - (vi) the failure by Toll Rail to implement any material recommendations contained in a safety report issued in accordance with clause 10.9 of the Common Access Terms; or
 - (vii) an Insolvency Event occurs in relation to Toll Rail.

- (b) The following events constitute an event of default in relation to the Access Provider (each an “**Access Provider Event of Default**”):
- (i) any breach by the Access Provider of any material provision of this Agreement and written notice has been provided to the Access Provider and the breach has not been remedied within 40 Business Days of that notice;
 - (ii) repeated material failure by the Access Provider to meet any Service Level under clause 8 (except to the extent the Service Level regime agreed under that clause specifies otherwise);
 - (iii) any amount payable (other than an amount disputed on reasonable grounds between the parties) by the Access Provider under this Agreement remains unpaid for more than 40 Business Days after notice has been given by the Access Provider;
 - (iv) any ongoing or repeated breach of this Agreement which will or is likely to result in material financial loss to Toll Rail or result in material disruption to the Services of Toll Rail and of which notice has been provided to the Access Provider and the breach has not been remedied within 40 Business Days of that notice; or
 - (v) an Insolvency Event occurs in relation to the Access Provider.

19.2 **Suspension Notices:**

- (a) The Access Provider may acting reasonably serve a suspension notice (“**Suspension Notice**”) on Toll Rail where a Toll Rail Event of Default has occurred and the underlying default has not been rectified or compensation satisfactory to the Access Provider has not been paid to the Access Provider, and impose on Toll Rail by such notice reasonable restrictions on the use of the Rail Network (so far as is reasonably applicable), provided that such restrictions relate only to the Vehicles, Services or categories of train movements to which that Toll Rail Event of Default relates.
- (b) Toll Rail may acting reasonably serve a Suspension Notice on the Access Provider where an Access Provider Event of Default has occurred and the underlying default has not been rectified or compensation satisfactory to Toll Rail has not been paid to Toll Rail.

19.3 **Toll Rail Termination Notices:** The Access Provider may serve a termination notice (“**Toll Rail Termination Notice**”) on Toll Rail where:

- (a) Toll Rail fails to comply with any material restriction in a Suspension Notice issued to Toll NZ under clause 19.2;
- (b) A Toll Rail Event of Default has occurred and is capable of being remedied (including, for the avoidance of doubt, by the cessation of all or part of Toll Rail’s operations) but Toll Rail fails to remedy that Toll Rail Event of Default within 90 days of receiving a Suspension Notice that relates to that Toll Rail Event of Default issued under clause 19.2; or

- (c) a Toll Rail Event of Default has occurred and is not capable of being remedied and 90 days have elapsed since the service of a Suspension Notice that relates to that Toll Rail Event of Default issued under clause 19.2.

A Toll Rail Termination Notice issued under this clause 19.3 may relate to the whole or any part of the Rail Network, or to any Service or Vehicle.

19.4 Access Provider Termination Notices: Toll Rail may serve a termination notice ("**Access Provider Termination Notice**") on the Access Provider where:

- (a) an Access Provider Event of Default has occurred and is capable of being remedied but the Access Provider fails to remedy the Access Provider Event of Default within 90 days of receiving a Suspension Notice that relates to the Access Provider Event of Default issued under clause 19.2; or
- (b) an Access Provider Event of Default has occurred and is not capable of being remedied and 90 days has elapsed since the service of a Suspension Notice that relates to that Access Provider Event of Default issued under clause 19.2.

19.5 Accrued rights: Termination under clause 19.3 or 19.4 does not affect any accrued rights and responsibilities of the parties or any such rights and responsibilities which are intended to continue or come into force after this Agreement ends. Without limiting the foregoing, clauses 7.2(a), 14 and 16 of the Common Access Terms continue in force (and are enforceable by the parties) notwithstanding the expiry or termination of this Agreement.

19.6 Effect of termination notice: On the date specified in any termination notice, Toll Rail's Access Rights and all other rights of Toll Rail as an Operator under this Agreement with respect to the parts of the Rail Network to which the termination notice relates cease to the extent specified.

19.7 Reversion of land:

- (a) Without limiting clause 19.6 and notwithstanding anything to the contrary in the Core Lease:
 - (i) if the Access Provider serves a Toll Rail Termination Notice on Toll Rail: or
 - (ii) if Toll Rail:
 - (1) serves an Access Provider Termination Notice on the Access Provider; and
 - (2) does not enter into a Replacement Access Agreement with the Crown in accordance with the Crown Deed of Covenant,

then the Access Provider (on behalf of the Lessor under the Core Lease) may give no less than 3 months notice in writing of the termination of the Core Lease in respect of the Relevant Retained Land that relate to the parts of the Rail Network to which the termination notice relates and, on the expiry of that notice period, the Core Lease terminates in respect of the Relevant Retained Land. The Crown must procure NZRC's (as a party to the Core Lease) agreement to this clause 19.7.

- (b) For the purpose of clause 19.7(a)(ii)(2), “**Crown Deed of Covenant**” has the meaning given to it in the Sale Agreement and “**Replacement Access Agreement**” has the meaning given in clause 4.1 of the Crown Deed of Covenant.

19.8 Removal of Vehicles: If Toll Rail’s Access Rights are terminated in respect of the whole or any part of the Rail Network, Toll Rail must remove its Vehicles and related materials from the Rail Network (to the extent that those Vehicles and related materials relate to Toll Rail in its capacity as an Operator) within 30 days of the termination of Toll Rail’s Access Rights. If Toll Rail fails to remove such Vehicles and related materials within this time frame, the Access Provider may place such Vehicles and related materials into storage areas and charge Toll Rail a storage fee, based on applicable market rates, until such time as such Vehicles and related materials are removed.

20. ASSIGNMENT AND SUBLICENSING

20.1 No assignment or subcontracting by Toll Rail:

- (a) Subject to clause 20.3, Toll Rail:
 - (i) may assign or transfer all (but not part) of its rights and obligations under this Agreement with the prior written consent of the Access Provider (such consent not to be unreasonably withheld); but
 - (ii) cannot otherwise assign or transfer its rights or obligations under this Agreement whether in whole or in part.
- (b) For the purposes of clause 20.1(a), any of the following events in respect of Toll Rail (or, to avoid doubt, any permitted assignee of any Toll Rail) is deemed to be an assignment for which the Access Provider’s prior consent is required under clause 20.1(a) above:
 - (i) a change in the ownership of shares in Toll Rail (or such assignee) which results in Toll Rail (or such assignee) ceasing to be a wholly owned subsidiary of Toll NZ Limited; or
 - (ii) a change in the legal or beneficial ownership of shares in a holding company of Toll Rail (or such assignee) which results in Toll Rail (or such assignee) ceasing to be a wholly owned subsidiary of Toll NZ Limited.

20.2 Assignment by Access Provider:

- (a) The Crown is entitled to assign or transfer its rights and obligations under this Agreement to any Crown Transferee.
- (b) The Crown Transferee may assign or transfer its rights and obligations under this Agreement to any wholly owned subsidiary provided that the Crown Transferee gives a parent company guarantee to Toll Rail, or otherwise with the prior written consent of Toll Rail (such consent not to be unreasonably withheld). Other than provided in the previous sentence, the Crown

Transferee (or any wholly owned subsidiary of the Crown Transferee) cannot assign or transfer its rights and obligations under this Agreement whether in whole or in part.

- (c) At the request of either party, the Access Provider, Toll Rail and the proposed assignee must enter into a deed of novation to give effect to the assignment of the Access Provider's rights and obligations under this clause 20.2.
- (d) The Access Provider must not subcontract its functions as Network Controller to any other Operator. Subject to the previous sentence and subject to clause 20.3, the Access Provider may subcontract to any person the performance of all or any part of its rights and obligations under this Agreement.

20.3 Subcontracting: The Access Provider agrees that it will not enter into any contract, that has the effect of the Access Provider subcontracting or transferring significant responsibility for the management of the Access Provider's functions under this Agreement or for the maintenance of the Rail Network, with any material competitor in New Zealand or Australia of:

- (a) Toll Rail;
- (b) any of its related companies (as defined in section 2(3) of the Companies Act 1993 provided that all references to a subsidiary related or holding company of Toll Rail which is not a company incorporated or registered under the Companies Act 1993 shall be construed as if that entity were such a company);
- (c) any of its Subsidiaries: or
- (d) any joint venture entity that conducts significant transport operations in New Zealand or Australia in which any person in clause 20.3(a), (b), or (c) has a minimum 50% shareholding or interest,

unless:

- (e) the entry into of that agreement has been approved by the Minister of Finance if the Access Provider is the Crown, or by the Access Provider's shareholding Minister if the Access Provider is the Crown Transferee ("the Shareholder"); and
- (f) the Shareholder has consulted in good faith with Toll Rail and considered any concerns raised by Toll Rail in respect of such agreement.

20.4 Toll Rail requests for third party access:

- (a) Toll Rail may request the Access Provider to grant a third party access to the Rail Network and the Access Provider may not unreasonably refuse such access (subject to the Access Provider agreeing appropriate terms and conditions with that third party), provided that:
 - (i) Toll Rail may require the Access Provider to terminate the third party's access rights on no less than 40 days notice;

- (ii) the third party to whom access rights are to be granted:
 - (1) will be operating on a branch line of the Rail Network;
 - (2) is a customer of Toll Rail; and
 - (3) in any one year does not carry cumulative loads under its Access Rights of above 100,000 tonnes per year;
- (iii) the Access Provider is not to be held in breach of this Agreement as a result of granting access under this clause 20.4(a); and
- (iv) Toll Rail indemnifies the Access Provider from and against all costs, losses, expenses and liabilities arising from any default (including any failure to pay any money due and payable) under the agreement between the Access Provider and third party.

To avoid doubt, all access fees and charges under the third party agreement are payable to the Access Provider, provided that the Access Provider offsets the net amount of those fees and charges (after deducting all costs incurred by the Access Provider in connection with providing access to the third party) against the access fee payable by Toll Rail under this Agreement.

- (b) Subject to clause 20.4(a), no other sub-licensing (including any form of subletting or subcontracting regardless of how it is structured) by Toll Rail of its Access Rights is permitted without the consent in writing of the Access Provider's (which it may give or withhold at its sole discretion).

21. DISPUTE PROCEDURE

21.1 Disputes: Subject to clause 21.2, any dispute or disagreement between the parties in connection with this Agreement that is unable to be resolved between the parties, shall be referred to the respective Chief Executives of the parties. If the Chief Executives are unable to resolve in good faith the dispute within 20 Business Days, either party may issue any legal proceedings relating to the dispute. This clause 21.1 does not prevent a party from applying to court for any interim or preliminary relief in respect of a dispute.

21.2 Failure to reach agreement: If the parties do not reach agreement under clauses 5.2, 7.5, 8.2, 8.4, 8.5(d), 8.6(d), 8.7, and 10.3, and section 2.6 of Schedule 1 either party may by notice in writing require the matters not agreed upon to be determined by an expert in accordance with clause 15.4 of the Common Access Terms.

22. MISCELLANEOUS PROVISIONS

22.1 Variation: Any variation to this Agreement must be recorded in writing and signed by the authorised representatives of each party.

22.2 **Notices and invoices:** Notices and invoices under this Agreement must be in writing and must be sent to the following contact addresses (or any address notified in writing by a party):

The Access Provider: The Treasury
1 The Terrace
P O Box 3724
Wellington

Attention: Treasury Solicitor

Fax: 04 472 6281

Toll Rail: Toll NZ Consolidated Limited
Tranz Rail Building
Smales Farm
Cnr Northcote and Taharoto Roads
Takapuna
Auckland

Attention: General Counsel

Fax: 09 270 5384

Any notice or invoice sent by post to that contact address is assumed to have been delivered 2 Business Days after it is posted. A notice may be sent by fax to the person listed above. Any notice sent by fax to that contact number is assumed to have been delivered once a correct transmission confirmation slip is received, but any fax sent after 5pm on a Business Day is deemed to have been delivered at 9am on the next Business Day.

22.3 **No waiver or consent:** No waiver of any breach, or failure to enforce any provision, of this Agreement at any time by either party in any way affects, limits or waives the right of such party to later enforce and compel strict compliance with the provisions of this Agreement. No consent under this Agreement shall be valid unless it is in writing, nor will it eliminate or modify the need for a specific consent in any other instance.

22.4 **No implied waivers:** A failure to exercise or delay in exercising any right under this Agreement will not operate as a waiver of that right, nor will any single or partial exercise of any right preclude any other or further exercise of that right or the exercise of any other right.

22.5 **Relationship of parties:** Nothing in this Agreement is deemed or construed to constitute any party a partner or agent of the other or to create any trust.

22.6 **Governing law:** This Agreement is governed by, and construed in accordance with, the laws of New Zealand, and the parties submit to the exclusive jurisdiction of the Courts of New Zealand.

- 22.7 **Counterparts:** This Agreement may be executed in two or more counterparts, each of which is deemed an original and all of which constitute one and the same agreement. This Agreement is effective upon the exchange by facsimile of executed signature pages.
- 22.8 **Entire agreement:** This Agreement and the Common Access Terms record the entire agreement between the parties, in respect of its subject matter, and prevails over any earlier agreement.
- 22.9 **Further assurance:** Each party must promptly do everything reasonably required to give effect to the terms of this Agreement according to their spirit and intent.
- 22.10 **Partial invalidity:** The illegality, invalidity or unenforceability at any time of any provision of this Agreement under any law, does not affect the legality, validity or enforceability of the remaining provisions of this Agreement nor the legality, validity or enforceability of those provisions under any other law.
- 22.11 **Crown action:** Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement requires the Crown (or the Access Provider if different from the Crown) to exercise, or use, any regulatory or legislative powers in order to influence or affect an outcome.

EXECUTION

SIGNED for and on behalf
of **HER MAJESTY THE QUEEN IN
RIGHT OF NEW ZEALAND** by her
MINISTER OF FINANCE:

in the presence of:

Signature of witness

Full name of witness

Address

Occupation

SIGNED for and on behalf
of **TOLL NZ CONSOLIDATED LIMITED** by:

Signature of Attorney

Signature of Attorney

Full name of Attorney

Full name of Attorney

SCHEDULE 1

Track Access Charges

1. PRINCIPLES:

1.1 Definitions:

“Cash expenses”: means all cash expenditure or cash outlay by the Access Provider (excluding capital expenditure). Cash expenses:

- (a) includes the full costs of performing the Access Provider’s obligations under this Agreement, including the costs of complying with the National Rail Safety System and other Codes (for example, the costs of any variations needed under the Transfield Contract to comply with National Rail Safety Standard); AND
- (b) includes the reasonable costs a prudent access provider would incur or internalise in managing its liability to Toll Rail under the liability provisions of the Common Access Terms, and this Access Agreement, including the costs of insurance and self insurance (contingency fund) having regard to the current risk profile of Toll Rail in consultation with Toll Rail; BUT
- (c) excludes any cash expenses directly relating to capital expenditure by the Access Provider that falls within section 1.3(a)(iii).

“Transfield” means Transfield Services Infrastructure (New Zealand) Limited

“Transfield Contract” means the Services Agreement Relating to Infrastructure Engineering Services in connection with Tranz Rail Outsourcing Programme dated 22 March 2002 between Transfield and Tranz Rail Limited and all related agreements and arrangements.

1.2 Over-riding principles:

- (a) The **TAC** payable by Toll Rail to the Access Provider for each Annual Period during the Term are to be set at levels which are expected to ensure that the Access Provider recovers:
 - (i) a return on capital and depreciation in respect of capital expenditure, to the extent provided in section 1.3; and
 - (ii) the reasonable cash expenses that an efficient access provider would be expected to incur in the operation and maintenance of the Rail Network and Network Assets and in the performance of the Access Provider’s other obligations under this Agreement,

after deduction of net access fees received from other rail operators for the use of the Rail Network and Network Assets and income derived from arrangements transferred to the Access Provider under the Sale Agreement relating to bridges on the Rail Network. The parties may also agree to set-off the amount payable to Toll Rail under clause 9.5(a) of the Sale Agreement in respect of the Area Networks Agreement against the TAC payable under this Schedule.

- (b) The Access Provider shall use its Best Endeavours to reduce operating costs through efficiency and other productivity gains. The Access Provider and Toll Rail will seek to realise productivity gains from capital replacement and upgrade projects.
- (c) Subject to any obligations of confidentiality, the Access Provider will provide Toll Rail with open book access (subject to reasonable confidentiality terms) to all financial and operational data concerning cash expenses and capital expenditure that form part of the TAC, to enable Toll Rail to assess the Access Provider's performance against section 1.2(b).
- (d) The TAC is payable by Toll Rail throughout the Term regardless of whether or not Toll Rail makes use of all or any part of the Rail Network or Network Assets (including when any part of the Rail Network is unavailable due to a Force Majeure Event or otherwise), provided that the variable component (agreed under section 1.7) of the TAC in respect of affected Line Segments will not be payable to the extent that the Line Segment is not being used by Toll Rail.
- (e) GST is payable by Toll Rail in addition to the TAC.

1.3 Capital expenditure:

- (a) **Return on the Access Provider's capex:** Subject to section 1.3(b), the TAC payable by Toll Rail will include recovery by the Access Provider of a return on capital and depreciation on capital expenditure to the extent that expenditure is undertaken:
 - (i) as part of the replacement of any of the Rail Network or Network Assets;
 - (ii) to enable the Access Provider to comply with legal or regulatory requirements (including any requirement of the LTSA or any other Authority); or
 - (iii) at Toll Rail's request.

The Access Provider will use its Best Endeavours to implement capital expenditure on the most economic basis practicable.

- (b) **Excluded Capex:** The Access Provider shall not be entitled to recover a return on capital or depreciation on the following capital expenditure:
 - (i) The first \$100,000,000 plus GST of capital expenditure by the Access Provider in the period to 30 June 2007 on replacement of the Rail Network and Network Assets (such as expenditure on life expired infrastructure). The Access Provider is deemed to have expended \$13,757,498.24 of that \$100,000,000 (being the amount reimbursed to Toll Rail under clause 4.2(d)(iii) of the Sale Agreement) as at the Completion Date (and to avoid doubt, the other amounts reimbursable to Toll Rail in respect of capital expenditure under clause 3.2(b)(iii) of the Sale Agreement and clause 9.2 of Schedule 10 to the Sale Agreement shall also be deemed to have been expended (and shall be deducted) from that \$100,000,000. Notwithstanding the foregoing, the Access Provider shall be entitled to recover a return on capital and depreciation on any capital expenditure by the Access Provider in excess of \$25,000,000 on the Midland line, in accordance with section 1.3(a);

- (ii) The \$100,000,000 plus GST to be expended by the Access Provider under clause 14.1(a) of this Agreement in upgrading the Rail Network (whether expended by the Crown or the Access Provider); or
- (iii) Capital expenditure by the Access Provider that does not provide any commercial benefit for Toll Rail (such as to extend the geographic scope of the Rail Network if such expansion does not confer commercial benefits on Toll Rail), provided (to avoid doubt) that expenditure within sections 1.3(a)(i) to (iii) is not excluded capital expenditure under this section.

- 1.4 **Other Access Provider Functions:** The parties record that for reasons of convenience or efficiency, if the Crown transfers this Agreement to a Crown Transferee, the Crown may also require the Crown Transferee to undertake public policy or other functions, in which case:
- (a) the Crown Transferee's accounts shall ensure that such functions are separately recorded and assume a reasonable share of corporate overheads; and
 - (b) there is no expectation of cross subsidy in either direction between such additional functions and the operation and administration of the Rail Network and Network Assets.
- 1.5 **Productivity gains:** Where the Access Provider and Toll Rail have agreed a capital expenditure project which has specific agreed operational expenditure benefits, the cash expenses component of the TAC shall be reduced by an amount equal to 90% of the agreed annual savings from the date of project completion, as set out in the project brief approved by the Steering Committee. That discount shall continue to the next triennial pricing review under section 3.2.
- 1.6 **New or decommissioned lines:** When Toll Rail obtains access rights to new Line Segments or when existing Line Segments are decommissioned, the parties will agree the appropriate TAC adjustment.
- 1.7 **Capacity and variable charges:** The parties record their intention to move to a capacity and variable pricing regime that is consistent with the overriding principles of this Schedule. No later than 6 months after the Commencement Date, Toll Rail and the Access Provider shall meet to consider and agree the appropriate principles for inclusion in such a regime, which must be consistent with the overall pricing principles set out in this Schedule. This regime is expected to be based on a capacity unit measure and variable tonnage unit measure by Line Segment, such that the aggregate of the proposed capacity and variable measures will be expected to equal the total TAC that would otherwise apply under this Schedule. The parties' aim is to agree this regime to operate from 1 July 2005.
- 1.8 **Auckland costs:** The parties acknowledge that:
- (a) notwithstanding that this Agreement relates to the Rail Network only, and not to the Auckland Network; and
 - (b) notwithstanding any other provision of this Schedule or this Agreement,
- the TAC payable by Toll Rail under this Agreement shall include the costs incurred by the Access Provider in operating and maintaining the Auckland Network in accordance with (and performing its

obligations under) the Auckland Access Agreement. Consequently, for so long as Toll Rail pays the access fee under the Auckland Access Agreement, the Access Provider agrees to deduct that access fee payable by Toll Rail under the Auckland Access Agreement from the TAC under this Agreement.

2. RETURN ON CAPITAL

2.1 **WACC:** In any Annual Period, the Access Provider's return on capital on capital expenditure in respect of which the Access Provider is entitled to recover a return shall be calculated as the average of the opening and closing depreciated book value for that period of the asset created by the expenditure multiplied by the Access Provider's weighted average cost of capital ("**WACC**").

2.2 **Book value of Rail Network and Network Assets:** For the purposes of this Agreement, the book value of the Rail Network or a Network Asset shall be calculated as the sum of its cost (less accumulated depreciation) plus interest accrued at the Access Provider's WACC on capital spent on the asset up to the time of its completion.

2.3 **The Access Provider's WACC:** The Access Provider's WACC shall be calculated as:

$$\text{WACC} = D/(D + E) \times K_d \times (1 - T) + E/(D + E) \times K_e$$

where:

D = book value of the Access Provider's debt;

E = book value of the Access Provider's equity;

K_d = the Access Provider's cost of debt;

T = tax rate on company income in New Zealand;

K_e = The Access Provider's cost of equity.

2.4 **The Access Provider's cost of equity:** The Access Provider's cost of equity shall be calculated as:

$$K_e = R_f \times (1 - t) + B_e \times \text{MRP}$$

where:

R_f = yield on 10-year New Zealand government stock;

t = weighted average tax rate on interest across all investors;

B_e = the Access Provider's equity beta;

$$= B_a \times (1 + D/E);$$

B_a = the Access Provider's asset beta;

MRP = post-tax market risk premium for the New Zealand market.

2.5 **The Access Provider's WACC parameters for the period to 30 June 2013:** For the period to 30 June 2013, the following parameters used in calculating the Access Provider's WACC are to be fixed at the values shown:

t = 0.20;

Ba= 0.45;

MRP = 7%;

T = zero in periods when the Access Provider is expected to have either current or past year tax losses available such that it is not expected to pay income tax in the period under consideration.

2.6 **The Access Provider's WACC parameters for periods after 30 June 2013:** The Access Provider and Toll Rail shall agree the WACC parameters to be used to calculate the Access Provider's WACC for each 3 year period following 30 June 2013. If the parties are unable to agree the parameters within a reasonable period, either party may require the matter to be referred for expert determination under clause 21.2. The role of the expert is to determine the Access Provider's WACC parameters, such determination to be binding on the parties.

2.7 **Depreciation:** Straight-line depreciation is to be recovered by the Access Provider from Toll Rail on capital expenditure in respect of which the Access Provider is entitled to recover depreciation as referred to in section 1.3, the depreciation term to be determined in accordance with generally accepted accounting practice (as defined in the Financial Reporting Act 1993).

2.8 **Income tax:** The Access Provider will take advantage of available tax deductions, including continuing to deduct replacement capital expenditure, to the extent permitted by law.

3. SETTING THE TRACK ACCESS CHARGE AND PAYMENT

3.1 1 July 2004 to 30 June 2005 ("First Annual Period"):

- (a) The TAC payable by Toll Rail for the First Annual Period is \$3,198,250 plus GST per month (equating to an annual TAC of \$38,379,000 ("**Base TAC**") plus GST) **plus** the amounts referred to in section 3.1(b). The monthly payment of that TAC shall commence from the 15th of the second month following the end of the Transitional Period (as defined in the Sale Agreement), on the basis that Toll Rail is meeting the cost of operating and maintaining the Rail Network under the Sale Agreement during that Transition Period.
- (b) The Base TAC was based on budget and supporting information provided to the Crown by Toll Rail. ("**Budget**"). Toll Rail agrees to reimburse the Access Provider within one month of 30 June 2005 for cash expenses incurred by the Access Provider in respect of the First Annual Period that were not provided for in the Budget, to the extent that:
 - (i) the same cash expenses were incurred by Toll Rail in relation to the Rail Network and Network Assets prior to 30 June 2004, and those expenses are consistent with the pricing principles in section 1.2; and

- (ii) the cumulative total of all such cash expenses for the First Annual Period exceeds \$250,000 (plus GST) but only to the extent of that excess.

The Access Provider must produce reasonable documentation in support of any claim under this section.

- (c) The electricity costs for Vehicle traction on the Rail Network shall be met by Toll Rail directly as Toll Rail is retaining the Meridian Energy and Transpower supply contracts. The Access Provider shall have no responsibility for the provision of electricity for that purpose.

3.2 Subsequent Triennial Charging Periods:

- (a) At least 3 months prior to the end of the First Annual Period (and at least 6 months prior to the commencement of each subsequent triennial TAC charging period from 30 June 2008), the Access Provider will prepare a forecast for the expected cash expenses of the Access Provider for the following 3 year period ("**Forecast**") having regard to:
 - (i) the categories and amount of costs included in the Budget; and
 - (ii) the pricing principles in section 1.2 (provided that if the Budget is in conflict with those principles, section 1.2 must be given precedence).
- (b) The purpose of the Forecast is to enable the Access Provider to set the TAC (before adding the Access Provider's return on capital and depreciation on capital expenditure in respect of which it is entitled to recover a return) for the subsequent triennial charging period. Toll Rail may either agree to or dispute the Forecast.
- (c) If Toll Rail disputes the costs set out in the Forecast within 30 days of receipt of the Forecast from the Access Provider (or 60 days in the case of the second and subsequent triennial TAC charging period), Toll Rail must submit its own proposed Forecast to the Access Provider for consideration, with the differences from the Access Provider's Forecast identified. The parties must negotiate in good faith in order to resolve the matters in dispute, at all times having regard to the materiality of the matters disputed. If the parties are unable to resolve that dispute within a reasonable period of good faith negotiations, either party may refer each of their proposed Forecasts (each amended to take account of any matters agreed by the parties) to an independent third party ("**Independent Auditor**") to review and audit the reasonableness of the cash expenses set out in the draft Forecasts based on the pricing principles in section 1.2, 1.8, 3.1 and 4.1 and having regard to best practice.

The Independent Auditor shall produce his or her own Forecast based on those of the parties, making such changes as he or she considers reasonable having regard to best practice (to the extent consistent with those pricing principles in section 1.2). The final Forecast shall be the midpoint between the Independent Auditor's determination and the position of the party whose draft Forecast was closest to the Independent Auditor's determination (which shall be decided by the Independent Auditor). The Independent Auditor's costs shall be paid by the party whose Forecast were furthest from the determination of the Auditor.

(d) The final Forecast (either as agreed or determined by the Independent Auditor) will be used to set the TAC for the subsequent triennial TAC charging period. The TAC shall comprise the sum of the Forecast plus the Access Provider's return on capital and depreciation on the capital expenditure in respect of which it is entitled to recover a return for the same period as the Forecast.

3.3 **Payment:** From the end of the Transitional Period, the TAC will be payable in monthly instalments in arrears on the 15th of each month. Default interest will be payable on payments overdue by 30 days or more, at the rate set out in clause 13.3 of this Agreement.

3.4 **Subsidies:** Any subsidy for a Line Segment or rail service that the Access Provider agrees to provide to Toll Rail will be provided in all respects independently from the TAC. The Forecast and the TAC will not include any deduction for any such subsidy.

4. **ADJUSTMENT OF TAC AND ADDITIONAL COST RECOVERY**

4.1 The TAC will be adjusted at the end of each Annual Period within a triennial TAC charging period by the movement in CPI during that period (or any other index agreed by the parties). Notwithstanding the foregoing, the CPI adjustment shall not apply to any material costs which are contractually fixed (and cannot be increased by the relevant supplier) from the current Annual Period to the end of the next Annual Period.

4.2 The TAC may also be adjusted by the Access Provider during any triennial TAC charging period in accordance with the pricing principles in section 1.2 to take account of any unbudgeted capital expenditure by the Access Provider in that period in respect of which the Access Provider is entitled to a return on capital expenditure under section 1.3.

4.3 Subject to section 8, Toll Rail must within 120 days of the provision of written notice by the Access Provider including reasonable details (including detailed quotations of any proposed rectification works) reimburse the Access Provider for any uninsured costs incurred by the Access Provider arising from the rectification of damage to the Rail Network and Network Assets caused by any fire (unless caused by Access Provider, its agents or representatives (including Transfield) or any other Operator), flood, storm, explosion (unless caused by the Access Provider, its agents or representatives (including Transfield) or any other Operator) nuclear accident, sabotage, revolution, act of war whether declared or not, warlike operations, earthquake, land slide, volcanic eruption or any similar act of God or act of nature. If Toll Rail disputes its liability for any amount claimed by the Access Provider under this clause including as to quantum, the parties agree to apply the dispute resolution procedure under clause 15 of the Common Access Terms, in which case no amount shall be payable by Toll Rail until the dispute has been resolved under that clause.

5. **REVIEW OF PRICING PRINCIPLES**

The parties will review in good faith the operation of the pricing principles and TAC regime in this Schedule in the six months prior to 30 June 2013 (or over such other period that the parties agree). Changes may only be made by agreement.

6. INFORMATION EXCHANGE

6.1 To support the Access Provider's and Toll Rail's respective obligations in this Schedule, the Access Provider and Toll Rail will be subject to reciprocal monthly information exchange obligations. The information to be exchanged will be based on the following:

- (a) reporting of performance against their respective Service Levels including additional service levels purchased by the Access Provider;
- (b) details of any future plans and programmes; and
- (c) it will include a process for verification where reasonably required by a party. Such information will be provided subject to appropriate confidentiality undertakings.

6.2 Without limiting the foregoing, if permitted under the Transfield Contract (or any replacement thereof), the Access Provider agrees to provide Toll Rail with copies of all monthly reports prepared by Transfield and the Access Provider after the Commencement Date.

6.3 Toll Rail must provide the Access Provider with all material information and explanations (including regarding Toll Rail's anticipated business plan, operations, including changes to its operations, for the following three year TAC charging period) necessary to enable the Access Provider to prepare reasonably accurate Forecasts under section 3 and to set the TAC in accordance with the principles in section 1.2. The Access Provider shall be entitled (by notice in writing to Toll Rail) to increase the TAC payable by Toll Rail by a reasonable amount if:

- (a) information provided by Toll Rail in connection with the preparation of any Forecast was known by Toll Rail to be incorrect or misleading; or
- (b) Toll Rail knowingly failed to provide any information to the Access Provider that would have been material to the preparation of the Forecast,

("Charging Error") with the result that the TAC for the applicable triennial TAC charging period was set at an amount materially lower than would have been the case but for that Charging Error.

7. RESTRUCTURE AND REPLACEMENT OF TRANSFIELD CONTRACT

7.1 Toll Rail will continue negotiations with Transfield to amend the Transfield Contract in order to realign the pricing and charging mechanisms for the maintenance of the Rail Network and Network Assets. Toll Rail agrees that it must obtain the Access Provider's approval for the proposed amended contract (approval not to be unreasonably withheld) before giving effect to those amendments with Transfield. If the negotiations are not completed by the end of the Transition Period, the parties will consult in good faith to determine which of them will continue the negotiations.

7.2 Whatever the outcome of those negotiations, the Access Provider agrees that the overhead allocation from the Transfield Contract shall be divided between operating and capital expenses in proportion to the amounts of the direct expenditure through Transfield on operating and capital items.

- 7.3 The Budget and the TAC for the First Annual Period shall be adjusted by the parties to take account of the changes to the agreed charges payable to Transfield.
- 7.4 The parties acknowledge that:
- (a) the Transfield Contract expires in 2005;
 - (b) the transition from the provision of maintenance services for the Rail Network and Network Assets ("**Maintenance Services**") under that contract to a new contract (or to an "insourced" model) will be a major event which will have to be carefully planned and implemented in order to ensure continuity of service, to address all safety and regulatory issues and to maximise the outcomes for both the Access Provider and Toll Rail in respect of such maintenance services; and
 - (c) they must work together co-operatively and in good faith in order to achieve those outcomes.
- 7.5 The parties will establish a working group of 2 senior executives each within 4 weeks of 30 June 2004 to develop a plan to address the matters referred to in section 7.3 ("**Transition Plan**"). The matters addressed in the Transition Plan shall include:
- (a) a process for the identification of the current level of Maintenance Services performed by Transfield ("**Base Services**") and the total annual cost payable under the Transfield Contract (after any amendment approved under section 7.1 is implemented) for that level of maintenance ("**Base Cost**"). If the parties cannot agree on the Base Services or Base Cost within a reasonable period and after following the dispute resolution procedure in clause 21.1, either party may require these to be determined by an independent expert in accordance with clause 15.4 of the Common Access Terms; and
 - (b) the preparation of a proposed procurement plan consistent with best practice for recommendation to the Access Provider.
- 7.6 The Access Provider retains the final right of decision in respect of the terms of the procurement plan (including the terms on which the Maintenance Services are put to tender), subject to the following:
- (a) the Access Provider must consult with Toll Rail before departing from the plan recommended by the working group under clause 7.4;
 - (b) the Maintenance Services must be put to international competitive tender;
 - (c) the tender must be conducted on a basis which will enable the parties to compare the costs proposed by tenders with the Base Cost for the Maintenance Services (this does not preclude the Access Provider from requesting tenders for additional services or service levels – whether or not the cost of such items will form part of the TAC will be determined in accordance with the pricing principles of this Schedule);
 - (d) the tender will allow both the Access Provider and Toll Rail to submit arms length tenders to provide the Maintenance Services internally (subject to appropriate protections to avoid conflict of interest); and

- (e) unless it is inappropriate (for example due to conflict of interest), Toll Rail will be entitled to appoint an observer to attend the Access Provider's internal (but not Board) meetings for the evaluation of tenders received.

7.7 Subject to compliance with the process in section 7.5, the final right of decision on the appointment of a preferred tenderer will rest with the Access Provider. The Access Provider shall notify Toll Rail of its preferred tenderer with a comparison of the tendered cost of providing the Maintenance Services with the Base Cost. If the tendered cost is greater than the Base Cost (adjusted for movements in the CPI (or any other index agreed by the parties) in the period between the date the base cost was fixed and the date of comparison) by more than 5%, Toll Rail shall have the option (exercisable within 20 Business Days of receipt of notice from the Access Provider) to enter into a contract with the Access Provider to provide the Maintenance Services on the terms on which the Access Provider called for tenders (provided that any maintenance fees and other costs payable to Toll Rail will be included as part of the TAC payable by Toll Rail unless the parties agree offset arrangements).. If the parties cannot agree contract terms within 30 days of Toll Rail exercising such option, the dispute resolution provision in clause 21.1 shall apply. If the contract terms have not been agreed within a further 14 days, either party may require the terms to be set by independent expert under clause 15.4 of the Common Access Terms on the basis of the terms of the tender and such of the contract terms that are not in dispute between the parties.

7.8 Toll agrees to participate in the process in clause 7.5, and to exercise its rights in clause 7.6, in good faith and must not actively discourage potential tenderers from participating in the tender process or from making best practice bids in response to the tender.

8. FORCE MAJEURE IN EXCESS OF INSURANCE LIMIT

8.1 Despite anything to the contrary in clause 18.1 of this Agreement:

- (a) where the Rail Network or Network Assets, or part of the Rail Network or Network Assets, has been partially or totally damaged or destroyed by or in connection with any fire (unless caused by a Party or a Party's agent or representative), flood, storm, explosion (unless caused by a Party or a Party's agent or representative), nuclear accident, sabotage, revolution, act of war whether declared or not, warlike operations, earthquake, land slide, volcanic eruption or any similar act of God or act of nature ("**Disaster**"); and
- (b) the Access Provider acting reasonably estimates that the cost of restoring the affected Rail Network or Network Assets would cost:
 - (i) for insured events, in excess of the limit of cover under the Access Provider's relevant policy of material damage insurance; or
 - (ii) in all other cases, in excess of \$4,000,000 plus GST,

then:

- (c) the Access Provider, after calculating its estimate for such restoration costs, must promptly consult in good faith with Toll Rail on options and alternatives available for restoration of the Rail Network or Network Assets or part of them, including the extent to which each of the

parties might bear uninsured costs and the extent to which, if at all, any costs borne by the Access Provider will be recovered via the TAC; and

- (d) if the parties agree on an option or alternative to restore the Rail Network or Network Assets or part of them under section 8.1(c), the parties shall negotiate appropriate documentation for those arrangements. Neither party shall be contractually bound until a contract is signed by both of them.

To avoid doubt, if section 8.1(a) or (b) does not apply, then Toll Rail must meet the full cost of the restoration of the affected parts of the Rail Network and Network Assets in accordance with section 4.3.

8.2 If the parties cannot reach agreement under section 8.1(c) above, Toll Rail must notify the Access Provider in writing within 120 days of the first consultation by the Access Provider under that clause stating whether it elects to:

- (a) terminate this Agreement in respect of the Line Segments (and Network Assets as applicable) that have been damaged or destroyed (including any Line Segments and Network Assets reasonably related to those damaged or destroyed Line Segments and Network Assets, so that the remaining parts of the Rail Network and Network Assets are operationally self contained). If Toll Rail elects to terminate it shall not be liable to contribute towards any restoration of the Line Segments (and Network Assets as applicable) under section 4.3 or otherwise; or
- (b) meet the cost (including deductible) of the restoration of the affected Line Segments and Network Assets over and above such amounts as the Access Provider recovers from its insurance (if any).

If Toll Rail elects to terminate under section 8.2(a) (and Toll Rail shall be deemed to have so elected if it fails to give notice within the above time period), this Access Agreement and Toll's Access Rights shall be terminated in respect of those Line Segments and Network Assets referred to in that section. If Toll Rail elects to meet the cost of restoration under section 8.2(b), the Access Provider shall proceed with the restoration work in accordance with clause 18.1 of this Agreement. Toll must pay all costs reasonably incurred by the Access Provider within 30 days of receipt of a correct invoice from the Access Provider. The Access Provider is not required to take any action under clause 18.1 of this Agreement prior to Toll Rail electing to meet the costs of restoration under section 8.2(b).

8.3 Where any of this Access Agreement is terminated under section 8.2 above in respect of any Line Segments or Network Assets, Toll Rail is deemed to have terminated this Agreement under section 8.2 and:

- (a) despite anything to the contrary in this Agreement, Toll Rail has no rights (including no right of first refusal under clause 6 of this Agreement) in respect of terminated parts of the Rail Network if the Access Provider decides to restore those parts at its own cost;

- (b) despite anything to the contrary in the Crown Deed of Covenant, Toll has no right to enter into a Replacement Access Agreement with the Crown in accordance with the Crown Deed of Covenant;
- (c) clauses 19.5, 19.6, and 19.8 apply as if Toll Rail had terminated this Agreement in accordance with clause 19; and
- (d) clause 19.7(a)(ii) applies, with all the necessary changes, to such termination.

8.4 For the purpose of this section 8 **“Crown Deed of Covenant”** and **“Replacement Access Agreement”** has the meaning given in clause 19.7(b) of this Agreement.

SCHEDULE 2

Line Segments and Minimum Annual Freight Thresholds

Line Type	Line Section	Track Km	Threshold (minimum freight level) in tonnes ¹	Threshold passenger service levels (in service numbers)
I	Cambridge Branch (Ruakura – Hautapu)	15	*	
I	ECMT Te Maunga – Kawerau	77	*	
I	Hokitika Branch	38	*	
I	Kinleith Branch (Waharoa – Kinleith)	65	*	
I	Midland Line Rolleston – Stillwater	197	*	
I	Midland Line Stillwater– Greymouth	14	*	
I	Mission Bush Branch	17	*	
I	MNPL New Plymouth - Breakwater	4	*	
I	MNPL Stratford– New Plymouth	48	*	
I	MNPL Marton – Stratford	161	*	
I	Murupara Branch	57	*	
I	Ohai Industrial Line (Wairio Branch)	77	*	
I	Rotowaru Branch	8	*	
I	Stillwater Westport Ngakawau	166	*	
I	Finegand Branch	3	*	
I	Gracefield Branch	3	*	
I	Ahuriri Branch	4	*	
I	Port Lyttleton	1	*	
I	Port Whangarei	2	*	
I	Greymouth - Rapahoe	10	*	
I	Wingatui (Otago Central Branch)	4	*	
I	Taneatua Line (Hawkens – Taneatua)	26	*	
Industrial Line Total		1101		
IC	Kapuni Branch	11	*	
IC	Mt Maunganui Branch	7	*	
IC	Port Chalmers Branch	2	*	
IC	Wanganui/Castlecliff Branch	11	*	
Interconnection Total		31		
M	Johnsonville	10	*	2303000
M	Melling	3	*	739000
M	NIMT Plimmerton - Paraparaumu	24	*	1408000
M	NIMT Wellington – Plimmerton	24	*	3914000
M	Wairarapa Wellington – Woburn	14	*	5130000
M	Wairarapa Woburn – Upper Hutt	18	*	3622000
M	Wairarapa Upper Hutt – Masterton	59	*	244000
Metro Total		152		
R	Bluff Branch	26	*	
R	Dargaville Branch	49	*	
R	NAL Helensville – Whangarei	147	*	
R	NAL Whangarei – Otiria	68	*	
R	PNGL Napier – Gisborne	212	*	
R	Rotorua Branch	51	*	

Line Type	Line Section	Track Km	Threshold (minimum freight level) in tonnes ¹	Threshold passenger service levels (in service numbers)
R	Stratford – Okahukura Line	143	*	
R	Wairarapa Masterton – Woodville	81	*	
Regional Lines Total		777		
T	ECMT Hamilton – Waharoa	52	*	
T	ECMT Waharoa – Te Maunga	57	*	
T	MNL Picton - Addington	335	*	
T	MSL Lyttleton – Addington	13	*	
T	MSL Addington - Rolleston	20	*	
T	MSL Rolleston – Dunedin	346	*	
T	MSL Dunedin – Invercargill	222	*	
T	NIMT Te Rapa – Pukekoe	81	*	
T	NIMT Marton – Te Rapa	368	*	
T	NIMT Palmerston North – Marton	44	*	
T	NIMT Paraparaumu – Palmerston North	88	*	
T	PNGL Woodville – Napier	151	*	
T	PNGL Palmerston North – Woodville	27	*	
Trunk Lines Total		1804		
	Otiria - Whangae Bridge	16	*	
	Makaraka Branch	3	*	
	Ngapara Branch	5	*	
	Okaihau Branch	39	*	
	Thames Branch (Morrinsville - Waitoa)	11	*	
	Waitara Branch (Lepperton – Waitara)	7	*	
	Rewanui – Rununga	7	*	
	Hornby Industrial Branch	5	*	
	Westport Link	3	*	
	Whakatane Board Mills Line		*	
Unspecified Lines Total		96		

* 70% of annual average tonnage for freight over the 2002, 2003 and 2004 calendar years. The parties will complete the above table with details of the actual tonnage figure, for each line within a reasonable period after 31 December 2004.

¹ Freight tonnage levels assessed on 2002 and 2003 calendar year data, as 2004 data is not yet available.

SCHEDULE 3

Common Access Terms

Copy attached

SCHEDULE 4

Service Levels

1. Service Levels

- (a) Toll Rail will agree to service levels (and will implement sustainable improvement programmes) in the following areas in order to meet the Access Provider's national rail objectives:
- (i) provision of a viable, nationwide rail service;
 - (ii) safety (including third party safety);
 - (iii) operating standards and efficiency;
 - (iv) customer satisfaction; and
 - (v) facilitation of other (permitted) Operators' operations on the Rail Network.
- (b) The Access Provider will agree to service levels (and will implement sustainable improvement programmes) in the following areas, in order to meet the Access Provider's national rail objectives:
- (i) provision of a viable, nationwide rail service;
 - (ii) safety (including third party safety);
 - (iii) operating standards and efficiency;
 - (iv) rail customer satisfaction; and
 - (v) facilitation of other (permitted) Operators' operations on the Rail Network.

2. Bonus and Penalty Regime

- (a) The parties agree that the purpose of a penalty and bonus regime is not to unduly penalise any party if any of the Service Levels are not met nor to provide the parties with a source of revenue, but to encourage each party to perform its obligations in accordance with those Service Levels. However, the parties acknowledge that a party's actual performance may result in that party incurring penalties or receiving bonuses under the penalty and bonus regime.
- (b) The amount of any penalty or bonus incurred or awarded to a party under the bonus and penalty regime shall, to the extent reasonably possible, reflect a balance between the loss suffered by each of the parties or benefit accrued by each of the parties. However, in practice, bonuses or penalties would necessarily need to be an approximation, and may, for example, be limited to an approximation of direct damage/benefits.

- (c) Where the contract price is already agreed, a penalty and bonus regime needs to be fiscally neutral.
- (d) Toll Rail's and the Access Provider's Service Levels and penalty and bonus regime should therefore be set so that Toll Rail's existing performance as at the Commencement Date becomes the norm and the penalty and bonus regime is designed so bonuses and penalties are symmetrical on either side of the norm.
- (e) Where one Service Level has a zero norm, a penalty and bonus regime is still possible if the Service Level is part of a package of other Service Levels. It would still be possible to have bonuses and penalties that in aggregate are symmetrical.
- (f) The maximum amount payable by a party under the bonus and penalty regime in each calendar year should be capped.

SCHEDULE 5

Land and facility rights

1. **Access Provider rights:** Subject to paragraph 1.7 of this Schedule, Toll Rail must ensure, and must procure every company in the Toll NZ Group to ensure, that the Access Provider and its Personnel have reasonable pedestrian and vehicle access, free of charge:
 - (a) to the extent necessary or desirable for the operation, maintenance, inspection, or development of the Rail Network or Network Assets:
 - (i) to and over the Retained Land and, pending its release, the Released Land and other property owned or occupied by any company in the Toll NZ Group; and
 - (ii) to facilities (including stations and turntables) and infrastructure owned or occupied by any company in the Toll NZ Group (whether on Surrender Land, Retained Land, or Released Land); and
 - (b) to amenities (including toilets and tea rooms) owned or occupied by any company in the Toll NZ Group where:
 - (i) the Access Provider or its Personnel require such access while carrying out activities relating to the operation, maintenance, inspection, or development of the Rail Network or Network Assets; and
 - (ii) there are no suitable amenities available to such Personnel on land owned or occupied by the Access Provider within a reasonable distance of the location where such activities are being carried out.
- 1.2 **Toll Rail rights:** Subject to paragraph 1.7 of this Schedule, the Access Provider must ensure that Toll Rail and its Personnel have reasonable pedestrian and vehicle access, free of charge:
 - (a) to the extent necessary or desirable for the operation of Services on the Rail Network:
 - (i) to and over the Surrender Land; and
 - (ii) to facilities and infrastructure owned or occupied by the Access Provider on the Surrender Land (including to the pedestrian subways and overbridges in the Wellington suburban area),
 - (b) to amenities (including toilets and tea rooms) owned or occupied by the Access Provider on the Surrender Land where:
 - (i) Toll Rail or its Personnel require such access while carrying out activities relating to the operation of Services on the Rail Network; and
 - (ii) there are no suitable amenities available to such Personnel on land owned or occupied by Toll Rail within a reasonable distance of the location where such activities are being carried out.

1.3 Review of amenity access: The amenity access rights of each party under paragraphs 1.1(b) and 1.2(b) of this Schedule must continue free of charge for a period of 2 years from Commencement Date. After that period, the cost for continued access to amenities will be negotiated in good faith by the parties on a site by site basis with the intent being that the party accessing the other party's amenities must meet all costs reasonably incurred by the other party as a direct consequence of providing such access.

1.4 Licence:

- (a) As at the Commencement Date, certain facilities and infrastructure ("**Facilities**") of each party (the "**Facility Owner**") are located on, under, in or above land and infrastructure ("**Premises**") owned or occupied by the other party (the "**Land Owner**"). The Land Owner grants a licence ("**Licence**") to the Facility Owner to continue to locate the Facilities at the Premises.
- (b) Under the Licence, Toll Rail may erect shelters and platform lighting and may local directional and identification signage on the Access Provider's platforms. For the purposes of this Schedule, such shelters, signage and lighting are deemed to be Facilities, in respect of which Toll Rail is the Facility Owner and the Access Provider is the Land Owner.
- (c) The Licence is subject to the terms and conditions set out in paragraphs 1.5 to 1.9.

1.5 Facility Owner: The Facility Owner:

- (a) must maintain its Facilities in a good, proper, neat and tidy state of repair and condition (including ensuring the Facilities do not become a fire or safety hazard);
- (b) must not change, modify, or add to the Facilities without the prior written consent of the Land Owner (such consent not to be unreasonably withheld) other than as necessary for the Facility Owner to comply with its obligations in paragraph 1.7 or exercise its rights under paragraph 1.9; and
- (c) acknowledges that the Facilities are at its sole risk.

1.6 Land Owner: The Land Owner:

- (a) does not warrant that the Premises are or will remain suitable or adequate for any of the Facility Owner's purposes; and
- (b) must not unreasonably interfere with any Facility, the supply of essential services to the Facilities (including electricity and water), or the use of the Facilities by the Facility Owner, located on the Land Owner's Premises.

1.7 Conditions:

- (a) Each party's rights of access under paragraphs 1.1 and 1.2, and the rights of the Facility Owner under the Licence, are subject to the rights of third parties pre-existing the Commencement Date.

- (b) A party must, when exercising its rights and complying with its obligations under this Schedule (other than as expressly provided for in this Schedule):
 - (i) must not cause interference to the operations of the other party or any third party (having regard to the reasons why the rights are being exercised);
 - (ii) not create any threat to, alter, or damage the other party's property without the other party's prior written consent;
 - (iii) comply with the other party's reasonable security, safety and other instructions and relevant and reasonable work practices;
 - (iv) comply with all laws; and
 - (v) make good any damage it causes to the land, facilities, infrastructure, or other property owned or occupied by the other party, promptly and at its expense.

1.8 Termination of Licence: The Licence terminates:

- (a) on termination of this Agreement; or
- (b) in respect of a Facility, on reasonable prior written notice of the Land Owner if the Facility Owner materially breaches the provisions of this Schedule in relation to that Facility.

1.9 Removal Of Facilities:

- (a) The Facility Owner may remove the Facilities from the Premises at its discretion.
- (b) The Facility Owner must remove all or part of the Facilities, as determined by the Land Owner, from the Premises:
 - (i) on termination of the Licence under paragraph 1.8; and
 - (ii) on reasonable notice from the Land Owner if the Land Owner determines, acting reasonably, that such removal is:
 - (1) in the case of the Access Provider, necessary or desirable for the operation, maintenance, inspection, or development of the Rail Network or Network Assets; or
 - (2) in the case of Toll Rail, necessary or desirable for the operation of Services on the Rail Network,

provided that the Land Owner uses Best Endeavours to provide the Facility Owner with another location for its Facilities of the same utility if the Facility Owner cannot, acting reasonably, relocate its Facilities to land owned or occupied by the Facility Owner.

- (c) The Facility Owner must pay all expenses associated with removal of the Facilities under paragraphs 1.9(a) and 1.9(b)(i) and the Land Owner must reimburse the Facility Owner for the reasonable expenses it incurs removing and relocating its Facilities under paragraph 1.9(b)(ii).
- (d) If the Facility Owner fails to remove the Facilities as required by paragraph 1.9(b) within a reasonable time following notice from the Land Owner, the Land Owner may either remove and store the Facilities not removed by the Facility Owner or relocate the Facilities, as the case may be. The Facility Owner must pay, on demand, all reasonable costs and expenses incurred by the Land Owner in so doing before the Facility Owner may uplift the relevant Facilities.

SCHEDULE 6

Project List

	\$m *		
Upgrade Projects - Non Coal Route Reconnect Fonterra "Waitoa" Dairy site to network Increase clearances in Manawatu Gorge Increase clearances in Goat Valley Increase clearances on North Auckland line Increase locomotive axle loads Auk-Tauranga, Auk-Dunedin Project Safe Edendale Dairy Site Wiri Industrial Siding Clandeboye Dairy Site Branch line Crossing Loop Extensions Total - Upgrade Projects - Non Coal Route			
Upgrade Projects - Coal Route Loop Extensions Upgrade Otira Tunnel Fan Weather Proofing			
Total Upgrades			
Renewals - Non-Coal Route Renewals Renewals - Coal Route Renewals Programme			
Total Renewals			
Grand Total			

*Project cost estimates Commercial Sensitive - Withheld