

Variation Agreement

Auckland Transport

Veolia Transport Auckland Limited

Veolia Transport Australasia Pty Limited

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Variation Agreement dated 2 February 2012

Parties

- 1 **Auckland Transport ('AT')**
- 2 **Veolia Transport Auckland Limited ('Operator')**
- 3 **Veolia Transport Australasia Pty Limited ('Parent')**

Background

- A The parties are each parties to the Existing PSA which relates to the passenger rail services in Auckland.
- B The parties wish to vary the terms of the Existing PSA in a number of material respects.
- C The parties have determined that they will adopt an amended form of passenger services agreement (**'Revised PSA'**) which will reflect their respective rights, obligations, duties, liabilities and roles from the Variation Commencement Date.
- D The parties wish to record the terms and conditions upon which the Revised PSA will become effective.

Agreements

1 Definitions and interpretation

1.1 Interpretation

In this agreement (including the Background) unless the context requires otherwise:

'Establishment Plan' means the Establishment Plan which is required to be prepared and agreed before the Variation Commencement Date and which is set out in Schedule 3 of the Revised PSA;

'Existing PSA' means the passenger services agreement made between the parties dated 19 March 2004 as amended from time to time prior to the date of this Agreement;

'Revised PSA' means the form of the passenger services agreement (including all schedules and appendices) attached as the Annexure, the terms and conditions of which the parties have negotiated and wish to govern their relationship in lieu of those in the Existing PSA from the Variation Commencement Date; and

'Variation Commencement Date' means the 1st day of July 2012 or such other date as may be agreed in writing by the parties.

1.2 General construction

In this agreement unless the context requires otherwise:

- a terms defined in the Revised PSA have the same meaning in this Agreement;

- b the terms and conditions of the Existing PSA continue to be fully applicable to the parties in respect of their respective rights, obligations, duties and responsibilities as they fell due or were to be asserted for or in respect of the period ending on the Variation Commencement Date;
- c headings appear as a matter of convenience and shall not affect the construction of this agreement;
- d the singular includes the plural and vice versa and words importing any gender include other genders; and
- e each reference to any party shall include its, his or her successors and assigns, legal representatives, executors and administrators.

2 Adoption of the Revised PSA

- 2.1 Subject to the terms and conditions of this Agreement, the parties acknowledge and agree that with effect from the Variation Commencement Date the terms and conditions of the Revised PSA govern their relationship and the Revised PSA is adopted in place of the Existing PSA
- 2.2 The parties jointly and severally agree:
 - a Adoption of the Revised PSA is without prejudice to any rights or obligations that any of them might have against the others or either of them under the terms and conditions of the Existing PSA.
 - b Any default or failure to perform or comply with any obligation, duty or responsibility under the terms and conditions of the Existing PSA will continue to be a failure or default under the Revised PSA unless cured or remedied in the meantime.

3 Establishment Plan

- 3.1 The parties acknowledge the Existing PSA requires them to have agreed certain matters and completed certain tasks set out in the Establishment Plan before the Variation Commencement Date. Accordingly the parties agree that they will each use their best endeavours to reach agreement on all matters and complete all tasks set out in the Establishment Plan by the Variation Commencement Date. If any of those matters is not agreed by the Variation Commencement Date then the default provisions in the Establishment Plan shall apply in relation to such matters that are not agreed.

4 Refreshment of Bond and Guarantee

- 4.1 Each of the Parent and the Operator will by the Variation Commencement Date provide AT with a new Performance Bond and new Guarantee in accordance with the terms of the Revised PSA to replace those already given by the Parent and the Guarantor respectively unless prior to the Variation Commencement Date the Parent and the Guarantor each confirm, in writing, that the terms of the existing Performance Bond and the Guarantee continue to apply to the Existing PSA and will secure their respective obligations as contemplated by the Revised PSA.

5 Warranties

- 5.1 The parties represent and warrant to each other that everything required to be done (including the obtaining of any necessary consents and the passing of any necessary resolutions) to:
- a enable it lawfully to enter into, exercise its rights and perform and comply with its obligations under this Agreement, the Revised PSA and the Relevant Agreements;
 - b ensure that those obligations are legal, valid, binding and enforceable in accordance with their respective terms; and
 - c make this Agreement, the Revised PSA and the Relevant Agreements admissible in evidence in the courts of New Zealand.

has been duly done.

- 5.2 The Operator and the Parent jointly and severally warrant and represent to AT that they have the required skills, experience and resources to perform the Services during the Term, which Services may entail assisting AT with the deployment of the new EMU fleet and the commissioning of the EMU depot.

6 General

6.1 Announcements and Confidentiality

The parties agree that clause 22.3 and 22.4 of the Revised PSA apply in relation to announcements to Notices and other communications required to be given and confidentiality.

6.2 Notices

The parties agree that clause 22.4 of the Revised PSA applies to Notices and other communications required to be given under this Agreement.

6.3 Conflict

If there is any conflict between the provisions of the Existing PSA and the Revised PSA then the provisions of the Revised PSA will prevail as from the Variation Commencement Date except in relation to any dispute or issue which relates to the performance, obligations, responsibilities or liabilities of the parties prior to the Variation Commencement Date.

6.4 Further assurances

The parties agree to do all things and execute all documents as reasonably required for the purposes of effecting the validity of the Revised PSA.

6.5 Governing Law

This Agreement is governed by and to be construed in accordance with New Zealand law and the parties irrevocably submit to the non-exclusive jurisdiction of the courts in New Zealand.

6.6 Counterparts

This Agreement may be executed in any number of counterparts (including facsimile counterparts), each of which shall be deemed to be an original and which together constitute one and the same instrument

Execution

Signed for Auckland Transport

by:

David Warburton, Chief Executive

Mark Ford, Chairman

Signed for Veolia Transport Auckland Limited

by:

Graham Sibery, Managing Director

Signed for Veolia Transport Australasia Pty Limited

by:

Edward Thomas, Deputy Chief Executive

ANNEXURE

Revised Passenger Services Agreement

Passenger Services Agreement

relating to

passenger rail services in Auckland

Auckland Transport

AT

and

Veolia Transport Auckland Limited

Operator

and

Veolia Transport Australasia Pty Limited, ACN 079 303 816

Parent

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Parties

- 1 **Auckland Transport (AT)**
- 2 **Veolia Transport Auckland Limited (Operator)**
- 3 **Veolia Transport Australasia Pty Limited, ACN 079 303 816 (Parent)**

Introduction

- A AT wishes to engage the Operator to provide passenger rail services in the Auckland region in accordance with this Agreement.
- B The Operator agrees to undertake (and the Parent will procure the Operator to undertake) the provision of those services in accordance with this Agreement.
- C The Operator is a wholly-owned subsidiary of the Parent. The Parent provides certain undertakings regarding the Operator in favour of AT and any New Operator in accordance with this Agreement.
- D The Parent is a wholly-owned subsidiary of the Guarantor. The Guarantor provides the Guarantee to AT with respect to certain obligations of the Parent under this Agreement.
- E AT is responsible for the provision of passenger rail services in Auckland. The parties expect that during the term of this Agreement these services will undergo significant change in their scope, quality and patronage. The parties have agreed to work together in a way that enables the passenger rail services that AT may wish to include within the scope of this Agreement to be delivered in a cost effective manner and to a high quality standard that reflects favourably on AT and the Operator.
- F The parties have agreed to enter into this Agreement in order to achieve the following objectives:
 - a incentivising the Operator to continue to improve performance, particularly in service reliability, service punctuality, customer satisfaction, communication of information to passengers, and the management of the impacts of service disruption;
 - b facilitating the assumption by the Operator of obligations of increasing scope and responsibility over the term of this Agreement, towards a more comprehensive vertically integrated model;
 - c enabling the Operator to deliver support and assistance to AT's EMU and Depot projects under any Variations Requests that may be agreed from time to time;
 - d ensuring that this Agreement requires delivery of services by the Operator which are efficient, cost effective and provide value for money for AT;

- e minimising risk, especially safety and operational risk, during a period of transformation;
- f improving allocation of risk and reward in a way that incentivises desired outcomes;
- g facilitating the Operator to manage subcontracted services more effectively.

It is agreed

1 Representations, warranties and acknowledgements

1.1 Parent and Operator

Each of the Parent and the Operator:

- a represent and warrant in favour of AT that, except as disclosed by it in writing to (and accepted on or before the Variation Commencement Date by) AT, in respect of each of them, each statement in Schedule 2 is true and correct and not misleading in any material respect as at the Variation Commencement Date;
- b will immediately notify AT on becoming aware of any non-compliance with clause 1.1a; and
- c acknowledge that AT has entered into this Agreement in reliance on such representations and warranties.

1.2 Auckland Transport

AT represents and warrants in favour of the Parent that, in respect of AT, each statement in paragraphs 1.2 and 1.4 of Schedule 2 is true and correct and not misleading as at the Variation Commencement Date. AT acknowledges that the Parent has entered into this Agreement in reliance on such representations and warranties.

1.3 NZTA not liable

The Parent and the Operator acknowledge that, although NZTA provides funding to AT for the provision of passenger rail services in Auckland under the Land Transport Management Act 2003, NZTA is not liable to the Parent, the Operator or any other person in relation to this Agreement.

1.4 Fair dealing

The parties will deal with each other fairly and co-operatively in respect of their dealings with each other under this Agreement, subject to any express contrary provision in this Agreement.

2 Term

2.1 Commencement and Variation

This Agreement commenced on the Appointment Date and was varied by the Variation Agreement with effect from the Variation Commencement Date. This Agreement continues in force until midnight on the Expiry Date, unless sooner terminated in accordance with clause 18 (Default and Termination).

3 Implementation of Variation Agreement

3.1 General

The Operator shall ensure that it is ready and able to perform its obligations under this Agreement from the Variation Commencement Date. AT will use its reasonable endeavours to assist the Operator in this regard by providing such information and assistance as the Operator may reasonably request for such purpose.

3.2 Establishment Plan

AT and the Operator shall by the Variation Commencement Date, to the extent that they have not already done so:

- a perform the respective activities assigned to them in the Establishment Plan;
- b enter into the Relevant Agreements identified in the Establishment Plan, in the respective capacities described in the Establishment Plan.

4 Services

4.1 Operator's Services

The Operator will provide the following services to AT:

- a the Operating Services in accordance with the Operating Services Schedule;
- b the Reporting Services in accordance with Reporting Services Schedule;
- c the Additional Services in accordance with the Additional Services Schedule; and
- d the Exit Services to the extent required by, and in accordance with, the Exit Services Schedule.

4.2 Parent's Services

The Parent will provide the Exit Services to AT to the extent required by, and in accordance with, the Exit Services Schedule.

5 Service standards

5.1 Operator and Parent obligations

Each of the Parent and the Operator will:

- a perform the Services and its other obligations under this Agreement:
 - i in accordance with the terms of this Agreement;
 - ii with the reasonable care, skill, diligence and foresight expected of any prudent, appropriately qualified and efficient passenger rail service operator experienced in carrying out activities of a similar type, scope, nature and complexity to the activities required to be performed by the Operator or the Parent (as the case may be) under this Agreement, and in accordance with best international industry practice;

- iii recognising that the safety of all users of the Auckland Network (including members of the public, passengers and the Operator's employees and subcontractors) is of paramount importance; and
- b ensure that the performance of its obligations under this Agreement:
 - i do not conflict with any obligation or duty owed by the Operator or the Parent (or any Associated Person of the Parent) to any other person; and
 - ii is undertaken by employees (and, if permitted, sub-contractors) who have the knowledge, qualifications, skills and experience appropriate for the provision of the Services, and who have been trained and instructed appropriately to provide the Services. This subclause ii does not apply to services or facilities provided by third parties to the Operator under any Relevant Agreement; and
 - iii subject to any applicable Relevant Agreement, is undertaken so that the Specified Equipment is, and continues to be, capable of being used for Train Services in accordance with this Agreement.

5.2 **Safety**

The Operator will:

- a use best endeavours to continually improve safety and safety standards in relation to the Services in accordance with, and comply with, the relevant Safety Improvement Plan making best use of resources; and
- b co-operate with Regulatory Authorities in relation to any safety investigations and implement any recommendations resulting from such investigations, subject to the costs relating to implementation having been approved by AT.

5.3 **Cost**

The Operator will always provide the Services in a cost-effective and efficient manner that delivers value for money to AT.

5.4 **Access to facilities**

The Operator will give AT and any person authorised by AT access to the land and buildings used by the Operator for any purpose related to this Agreement, provided that:

- a AT provides reasonable notice to the Operator that it, or that person, requires such access; and
- b such access does not contravene the provisions of any Relevant Agreement or unreasonably interfere with the Operator's ability to perform the Services.

5.5 **Failure to meet standards**

If the Parent or the Operator (as the case may be) does not perform the Services in accordance with this Agreement, AT may require the Parent or the Operator (as the case may

be) to do any of the following, in each case, to the extent required in order to remedy the non-performance and to prevent the recurrence of any similar non-performance:

- a re-perform any of the Services that have been performed otherwise than in accordance with the terms of this Agreement, unless it is impossible to re-perform those particular Services;
- b withdraw the employees, contractors or agents (other than under a Relevant Agreement) responsible for the breach from the provision of the Services;
- c replace, repair or make good any damage to:
 - i the assets of the Operator to the extent caused or contributed to by any act or omission of the Parent or the Operator, except to the extent otherwise expressly provided in a Relevant Agreement; and
 - ii any property of any other person to the extent caused, or contributed to, by any act or omission of the Parent or the Operator; and
- d adopt alternative processes and methodologies.

Any costs or expenses incurred by the Parent or the Operator in performing its obligations under this clause 5.5 are Non-reimbursable Costs, except to the extent that any such non-performance of the Services has been caused as a direct result of any act or omission of AT or any other third party (and for the avoidance of doubt, a third party does not include the Parent or any Associated Person of the Parent or their respective directors, employees or representatives).

5.6 **Applicable Laws**

The Operator will, and the Parent will procure that the Operator will:

- a comply with its Rail Operator Licence and all Applicable Laws;
- b procure, maintain and comply with any Regulatory Approval required to perform its obligations under this Agreement, including any requirement:
 - i of a railway operator under the New Zealand Railways Corporation Restructuring Act 1990;
 - ii of a rail operator under the Railways Act 2005 and the Operator will exercise its rights under that Act in accordance with the instructions of AT (acting reasonably);
- c duly and promptly file all tax and GST returns as required by law, and pay and discharge all taxes, assessments and governmental charges on it or its income or assets prior to the date upon which penalties become payable, except only to the extent that those taxes, assessments or governmental charges are being contested in good faith by appropriate proceedings and adequate reserves are set aside for their payment;
- d provide AT with any assistance, advice and information required of the Operator by AT to enable AT to obtain, maintain or comply with any Regulatory Approval where such

Regulatory Approval must be obtained or maintained in the name of AT and cannot, under the Applicable Law, be obtained by, or in the name of, the Operator;

- e comply with all requirements made of it by AT in connection with this Agreement which arise out of:
 - i the requirements of any Applicable Law; or
 - ii a requirement, or reasonable request, made of AT by a Regulatory Authority;
- f pay all debts as they fall due, unless subject to a genuine dispute (excluding any amounts payable to AT under this Agreement); and
- g in relation to third party warranties:
 - i obtain all usual and customary trade warranties from manufacturers and suppliers of materials and other assets used in the provision of the Services (if applicable);
 - ii ensure that the New Operator will have the benefits of those warranties; and
 - iii if requested by AT, provide to AT details of such warranties, including duration and conditions.

5.7 Notification

Without prejudice to any other provision in this Agreement, the Parent and the Operator will promptly provide to AT a copy of any safety or other report (including any draft report), notification, order, directive or requirement (including any charge against the Operator, or any of its directors or senior managers of any offence relating to the provision or operation of Services or failure to comply with any safety notification or directive of any Regulatory Authority or material breach of its Rail Operator Licence) issued or received by the Operator to or by a Regulatory Authority or under the Common Access Terms or any Relevant Agreement.

6 Variations

6.1 Informal Variation

AT and the Operator acknowledge that it is not intended to apply the Formal Variation Procedure to every variation to this Agreement. The Contract Committee may agree that certain minor changes will not be subject to the Formal Variation Procedure. However the Operator will maintain a written record (including any associated amendment to the Approved Operations Management Plan) for each agreed variation which is not subject to the Formal Variation Procedure and shall make such record available to AT upon request. Any such variation will be contractually binding on the parties in accordance with the agreed terms.

If AT and the Operator are unable to agree whether or not the Formal Variation Procedure should be applied to a proposed variation to this Agreement within 10 Business Days of the request for the variation, then the Formal Variation Procedure will be applied to such proposed variation.

6.2 Variation Proposal

AT or the Operator may issue to the other a request for a Variation to the Services or to any provision of this Agreement as a written proposal in accordance with this clause 6; each such proposal being a “**Variation Proposal**” and each variation which is initiated by a Variation Proposal being a “**Variation**”. Each Variation Proposal must:

- a be signed by the Relationship Manager of the party requesting the Variation;
- b contain information that is reasonably sufficient to enable the party to whom the Variation is addressed to understand:
 - i the proposed Variation,
 - ii its intended purpose and effect; and
 - iii the time and date from which it is intended to take effect; and
- c in the case of non-urgent Variation Proposals, be submitted at or about the start of a Quarter, unless it is not practical to do so.

6.3 Preparation of Variation Impact Reports

Once a Variation Proposal has been submitted in accordance with clause 6.2, the Operator and AT will discuss the Variation Proposal as soon as reasonably possible after receipt by the other party of the Variation Proposal, having regard to the nature and urgency of the Variation Proposal and in any event no later than at the next meeting of the Contract Committee. If requested to do so by AT, the Operator will provide a written report in response to the Variation Proposal (a “**Variation Impact Report**”) to AT within a reasonable period (given the nature and urgency of the Variation Proposal) of receipt or issue (as the case may be) by the Operator of the relevant Variation Proposal. The Operator may also, of its own initiative, provide AT with a Variation Impact Report in relation to any Variation Proposal that the Operator determines requires further consideration.

6.4 Information in Variation Impact Reports

The Operator shall set out in detail in each Variation Impact Report:

- a the impact on each party and on any third party affected by the Variation, of that Variation;
- b the manner in which the Operator considers that this Agreement must be amended in order to implement the Variation; and
- c to the extent relevant:
 - i any impact of the proposed Variation on the Services and other obligations of the Operator under this Agreement or any Relevant Agreement;
 - ii any changes to resource requirements, costs, fares, revenues and risks, including any proposed change to the Direct Costs if the Variation were implemented; and

- iii how the proposed Variation would be implemented, including a proposed programme and detailed plan for the implementation of the Variation and any changes required to the Operations Management Plan.

6.5 Obligations of the Operator

The Operator shall ensure that all its Variation Impact Reports are fair, reasonable and accurate. The Operator will not unreasonably decline to consider or perform any Variation Proposal raised by AT nor seek to impose any unreasonable conditions or charges.

6.6 Consideration by AT

After receipt of a Variation Impact Report AT will notify the Operator that it:

- a accepts the Variation Impact Report; or
- b wishes to amend any term of the Variation Impact Report, in which case AT and the Operator will, without delay, negotiate in good faith to agree any such amendment; or
- c queries any term of the Variation Impact Report, in which case the Operator will provide (as soon as possible) any additional information reasonably required by AT to verify the contents of the Variation Impact Report. AT may then give further notice under this clause 6.6.

6.7 Obligations of AT

AT shall not unreasonably decline to accept any Variation Impact Report relating to a Variation Proposal requested by the Operator to the extent that the proposed Variation is necessary to ensure compliance with:

- a the terms of the Operator's Rail Operator Licence; or
- b the statutory duties of AT or the Operator.

6.8 Dispute

Any dispute between the parties over the application of this clause 6 shall be resolved in accordance with the Dispute Resolution Procedure, as modified by the provisions of this clause 6.8. Any such dispute which is not resolved through the process set out in clauses 19.2 through 19.4 may be referred by either AT or the Operator to:

- a an expert provided that:
 - i the expert shall not determine the dispute but instead shall make a non-binding recommendation addressed to the respective Chief Executives of AT and the Operator as to the terms of the Variation; and
 - ii the appointment of the expert shall be conditional upon agreement between AT and the Operator, each acting reasonably, as to the terms of reference that the expert must consider in making his or her recommendation, or

- b arbitration under clause 19.5 provided that if either party refers such a dispute to arbitration under clause 19.5 then either party may within 10 Business Days of such referral refer the dispute to an expert under clause 6.8a, in which event the arbitration process shall be cancelled and shall have no effect in relation to the dispute.

If any expert recommendation made in accordance with clause 6.8a is not accepted by both parties, then either party may submit a revised Variation Proposal for consideration by the other party.

6.9 Acceptance

If AT accepts a Variation Impact Report, AT and the Operator will sign and date the relevant Variation Impact Report (with any agreed amendments). If no Variation Impact Report has been prepared for a Variation but the parties have agreed the terms of the proposed Variation, AT and the Operator will sign and date the relevant Variation Proposal (with any agreed amendments). Any such Variation will be contractually binding on the parties in accordance with the terms of the relevant signed Variation Impact Report or signed Variation Proposal, as the case may be, and (unless stated otherwise in the relevant signed Variation Impact Report or signed Variation Proposal) the Variation will take effect as an amendment to this Agreement on and from the date of the relevant signed Variation Impact Report or signed Variation Proposal. AT shall not be liable to pay for any Variations carried out by the Operator that have not been authorised by AT pursuant to the above procedure.

6.10 Cost of Variation Impact Reports

Except as otherwise provided in this clause 6.10, each party shall bear its own costs in relation to the initiation, preparation, negotiation, and finalisation of each Variation. Where the Operator's reasonable costs in preparing a Variation Impact Report in response to a Variation Proposal issued by AT exceed ██████████ and such costs are not included as an assumed cost within the Direct Cost Budget then the Operator may recover such costs from AT in accordance with the following process:

- a the Operator shall submit to AT for AT's approval a written quote for the preparation of the Variation Impact Report providing such detail as AT may reasonably require (including details of all third party costs);
- b if AT approves the Operator's quote, AT shall pay the agreed amount of the Operator's quote upon delivery of the Variation Impact Report in addition to the agreed costs of implementing the Variation unless AT reasonably considers that the Variation Impact Report has not been completed with all due care and skill and to a professional standard;
- c if AT does not approve the Operator's quote the Operator shall have no obligation to prepare the Variation Impact Report or to proceed with the Variation and AT shall have no liability to pay the Operator any amount in relation to the Variation.

6.11 Performance related amendments

Nothing in this clause 6 limits the application of any provision in this Agreement that allows AT to remove Services from the scope of the Services where the Operator fails to perform the Services as required by this Agreement, including under the Excepted Risk Termination

Notice provisions in clause 16.6 and the step-in rights provisions in clause 17. In any such case, AT may request, or the Operator may at its discretion prepare and provide, a Variation Impact Report in accordance with clause 6.3, to the extent that it is practical to do so in the circumstances. Any such Variation Impact Report shall be prepared in accordance with clauses 6.4 and 6.5. However no other provisions of this clause 6 shall apply to such Variation Impact Report.

7 Operations Management Plan

7.1 Preparation and approval

An Operations Management Plan for each Full Year will be prepared and approved in accordance with the Operations Management Plan Schedule.

7.2 Implementation

Without limiting the obligations of the Operator and the Parent under this Agreement, the Operator will use its best endeavours to implement the relevant Approved Operations Management Plan in accordance with this Agreement.

8 Relevant Agreements

8.1 General

The Operator acknowledges that AT may have engaged, or may at any time engage, under the terms of a Relevant Agreement a third party (a “**Third Party Service Provider**”) to perform any services or to supply any resources or facilities which are required for, or related to, the performance of the Services or the obligations of AT or the Operator. The Operator must cooperate with AT and work collaboratively and helpfully with Third Party Service Providers, including by providing information, assistance and support services to Third Party Service Providers as reasonably requested by AT.

8.2 Responsibility of Operator for Relevant Agreements

AT may wish the Operator to assume responsibility in relation to Relevant Agreements in one or more of the following ways:

- a **Accession:** AT may wish the Operator to become a party to a Relevant Agreement and to assume responsibility for performing certain obligations in accordance with that Relevant Agreement. The Operator agrees to accede to the Relevant Agreements identified in Schedule 3 as required by Schedule 3 and under the process set out in clause 8.3;
- b **Management of Third Party Service Provider:** AT may wish the Operator to assume responsibility for managing the performance of services by a Third Party Service Provider under a Relevant Agreement in order to better manage risks or to deliver required services more efficiently. The Operator agrees to assume responsibility for managing services that are performed by a Third Party Service Provider under the Relevant Agreements identified in Schedule 3 as required by Schedule 3 and under the process set out in clause 8.3;

- c **Novation of Relevant Agreement:** In some circumstances, AT may wish the Operator to accept a novation of AT's rights and obligations under a Relevant Agreement on the basis that the Operator will replace AT as a party to that agreement and the Third Party Service Provider would become a subcontractor to the Operator under the process set out in clause 8.3.

8.3 Process

The Operator shall upon request by AT initiated through a Variation Proposal:

- a **Accession:** become a party to a Relevant Agreement upon such terms as may be agreed through the Formal Variation Procedure and with the relevant Third Party Service Provider.;
- b **Management:** manage the Third Party Service Provider's performance of that Relevant Agreement on behalf of AT in accordance with clause 8.4; or
- c **Novation:** enter into a novation of any Relevant Agreement under the terms of a novation agreement prepared by AT between AT, the Operator and the Third Party Service Provider in accordance with clause 8.5.

The Operator must give reasonable consideration to any Variation Proposal raised by AT under this clause 8 and will not decline to perform any such Variation Proposal unless it is not reasonably practical for the Operator to comply with such Variation Proposal.

The Formal Variation Procedure shall apply to all Variation Proposals initiated by AT under this clause 8.3, subject to the provisions of this clause 8.

8.4 Management of Third Party Service Providers

If AT requires the Operator to manage the performance of any Third Party Service Provider under a Relevant Agreement:

- a AT will inform the Operator of the relevant terms and conditions of the Relevant Agreement (subject to confidentiality obligations);
- b AT and the Operator shall define the level of management authority that is delegated to the Operator by AT as well as any rights or discretions that are reserved to AT in the management arrangements that are agreed in relation to each Relevant Agreement that the Operator is required to manage; and
- c [REDACTED]

Upon appointment of the Operator to manage a Third Party Service Provider:

- d the Operator shall be the agent of AT for the limited purpose of ensuring that such Third Party Service Provider performs its contractual obligations in accordance with the Relevant Agreement;

- e the Operator shall diligently manage the Third Party Service Provider in the best interests of AT and use the Operator's best endeavours to ensure that the Third Party Service Provider always performs its obligations in a manner that achieves the best outcomes for AT (consistent with the terms of the Relevant Agreement with that Third Party Service Provider);
- f the Operator shall be responsible for any failure of the Third Party Service Provider to perform its obligations in accordance with the Relevant Agreement except where the Operator demonstrates that such failure occurred:
 - i despite due diligence on the Operator's part; and
 - ii without any material contributory fault or failure by the Operator;
- g the Operator shall not make any admissions or compromise any rights of AT against any Third Party Service Provider without the prior written consent of AT in each case subject to any contrary delegation made pursuant to clause 8.4b; and
- h [REDACTED]

8.5 **Novation of Relevant Agreements**

If AT and the Operator and the Third Party Service Provider cannot agree the terms of a novation under a Variation Proposal then AT may request the Operator to manage the performance of the Third Party Service Provider under clause 8.4 under a new or amended Variation Proposal. Any novation of a Relevant Agreement between AT and a Third Party Service Provider will relieve AT of AT's obligations under that Relevant Agreement.

8.6 **Performance of obligations**

The Operator will:

- a perform its obligations under the Relevant Agreements; and
- b monitor compliance by other parties to the Relevant Agreements in relation to their respective obligations under a Relevant Agreement and report on such compliance during the relevant month to AT in each Monthly Report.

8.7 **Dispute with a Third Party Service Provider**

In the event of any dispute between the Operator and a Third Party Service Provider:

- a the Operator shall promptly notify AT in writing of the nature of the dispute;
- b where directed to do so by AT, the Operator shall use its best endeavours to negotiate and resolve the dispute with the Third Party Service Provider, without involvement of AT subject to any contrary delegation made under clause 8.4b;
- c where the Operator is unable to resolve a dispute with a Third Party Service Provider despite using its best endeavours then the Operator must notify AT of this fact;

- d AT may attempt to resolve any dispute between the Operator and a Third Party Service Provider, in which event the Operator must provide all reasonable co-operation to AT in the attempted resolution of the dispute; and
- e AT may require the Operator to undergo a formal dispute resolution process with the Third Party Service Provider.

8.8 Resumption of control of Relevant Agreements

AT may at its discretion at any time resume control of:

- a the management of the performance of any Third Party Service Provider under a Relevant Agreement;
 - b Relevant Agreements that have been novated to the Operator; and
 - c Relevant Agreements to which the Operator has become a party,
- under the process set out in clause 8.9.

8.9 Process for resumption of control

The following process shall apply where AT wishes to resume control of a Relevant Agreement:

- a AT shall provide the Operator with a notice (**'Resumption Notice'**) in which AT shall inform the Operator of the date on which AT will resume control under such Relevant Agreement (**'Resumption Date'**);
- b AT may require the Operator to prepare a Variation Impact Report, or the Operator may at its own initiative prepare and submit to AT a Variation Impact Report, containing the information set out in clause 6.4 in relation to AT's decision to resume control of a Relevant Agreement. AT shall give reasonable consideration to all reasonable recommendations or requests made by the Operator in its Variation Impact Report but, unless otherwise agreed, AT will resume control of the Relevant Agreement as set out in AT's Resumption Notice;
- c where the Operator has become a party to the Relevant Agreement, the Operator shall enter into a variation agreement prepared by AT with AT and the Relevant Third Party Service Provider under which the Operator ceases to be a party to the Relevant Agreement from the Resumption Date;
- d where a Relevant Agreement has been novated from AT to the Operator, the Operator shall enter into a novation of such Relevant Agreement from the Operator to AT under the terms of a 'Novation Agreement', prepared by AT, between AT, the Operator and the Third Party Service Provider;
- e where a Relevant Agreement is being managed by the Operator on behalf of AT, the Operator shall cease to manage such Third Party Service Provider, and shall cease to be the agent of AT for the purpose of managing such Third Party Service Provider, from the Resumption Date;

- f the Operator shall co-operate with AT and the Third Party Service Provider to ensure a smooth and efficient handover to AT of the management of the Third Party Service Provider from the Resumption Date;
- g AT and the Operator shall negotiate an amendment to the Direct Cost Budget (and other financial arrangements under this Agreement) to reflect a fair apportionment of costs relating to AT's resumption of the management of any Third Party Service Provider.

8.10 **Warranty by AT regarding Relevant Contracts**

AT warrants to the Operator that, to the best of AT's knowledge and belief, the versions of the Relevant Contracts provided to the Operator [REDACTED] [REDACTED] [REDACTED] [REDACTED] a party to such agreements then AT's warranty is given in reliance of the warranty given by the Operator in clause 8.11.

8.11 **Warranty by the Operator regarding Relevant Contracts**

The Operator warrants to AT, to the best of the Operator's knowledge and belief, that the versions of the Relevant Contracts provided to the Operator by AT [REDACTED] [REDACTED] [REDACTED] The Operator acknowledges AT's warranty in clause 8.10 is given in reliance of this warranty and is conditional upon its accuracy.

9 **Records, accounts, and audit**

9.1 **Records**

- a **Record keeping:** The Parent and the Operator shall ensure that the Operator at all times during the term of this Agreement and upon the termination of this Agreement maintains in its possession and control true, up-to-date and complete records relating to the Services and its other obligations under this Agreement to a standard that would be expected of a prudent, efficient and experienced rail passenger services operator (and that each of the Operator's sub-contractors does the same).
- b **Reconciliation:** Without prejudice to the generality of the foregoing, the records kept by the Operator must provide sufficient detail to enable the Relationship Committee and AT to reconcile those records with the financial reports, invoices, and other information that is provided by the Operator to AT under this Agreement.
- c **Access to and availability of records:** AT will have access to all of the records and other information required to be maintained under this clause 9 and any other information relevant to the Operator's performance and compliance with the terms of this Agreement. Such records and information are to be made available for inspection on 1 Business Day's notice (or on 3 Business Days' notice where those records are archived). Subject only to the foregoing notice requirements, such access shall be available to AT unconditionally and without restriction on an Open Book Basis at any time during the term

of this Agreement and upon its termination, provided that AT shall not request such access more frequently than bi-annually in any Full Year unless AT has reason to believe that information provided by the Parent or the Operator in relation to that Full Year may be inaccurate or incomplete, in which case the Operator and the Parent shall comply with such further requests that AT may make as reasonably required to satisfy AT that the information it has received from the Parent and the Operator is complete and accurate. AT may take copies of such records and information or, where it is not practical or convenient for AT to take such copies, the Operator and the Parent shall provide them to AT upon request.

- d **Format:** All records and other information required to be maintained under this clause 9 are to be held and made available to AT in a standard electronic format and made available to AT in hard copy, on request by AT.
- e **Disclosure of relevant information:** The Parent and the Operator shall disclose to AT upon request on an Open Book Basis all information in the possession or control of either of them that is relevant to:
 - i the outputs of AT's financial modelling process and annual budget process (as reasonably determined by AT or its Auditors);
 - ii the provision of Services including, without limitation, all financial information and all components of their costs and margins;
 - iii the Relevant Agreements;
 - iv the Safety Case that the Operator is required to have approved under the Railways Act 2005; and
 - v the Operator's Rail Operators Licence under the Railways Act 2005.
- f **Security of records:** The Operator will store records in accordance with good commercial practice and in a manner which reasonably ensures their continued safety from destruction or loss and their confidentiality. Where records are kept in electronic form, they must be backed-up and copied in accordance with good commercial practice for the retention and safety of records of such a nature, and in a manner that ensures that they can be readily restored and retrieved in the event that the original records are lost or damaged.
- g **Ownership and return of records**
 - i The Parent acknowledges that the records are owned by the Operator and that the Parent, on termination of this Agreement or at such other time as is required by AT, will provide to AT:
 - A full and complete information on what records the Parent or the Operator hold in relation to this Agreement; and
 - B all such records required by AT.

- ii Where, on termination of this Agreement or such other time as required by AT, the Parent continues to have possession or control of records which are not requested by AT, the Parent will retain such records for a minimum period of three years, and will provide them to AT if requested to do so during that period.

9.2 Accounts

The Operator will maintain a full set of auditable accounts in accordance with this clause 9.2 and in accordance with generally accepted accounting principles that are sufficient to provide full disclosure of all financial transactions conducted by the Operator. In particular, the Operator will maintain:

- a an auditable financial accounting management system to accurately and separately identify and record on an accrual accounting basis during each Full Year:
 - i the Direct Costs and Non-reimbursable Costs (by line item specified in the relevant Approved Direct Cost Budget) incurred by the Operator for each Full Year;
 - ii all amounts received from AT in relation to the Direct Costs and the Direct Cost Margin, all amounts received or incurred in relation to the Fare Revenue Bonus/Reimbursement, and all Rebates incurred by the Operator under the incident management regime set out in the Performance Regime Schedule;
 - iii all amounts received from the Parent in relation to the Non-reimbursable Costs;
 - iv all Train Fares collected by the Operator; and
 - v all other revenue or other amounts received by the Operator (including any performance or incentive payments or other amounts received by the Operator under a Relevant Agreement),

(together, the “**Auckland Rail Accounts**”).

The Operator shall maintain and operate the Auckland Rail Accounts in accordance with generally accepted accounting principles and practices consistently applied in New Zealand, the requirements of the Local Government Act 2002 (if any) and any other requirements reasonably notified by AT for the purpose of enabling the Auditors to audit the Operator’s compliance with its obligations under this clause 9.2 and clauses 10 and 11.

9.3 Asset register

The Operator will maintain an accurate, up-to-date and complete register of all of the assets (including intellectual property and information technology systems) used by the Operator. The Operator will promptly provide a copy of the asset register to AT on request.

9.4 Inspection, review and audit

AT may upon request to the Parent or the Operator at any time, upon giving such prior notice as is reasonable in the circumstances, inspect, review or audit:

- a any accounts, records, equipment, software, systems, documentation, data, materials, information, or plans and any other assets or resources used by the Operator or that are

relevant to the performance of the Services or the Operator's other obligations under this Agreement; and

- b the Operator's performance of the Services or the Operator's other obligations under this Agreement, including the performance of the Operator's subcontractors,

(collectively called the "**Auditable Items**");

provided that AT shall not exercise such right to inspect, review or audit more frequently than bi-annually in any Full Year unless:

- c AT is required to conduct such inspection, review, or audit in order to comply with the requirements of a Regulatory Authority; or
- d AT has reason to believe that information provided by the Parent or the Operator in relation to that Full Year may be inaccurate or incomplete or there is a suspicion of fraud or misfeasance which affects or relates to the Operator or any of the Services.

9.5 **Conduct of inspections, reviews and audits**

The purposes for which AT may conduct such inspections, reviews and audits include, without limitation:

- a verifying the correctness and completeness of information held by the Operator or provided to AT;
- b verifying the integrity and completeness of assets held or used by the Operator in relation to the Services;
- c confirming that any plans relating to the Services or the future provision of Services remain relevant to the needs of customers and stakeholders;
- d confirming that the Services are being performed in accordance with this Agreement.

Audits shall be carried out in accordance with international standards and best practice. AT may engage third parties to conduct such inspections, reviews, or audits provided that such third parties agree to accept confidentiality obligations that are no less stringent than those set out in clause 22.4 where they may obtain access to Confidential Information of the Operator.

9.6 **Assistance**

The Operator must:

- a give AT (and any other person authorised in writing by AT) access to any premises or facilities where any Auditable Items are held or Services are performed and permit those persons to inspect, review, and audit the Auditable Items in accordance with AT's instructions;
- b provide full co-operation and assistance to the persons conducting such inspections, reviews or audits; and

- c answer all reasonable inquiries and provide complete and accurate information regarding the Auditable Items upon request.

9.7 Implementation of review or audit findings

The Parent and the Operator shall give favourable consideration to all reasonable and practical recommendations arising from any review or audit process initiated or approved by AT and shall carry out remedial action to the extent necessary to ensure that the Operator performs its obligations in accordance with this Agreement. If any review or audit finds that the Parent or the Operator is in breach of its obligations under this Agreement or reveals material deficiencies in the Services that are caused by the failure of the Parent or the Operator to perform its obligations in accordance with this Agreement then, in addition to any other remedy AT may have, the Operator shall forthwith remedy all such breaches and deficiencies and the cost of doing so shall be a Non-reimbursable Cost.

10 Costs, revenues, remuneration and payment

10.1 Financial regime

The financial arrangements relating to costs and revenues and the basis on which the Operator will be remunerated for the performance of the Services are set out in the Financial Schedule under the following headings:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

and may incur Non-reimbursable Costs through payment of Rebates for unsatisfactory performance as provided in the Performance Regime Schedule. The Operator will provide to the Contract Committee, as soon as possible after the end of each Full Year, the audited Financial Statements of the Operator for the relevant Full Year, together with an unqualified Audit Report.

10.2 Invoice and payment

AT will pay the amounts referred to in clause 10.1 on the basis set out in the Financial Schedule.

10.3 Invoice disputes

- a Payment of any money by AT to the Operator or the Parent is not evidence of the value of the obligations of the Operator or the Parent under this Agreement or evidence that such

obligations have been performed in accordance with the terms of this Agreement, but is a payment on account only.

- b If AT disagrees with an amount (or a portion of an amount) claimed in an invoice or any amount alleged to be due from the Operator (a "**Disputed Sum**"), then, without prejudice to AT's rights under this Agreement, AT may notify the Operator or the Parent (as the case may be) of the Disputed Sum and the nature of the dispute within 5 Business Days of receipt of the relevant invoice by AT.
- c AT may withhold payment of a Disputed Sum until the dispute is resolved, provided that any such withholding is approved by the CEO or the Chief Operating Officer of AT in the case of a withholding by AT or by the Managing Director of the Operator in the case of a withholding by the Operator.
- d The Operator or the Parent (as the case may be) will promptly acknowledge receipt of AT's notice and both parties will use all reasonable endeavours to promptly resolve the invoice dispute. If the invoice dispute is not resolved within 5 Business Days, it will then be resolved in accordance with the Dispute Resolution Procedure.
- e On resolution of the dispute, the party liable to pay a sum will pay it within 5 Business Days of the later of the date of settlement of the dispute and the original due date for payment of the Disputed Sum, together with interest calculated in accordance with clause 10.6. The recipient will issue a new Tax Invoice or credit note (as the case may be) to reflect the resolution of the dispute.
- f The existence of a dispute as to payment does not relieve the Operator or the Parent (as the case may be) from its obligations under this Agreement while that dispute remains unresolved.

10.4 **Set off and suspension**

- a AT may deduct from any amount that would otherwise be due and payable by AT to the Operator or the Parent (as the case may be) under this Agreement:
 - i any overpayment made to the Operator or the Parent;
 - ii any payment, credit, refund or other Loss which AT is entitled to claim from the Operator, Parent or the Guarantor; and
 - iii any amount which AT is obliged to withhold or deduct, by law, from any amount (including any relevant taxable amount that AT is required to deduct or withhold and pay to the Inland Revenue Department on account of any tax).
- b If any deduction made under clause 10.4a is insufficient to satisfy the relevant amount owed to AT, the balance remaining unpaid to AT will be deemed to be a debt due to AT payable on demand by the Parent or the Operator (as the case may be).
- c If an Operator Event of Default occurs, AT may, by written notice to the Operator, suspend payment of such part of any of the amounts payable by AT under clause 10.2 which AT considers to be necessary to compensate it for any Recoverable Loss of AT

which may arise as a result of the Operator Event of Default, provided that such suspension of payment may not be made to the extent that such Recoverable Loss was caused by any action or omission of AT.

- d AT's exercise of its rights under this clause 10.4 does not affect any other rights or remedies available to AT.

10.5 **Entire payment liability**

Except as expressly set out in this Agreement or under any court award or judgment, claim or settlement, the obligation to pay an amount under clause 10.2 or clause 12 will constitute AT's entire payment liability to the Operator and the Parent under this Agreement.

10.6 **Default interest**

If a party (in this clause, the "**Payee**") does not receive, when due, an amount payable to it under this Agreement (the amount due having been determined net of any rights of set off or deduction of AT) then, without prejudice to any other right exercisable by the Payee, the party obliged to make the payment is to pay interest on that overdue amount (including interest payable under this clause) calculated from its due date to the date of its receipt by the Payee (after as well as before judgment). This obligation to pay default interest is to arise without the need for a notice or demand. The rate of default interest will be 5 per cent per annum above the Bill Rate.

10.7 **All payments on Business Days**

Where a payment to be made under this Agreement is due on a day which is not a Business Day the due date will be the immediately succeeding Business Day.

10.8 **Mode of payments**

Each payment by AT under this Agreement is to be made by direct credit on the due date to either the Operator's Bank Account or the Parent's Bank Account (as the case may be).

10.9 **Reporting Services**

Without limiting any other rights of AT under this Agreement, if the Operator does not perform the Reporting Services then:

- a AT may require the Operator to pay AT a Rebate of [REDACTED] for each report required to be provided under paragraph 2.1 of the Reporting Services Schedule that is not received by AT in accordance with this Agreement (other than a report that is required to be provided at daily or weekly intervals); and/or
- b AT may withhold, in accordance with clause 10.3c, payment of any part of the Direct Cost Margin until the Operator does perform the Reporting Services for the relevant Full Year.

The parties acknowledge that each such payment:

- c represents a genuine pre-estimate of the loss anticipated;

- d shall be applied against the Operator's liability cap in paragraph 1.1f of the Financial Schedule.

11 Insurance

11.1 Public liability insurance

The Operator will obtain and maintain a general public liability insurance policy (the "**Primary Insurance Policy**") which must (except to the extent to which such policy is not available):

- a provide cover of no less than [REDACTED] for any one event;
- b include a waiver of any right of subrogation against AT;
- c be taken out with such insurer or insurers as are acceptable to AT (acting reasonably);
and
- d unless varied under clause 6:
 - i have a deductible of [REDACTED]
 - ii take effect from the Variation Commencement Date;
 - iii provide that a loss payable to the Operator is payable notwithstanding the deliberate act or default or negligence of any other insured or other person, or a breach or violation of a warranty or condition;
 - iv provide that both AT and the Operator are directly notified by the insurer where there is any material change to, or cancellation of, the policy or where the Operator fails to pay any premium when due and payable; and
 - v provide that AT may pay the premium for the policy if the Operator fails to pay any such premium,

and otherwise be on usual commercial terms having regard to the nature of the risks insured.

11.2 Particulars to be provided

The Operator will:

- a provide AT with full particulars of the Primary Insurance Policy as soon as they are available, and in any event on or prior to the Variation Commencement Date, a final copy of the Primary Insurance Policy; and
- b procure that the insurer provides to AT copies of all notices given by the insurer under the Primary Insurance Policy.

11.3 Co-operation

The parties agree to co-operate with each other, as reasonably requested, in respect of any claim made under the Primary Insurance Policy. No party will admit liability to any third party for any loss covered by the Primary Insurance Policy without first consulting with the others. The Operator will apply any proceeds received under the Primary Insurance Policy in

accordance with the reasonable instructions of AT. The Operator will take all reasonable steps to diligently pursue a valid claim under the Primary Insurance Policy (or any other insurance which the Operator is required to hold under this Agreement), except to the extent that AT directs the Operator otherwise (in which case AT will reimburse the Operator for any Direct Costs which the Operator would otherwise be entitled to recover under the Primary Insurance Policy).

11.4 Insurance certificates

On the Variation Commencement Date and at the end of each Full Year, and at any time on the reasonable request of AT, the Operator will provide to AT a certificate of a director of the Operator confirming that the Operator is complying with this clause 11 (and, if not, stating any exception).

11.5 Other insurance

The Operator will maintain in full force and effect during the term of this Agreement such other insurance:

- a as may be required by any Variation made under clause 6; and
- b which the Operator is required to hold under any Relevant Agreement.

11.6 Specified Equipment

Notwithstanding the existence or terms of any material damage or other insurance held by the Operator for loss of, or damage to, the Specified Equipment, the Operator will pay to AT an amount equal to each Specified Equipment Loss up to a maximum of:

- [REDACTED]
- [REDACTED]
- [REDACTED]

For the avoidance of doubt:

- d any Specified Equipment Loss payable by the Operator under this clause 11.6 is a Non-reimbursable Cost. The Operator will pay such amount to AT within 5 Business Days of demand; and
- e the payment of such amount by the Operator is the sole liability of the Operator to AT (and the owner of the affected Specified Equipment) in relation to damage to the Specified Equipment caused or contributed to by the Operator.

The Operator will promptly notify AT of any Incident. Where an Incident occurs which AT considers may give rise to liability under this clause 11.6 AT may require the Operator to meet with AT for the purposes of allocating liability for any Specified Equipment Loss resulting from that Incident. At such meeting AT and the Operator will:

- f provide such information as is reasonably required for determining liability; and

- g review such information and endeavour to agree, in good faith, on the allocation of liability.

Where AT and the Operator are unable or unwilling to agree on each of their respective proportions of liability within 5 Business Days of the date of the relevant meeting, AT will make a decision (acting reasonably) on the Operator's proportion of liability. The Operator may refer such apportionment of liability for an Incident to the Dispute Resolution Procedure.

[REDACTED]

13 Intellectual property

13.1 Branding

AT will determine the branding of the Operator, the Specified Equipment and the Operating Services (including employee and subcontractor uniforms). AT may require the name of the Operator or the Parent to be clearly stated on any Specified Equipment in accordance with the specifications of AT.

13.2 Licence

AT grants to the Operator a royalty-free licence for the term of this Agreement to use:

- a the trade mark "MAXX" (with the weave pattern/symbol) in accordance with AT's Branding and Theming Manual; and
- b any specifications, formulae, quality standards, processes and other technical information ("**Technical Information**") provided by or on behalf of AT,

solely for the purpose of performing the Operator's obligations under this Agreement and for no other purpose.

13.3 Intellectual property ownership and rights

The Parent acknowledges that neither it nor any of its Associated Persons (other than the Operator, as set out in this Agreement) will obtain or have any property in, or ownership of, or registered user rights (in any case either express or implied) in respect of Intellectual Property Rights used or developed in relation to the Services or the performance of its other obligations under this Agreement or the Technical Information.

AT acknowledges that, as between the parties:

- a the Parent shall be the absolute owner of all Intellectual Property Rights in respect of the name "Veolia", and any brand incorporating that name (as replaced or amended from time to time by the Operator) which is used by the Operator; and

- b the Operator may use that name and brand as licensee only, which licence may be revoked by the Parent at any time, whether before or after the termination or expiry of this Agreement.

13.4 Confidentiality

The Parent and the Operator:

- a will keep all Technical Information confidential and will not use or disclose any Technical Information except to the extent necessary to perform their obligations under this Agreement;
- b acknowledge that AT's property in, and rights to, the Technical Information extend to any modification, improvement or addition of or to that Technical Information whether due to, or arising from, improvements effected by the Operator or otherwise.

The obligations under this clause 13 will apply only until any Technical Information ceases to be proprietary or confidential to AT other than by reason of any breach by the Operator of its obligations under this Agreement.

14 Parent's Undertakings

14.1 Security

- a Performance Bond and Guarantee

In order to secure the performance by the Parent and the Operator of their respective obligations under this Agreement, the Parent will, if it has not already done so, provide to AT within 5 Business Days after the Variation Commencement Date:

- i a Performance Bond (a "**Performance Bond**") which must be:
 - A for an amount equal to [REDACTED] available for each Full Year;
 - B [REDACTED]
 - C provided by way of a bank guarantee from a New Zealand registered bank acceptable to AT in the form set out in Schedule 16 (or in substantially the same form, with the approval of AT); and
- ii the Guarantee from the Guarantor.

- b Top-up annually

The Parent will ensure that the guaranteed amount under the Performance Bond which is available for drawdown at the beginning of each Full Year is [REDACTED]

- c Recourse – Performance Bond

AT may have recourse to the Performance Bond if:

- i an Operator Event of Default occurs or such recourse is provided for in this Agreement; and

- ii AT has given the Parent at least 5 Business Days notice of its intention to have recourse to the Performance Bond. Such notice must specify the amount claimed and the contractual basis for that claim.

d Application of funds

If AT receives any amount under the Performance Bond, it will apply the amount received as follows:

- i first, the amount received will be offset against any amount which is or may be payable by the Parent or the Operator under this Agreement; and
- ii if the amount received exceeds the aggregate amounts that are or may be payable by the Parent or the Operator under this Agreement, then AT will, at the earliest reasonable opportunity (and, in any event, within [REDACTED] after receipt of such excess), pay to the Parent the amount of that excess. Without limiting clause 14.1b above, to the extent that the Parent receives such payment, the Parent will ensure at the earliest opportunity that an amount equal to such payment is available for drawdown under the Performance Bond. Any Recoverable Loss of AT resulting from the Parent not complying with that obligation is a Non-reimbursable Cost.

e Replacement

The Parent may procure a new Performance Bond to replace an existing Performance Bond with the approval of AT (such approval not to be unreasonably withheld).

f Return of Performance Bond

AT will return the Performance Bond to the Parent within [REDACTED] of termination of this Agreement.

14.2 Call Option

The Parent grants the Call Option set out in paragraph 1 of Schedule 12 in favour of AT. Any amount due to AT in relation to the Call Option may be recovered by AT by recourse to the Performance Bond.

AT may register a security interest (in respect of the Call Option) against the Operator under the Personal Property Securities Act 1999.

14.3 Other undertakings

The Parent undertakes in favour of AT (and a New Parent in respect of the undertakings in sub-clause 2.2 of the Parent's Undertakings Schedule) as set out in paragraph 2 of the Operator Restrictions Schedule.

14.4 Restrictions on Operator's activities

The Parent acknowledges that the Operator is incorporated for the sole purpose of performing its obligations under this Agreement. Accordingly, the Parent will ensure that the Operator does not undertake any activity:

- a other than for that purpose; or
- b that is contrary to the restrictions on the activities of the Operator set out in Operator Restrictions Schedule.

15 Liability

15.1 Parent and Operator indemnity

Each of the Parent and the Operator (jointly and severally) will be liable for, and will indemnify AT against, any Recoverable Loss of AT resulting from:

- a any non-performance by the Parent or the Operator of the Services or its other obligations under this Agreement or any Relevant Agreement;
- b any negligent act or omission by the Parent or the Operator in the performance of the Services and its other obligations under this Agreement or any Relevant Agreement;
- c any personal injury or death or damage to tangible property or infringement of Intellectual Property Rights resulting from the negligent act or omission of, or non-performance of its obligations under this Agreement or any Relevant Agreement by, the Parent or the Operator;
- d any fraud or theft by the Parent or the Operator; or
- e any representation or warranty made by the Parent or the Operator under this Agreement or any Relevant Agreement being untrue or incorrect,

except to the extent caused by an Excepted Risk or any fraud, non-performance or negligent performance by AT of its obligations under this Agreement.

The indemnity in this clause will apply, and be enforceable by AT, regardless of whether or not AT has actually made payment for, or in relation to, any such cost, expense, loss or liability.

15.2 Satisfaction

The respective liability of the Parent and the Operator under clause 15.1 will be satisfied:

- a first, by reduction of the Direct Cost Margin payable by AT under this Agreement; and
- b secondly, to the extent such reduction is insufficient, by recourse to:
 - i the Performance Bond; and/or
 - ii in relation to any obligation which is a Guaranteed Obligation (as defined in the Guarantee), the Parent, provided that such liability of the Parent may not exceed \$10 million in each Full Year; and/or
 - iii to the extent that the Guarantee is available, the Guarantee.

For the avoidance of doubt, notwithstanding the earlier provisions in this clause 15.2, the liability of:

- c the Operator in relation to its obligations under this Agreement is not limited; and
- d the Parent in relation to its obligations under clause 14 and in relation to Non-reimbursable Costs in the Financial Schedule is not limited.

15.3 Excluded losses

The liability of a party under this Agreement (whether by virtue of any remedy conferred by this Agreement whether by way of indemnity, by statute (to the extent it is possible to exclude such liability) in tort (whether for negligence or otherwise), or on any other basis in law or equity) extends only to any Recoverable Loss.

15.4 Claim management

The management of third party claims brought by third parties against the Operator is the responsibility of the Operator. The costs of

- a defending or settling any such claims; and
- b complying with any order or judgment made against the Operator in relation to such claims are Non-reimbursable Costs, except to the extent that provision has explicitly been made for such costs in the Approved Direct Cost Budget.

16 Excepted Risks

16.1

[REDACTED]

16.2 Notice

If an Excepted Risk affects a party (the “**Affected Party**”), then that party will, within 5 Business Days of it becoming aware of the occurrence of that Excepted Risk, provide written notice to the other parties (an “**Excepted Risk Notice**”) specifying:

- a the nature of the Excepted Risk;
- b the obligations of the Affected Party which the Affected Party is prevented from performing or complying with by that Excepted Risk (the “**Affected Obligations**”);
- c the extent to which the Excepted Risk prevents the Affected Party from performing or complying with the Affected Obligations (the “**Precluded Extent**”);

- d the reasons why the Affected Party considers that the occurrence of the Excepted Risk prevents the Affected Party from performing or complying with the Affected Obligations to the Precluded Extent; and
- e the expected duration of any delay arising directly out of the occurrence of the Excepted Risk.

16.3 **Objection to Excepted Risk Notice**

If a party that receives an Excepted Risk Notice does not consider that an Excepted Risk Event has occurred in relation to the Affected Party, it may:

- a refer the matter to the Dispute Resolution Procedure within 5 Business Days of receiving that Excepted Risk Notice; or
- b exercise such other rights available to it under this Agreement.

16.4 **Effect of notice**

If the Affected Party complies with clause 16.2 then, subject to the outcome of any Dispute Resolution Procedure:

- a the Affected Party's obligation to comply with, or perform, the Affected Obligations as a result of it being unable to perform those Affected Obligations will be suspended to the Precluded Extent, for the time (the "**Period of Suspension**") the Affected Party is prevented from complying with, or performing, those Affected Obligations as a direct result of that Excepted Risk;
- b from the date of service of the Excepted Risk Notice each party's obligation to perform any obligations dependent on the Affected Obligations (including any payment obligations directly referable to the Affected Obligations (other than in relation to any payment of Direct Costs)) will be suspended until the Affected Party can resume full performance of its obligations; and
- c if the Affected Party is the Parent or the Operator and the Services are adversely affected by the Excepted Risk the Direct Costs will not be reduced or increased to reflect the extent and standard to which such Services are being provided.

16.5 **Mitigation or avoidance**

During the Period of Suspension:

- a the Affected Party will do everything that it can do within its power that is practicable to avoid or mitigate the effect of it being prevented from complying with, or performing, the Affected Obligations; and
- b each party will endeavour to agree such reasonable arrangements with the other, that both parties believe to be prudent, to avoid or mitigate the Affected Party's inability to perform the Affected Obligations.

16.6 Termination

If an Excepted Risk occurs and continues to adversely affect provision by the Parent or the Operator of all or a material portion of:

- a all the Services; or
 - b a distinguishable part of the Services,
- for a period, in both cases, of not less than either:
- c three months; or
 - d two weeks followed by a further period of not less than two weeks (both two week periods being within any 6 month period),

from the date of service of the relevant Excepted Risk Notice on AT, AT may give written notice of termination of, where paragraph a above applies, this Agreement or, where paragraph b applies, the relevant parts of the Services to the Parent and the Operator, (an **“Excepted Risk Termination Notice”**) and termination of this Agreement or the Affected Obligations, respectively, will occur on the date for termination specified in that notice (which must be no more than [REDACTED] after the date of receipt by the Operator of the Excepted Risk Termination Notice).

Until termination of this Agreement has taken effect, where paragraph a above applies, each party will continue to perform those of its respective obligations:

- e that are not then Affected Obligations; or
- f that are not obligations the performance of which is dependent on the performance by the other party of Affected Obligations.

Where a part of the Services is terminated, where paragraph f applies, then:

- g from the date specified in the Excepted Risk Termination Notice, each party will be discharged from its obligations in respect of the Affected Obligations;
- h none of the rights and remedies of either party that have accrued to the date specified in the notice will be affected as a result of the termination of the Affected Obligations; and
- i each party will continue to perform its obligations in respect of the remaining Services that are not Affected Obligations.

16.7 Excepted Risks

In this Agreement, **“Excepted Risk”** means any event beyond the reasonable control of a party that prevents that party from performing its obligations under this Agreement provided that such party demonstrates that:

- i it diligently attempted to perform its obligations notwithstanding the event and diligently took all prudent and reasonable steps to overcome the event, to avoid such non-performance, and to mitigate its impact; and

- ii such non-performance was not caused or contributed to by the acts or omissions of the Operator.

Subject to the foregoing, an Excepted Risk may arise from the following events:

- a fire, flood, storm, earthquake, land slide, volcanic eruption, epidemic or other forces of nature;
- b confiscation, expropriation or embargo;
- c explosion or nuclear accident;
- d sabotage or terrorist activity or revolution, riot, act of war whether declared or not or warlike operations;
- e the withdrawal of the Operator's Rail Operator Licence, where such withdrawal:
 - i is not caused by any act or omission of the Operator; and
 - ii results in the provision of any Services being unlawful or impossible;
- f change in Applicable Law which materially and adversely affects the performance by the Parent or the Operator of their respective obligations under this Agreement; or
- g any restriction on the Operator's activities contained in any Relevant Agreement; or
- h any non-performance or negligent performance by any other party to any Relevant Agreement of its obligations under the Relevant Agreement where the Operator establishes to AT's reasonable satisfaction that:
 - i the Operator diligently managed the performance of the Relevant Agreement and took all prudent and reasonable steps to avoid such non-performance or negligent performance and to mitigate its impact; and
 - ii such non-performance or negligent performance was not caused or contributed to by the acts or omissions of the Operator.

However, the following will not be Excepted Risks on which the Operator is entitled to rely:

- i strikes or other labour disputes of the workforce of the Operator, its sub-contractors or suppliers, except to the extent such strikes or other labour disputes are outside the control of the Operator;
- j an event where the event could have, or it is likely that the event could have, been prevented, avoided, overcome or mitigated by the Operator by:
 - i implementation of contingency plans; or
 - ii exercising a reasonable standard of care;
- k any event or circumstance that arises from a breach of the Operator's obligations;

- l any act or omission of a sub-contractor or supplier of the Operator unless and to the extent that the sub-contractor or supplier was itself affected by an event, which if it occurred in relation to the Operator would have been an Excepted Risk; or
- m the insolvency of the Operator, or a sub-contractor or supplier of the Operator, or lack of funds for any reason (except as a direct result of AT failing to pay any amount due and payable by AT to the Operator in accordance with this Agreement).

17 Remediation and step-in rights

17.1 Right to step-in

In addition to any other remedy AT has under this Agreement or at law, if AT determines, acting reasonably, that the Parent or the Operator has failed to perform the Services or any part thereof in accordance with this Agreement and has failed to remedy such non-performance within such reasonable period (having regard to the circumstances) as may be notified by AT to the Parent and the Operator in writing, or if either the Parent or the Operator is threatening to fail to perform the Services in accordance with this Agreement, AT may, at its discretion, after giving written notice to the Operator take any one or more of the following actions as it considers fit:

- a take steps to remedy the failure itself; or
- b appoint a third party to remedy the failure; or
- c arrange for any of the Services to be performed by AT or a third party service provider on a temporary basis for such period as AT considers appropriate; or
- d sever from this Agreement parts of the Services permanently and appoint a third party to provide those severed parts of the Services, in which case the Operator shall continue to perform the balance of the Services in accordance with this Agreement.

17.2 Access to resources

For the purposes of this clause 17:

- a The Parent and the Operator will provide free access to the relevant assets, information, records and other relevant resources and facilities for the purpose of enabling AT to exercise its rights under this clause 17;
- b AT will provide written notification to the Parent and the Operator:
 - i in the case of an emergency, at the time of; or
 - ii in any other case, at least 2 Business Days prior to, any exercise of the rights conferred under this clause 17.

17.3 Indemnities

- a The Parent will indemnify AT on demand for all reasonable costs and expenses incurred by, or charged to, AT in remedying any non-performance under this clause 17. Such

costs and expenses may be treated by AT as a debt due by the Parent payable on demand or deducted from any payment due, or to become due, to the Parent or the Operator. The Parent and the Operator will not be entitled to any relief in the performance of their respective obligations under this Agreement as a result of the rights conferred on AT by this clause 17 or as a result of the exercise of those rights, provided that the Parent and the Operator will not be responsible for any subsequent breach of this Agreement to the extent that any such breach is caused by AT or any act or omission of any third party (for the avoidance of doubt, a third party does not include the Parent or any Associated Person of the Parent or their respective directors, employees or representatives) during the exercise of the rights conferred under this clause 17.

- b AT will indemnify the Parent on demand for all Direct Costs and expenses incurred by the Parent as a direct result of any negligence or default of AT in the exercise of its rights under this clause 17, except to the extent resulting from any fraud, negligence or default of the Parent or any Associated Person of the Parent.

17.4 **Costs**

While AT or any third party service provider is providing any part of the Services pursuant to this clause 17 AT will not be obliged to pay any amounts to the Operator in respect of those Services. AT may recover all reasonable costs of exercising its rights under this clause 17 from the Operator, to the extent that those costs exceed the amounts that would have otherwise been payable to the Operator for those Services if the Operator had properly performed those Services.

17.5 **Other rights not affected**

This clause 17 is without prejudice to any rights or remedies of AT including, without limitation, any right to recover damages or to terminate this Agreement or to terminate the Services (or any part of them).

18 **Default and Termination**

18.1 **AT default**

If AT does not perform any of its obligations under this Agreement in any material respect, and such non-performance:

- a is not capable of remedy; or
- b is capable of remedy, but has not been remedied by AT within 20 Business Days of receipt of a written notice from the Parent requiring the failure to be remedied,

then the Parent may terminate this Agreement on giving AT 20 Business Days' written notice of termination.

18.2 **Parent and Operator default**

Each of the following events is a "**Material Operator Event of Default**":

- a any representation or warranty given by the Parent or the Operator under this Agreement is not true and correct in all material respects as at the relevant date; or
- b the Parent or the Operator (as the case may be) does not
 - i perform any of its material obligations under this Agreement and such non-performance:
 - A is not capable of remedy; or
 - B is capable of remedy, but has not been remedied by the Parent or the Operator (as the case may be) within [REDACTED] of receipt of a written notice from AT requiring the non-performance to be remedied; or
- c this Agreement ceases to be, or is claimed by the Parent or the Operator not to be, in full force and effect, or the validity or enforceability of this Agreement is contested by the Operator or the Parent, or the Operator or the Parent does or causes to be done an act, omission, matter or thing evidencing an intention to repudiate this Agreement, unless as a result of an Excepted Risk; or
- d AT has issued three or more Performance Notices in accordance with clause 18.3 during any 12 month period after the Variation Commencement Date; or
- e the Performance Bond ceases to be, or is claimed by the surety not to be, in full force and effect; or
- f the Guarantee ceases to be, or is claimed by the Guarantor not to be, in full force and effect; or
- g an Insolvency Event occurs in relation to the Operator, the Parent or the Guarantor (or any Associated Person of the Guarantor which is also a holding company of the Operator); or
- h a distress, attachment, execution or other legal process is levied or enforced on or against assets of the Operator or Parent and is not discharged or stayed within 5 days or a receiver, trustee, manager, administrator or similar officer is appointed in respect of any of them or their assets; or
- i the Operator is declared at risk pursuant to the Corporations (Investigation and Management) Act 1989, or a statutory manager is appointed or any step taken with a view to any such appointment in respect of it under that Act (including a recommendation by, or submission by any person to, the Financial Markets Authority supporting such an appointment); or
- j the Guarantor or the Parent ceases or threatens to cease to conduct all or a substantial part (such part being not less than [REDACTED]) of its relevant business, or disposes of, or threatens or agrees to dispose of (either by a single transaction or series of transactions, whether related or not and whether voluntary or involuntary) all or a substantial part of its assets; or

- k in the reasonable opinion of AT, a material adverse change occurs in relation to the Operator, the Parent or the Guarantor which will or is reasonably likely to materially affect its ability to perform its obligations under this Agreement; or
- l it is or will become unlawful for:
 - i the Operator or the Parent to perform or comply with any of its obligations under this Agreement or any Relevant Agreement in any material respect; or
 - ii the Guarantor to perform or comply with any of its obligations under the Guarantee in any material respect; or
- m a termination event (however described) occurs under any Relevant Agreement as a result of the fraud, negligence or default (unless as a result of an Excepted Risk) of the Operator whether or not acting in an agency capacity; or
- n there is any change in the control of the Operator, the Parent or the Guarantor, except a change in control:
 - i approved by AT; or
 - ii arising from a transfer of the shares of the Operator to a wholly-owned subsidiary of the Parent as part of a solvent corporate reorganisation and such subsidiary remains a wholly-owned subsidiary of the Parent and the Guarantor; or
 - iii resulting solely from a change in shareholding of the Guarantor's shareholders; or
- o any meeting of directors or shareholders is called for the purposes of considering and, if thought fit, passing any resolution the passing or the performance of which would cause a Material Operator Event of Default.

18.3 Performance Notices

AT may, at its discretion, issue a notice (a **Performance Notice**) to the Operator within three months after the occurrence of each of the following events:

- a the Operator's service reliability performance in any month falls below the 'fail' threshold specified in the Performance Regime Schedule for service reliability;
- b the Operator's service punctuality performance in any month falls below the 'fail' threshold specified in the Performance Regime Schedule for service punctuality;
- c the level of customer satisfaction achieved by the Operator in any Quarter, as determined by a customer satisfaction survey conducted under the Performance Regime Schedule, falls below the 'fail' threshold specified in the Performance Regime Schedule for customer satisfaction;
- d AT, or an expert appointed under the incident management regime set out in the Performance Regime Schedule, determines that a significant incident has occurred for which the Operator should pay a Rebate of not less than [REDACTED] or [REDACTED]

- e AT issues a written notice to the Operator requesting the Operator to remedy a Significant Breach and the Operator fails within 10 Business Days after the date on which such notice is given to:
 - i remedy such breach; and
 - ii implement effective measures that ensure such a breach does not recur.

18.4 Definition of ‘Significant Breach’

For the purposes of this clause 18, “**Significant Breach**” means any breach by the Operator, which breach has, or is reasonably likely to have, a discernible adverse effect on AT or its business, but does not include breaches that are trivial in nature unless the cumulative effect of such trivial breaches has, or is reasonably likely to have, a discernible adverse effect on AT or its business.

18.5 AT Termination Notice

AT may issue a written notice terminating this Agreement (an “**AT Termination Notice**”) to the Parent and the Operator on the occurrence of a Material Operator Event of Default. AT may in any AT Termination Notice terminate this Agreement immediately or on the date specified in AT Termination Notice.

18.6 Termination Notice consequences

On the issue of a Termination Notice:

- a AT may (by separate notice or in any such notice given by AT):
 - i appoint an Administrator of the Operator in accordance with the Administrator Schedule; and/or
 - ii without limiting the rights of AT under clause 14.1, have recourse to the Performance Bond and (if applicable) the Parent Guarantee if the Termination Notice relates to an Operator Event of Default; and/or
 - iii exercise its rights under clause 17; and/or
 - iv exercise its rights under clause 18.8; and/or
- b the Parent and the Operator will perform the Exit Services which each is required to perform under this Agreement to the extent that the Exit Services have not been performed; and
- c the Parent will perform its obligations in relation to the Call Option.

[REDACTED]

18.7 **Attorney**

The Parent and the Operator each irrevocably appoint AT, with effect on and from the Variation Commencement Date (but exercisable only from the date of issue of a written Termination Notice) as its attorney (with full power to appoint substitutes and sub-delegates) on behalf of the Parent and the Operator (as the case may be) and in its name or otherwise and at the Parent's expense (in the case of a Termination Event relating to an Operator Event of Default) to complete, execute and otherwise perfect all assignments, transfers, security interests and other documents and generally do all other acts and things, that the Parent or the Operator (as the case may be) is obliged to do under this Agreement or any Relevant Agreement.

The Parent and the Operator each ratifies and confirms to each person dealing with the Administrator and each such attorney, whatever such Administrator or attorney does in the exercise of any rights conferred on that person under this Agreement.

AT will not exercise its rights under this clause 18.7 until or unless it has given to the Operator such period of notice (if any) which is reasonable in the circumstances of its intention to do so.

18.8 **Exit Services**

Without limiting the rights of AT under clause 18.6, AT may require (by at least 10 Business Days' prior written notice to the Parent and the Operator) the Parent and the Operator to perform the Exit Services (in particular, implementation of the Exit Plan in accordance with any timetable requirements reasonably specified by AT) in anticipation of termination of this Agreement.

18.9 **Effect of termination**

Termination of this Agreement:

- a will not affect any accrued rights or liabilities of either party at the date of termination;
- b will be without prejudice to any other rights or remedies that either party may have under this Agreement or at law;
- c will not affect the continuance in force of any provision of this Agreement to the extent it is expressed or by implication intended to continue in force after termination; and
- d will not affect a defaulting party's obligations under this Agreement during any termination notice period.

19 **Dispute Resolution Procedure**

19.1 **General**

The parties agree to follow the process in this clause 19 should any dispute arise between them and undertake to use all reasonable efforts to resolve any such dispute.

19.2 Notice of dispute

A party will as soon as reasonably practicable give notice in writing of a dispute to the other party to that dispute. Any dispute shall be notified in the first instance, at the weekly Contract Committee meeting for resolution by the Contract Committee at its next weekly meeting. The notice shall include brief details of the dispute so that the other party is made aware of the nature of the dispute.

19.3 Escalation

In the event that the Contract Committee is unable to resolve such dispute within [REDACTED] [REDACTED] any party may refer the dispute by notice in writing to the respective Relationship Managers of the Operator and AT, who shall endeavour to resolve the dispute within [REDACTED] [REDACTED]

19.4 Resolution by Relationship Committee

If upon the expiry of the time set out in clause 19.3 for resolution, the dispute remains unresolved then any party may refer the dispute by notice in writing to the Relationship Committee for resolution. The respective members of the Relationship Committee shall use their best endeavours to resolve that dispute in a timely manner and, in any event, within [REDACTED] [REDACTED] after each member of the Relationship Committee has received notice of the dispute.

19.5 Arbitration

- a Any dispute which cannot be resolved pursuant to clause 19.4, may be referred to arbitration in accordance with this clause and the Arbitration Act 1996.
- b Arbitration will take place using a single arbitrator. On a referral to arbitration the parties will appoint a single arbitrator if they can agree on one. If they cannot agree within three Business Days an arbitrator will, on application by a party, be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand.
- c Any arbitrator will:
 - i be suitably qualified for this purpose in matters relevant to the dispute; and
 - ii be independent from either party (for example, will not be an ex-employee of either party and will not have entered into significant contracts or arrangements with either party).

19.6 Expert determination

Notwithstanding clauses 19.1 to 19.5, where expressly provided for in this Agreement, either party may by written notice served on the other party require the dispute to be determined by an expert. Any such dispute will not be subject to clause 19.5. The expert will be appointed:

- a by agreement of the parties; or
- b failing such agreement within [REDACTED] of serving written notice, at the request of any party by the President of the Arbitrators' and Mediators' Institute of New Zealand.

The expert will act as an independent expert and not as an arbitrator. The dispute will be resolved as soon as possible in accordance with the guidelines determined by the expert. The costs of the expert will be paid by the Parent and AT equally. Reference to the expert will not be a submission to arbitration and the Arbitration Act 1996 will not apply to the resolution of such disputes.

19.7 Final decision

Subject to clause 6, the decision of the arbitrator or an expert (as the case may be) (including the right to determine damages) will be final and binding on the parties (in the absence of manifest error).

19.8 Equitable relief

Nothing in this clause 19 will preclude any party from taking immediate steps to seek urgent equitable relief before a New Zealand court.

19.9 Continuity

If a dispute arises during the term of this Agreement the parties will continue to perform their obligations under this Agreement.

Where the dispute relates to any payment claimed by the Operator, AT will continue to pay the undisputed amount, and the Operator will continue to perform the Services and its other obligations under this Agreement to the best of its ability.

20 Transfer

20.1 This Agreement will be binding on and endure for the benefit of the parties and their respective successors and their permitted assignees or transferees.

20.2 Each of the Parent and the Operator may not transfer or otherwise dispose of any of its rights or obligations under this Agreement without the prior written approval of AT.

20.3 AT may, by providing at least [REDACTED] prior written notice to the Parent and Operator:

- a transfer its rights and obligations under this Agreement to a council-controlled organisation (as defined in section 6(1) of the Local Government Act 2002) of Auckland Council (on terms reasonably acceptable to the Operator). Any such transfer may involve the transfer of AT's rights and obligations under the Call Option to a different council-controlled organisation of Auckland Council, which may require the parties to enter into a separate agreement setting out such Call Option; and
- b require the Operator to transfer its rights and obligations under any Relevant Agreement to a council-controlled organisation (as defined in section 6(1) of the Local Government Act 2002) of Auckland Council (on terms reasonably acceptable to the Operator), provided that such organisation enters into a sublease, sublicence or similar arrangement with the Operator, as specified by AT, in order to allow the Operator to have the benefit of the rights (and requiring the Operator to comply with such organisation's obligations) under the particular Relevant Agreement as required to enable the Operator to perform its

obligations under this Agreement. Such council-controlled organisation may be different from the organisation referred to in subclause a above. For the purposes of this Agreement, “**Relevant Agreement**” includes any such licence, lease, sublicense, or similar arrangement.

21 New Operator’s rights

Rights conferred on the New Parent or the New Operator under this Agreement are for the benefit of, and enforceable by, the New Parent or New Operator (as the case may be) in terms of the Contracts (Privity) Act 1982.

22 General provisions

22.1 Definitions and interpretation

The definitions and interpretation rules set out in Schedule 1 to this Agreement apply to this Agreement.

22.2 Notices

Except as provided in this clause, each notice or other communication under this Agreement (including any communication by the Relationship Committee to any party) will be in writing, will be made by personal delivery to the addressee at the address, and marked for the attention of the person or office holder (if any), from time to time designated for the purpose by the addressee to the other parties. The initial address and relevant person or office holder of each party is set out below:

| | |
|--------------------------|--|
| The Parent Attention: | Veolia Transport Australasia Pty Limited General Manager Company Secretary |
| Address: | Level 12 114 William Street Melbourne 3000 Victoria Australia |

| | |
|----------------------------|---|
| The Operator Attention: | Veolia Transport Auckland Limited Managing Director |
| Address: | Level 7, Citibank Centre, 23 Customs Street East, Auckland |

| | |
|------------------|--|
| AT Attention: | Auckland Transport Manager, Public Transport Operations |
| Address: | Level 4, Bledisloe House, 24 Wellesley Street, Auckland |

No communication will be effective until delivered as specified above unless the individual to whom the notice is to be sent acknowledges in writing receipt of the notice. Notwithstanding the foregoing, reports and notifications required as part of the Operator’s reporting obligations and day-to-day operations may be provided by electronic means in a convenient standard electronic format.

22.3 **Announcements**

The Parent and the Operator will not make or issue any press or public announcements, circulars or communications relating to this Agreement or the subject matter of it (including any communication with a passenger or member of the public) except:

- a with the prior written approval of AT; or
- b in accordance with this clause 22.3.

The Parent or the Operator may only make or issue such press or public announcements, circulars or communications if:

- a in relation to public announcements it:
 - i consults with AT prior to the making or despatch of the public announcement; and
 - ii so far as may be reasonable, takes account of the comments of AT with respect to the content, timing and manner of the making or despatch of the public announcement; and
 - iii does not communicate any Confidential Information relating to AT or its business except in accordance with clause 22.4 and protects the interests of AT.
- b in relation to any communication with a passenger or member of the public, it acts in accordance with any general or specific instructions of AT and otherwise in a manner which protects the interests of AT.

In all other respects AT will manage press or public announcements relating to this Agreement.

22.4 **Confidentiality**

Each party will at all times keep confidential and not directly or indirectly make or allow any disclosure or use to be made of any Confidential Information except to the extent:

- a required by law and then only after advising the other party of that requirement; or
- b necessary to obtain the benefit of, or to carry out obligations under, this Agreement but for no other purpose; or
- c that the information is or becomes available in the public domain without breach by either party of its confidentiality obligations under this clause or at law; or
- d that the other parties otherwise agree in writing.

The provisions of this clause will continue to bind each party notwithstanding that it may have ceased to be a party to this Agreement or that this Agreement has been terminated.

22.5 **GST**

- a If any amount payable by AT, the Parent or the Operator (in this clause, the “**Payer**”) under this Agreement represents consideration for a Taxable Supply by the Parent, the

Operator or AT (as the case may be) (in this clause, the “**Payee**”) to the Payer, the Payer will pay to the Payee, in addition to and at the same time as any other amount payable for that supply, an amount equal to the GST chargeable on that supply, provided that the Payee has issued a Tax Invoice to the Payer in respect of that Taxable Supply.

- b In respect of Taxable Supplies by the Operator to AT under this Agreement:
 - i AT may apply to the Commissioner of Inland Revenue (the “**Commissioner**”) for approval for AT to issue buyer created Tax Invoices under section 24(2) of the Goods and Services Tax Act 1985 in respect of those Taxable Supplies;
 - ii if AT does apply under subclause i and the Commissioner grants approval, then the Operator will not issue a Tax Invoice in respect of those Taxable Supplies; and
 - iii if AT does not apply under subclause i or the Commissioner either does not grant approval or, having granted approval, the Commissioner revokes that approval, then AT will not be liable to pay any amount under sub-clause 22.5a in respect of such a Taxable Supply unless the Operator has first issued to AT a Tax Invoice in respect of that Taxable Supply.
- c The Operator represents and warrants to AT that it is a registered person for the purposes of the Goods and Services Tax Act 1985 and will immediately notify AT if it ceases to be a registered person.
- d For the purposes of calculating the Direct Costs all amounts will be calculated net of any GST deduction or input tax credit to which the Operator or the Parent (or their representative member if either is group registered under the Goods and Services Tax Act 1985) is entitled under the Goods and Services Tax Act 1985.

22.6 **Exercise of rights**

The exercise of any of the rights and remedies provided for under this Agreement by AT will not prejudice any other rights or remedies which AT may have nor will AT be precluded from exercising any other such rights or remedies available to it.

The Parent and the Operator acknowledges that monetary damages alone may not be adequate compensation to AT for the breach of their respective obligations under this Agreement and that an order for specific performance of those obligations may be an appropriate remedy.

22.7 **Enforceable rights**

AT’s rights under this Agreement will remain enforceable to the fullest extent, although AT may have made payment for, used or otherwise accepted any services provided under this Agreement.

22.8 **Independent contractor**

Subject to any express contrary provision in this Agreement, neither AT, nor the Parent nor the Operator:

- a are to be considered the agent of the other for any purpose; or
- b have authority to enter into any contract or assume any obligation for the other or to make any representation or warranty on behalf of the other.

Nothing in this Agreement will be considered to establish a relationship of co-partners or joint venturers between the Parent and the Operator, and AT. Under no circumstances will AT be liable for the debts or obligations of the Parent or the Operator or for the wages, salaries or other benefits of their employees or contractors, except to the extent expressly set out in this Agreement.

22.9 Survival of provisions

Clauses 1.3, 4.1d, 4.2, 9.1g, 12, 13.3, 13.4, 14.1c, d and f, 14.2, 15, 18.6, 22.3 and 22.4 survive termination of this Agreement.

22.10 No waiver

No waiver of any breach of, or failure to enforce, any provision of this Agreement at any time by any party in any way affects, limits or waives the right of such party thereafter to enforce and compel strict compliance with the provisions of this Agreement.

22.11 Entire agreement

This Agreement records the entire agreement between the parties, and prevails over any earlier agreement, relating to the transaction recorded in this Agreement.

22.12 Further assurance

Each party will promptly do everything reasonably required to give effect to this Agreement.

22.13 Partial invalidity

The illegality, invalidity or unenforceability of a provision of this Agreement under any law will not affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of any other provision of this Agreement.

22.14 Counterparts

This Agreement may be signed in any number of counterparts all of which, when taken together, will constitute one and the same instrument.

22.15 Governing law

This Agreement is governed by and to be construed in accordance with New Zealand law and the parties irrevocably submit to the non-exclusive jurisdiction of the courts of New Zealand.

EXECUTED as an agreement.

Signed for and on behalf of
Auckland Transport by:

David Warburton, Chief Executive

Mark Ford, Chairman

Signed for and on behalf of
Veolia Transport Auckland Limited
by:

Graham Sibery, Managing Director

Signed for and on behalf of
**Veolia Transport Australasia Pty
Limited** by:

Edward Thomas, Deputy Chief
Executive

Schedule 1 Definitions and interpretation

1 Definitions

In this Agreement, unless the context otherwise requires:

“**Additional Services**” means the services and other obligations set out in the Additional Services Schedule;

“**Additional Services Schedule**” means Schedule 6;

“**Administrator**” has the meaning given to that term in the Administrator Schedule;

“**Administrator Schedule**” means Schedule 15;

“**Advisory Services**” means the services and other obligations set out in Schedule 6;

“**Agreement**” means this agreement, as varied by the Variation Agreement;

“**Applicable Laws**” means all and any laws, statutes, proclamations, by-laws, directives, regulations, statutory instruments, rules, orders, legislation, delegated or subordinated legislation applicable to the provision of the Services or otherwise applicable to AT, the Parent or the Operator and includes, without limitation:

- a Public Transport Management Act 2008
- b Land Transport Management Act 2003;
- c Local Government Act 2002;
- d Local Government (Auckland Council) Act 2009;
- e Transport Accident Investigation Commission Act 1990;
- f Railways Act 2005;
- g Land Transport Act 1998;
- h Resource Management Act 1991;
- i Health and Safety in Employment Act 1992;
- j Hazardous Substances and New Organisms Act 1996;
- k Carriage of Goods Act 1979; and
- l Employment Relations Act 2000;

“**Appointment Date**” means 19 March 2004;

“Approved Direct Cost Budget” means, in relation to a Full Year, the Direct Cost Budget in the relevant Approved Operations Management Plan (as amended from time to time in accordance with this Agreement);

“Approved Operations Management Plan” has the meaning given to that term in Operations Management Plan Schedule;

“Approved Working Capital Facility” means the credit facility which the Operator has with a New Zealand bank for the funding of Direct Costs;

“Associated Person” has the meaning given to that term in section 2(2) of the Securities Markets Act 1988;

“AT Account” means the bank account held by AT notified from time to time by AT by written notice to the Parent and the Operator;

“AT’s Branding and Theming Manual” means any Branding and Theming Manual prepared by AT and provided to the Operator from time to time that relates to the use of trade marks, get up, or other intellectual property;

“AT Fare Schedule” means the schedule issued by AT from time to time (as notified to the Operator) regulating Train Fares;

“AT Representative” means the person nominated by AT by written notice to the Parent and the Operator as AT Representative for the purposes of this Agreement. AT Representative may delegate its responsibility under this Agreement to one or more persons by written notice to the Parent and the Operator;

“At Risk Direct Costs Margin” has the meaning given to that term in the Financial Schedule;

“Auckland Network” means the Auckland Network (as defined in the Common Access Terms), together with any other line specified by AT by notice to the Operator;

“Auckland Network Access Agreement” means the access agreement to be entered into between the KiwiRail and AT regarding access to the Auckland Network in the form approved by AT;

“Auckland Network Controller” has the meaning given to that term in the Common Access Terms;

“Auckland NIMT” has the meaning given to that term in the Common Access Terms;

“Auckland Rail Accounts” has the meaning given to that term in clause 9.2;

“Auditors” means AT’s auditors, who will also be the auditors of the Operator;

“Audit Report” means, in respect of any Financial Statement, the report of the Auditors relating to any such Financial Statement, prepared in accordance with the Financial Reporting Act 1993 and generally accepted auditing standards;

“Bill Rate” means the average rate per annum (expressed as a percentage) as quoted on Reuters page BKBM (or any successor page displaying substantially the same information)

under the heading FRA for bank accepted bills having a term of three months as fixed at 10.45 am on the first Business Day following the due date (and on the first Business Day next following the expiration of each succeeding three month period after the due date thereafter);

“Britomart Transport Centre Access Agreement” means the agreement to be entered into between the Operator and AT for access to the Britomart Transport Centre;

“Business Day” means a day (other than a Saturday or Sunday) on which registered banks are open for general banking business in Auckland;

“Call Option” means the option granted by the Parent under clause 14.2;

“Common Access Terms” means the common access terms for the Auckland Network, a copy of which is attached as a schedule to the Auckland Network Access Agreement, as amended from time to time;

“Confidential Information” means:

- a the terms of this Agreement and the financial position and state of affairs of the other party; and
- b includes:
 - i all written or computerised data, know-how, designs, sketches, photographs, plans, drawings, specifications, prototypes, costings, studies, findings and forecasts relating to the Services or the Auckland Network (or stations);
 - ii all Technical Information and technical data; and
 - iii any information designated confidential by AT whether such information is oral, written or recorded or stored by electronic, magnetic, electromagnetic or other process or otherwise in a machine readable form or any other form;

“Contract Committee” has the meaning given to that term in the Relationship Management Schedule;

“Direct Cost Budget” has the meaning given to that term in the Operations Management Plan Schedule;

“Direct Cost Margin” has the meaning given to that term in the Financial Schedule;

“Direct Costs” has the meaning given to that term in the Financial Schedule;

“Dispute Resolution Procedure” means the dispute resolution procedure set out in clause 19;

“Driver Hire Agreement” means the agreement entered into between the Operator and KiwiRail for the provision of additional drivers for the Specified Equipment;

“Eastern Line Services” means any Train Services that operate on the Auckland NIMT between Westfield and Britomart via Glen Innes and includes Train Services that operate on the Auckland NIMT and Westfield that may not operate to Britomart;

“Efficiency Audit Report” means, in relation to any Full Year, the report prepared by an independent expert appointed by AT regarding an economy and efficiency audit undertaken by such expert for the purposes of testing the effectiveness and efficiency of the operations of the Operator in relation to the performance of the Services during the relevant Full Year against the relevant Approved Operations Management Plan, which may include:

- a determining meaningful input and output benchmarks;
- b comparisons with similar organisations or activities or Services; and
- c providing information regarding the reallocation of resources to enable the provision of the Services in accordance with this Agreement in a more economic and efficient manner;

“Establishment Plan” means the plan attached as Schedule 3;

“Excepted Risk” has the meaning given to that term in clause 16;

“Exit Costs” has the meaning given to that term in the Exit Costs Schedule;

“Exit Costs Schedule” means Schedule 13;

“Exit Services” means the services and other obligations set out in the Exit Services Schedule;

“Exit Services Schedule” means Schedule 14.

“Expiry Date” means 30 June 2016;

“Fare Revenue” means the total Train Fare revenue collected in relation to the provision of the Train Service;

“Fare Revenue Bonus” has the meaning given to that term in the Financial Schedule;

“Fare Revenue Reimbursement” has the meaning given to that term in the Financial Schedule;

“Fare Revenue Target” has the meaning given to that term in the Operations Management Plan Schedule;

“Financial Schedule” means Schedule 9.

“Financial Statement” means:

- a statement of financial performance;
- b statement of financial position;
- c statement of cashflows,

for the relevant Full Year, each prepared in accordance with generally accepted accounting principles and the Financial Reporting Act 1993 (or equivalent legal requirements of the jurisdiction of incorporation of the relevant reporting entity), and in relation to the Operator,

identifies as separate items the total Direct Costs and Non-reimbursable Costs for the relevant Full Year;

“Formal Variation Procedure” means the procedure set out in clauses 6.2 to 6.9;

“Full Year” means:

- a the period from the Variation Commencement Date to 30 June 2013; and
- b subsequently, each consecutive 12 month period beginning on 1 July and ending on 30 June of the following year;

“Full Year Report” has the meaning given to that term in paragraph 2.1f of the Reporting Services Schedule;

“GST” means tax charged under the Goods and Services Tax Act 1985;

“Guarantee” means the deed of guarantee and indemnity from the Guarantor in favour of AT in relation to the obligations of the Parent under this Agreement, in the form set out in Schedule 17;

“Guarantor” means Veolia Transdev SA, a French société anonyme, registered at RCS PARIS number 521 477 851, Paris;

“Half Year” means:

- a the period from the Variation Commencement Date to the immediately following [REDACTED] or 31 December (whichever is earlier); and
- b subsequently, each consecutive 6 month period beginning on 1 July and 1 January;

“Half Year Report” has the meaning given to that term in paragraph 2.1e of the Reporting Services Schedule;

“Incident” means an occurrence which results in loss or damage to any Specified Equipment which is caused or contributed to by the fraud, negligence or default of the Operator, the Parent or the Guarantor (or any Associated Person of the Guarantor);

“Insolvency Event” means, in relation to a person:

- a the presentation of an application for the liquidation of that person that is not discharged within [REDACTED] of its filing or which is not demonstrated to the other party prior to the expiry of that [REDACTED] period as being an application that is frivolous or vexatious;
- b any step taken in, or towards, the making of any compromise, proposal or deed of arrangement with all or some of that person’s creditors;
- c the appointment of a liquidator, receiver, administrator, statutory manager, or similar official, to that person;

- d that person being unable to pay its debts as they fall due in the ordinary course of business;
- e the suspension or threatened suspension by that person of the payment of its debts;
- f the enforcement of any security against the whole, or a substantial part, of that person's assets; or
- g any other Insolvency Event or proceedings analogous to any of the foregoing occurring;

"Intellectual Property Rights" means all copyright, database rights, trade marks, designs, patents, rights to extract data, trade or other proprietary rights or rights derivative of those rights (including licence rights), whether registered or unregistered, as well as any other rights in intellectual property which are recognised or protected under law, but does not include moral rights (if any) subsisting in any particular work;

"Interim Network Access Agreement" means the access agreement between the KiwiRail and the Operator regarding access to the Auckland Network in the form approved by AT;

"KiwiRail" means KiwiRail Limited, formerly called Tranz Rail Limited or New Zealand Rail Limited;

"Loss" means any cost, expense, loss or liability (including any fines or penalties) suffered or incurred by a party and, where that party is AT, such costs and expenses in relation to termination of this Agreement and any re-tendering process (including reasonable costs of management time and of professional advisors) from the date of the Termination Notice to appointment of a replacement passenger rail services operator;

"Manukau Line Services" means any Train service that operates on the Manukau Line between Manukau and Puhinui;

"MAXX" means the passenger information service provided by AT which, as at the Variation Commencement Date, is referred to as "MAXX" and comprises a website (www.maxx.co.nz) and phone service (09 366 6400) for passenger bus, train and ferry services in the Auckland region;

"MAXX Service Operations Agreement" means the agreement (in AT's standard form) between the Operator and AT, in relation to the provision of passenger information services;

"NZTA" means the New Zealand Transport Agency established under the Land Transport Management Act 2003 (or any replacement or predecessor agency or authority, including, without limitation, the Land Transport Safety Authority and Transfund New Zealand);

"Monthly Report" has the meaning given to that term in paragraph 2.1c of the Reporting Services Schedule;

"Newmarket Branch" has the meaning given to that term in the Common Access Terms;

"New Operator" means, where the Specified Asset under the Call Option is the assets of the Operator, the purchaser specified in the Exercise Notice;

“New Parent” means any person appointed by AT for the provision of passenger rail services in the Auckland region on termination of this Agreement (or any other agreement for the provision of passenger rail services in the Auckland region) and notified to the Parent by AT as the New Parent. The New Parent may also be the New Operator;

“Non-reimbursable Cost” has the meaning given to that term in the Financial Schedule;

“North Auckland Line” has the meaning given to that term in the Common Access Terms;

“Not At Risk Direct Costs Margin” has the meaning given to that term in the Financial Schedule;

“Onehunga Line Services” means any Train Service that operates on the Onehunga Branch Line between Penrose and Onehunga;

“ONTRACK” means the company that owns and manages New Zealand's rail network on behalf of the Government and is part of KiwiRail Group (New Zealand Railways Corporation);

“Open Book Basis” means complete and open access at all reasonable times (subject to the provision of reasonable prior written notice) to all financial records, asset records, documents and data of any nature, books of account (whether held in electronic or physical form), invoices paid or provided, any Safety Case, any Rail Operator Licence, relevant correspondence and such other information as may be held by or on behalf of the Parent or the Operator or a sub-contractor of the Operator that is relevant to:

- a the outputs of financial modelling or the annual budget process;
- b the preparation and implementation of each Operations Management Plan and its components;
- c the performance of Services; or
- d any payments to be made by AT under this Agreement;

“Operating Plan” has the meaning given to that term in Operations Management Plan Schedule;

“Operating Services” means the services and other obligations set out in the Operating Services Schedule;

“Operating Services Schedule” means Schedule 4;

“Operations Management Plan” means the Operations Management Plan referred to in paragraph 1 of the Operations Management Plan Schedule;

“Operations Management Plan Schedule” means Schedule 8;

“Operator Event of Default” means a Material Operator Event of Default or a Notifiable Operator Event of Default;

“Operator Restrictions Schedule” means Schedule 11;

“Parent’s Undertakings Schedule” means Schedule 12;

“Peak” means, in relation to the Train Services, the periods between:

- a 07:30 to 09:00 Monday to Friday for inbound Train Services scheduled to arrive at the Britomart Transport Centre or any other terminus specified by AT (**Morning Peak**); and
- b 16:00 to 18:00 Monday to Friday for outbound Train Services scheduled to depart from the Britomart Transport Centre or any other terminus specified by AT (**Evening Peak**);

“Performance Bond” has the meaning given to that term in clause 14.1;

“Performance Notice” has the meaning given to that term in clause 18.3;

“Performance Regime Schedule” means Schedule 10;

“Pre-approved Subcontract” means a sub-contract for any part of the Services or any input required for the provision of the Services:

- a which is a Relevant Agreement as at the Variation Commencement Date; or
- b with a term that extends beyond the Expiry Date; or
- c to which an Associated Person of the Operator is not, directly or indirectly, a party;

“Projected Train Fare Revenue” is the projected annual Train Fare revenue determined having regard to the:

- a previous year’s Fare Revenue; and
- b likely impact of foreseeable externalities (such as the delivery of additional rolling stock, increased Train Fares, and increased Train Services);

“Provisional Operations Management Plan” has the meaning given to that term in the Operations Management Plan Schedule;

“Punctuality KPI” has the meaning given to that term in the Performance Regime Schedule;

“Punctuality Performance Indicator” has the meaning given to that term in the Reporting Services Schedule;

“Quarter” means:

- a the period commencing on the Variation Commencement Date to 30 September 2012; and
- b subsequently, each consecutive 3-month period commencing on 1 October, 1 January, 1 April, and 1 July (as the case may be);

“Quarterly Report” has the meaning given to it in paragraph 2.1d of the Reporting Services Schedule;

“Rail Operator Licence” means any licence or other regulatory approval required for the provision of the Services, including any requirement to hold a licence as a rail operator under the Railways Act 2005;

“Rebate” means any amount or percentage described as a rebate in the Performance Regime Schedule that may become payable by the Operator to AT;

“Recoverable Loss” means any Loss of a party other than a Loss:

- a of anticipated savings and the projected economic returns on any such savings;
- b of revenue or loss of profit;
- c of goodwill;
- d which is consequential or indirect; or
- e of future contracts or business opportunities;

“Regulatory Authorities” means those government departments and regulatory, statutory and other entities, committees and bodies which, whether under statute, rules, regulations, codes of practice or otherwise, are entitled to regulate, investigate or influence the matters dealt with in this Agreement or any Relevant Agreement or any other affairs of AT, the Parent or the Operator and which (for the avoidance of doubt) includes the NZTA, Transport Accident Investigation Commission and Occupational Health and Safety;

“Relationship Committee” means the Relationship Committee established under the Relationship Management Schedule;

“Relationship Management Schedule” means Schedule 7;

“Relationship Manager” means, as the context requires, the Operator’s Managing Director and AT’s Manager, Public Transport Operations;

“Relevant Agreement” means the agreements specified in paragraph 2.1 of the Establishment Plan and such other agreements with Third Party Service Providers that become Relevant Agreements under the process described in clause 8;

“Reliability KPI” has the meaning given to that term in the Performance Regime Schedule;

“Reliability Performance Indicator” has the meaning given to that term in the Reporting Services Schedule;

“Reporting Services” means the services and other obligations set out in the Reporting Services Schedule;

“Reporting Services Schedule” means Schedule 5;

“Representative” has the meaning given to that term in clause 1.2 of the Relationship Management Schedule;

“Revenue Protection and Enhancement Strategy” has the meaning given to that term in the Operations Management Plan Schedule;

“Rolling Stock Allocation Plan” has the meaning given to that term in the Operating Services Schedule;

“Rolling Stock Maintenance Agreement” means the agreement entered into between the Operator and Alstom or TRL regarding rolling stock maintenance;

“Safety Case” has the meaning given to that term in the Railways Act 2005;

“Safety Improvement Plan” has the meaning given to that term in the Operations Management Plan Schedule;

“Senior Management” means the Managing Director, and the Finance Manager and the Operations Manager (or any roles equivalent to the foregoing roles, however called) of the Operator;

“Services” means the Operating Services, the Reporting Services, the Additional Services and the Exit Services;

“Southern Line Services” means any Train Services that operate on the North Auckland Line (“NAL”) and Newmarket Branch Line (“NBL”) between Westfield and Britomart and includes any Train Service that operates on the Westfield to Newmarket section of the NAL that does not operate to Britomart;

“Special Timetable” has the meaning given to that term in the Operating Services Schedule;

“Specified Asset” has the meaning given to that term in the Parent’s Undertakings Schedule;

“Specified Equipment” means:

- a the SX rolling stock;
- b the ADL/ADC and ADK/ADB Diesel Multiple Units; and
- c the SA and SD rolling stock;

and such other equipment specified by AT;

“Specified Equipment Loss” means:

- a if the relevant Incident is covered by insurance, the deductible under that insurance; or
- b if the relevant Incident is not covered by insurance:
 - i the total cost of reinstatement or repair of the Specified Equipment as a result of the Incident; or
 - ii if the Specified Equipment is a total loss or is otherwise considered by AT to be uneconomic to reinstate or repair, the replacement value of the Specified Equipment immediately prior to the relevant Incident;

“Succession Package” has the meaning given to that term in the Exit Services Schedule;

“Swanson to Huapai Services” means any Train Services that operate on the North Auckland Line north of Swanson;

“Taxable Supply” has the meaning given in the Goods and Services Tax Act 1985;

“Tax Invoice” has the meaning given in the Goods and Services Tax Act 1985;

“Technical Information” has the meaning given to that term in clause 13;

“Tender” means the tender submitted by the Parent in relation to the RFT which was selected by AT as its preferred tender;

“Termination Notice” means:

- a an AT Termination Notice; or
- b an Excepted Risk Termination Notice;

“Third Party Service Provider” has the meaning given to that expression in clause 8.1;

“Timetable” means the then current timetable for Train Services approved in writing by AT in accordance with this Agreement;

“Train Fare” means the consideration that may be charged by the Operator to a passenger for a Train Service;

“Train Service” means a single train service operated by the Operator on the Auckland Network for the carriage of passengers in accordance with this Agreement having:

- a an origin;
- b a destination;
- c stopping pattern;
- d arrival time at destination and departure time at origin and intermediary stations; and
- e a unique service identification number,

all as set out in the Timetable and/or a Special Timetable and includes special event services and alternative transport arrangements which operate as replacements for Train Services;

“Upgrade Timetable” has the meaning given to that term in the Operating Services Schedule;

“Variation” has the meaning set out in clause 6.2;

“Variation Agreement” means the Agreement dated 2 February 2012, in which the parties agreed to vary this Agreement, so as to incorporate all of the terms set out in this document;

“Variation Commencement Date” means 1 July 2012;

“Variation Proposal” has the meaning set out in clause 6.2; and

“Western Line Services” means any Train Services that operate on the NAL and NBL between Swanson and Britomart and includes any Train Service that operates on the NAL between Swanson and Newmarket that does not operate to Britomart.

2 General references

In this Agreement, unless the context otherwise requires, any references to:

- a a gender include each other gender;
- b the singular includes the plural and vice versa;
- c an agreement or instrument includes that agreement or instrument as modified, supplemented, novated or substituted from time to time;
- d a statute or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them (whether before or after the date of this Agreement);
- e a person includes:
 - i an individual, a body corporate, an association of persons (whether corporate or not), a trust, a state and an agency of state, in each case, whether or not having a separate legal personality; and
 - ii a reference to the person’s successors, substitutes (including, but not limited to, persons taking by novation) and permitted assigns;
- f \$ or dollars is a reference to the lawful currency of New Zealand;
- g clauses, schedules and paragraphs are references to clauses of, and schedules to, this Agreement and paragraphs of the relevant schedule;
- h the consent, approval or acceptance of a person requires the prior written consent, approval or acceptance of that person;
- i an obligation to not do something includes an obligation to not suffer, permit or cause that thing to be done;
- j an approval also includes a consent, authorisation, exemption, filing, licence, order, permit, recording and registration (and references to obtaining approvals are to be construed accordingly);
- k an agreement, undertaking, representation or warranty in favour of more than one person is for the benefit of them jointly and severally. An agreement, undertaking, representation or warranty from more than one person is from them both jointly and severally;
- l a month is a calendar month. A day is 24 consecutive hours from (but excluding) 24:00 on the previous calendar day, and any reference to any named day of the week will be to such period commencing on that named day;
- m “XX:20” means, as an example of this notation, 20 minutes past the hour; and

n all monetary amounts are stated in this Agreement exclusive of any GST.

Headings are to be ignored in construing this Agreement.

3 Contractors, agents, etc

An act or omission of any director, employee, contractor, sub-contractor or agent of a party is deemed to be an act or omission of that party.

4 Approvals

In any express provision in this Agreement for the giving of consent or approval by AT, the Contract Committee or the Relationship Committee:

- a that consent or approval may be given unconditionally or subject to conditions or withheld by AT, the Contract Committee or the Relationship Committee (as the case may be), unless otherwise stated;
- b if a consent or approval is given conditionally, the Relationship Committee, the Contract Committee, the Parent or the Operator (as the case may be) must comply with each condition; and
- c a consent for, or approval of, one thing does not apply to any other thing.

Schedule 2 Representations and warranties

1 General representations and warranties

1.1 Status

It is a company duly incorporated and validly existing under the laws of New Zealand (in the case of the Operator) and Australia (in the case of the Parent).

1.2 Power

It has the power to enter into and perform its obligations under this Agreement and the Relevant Agreements to which it is expressed to be a party.

1.3 Constitution

The constitution of the Operator will not be altered except with the express prior written consent of AT.

1.4 Authorisations and consents

Everything required to be done (including the obtaining of any necessary consents and the passing of all necessary resolutions) to:

- a enable it lawfully to enter into, exercise its rights and perform and comply with its obligations under, this Agreement and the Relevant Agreements to which it is expressed to be a party;
- b ensure that those obligations are legal, valid, binding and enforceable in accordance with their respective terms; and
- c make this Agreement and the Relevant Agreements to which it is expressed to be a party admissible in evidence in the courts of New Zealand,

has been duly done.

1.5 Non-contravention

Its entry into, and the exercise of its rights and performance of and compliance with its obligations under, this Agreement and the Relevant Agreements to which it is expressed to be a party do not and will not:

- a contravene any law to which it is subject; or
- b contravene any of the documents constituting it; or
- c exceed any limitation on, or constitute an abuse of, the powers of its directors or officers;
or

- d contravene any agreement to which it or any Associated Person is a party or which is binding on any of its/their assets; or
- e result in the creation of, or oblige it or any Associated Person (absolutely or contingently) to create or permit to exist, any security interest over or affecting its/their assets.

1.6 **Obligations binding**

Its obligations under this Agreement and the Relevant Agreements to which it is expressed to be a party are legal, valid, binding and enforceable in accordance with their respective terms.

2 Other representations and warranties

2.1 **No default**

It is not, nor is any Associated Person, in default under:

- a any agreement relating to indebtedness for borrowed money, including indebtedness for and in respect of money borrowed and raised by any means (including acceptances, deposits, financial leases, debt factoring with recourse and sale and repurchase agreement) and for the deferred purchase price of assets and Services; or
- b any guarantee; or
- c any other agreement, to an extent or in a manner which, has or could have a material adverse effect on the Parent or the Operator.

2.2 **Solvency**

The Parent satisfies the solvency test (as defined in section 4 of the Companies Act 1993) as if it were a company for the purposes of the Companies Act 1993.

2.3 **No security interest**

No security interest (as defined in the Personal Property Securities Act 1999) exists over or affects, nor is there any agreement to give or permit to exist any security interest over or affecting, any asset of the Operator.

2.4 **Financial information**

All information provided to AT in respect of the financial standing of the Guarantor and the Parent or any Associated Person of the Parent is true, accurate and complete and may be relied upon by AT.

2.5 **Litigation**

No litigation, arbitration or administrative proceeding is current or pending or, to its knowledge, threatened:

- a to restrain its entry into, or the exercise of its rights or the performance of or compliance with or enforcement of its obligations under, this Agreement or any Relevant Agreement to which it is expressed to be a party; or
- b which has or could have a material adverse effect on it or on any of its Associated Persons or on AT's ability to exercise or enforce its rights under this Agreement or any Relevant Agreement to which it is expressed to be a party.

3 Title

The Parent is the sole legal and beneficial owner (subject to the Call Option) of all of the shares in the Operator.

Schedule 3 Establishment plan

1 Scope of Establishment Plan

For the purposes of this Agreement, the “**Establishment Plan**” comprises the activities identified in this Schedule, with such amendments as may be agreed in writing by AT prior to the Variation Commencement Date, such that the Operator is able to perform the Services and all of its other obligations under this Agreement on and from the Variation Commencement Date.

2 Relevant Agreements

2.1 Main Agreements

The following Relevant Agreements shall continue in force from the Variation Commencement Date:

- a Interim Network Access Agreement
- b Rolling Stock Maintenance Agreement
- c Driver Hire Agreement
- d Britomart Transport Centre Access Agreement
- e MAXX Service Operations Agreement.

2.2 Auckland Network Access Agreement

The Operator shall, by the Variation Commencement Date, enter into the Auckland Network Access Agreement (presently being negotiated) between AT and KiwiRail (under which the Operator will be a party as the MSO) in the form and substance approved by AT.

3 Other matters

3.1 General

The Operator or the Parent (as the case may be) shall have:

- a provided the Performance Bond by the Parent and the Guarantee by the Guarantor in accordance with this Agreement;
- b obtained any insurance required by this Agreement.

3.2 Plans and Targets

The Operator and AT shall have agreed:

- a the KPI targets for reliability, punctuality and customer satisfaction and the significant incidents regime that shall apply in the 2012/13 Full Year;

- b the Approved Direct Cost Budget and Fare Revenue Target that shall apply for the 2012/13 Full Year; and
- c an Operations Management Plan, effective from the Variation Commencement Date, that provides a plan for 2 additional years to reflect the requirement to develop a 3 year rolling budget that includes:
 - i annual Direct Cost Budget,
 - ii annual Fare Revenue Target,
 - iii indicative KPIs for reliability, punctuality and customer satisfaction for each of the subsequent two years,
 - iv proposed scope and key initiatives for each of the subsequent two years.

The Operations Management Plan shall be the basis for the negotiation of the Operations Management Plan for the Full Year that commences on the Variation Commencement Date. The parties shall negotiate that plan in good faith, noting that the Operations Management Plan sets out their aspirations for the Operations Management Plan for the Full Year that commences on the Variation Commencement Date.

3.3 Default Arrangements

If the Operator and AT have not agreed the above items by the Variation Commencement Date the following default arrangements will apply in relation to the Full Year that commences on the Variation Commencement Date:

- a The Operations Management Plan for the Full Year that commences on the Variation Commencement Date shall be the Operations Management Plan that is in effect on 31 January 2012 (except as noted otherwise below):
- b The Approved Direct Cost Budget shall be the Target Reimbursable Costs that apply as at 31 January 2012 for the 2011/12 Full Year plus:
 - i any increase in the Operator's labour costs during that Full Year under any MECA that has been approved by AT (such approval not to be unreasonably withheld);
 - ii a percentage increase, equivalent to the corresponding increase in the Consumers Price Index (All Groups) for the year ended 31 March 2012, on the Target Reimbursable Costs that apply as at 31 January 2012 (except in relation to any increased labour costs described in paragraph 3.3bi);
- c The Fare Revenue Target shall be the 2011/12 Full Year's actual Fare Revenue (adjusted for any increase in revenue commensurate with any increase in Train Fares for the 2012/13 Full Year);
- d The KPIs for punctuality, reliability, and customer satisfaction shall be the 2011/12 Full Year's KPIs and the fail threshold for the purposes of the Performance Notice regime shall be:

- i Punctuality – 78% in any one month.
- ii Reliability – 96% in any one month.
- iii Customer satisfaction – 74.75% in any one 6 month customer satisfaction survey.

For the purposes of this sub-paragraph 3.3d, in considering whether or not the Operator has failed to meet a KPI "fail" threshold in respect of any period due allowance will be made for any failure of service performance caused by KiwiRail to the extent that the average performance by KiwiRail of its obligations under any Relevant Agreement, during that same period, is below the level of KiwiRail's average performance for the calendar year preceding that period.

- e Only half of the At Risk Direct Costs Margin shall be available until KPIs for the 2012/13 Full Year are agreed.

3.4 **Reviews**

By the Variation Commencement Date the parties shall endeavour to complete the following reviews:

- a A review of the provisions of this Agreement that deal with insurance
- b A review of the Operating Services Schedule
- c A review of the Reporting Services Schedule
- d A review of the Performance Regime Schedule, including:
 - i The measurement of customer satisfaction trends; and
 - ii The Significant Incident regime and Rebate levels
 - iii Fail levels for all KPIs, for the purpose of the Performance Notice regime.

Schedule 4 Operating Services

1 Scope of Operating Services

The Operator will, on and from the Variation Commencement Date provide the following Operating Services in accordance with this schedule and as determined by AT from time to time:

- Train Services
- Passenger Information Services
- Revenue Collection Services.

2 Train Services

2.1 Requirements

The Operator will, on and from the Variation Commencement Date, provide Train Services using the Specified Equipment on the Auckland Network in accordance with the requirements set out in each Operations Management Plan that is current from time to time.

2.2 Upgrade Timetables

The Operator will prepare, as required by AT from time to time, a draft timetable to take into account any development of station or network infrastructure or changes in the Specified Equipment (an “**Upgrade Timetable**”).

AT will determine (either generally or in relation to a specific proposed draft Upgrade Timetable) a reasonable process for preparing and approving a proposed draft Upgrade Timetable having regard to the relevant circumstances. Each Upgrade Timetable prepared by the Operator must be consistent with the timetable requirements notified by AT from time to time.

2.3 Special timetable

a Requirement

The Operator will prepare, from time to time as required, a draft timetable amending the current Timetable as necessary for any:

- i special event Train Service; or
- ii engineering, upgrade or other works that will have a material effect on the Train Services as follows:
 - A the suspension or amendment of Timetabled Services on any line on any day for more than two hours;
 - B closure of any platforms or stations for more than two hours;

- C suspension or amendment of Timetabled Services or closure of platforms or stations for any period on more than one day; or
- D which is likely to affect other modes of public transport or be of public interest, (a “**Special Timetable**”).

b Instructions

The Operator will prepare each draft Special Timetable:

- i in accordance with any instructions provided to the Operator by AT regarding that draft Special Timetable or the preparation of Special Timetables generally. Those instructions may include a requirement for any draft Special Timetable to be provided to AT for consideration and, if considered acceptable, approval (with or without any amendments approved by AT; and
- ii in sufficient time to enable AT to publish the Special Timetable no less than 20 Business Days prior to the commencement of the delivery of the Special Timetable.

c Effective time

A draft Special Timetable will take effect as the timetable for the period:

- i if applicable, specified by AT; and
- ii approved by the Timetable Committee under the Common Access Terms.

Each Special Timetable prepared by the Operator must be consistent with the timetable requirements notified by AT from time to time.

2.4 Timetable model

An electronic timetabling model of the Auckland Network has been provided to assist the Operator in developing Timetables. The Operator is required to use this model or an alternative approved by AT.

2.5 Rolling Stock Allocation Plan

a Preparation

The Operator will develop and provide to AT, as part of each draft Operations Management Plan, and at the time any revised or proposed Timetable is submitted by the Operator to AT, a Rolling Stock Allocation Plan.

b Variation

A Rolling Stock Allocation Plan may be varied during the relevant Full Year by the Operator to take into account changes in the factors identified in paragraph ii of the definition of Rolling Stock Allocation Plan. Any such variation must be agreed by AT.

c Definition

A “**Rolling Stock Allocation Plan**” is a rolling stock allocation plan for each Timetable that:

- i allocates Specified Equipment types and quantities (cars per train) and identifies the resulting seating and standing capacity for each Train Service; and
- ii allocates Specified Equipment to each Train Service having regard to:
 - A the expected demand for the Train Service based on time of day and stopping pattern and timing of each Train Service, as set out in the relevant Timetable;
 - B boarding and alighting characteristics of the available Specified Equipment; and
 - C a target of no passenger being required to stand on a Train Service for more than 15 minutes.

2.6 Passengers

a Carry all passengers

The Operator will, subject to any regulatory requirements and paragraph 2.6b below, use its best endeavours to carry all passengers who wish to use the relevant Train Service.

b Refusal to carry passengers

The person authorised by the Operator to control the boarding, alighting and safety of passengers may refuse to carry any passenger or require any passenger to disembark at a station, on the grounds set out in the Conditions of Carriage approved from time to time by AT.

2.7 Cleanliness

The Operator will procure or implement systems and procedures to ensure that:

- a the Specified Equipment undergoes an interior clean and de-littering at least once every day (or as agreed in the relevant Operations Management Plan) that the Specified Equipment is used to provide Train Services (i.e. normally overnight);
- b the Specified Equipment undergoes an exterior clean at least once every 48 hours, including the removal of exterior graffiti in accordance with the requirements of the Rolling Stock Maintenance Agreement;
- c no Specified Equipment enters service each day with offensive graffiti, dangerous material or human waste; and
- d the Specified Equipment is de-littered at least once during the Interpeak period on Business Days.

The Operator's performance is to be monitored by the customer satisfaction surveys undertaken in accordance with paragraph 4.1 of Reporting Services Schedule.

2.8 Security

The Operator will provide a reasonable level of on-train security for passengers and their property and against damage to stations, the network and the Specified Equipment. The Operator will provide such security by:

- a the presence of on-train train managers and passenger operators (where patronage levels justify the presence of passenger operators) on each Train Service;
- b provide for additional security on-train where patronage levels or passenger demographics justify an additional presence;
- c such train managers and any other on-board staff present, through the approved communication channel, informing the Auckland Network Controller and the duty manager and (if required by the Auckland Network Controller) emergency services, of any observed or reported incident involving injury to a passenger or loss or theft of a passenger's property;
- d maintaining records of all security incidents (including damage to stations, the network or the Specified Equipment) and undertaking analysis of each incident to develop appropriate security response plans (in conjunction with the relevant equivalent plans of the Auckland Network Controller);
- e where required by AT, implementing appropriate procedures for storing closed-circuit television images from rolling stock cameras for at least 9 months; and
- f maintaining a liaison group with the police and interested local groups (including AT facilities staff) to meet on a regular basis to discuss and agree local action plans for specific problem areas relating to on-train and station security.

2.9 **Alternative Services**

a Circumstances

Where the Operator is unable to provide Train Services in accordance with the Timetable, because of either:

- i scheduled maintenance of the Auckland Network, any station on the Auckland Network or the Specified Equipment, or any other scheduled or planned interruption to Train Services, the Operator will provide alternative bus Services for affected passengers and will ensure that affected passengers are given a minimum of 20 Business Days' notice of service alteration in a format to be agreed by the Contract Committee (unless otherwise agreed by AT), reasonable directions, information and assistance to such alternative Services; or
- ii any unscheduled or unplanned interruption to Train Services which results in the cancellation of any Timetabled Services or delay of Train Services for more than 30 minutes, the Operator will use reasonable endeavours to provide alternative transport arrangements for affected passengers including railbus replacement services, taxi services or directions to local scheduled bus services and will ensure that affected passengers are given reasonable directions and regular (3-5 minutes intervals), customer-focussed up-to-date information about such alternative Services.

b Standard

The Operator will:

- i ensure that such alternative Services stop at each scheduled station stop (or as close as possible), and operate as closely as possible to the Timetable for the delayed or cancelled Timetabled Service; and
- ii use its reasonable endeavours to ensure that the relevant bus operators will accept rail Services tickets that may be held by the affected passengers.

c Last service

The Operator must run the last Timetabled Service for each day or provide an alternative means of transport.

2.10 Revenue from Services and other activities

The Operator must obtain the prior written approval of AT for any activity which is not a Service, such as charter Train Services and filming on board the trains. Any approval of such activity will involve a revenue sharing arrangement with the Operator.

2.11 Public Relations and Media

The Operator will:

- a work jointly with AT in dealing with any public affairs and media issues relating to Auckland passenger rail services, including relationships with the Crown, territorial authorities, Auckland Council, and NZTA; and
- b comply with clause 22.3 in relation to each press release and media engagement issued by the Operator relating to the Services or this Agreement. The Operator (as approved by AT) will front any media engagement concerning any Train Service operational issue.

3 Passenger information Services

3.1 Co-operation

AT will meet the amount of the contribution to be paid by the Operator towards the cost of the MAXX service.

AT will be responsible for publishing Timetable information to be distributed through MAXX, the Operator (for example for on-train information) and others (for example, the manager of the Britomart Transport Centre).

Special Timetable information will be provided to AT, by the Operator, in an accurate and customer focussed format (as agreed by the Contract Committee) no later than 4 weeks prior to the Timetable being effective.

In addition, the Operator will display on the inside of the Specified Equipment any information provided by, or agreed by, AT which relates to the public transport activities of AT and which may include publicity or other relevant information leaflets.

3.2 Passenger information systems

The Operator will provide both static and real time information that is accurate and customer-focussed on the Train Services to passengers using the passenger information systems

available at the Britomart Transport Centre and other stations, on-board trains and through MAXX as necessary, including:

- a subject to the Britomart Transport Centre Access Agreement ensure (either directly or through contractors appointed by the Operator) timetable boards on all station platforms and at station entrances are clear and readable, contain correct and valid information, and advise AT when the information contained within those boards or cases requires replacement;
- b in respect of any scheduled maintenance of the network infrastructure or stations or Specified Equipment and any other planned works affecting Train Services, at least 20 Business Days prior to such works:
 - i provide to AT and to the MAXX service, final details of such works and alternative service arrangements (including replacement buses (if any), amendments to timetables and platform berthing arrangements, and the provision of special trains);
 - ii prepare and arrange the posting of notices regarding such works and alternative services at each station affected by such works or alteration to the Timetabled Services;
- c make available to passengers any in-service train or station timetables provided by AT. The Operator will advise AT at least 10 Business Days prior to the anticipated resupply date;
- d create, maintain and update timetable and ticket information for publication on the MAXX internet website and provide that information to the MAXX service in a timely and correct manner, no later than 20 Business Days prior to the effective date;
- e respond in an appropriate manner, protecting the interests of AT, to any letters or other correspondence from the public within 10 Business Days of receipt of any such correspondence and maintain a record of the correspondence received and response times for presentation to AT as part of the relevant Weekly and Monthly Report;
- f create, maintain, administer and update scheduled Timetable and delayed or cancelled services information within the AT real-time passenger information system (RAPID) to present real-time service information to passengers to required timescales;
- g on-board train announcements both automated and specific as necessary; and
- h text messaging to subscribers of any text messaging system.

3.3 **Delayed or cancelled Train Services**

The Operator will provide the following information on a “real-time” basis:

- a to AT and to the MAXX service, details of any delay or cancellation of any Train Service expected to last more than 5 minutes;
- b to passengers on any Train Services delayed by more than 5 minutes, a brief explanation of the cause of any delay, the expected duration and reasonable details of any alternative routes or services available for such passengers; such passenger information

announcements to be repeated frequently while the delay or cancellation is in place (3-5 minute intervals);

- c for passengers at the Britomart Transport Centre, a customer-focussed brief explanation of the cause of any delay or cancellation, the expected duration and reasonable details of any resulting changes to Train Services (including changes in platform use) and reasonable details of any alternative routes or services for such passengers using both the passenger information display and the public address systems in the Britomart Transport Centre;
- d for passengers at all other stations on the affected route or routes a customer-focussed, brief explanation of the cause of any delay or cancellation, the expected duration and reasonable details of any resulting changes to Train Services (including changes to platform use) using the passenger information display signs and the public address systems;

The delay or disruption information must be relevant to the services scheduled to stop at the stations where the passenger information sign and public address system messages are made.

3.4 Other Services

The Operator will be responsible for:

- a responding to any “help point” queries as such equipment is provided;
- b ensuring that all on-train employees wear or display a name badge or identification label which must remain clearly visible at all times so that they are readily identifiable by members of the public with whom they come into contact;
- c employing fit and proper staff to deal with passengers. Staff must be neatly attired and polite, courteous, helpful, and communicative in dealing with the travelling public and must be capable of communicating with passengers in the English language in a clear and concise manner. AT has the right to require the removal from public contact on the Operating Services any employee whose behaviour or attire is considered by AT to be inconsistent with these requirements or otherwise objectionable;
- d provide customer service representatives at the Britomart Transport Centre to assist passengers;
- e provide for increased on-train security, on-train passenger information announcements and on-train and platform passenger assistance and customer service as necessary for Special Timetable operations or when patronage levels or passenger demographics justify additional service levels.

4 Revenue collection Services

4.1 Ticket sales

The Operator will:

- a sell tickets on board each Train Service or on station platforms and issue to each passenger on payment of the relevant Train Fare (other than passengers holding valid passes approved by AT) a ticket for the journey being undertaken using a ticketing system approved by AT;
- b sell tickets and fare products as requested by AT, through ticket offices provided by AT at the Britomart Transport Centre, Newmarket Station, Manukau Station, Papakura Station and New Lynn Station;
- c continue to provide the range of ticket types existing immediately prior to the Variation Commencement Date;
- d continue to offer current discount levels to passengers currently qualifying for such discounts; and
- e collect Train Fares.

4.2 **Agents**

The Operator will make arrangements for the sale of tickets through agents approved by AT. Commission rates for agents (including any agent at the Britomart Transport Centre) must be approved by AT and confirmed by AT. Such arrangements must require agents to provide collected Train Fare revenue (less any approved commission) to the Operator on a monthly basis, together with a reconciliation of Train Fares collected against ticket sales (by ticket type).

4.3 **Fare Revenue collection**

The Operator will:

- a deposit all Train Fares collected by the Operator into the AT Account on the Business Day after reconciliation; and
- b deposit Train Fares (less any approved commission) collected from agents into the AT Account no later than 5 Business Days after the date of collection. The Operator will promptly notify AT of each such deposit.

If any Train Fares collected by the Operator are lost or stolen prior to deposit in the AT Account and after investigation by the Contract Committee such loss or theft is attributable to any employee of the Operator or a sub-contractor (whether by negligence, dishonesty or otherwise) then an amount equivalent to such lost or stolen Train Fares is deemed to be a Non-reimbursable Cost payable to AT.

4.4 **AT Fare Schedule**

AT will set Train Fares, Fare Products, and Train Fares collection policy through the Operations Management Plan and variations to the Operations Management Plan from time-to-time.

4.5 **Integrated ticketing**

The Operator will participate in any integrated ticketing system in Auckland, as required by AT including (as at the Variation Commencement Date) continuation of the Auckland Integrated Fares Scheme (“AIFS”) Limited Functionality Pilot Stage 2 (“LFP2”).

4.6 **Ticketing and platform management Services**

The Operator will provide ticketing and platform management Services at the Britomart Transport Centre, ticketing at Newmarket, Manukau, Papakura and New Lynn Stations, ticketing and platform management at any station necessary for Special Timetable operations or where passenger demographics justify additional service levels (and any additional ticketing and platform management Services), as determined by AT.

4.7 **Bus Services – monthly passes**

The Operator will continue any arrangements (as at the Variation Commencement Date) regarding the use of rail monthly passes on inner-city bus Services operated by bus operators, as required by AT.

Schedule 5 Reporting Services

1 Reporting systems

The Operator will operate and maintain monitoring and recording systems and processes, to the reasonable satisfaction of AT, that accurately and reliably monitor, record and report on the performance of the Services in a manner that provides all information reasonably required to satisfy AT that the Services have been performed in accordance with AT's requirements for those Services, as agreed under this Agreement.

2 Reports

2.1 Regular reports

The Operator will prepare and provide to AT the following reports:

- a a daily operations report;
- b a weekly report;
- c a report (the "**Monthly Report**"), within 5 Business Days of the end of that month, in a format approved by the Contract Committee
 - i reporting on the items set out in paragraph 3 and noted with "(M)", the Punctuality Performance Indicator and the Reliability Performance Indicator in accordance with paragraph 5 and the matters referred to in paragraph 3.2e of the Operating Services Schedule and clause 8.6b, for the relevant month; and
 - ii providing a comparison of total actual Direct Costs with Approved Direct Costs, Train Fares and the Reliability KPI, the Punctuality KPI, Customer Satisfaction KPI and Significant Incidents for the relevant month (as set out in the Approved Operations Management Plan);
- d a report (in addition to the Monthly Report for the last month of that Quarter) (the "**Quarterly Report**"), within 10 Business Days of the end of that Quarter, in a format approved by the Contract Committee
 - i reporting on the items set out in paragraph 3 and noted with "(Q)", and the Punctuality Performance Indicator and the Reliability Performance Indicator in accordance with paragraph 5, for the relevant Quarter;
 - ii providing a comparison of the actual performance of the Operator against the projected performance of the Operator (as set out in the Approved Operations Management Plan) (including a comparison of total actual Direct Costs with Approved Direct Costs, Train Fares and the Reliability KPI and the Punctuality KPI) , the Customer Satisfaction KPI and Significant Incidents for the relevant Quarter;
 - iii reporting on the performance of the other parties to the Relevant Agreements in relation to their respective obligations under the Relevant Agreement;
 - iv information on track possessions and alternative Services; and

- v providing unaudited Financial Statements of the Operator for the relevant Quarter;
- e a report (in addition to the relevant Monthly Report and Quarterly Report) (a “**Half Year Report**”), within 15 Business Days of the end of the relevant Half Year, in a form approved by the Contract Committee reporting on the items set out in paragraphs 2.3c, 4.1 and 4.2 and a breakdown by line item of actual Direct Costs against Approved Budget Direct Costs for the relevant Half Year; and
- f a report (in addition to the relevant Monthly Report, Quarterly Report and Half Year Report) (the “**Full Year Report**”), within 15 Business Days of the end of the relevant Full Year, in a form approved by the Contract Committee
 - i reporting on the items set out in paragraph 3 and noted with a “(Y)”, the Punctuality Performance Indicator and the Reliability Performance Indicator in accordance with paragraph 5 and the items set out in paragraph 4.3, for the relevant Full Year; and
 - ii providing a comparison of the actual performance of the Operator against the projected performance of the Operator (as set out in the Approved Operations Management Plan) (including a comparison of actual Direct Cost Budget with the Approved Direct Cost Budget, Train Fares and the Reliability KPI and the Punctuality KPI), the Customer Satisfaction KPI and Significant Incidents for the relevant Full Year.

Each Quarterly Report and Full Year Report must provide a report against the Approved Operations Management Plan in sufficient detail to allow AT, the Contract Committee and the Relationship Committee to make an informed comparison of the Operator’s activities during the relevant period against the Approved Operations Management Plan.

The Operator will provide a copy of each Quarterly Report, Half Year Report and Full Year Report to the Contract Committee.

2.2 **Audit Report and Efficiency Audit Report**

The Operator will provide to AT:

- a within 20 Business Days of the Operator’s receipt of the Efficiency Audit Report, the Operator’s analysis and recommendations in relation to the Efficiency Audit Report for the relevant Full Year; and
- b within 3 months of the end of each Full Year, audited Financial Statements for the relevant Full Year, together with an Audit Report.

2.3 **Rolling Stock Allocation Plan – recording and reporting**

The Operator will:

- a record the actual capacity provided to each Train Service relative to the Rolling Stock Allocation Plan – in particular short formation trains or different rolling stock to plan are to be recorded along with cancellations;
- b periodically monitor passenger loadings on all Train Services using a passenger count or any other methodology approved by the Contract Committee; and

- c report to AT the results of such monitoring and recording during the relevant Half Year and:
 - i propose solutions to AT where the requirements of the Operating Services Schedule and in particular 2.5ciiC are not complied with or passenger loadings are not excessive, such as adjustments in Timetable or relevant Rolling Stock Allocation Plan or by any other appropriate method; and
 - ii provide an assessment of any further likely changes to passenger loadings if the proposed solution is implemented together with the anticipated effect on Direct Costs and Train Fare revenue.

3 Reporting items

The items set out in this paragraph 3 are to be reported to AT and (where applicable) the Contract Committee and the Relationship Committee in accordance with paragraph 2.1.

3.1 Revenue and cost

- a Monthly Train Fare revenue against Fare Revenue Target (M);
- b Direct Costs expenditure together with an explanation of any significant variances (M);
- c End of year out turn forecasts for Train Fare revenue and Direct Cost expenditure by major cost categories (M);
- d Train Fare revenue collected by each individual ticket agent, identifying relevant commission rates (excluding the Britomart Transport Centre, Newmarket Station, Manukau Station, Papakura Station and New Lynn Station) (dollar amount and percentage of total Train Fare revenue) during the relevant month (M);
- e Train Fare revenue collected at the Britomart Transport Centre (dollar amount and percentage of total Train Fare revenue) during the relevant month (M);
- f Train Fare revenue collected (dollar amount and percentage of total Train Fare revenue) (separately identifying ticket sales on-board and by agents) during the relevant month, by ticket type and service (M);
- g Train Fare revenue collected during each relevant month, by Western Line Services and Southern Line, Onehunga Line, and Eastern Line Services combined (Q); and
- h Train Fare revenue collected during each relevant month, by ticket type (Q).

3.2 Productivity

- a Total Direct Cost/train kilometre, calculated Quarterly (Q);
- b Total Direct Cost/passenger, calculated Quarterly (Q);
- c Total Train Fares/passenger, calculated Quarterly (Q);
- d Total Train Fares/employee, calculated Quarterly (Q);

- e Number of passenger journeys/employee, calculated Quarterly (Q);
- f Fuel - litres/train kilometre by rolling stock type, calculated Quarterly (Q);
- g Crew – train kilometres/locomotive engineer paid hours, calculated Quarterly (Q);
- h Crew – train kilometres/train manager paid hours, calculated Quarterly (Q);
- i Crew – locomotive engineer and train manager costs per Train Service hour, calculated Quarterly (Q);
- j Crew - locomotive engineer cab hours/total locomotive engineer paid hours, calculated Quarterly (Q);
- k Rolling stock maintenance costs/train kilometres, calculated Quarterly (Q);
- l Rolling stock availability by rolling stock type, calculated monthly (Q);
- m Rolling stock reliability – train kilometres/reported faults, by rolling stock type, calculated monthly (Q);
- n In-service mechanical failures (M); and
- o Passenger delay minutes, determined in accordance with a methodology specified by the Contract Committee (M).

3.3 **Safety**

- a Number of lost time injuries and a frequency rate (incidents per thousand passenger hours) (M);
- b Injury severity index, determined in accordance with the memorandum prepared by Interfleet Technology dated 18 July 2003 regarding such severity index provided to the Parent by AT prior to the Appointment Date or otherwise as determined by the Contract Committee (M);
- c Number of passenger injuries (M);
- d Number of non-passenger and non-staff injuries (i.e., trespassers and members of the public) (M);
- e Number of SPADS (signals passed at danger) (M);
- f Number of safety observations completed or overdue (M);
- g Number of near hits reported (M); and
- h Average hours worked by staff with safety critical functions (M).

3.4 **Work culture**

- a Unrostered overtime/total rostered hours, expressed as a percentage, calculated monthly (M);
- b Sick leave/total rostered hours, expressed as a percentage, calculated monthly (M);

- c Time in training/total rostered hours, expressed as a percentage, calculated monthly (Q);
- d Disciplinary actions taken per month (Q); and
- e Annual staff turnover, as a percentage of total staff (Q).

3.5 **Output statistics**

- a Total car kilometres per month together with planned car kilometres in accordance with the relevant Timetable (Q);
- b Train manager hours - average hours per fortnight (Q);
- c Locomotive engineer hours - average hours per fortnight (Q);
- d Passenger operator hours - average hours per fortnight (Q);
- e Actual Train Services kilometres per month, together with scheduled Train Services kilometres (as determined in accordance with the relevant Timetable) (Q);
- f Car kilometres by rolling stock type per month, together with planned car kilometres (as determined in accordance with the relevant Rolling Stock Allocation Plan) (Y);
- g Car kilometres produced per month by rolling stock type, for each of the Eastern Line Services (in aggregate), the Western Line Services (in aggregate) and the Southern Line Services (in aggregate), together with planned car kilometres (as determined in accordance with the relevant Rolling Stock Allocation Plan) (Y);
- h Train Services kilometres per month for each of the Eastern Line Services (in aggregate), Western Line Services (in aggregate), and the Southern Line Services (in aggregate), together with scheduled train kilometres (as determined in accordance with the relevant Timetable) (Y);
- i Train Services hours per month, together with scheduled Train Services hours (as determined in accordance with the relevant Timetable) (Y); and
- j Train Services hours per month for each of the Eastern Line Services (in aggregate), the Western Line Services (in aggregate) and the Southern Line Services (in aggregate), together with planned Train Services hours, as determined in accordance with the relevant Timetable (Y).

3.6 **Track and infrastructure performance**

- a Percentage of the Auckland Network subject to temporary speed restrictions – measured as kilometres of track subject to temporary speed restrictions divided by the total track kilometres measured at 06:00 on the first Monday of each month (M).
- b Time delay to the Western Line Services, the Southern Line Services and the Eastern Line Services due to temporary speed restrictions calculated on the basis of the speed restrictions in place at 06:00 on the first Monday in each month (M).
- c Train Services delays – minutes lost and services cancelled each month due to:

- i signal failures (M);
- ii rail breaks (M);
- iii heat buckle (M);
- iv mechanical infrastructure failures (e.g. points failure) (M);
- v network control (i.e., train path taken by another operator) (M);
- vi speed restrictions (M); or
- vii track protection measures.

To the extent that the Operator is able to obtain the required information:

- d Availability of the train radio system - system uptime/hours of train operation (Q);
- e Signalling system - number of outages per month (Q);
- f Signalling system – frequency histogram of outage by duration grouped into bandwidths (e.g. less than 5 minutes, 5 to 10 minutes, etc), calculated monthly (Q);
- g Rail breaks repaired per Quarter (Q);
- h Sleeper replacement – number of sleepers replaced on the Onehunga Line, Manukau Branch Line, North Auckland Line, Auckland NIMT and Newmarket Branch per annum, as a percentage of total sleeper population (Q);
- i Top, twist, line and gauge by Onehunga Branch Line, Manukau Branch Line, North Auckland Line, Auckland NIMT and Newmarket Branch, measured annually (Y); and
- j Rail head wear - percentage of track on the Onehunga Branch Line, Manukau Branch Line, North Auckland Line, Auckland NIMT and Newmarket Branch subject to reporting limits on the last day of each Full Year (Y).

3.7 **Mechanical Maintenance**

Train Services delays – minutes lost and services cancelled each month due to rolling stock faults (M).

3.8 **Service Operations**

Train Services delays – minutes lost and services cancelled each month due to:

- a crowding or passenger delays (M);
- b staff error (M);
- c driver error (M);
- d incidents caused by passenger actions (M);

- e any other incident that affects the delivery of Train Services that is caused by external factors (including, for example, fires premises adjacent to the rail corridor, accidents or fatalities (other than to passengers, train crew or rail workers), or adverse weather) (M).

3.9 Other reporting requirements

Summary details on the following activities undertaken by the Operator during the Quarter (including a comparison against the Approved Operations Management Plan):

- a marketing and promotional activities (Q);
- b training activities (Q);
- c customer service initiatives (Q);
- d unplanned disruptions to Train Services resulting in the delay for a period exceeding one hour, cancellation or significant truncation of Timetabled Services, together with a summary of alternative Services (if any) provided by the Operator (including compliance with Timetable and timetabled stopping points) (Q);
- e Train Service disruptions caused by scheduled or planned track possessions/interruption to Train Services, together with a summary of alternative Services provided by the Operator (including compliance with Timetable and timetabled stopping points) (Q);
- f HR process or practice changes (Q);
- g special event Train Services operated including the cost incurred and revenue collected in the delivery of such services, and the number of passengers carried to and from these special events (Q); and
- h any other activity or initiative agreed for delivery within the Approved Operations Management Plan.

4 Information to be established by survey

The items set out in this paragraph 4 are to be reported to AT in accordance with paragraph 2.1.

4.1 Customer satisfaction surveys

The Operator will participate in the customer satisfaction surveys carried out by AT. The Operator will work with AT to ensure the methodology used to survey rail customers is robust. The survey will cover customer perceptions including, but not limited to, the following matters:

- a speed of journey;
- b frequency of service;
- c reliability of service;
- d cleanliness of interior and exterior of rolling stock;
- e cleanliness of stations;

- f ease of buying a ticket;
- g quality of ride;
- h adequacy of information when there are problems with Train Services;
- i adequacy of information on the Train Services (Timetables, maps etc.) at stations and on trains;
- j friendliness and helpfulness of staff (including complaints handling);
- k safety and security; and
- l train and platform crowding.

The Operator will undertake gap analysis to identify the shortfall between actual performance and customer expectation and provide to the Contract Committee details of the Operator's proposed actions to remedy any identified shortfall. This may include carrying out market research (as a non-Direct Cost) in accordance with paragraph 4.5.

4.2 **Revenue leakage**

Revenue leakage (being uncollected Train Fares calculated as a percentage of total revenue, where total revenue equals Train Fares collected plus the estimated value of the revenue leakage), calculated for each of the Western Line Services and (together) the Onehunga, Manukau, Southern and Eastern Line Services, employing a methodology approved by the Contract Committee.

The Operator's report on such revenue leakage survey will also include recommendations on ways to reduce revenue leakage.

Notwithstanding paragraph 2.1e, the first revenue leakage survey under this paragraph 4.2 will be undertaken (and the results of that survey reported to AT) by the Operator no later than 6 months after the Variation Commencement Date.

4.3 **Passenger statistics**

Using a methodology approved by AT:

- a Passenger journeys per month for each of the Onehunga Line Services (in aggregate), Manukau Line Services (in aggregate), Eastern Line Services (in aggregate), the Western Line Services (in aggregate) and the Southern Line Services (in aggregate).
- b Boardings and alightings by station.
- c Average passenger kilometres for the Onehunga Line Services (in aggregate), Manukau Line Services (in aggregate), Eastern Line Services (in aggregate), the Western Line Services (in aggregate) and the Southern Line Services (in aggregate), calculated by survey and ticket sales.

These reports shall include patronage on alternative transport replacement services where such services are in operation.

4.4 **Staff satisfaction**

The Operator will undertake a staff satisfaction survey at the end of each Full Year using a methodology approved by the Contract Committee. The survey will cover staff perceptions on the following matters:

- a job satisfaction;
- b satisfaction with wages/salary;
- c satisfaction with terms of employment;
- d perception of wages/salary and employment terms relative to the marketplace;
- e perception of the Operator as a preferred employer;
- f satisfaction with leadership of Senior Management;
- g satisfaction with leadership of immediate manager;
- h level of feedback on job performance;
- i perception of work colleagues;
- j perception of management commitment to improve marginal staff performance;
- k perception of customer satisfaction;
- l communication;
- m loyalty to organisation; and
- n training and development opportunities.

4.5 **Market Research**

AT may request the Operator to carry out market research at any time. The methodology, scope and the market research firm for any additional market research must be approved by AT.

5 Punctuality and reliability

5.1 **Reporting requirements**

The Punctuality Performance Indicator and Reliability Performance Indicator will be calculated on a monthly basis and reported to AT for the relevant period as part of each Monthly Report.

5.2 **Service quality – punctuality**

The “**Punctuality Performance Indicator**” is calculated:

- a for each of the Onehunga Line Services (in aggregate), Manukau Line Services (in aggregate), Western Line Services (in aggregate), the Southern Line Services (in aggregate) and the Eastern Line Services (in aggregate); and

- b as the percentage of timetabled Train Services (calculated to one decimal place) that were on time, for the following periods during each month:
 - i Morning Peak (i.e. Train Services timetabled to arrive at the relevant Britomart Transport Centre platform between 07:30 and 09:00 on a Business Day);
 - ii Evening Peak (i.e. Train Services timetabled to depart the relevant Britomart Transport Centre platform between 16:00 and 18:00 on a Business Day);
 - iii Days other than Business Days; and
 - iv all Days.

The Operator will calculate the Punctuality Performance Indicator for each month. For example, where there are 21 Business Days in a month, the Punctuality Performance Indicator for that month in relation to the Morning Peak would be calculated as follows:

$$PPI_{mp} = \frac{\sum MP_{ot}}{\sum MP_{ot} + \sum MP_{not}} \times 100$$

Where:

- PPI_{mp} = the Punctuality Performance Indicator for the relevant month, expressed as a percentage rounded to one decimal place;
- MP_{ot} = the number of Train Services that arrived on time at the relevant Britomart Transport Centre platform in each of the 21 Morning Peak periods during the relevant month;
- MP_{not} = the number of Train Services that were timetabled to arrive, but did not arrive on time, at the relevant Britomart Transport Centre platform in each of the 21 Morning Peak periods during the relevant month.

5.3 Service quality - reliability

The “**Reliability Performance Indicator**” is calculated:

- a for each of the Onehunga Line Services (in aggregate), Manukau Line Services (in aggregate), Western Line Services (in aggregate), the Southern Line Services (in aggregate) and the Eastern Line Service (in aggregate); and
- b as the number of timetabled Train Services that were not cancelled during the relevant month divided by the number of timetabled Train Services for that month, calculated to one decimal place.

The Operator will calculate the Reliability Performance Indicator each month. The Reliability Performance Indicator is expressed mathematically as follows:

$$RPI_{mp} = \frac{T_t - T_c}{T_t} \times 100$$

Where:

- RPI_{mp} = the Reliability Performance Indicator for the relevant month, expressed as a percentage rounded to one decimal place;
- T_t = number of Train Services timetabled to run during the relevant month;
- T_c = number of Train Services cancelled during the relevant month.

5.4 Calculation rules

For the purposes of calculating the Punctuality Performance Indicator and the Reliability Performance Indicator:

- a the on time status of a Train Service (used in calculating the Punctuality Performance Indicator) or cancellation of a Train Service (used in calculating the Reliability Performance Indicator) is to be determined by reference to the relevant Train Service's unique service number as set out in the relevant Timetable;
- b any Train Service that could not be run due to planned possessions will be deemed to, if the Operator:
 - i has complied with its obligations under paragraph 3.3 of the Operating Services Schedule and paragraph 2.9 of the Operating Services Schedule, have run on time; or
 - ii has not complied with its obligations under paragraph 3.3 of the Operating Services Schedule and paragraph 2.9 of the Operating Services Schedule, have been cancelled; and
- c a Train Service is:
 - i "on time" (for the purposes of the Punctuality Performance Indicator); and
 - ii not "cancelled" (for the purposes of the Reliability Performance Indicator),if it arrives at the relevant Britomart Transport Centre platform (in the case of a Train Service having in the Timetable as its final destination the Britomart Transport Centre) or at its timetabled destination (i.e. Pukekohe, Papakura, Otahuhu, New Lynn, Swanson or Waitakere stations) (in the case of any other Train Service) within $\pm 4:59$ minutes of its timetabled arrival time, as specified for the relevant Train Service (identified by its unique services number) in the Timetable, except where the Train Service:
 - A does not run at all;
 - B failed to commence or finish its journey at its timetabled origin or destination (as the case may be); or
 - C departed its timetabled origin earlier than its timetabled departure time.

6 AT surveys

The Operator will permit authorised AT Representatives to travel free on Train Services for the purpose of conducting passenger interviews or surveys and to undertake monitoring exercises relevant to this Agreement or to undertake the planning or development of the Auckland public transport system. Such travel will include positioning runs where necessary.

7 Reporting to AT

For the avoidance of doubt, an AT Representative is permitted to disclose to AT any information provided by any person to the Relationship Manager, the Relationship Committee or the Contract Committee.

Schedule 6 Additional Services

1 Advisory Services

The Operator and the Parent will provide assistance to AT where reasonably required (including access to records and employees) in relation to:

- a station or network development, procurement of additional rolling stock or the renegotiation or management of any Relevant Agreement;
- b requested assistance to any advisors or consultants engaged by AT regarding public transport in Auckland (including the matters set out in subparagraph a); and
- c implementing, managing and operating any integrated ticketing system, marketing or any information technology in relation to passenger transport or MAXX.

2 Acceptance of Operator's work

- 2.1 All work performed by the Operator under this schedule must conform to the agreed requirements for that work and to applicable standards and warranties identified in this Agreement. Unless otherwise agreed in writing, acceptance of all such work will be conditional upon AT assessing the work and confirming that all agreed requirements for that work have been met.
- 2.2 Payment for such work shall be conditional upon completion of the work within the agreed timeframes and AT's acceptance of the work shall be based on AT's reasonable judgement as to whether or not the work meets agreed requirements and the Operator has performed all its obligations in relation to such work. AT shall not unreasonably withhold or delay acceptance.

Schedule 7 Relationship Management

1 Relationship Committee

1.1 Relationship Committee

AT, the Parent and the Operator will maintain a Relationship Committee in accordance with this schedule for the purpose of:

- a engendering a “partnership” ethos between AT and the Operator with a shared goal of improving passenger rail services for the Auckland region;
- b providing guidance on how the parties could improve those services and maximise their management of other rail participants;
- c receiving reports and plans and provide advice and recommendations to AT and the Operator on those reports and plans, some of which have financial implications for AT;
- d providing strategic direction and oversight relating to the performance of this Agreement; and
- e resolving any issues that are escalated to the Relationship Committee under this Agreement.

1.2 Representatives

The Relationship Committee shall comprise 6 Representatives, 3 of whom shall be appointed by AT and 3 of whom shall be appointed by the Parent and the Operator. Unless otherwise agreed, AT, the Parent and the Operator shall each:

- a appoint and maintain the following persons as their respective Representatives on the Relationship Committee (each a “**Representative**” in respect of the party appointing that individual):

AT –

- Chief Executive, Auckland Transport
- Chief Operating Officer, Auckland Transport
- Manager, Public Transport Operations, Auckland Transport

Parent and Operator –

- Chief Executive, Veolia Transport Australasia Pty Limited.
- Deputy Chief Executive, Veolia Transport Australasia Pty Limited.
- Managing Director, Veolia Transport Auckland Limited.

- b procure that their respective Representatives:

- i act, and will ensure that the Relationship Committee will operate, in accordance with:

- A the provisions of this schedule; and
 - B the strategies and plans of AT and the Auckland Council relating to transport in the Auckland region; and
- ii otherwise perform the obligations and functions of the Relationship Committee set out in this Agreement.

1.3 Authority of Representatives

Each party authorises its Representatives to act on behalf of that party in matters relating to the performance of that party's obligations, and exercise of that party's rights, under this Agreement, and otherwise to the extent set out in the notice appointing such Representative, such that in respect of a matter for which he or she is so authorised:

- a a direction or notice given to a Representative:
 - i will be regarded as having been given to the party or parties which appointed the Representative; and
 - ii constitutes a direction or notice to the party or parties which appointed the Representative;
- b matters within the knowledge of a Representative will be regarded as being within the knowledge of the party or parties which appointed the Representative; and
- c each Representative may delegate its authority to another person one tier below him or her in the management structure of the relevant party (to the extent set out in that Representative's notice of appointment) by prior written notice to the parties.

1.4 Functions

Without limiting the other functions of the Relationship Committee set out in this Agreement, the Relationship Committee will (subject to the other terms of this Agreement):

- a determine whether the Operator has completed the Establishment Plan;
- b monitor each Operations Management Plan in accordance with the Operations Management Plan Schedule;
- c receive and consider reports and surveys to be provided by the Operator to the Relationship Committee under this Agreement;
- d provide sponsorship and direction to formulate strategy for delivery of the Train Services (for consideration by AT);
- e provide sponsorship and direction to the Relationship Manager and Contract Committee and delegate any responsibility it has for day-to-day operational matters to the Relationship Manager and Contract Committee;
- f fulfil its role in the Dispute Resolution Procedure; and
- g receive and consider ad hoc presentations and reports on the development of the Auckland Network.

1.5 Duties of Representatives

In performing the functions of the Relationship Committee under this Agreement, each Representative will:

- a at all times act reasonably;
- b do everything properly and reasonably within his or her control necessary to enable the Relationship Committee to perform its functions under this Agreement;
- c not appoint any person to be his or her alternate or delegate other than to another person one tier below in the management structure of the relevant party; and
- d act in good faith, which means:
 - i being fair and reasonable;
 - ii being honest in performing the work of the Relationship Committee; and
 - iii doing all things reasonably expected to give effect to the spirit and intent of this Agreement.

1.6 Meetings

The Relationship Committee will meet:

- a at least once in every Quarter;
- b as required to resolve any dispute that may be referred to the Relationship Committee; and
- c otherwise upon request by any party.

Meetings may be held in person or by way of audio or audiovisual communication. The quorum for each meeting shall be 4 or 6, provided that 50% of the Representatives present in person or participating by means of simultaneous audio or audiovisual communication at each meeting are AT's Representatives.

1.7 Decisions

Decisions of the Relationship Committee shall be made by agreement. Any decision or approval of the Relationship Committee that is recorded in writing and signed by at least 2 Representatives appointed by AT and 2 Representatives appointed by the Parent and the Operator shall be binding on the parties.

2 Day-to-day Relationship Management

AT and the Operator shall each:

- a appoint the following persons as their respective Relationship Manager (each a "**Representative**" in respect of the party appointing that individual):
 - i AT – Manager, Public Transport Operations
 - ii Operator – Managing Director, Veolia Transport Auckland Limited

- b procure that their respective Representatives act and will use their respective best endeavours to:
 - i ensure that the day-to-day relationship between AT and the Operator engender a “partnership” ethos with a shared goal of meeting all respective obligations in this Agreement and improving rail services in the Auckland region;
 - ii procure that AT and the Operator seek to continuously improve all aspects of meeting their respective obligations in this Agreement and improving passenger rail services in the Auckland region;
 - iii provide sponsorship and direction to the Contract Committee and delegate any responsibility to the Contract Committee required for day-to-day operational matters;
 - iv fulfil their role in the Dispute Resolution Procedure;
 - v determine whether the Operations Management Plan has been completed in accordance with the Operations Management Plan Schedule and endorse each Operations Management Plan for submission for approval to the Relationship Committee;
 - vi receive and consider representations and requests for direction from the Contract Committee;
 - vii sign all Variation Proposals generated by his or her respective party;
 - viii approve the agenda and contents of any submission to the Relationship Committee; and
 - ix generally ensure the delivery by each party of their obligations under this Agreement.

3 Contract Committee

3.1 Function

AT and the Operator will maintain a committee (the “**Contract Committee**”) which shall be responsible for resolving day-to-day issues which arise under this Agreement and to give effect to this Agreement. The Relationship Managers will regulate the procedure of the Contract Committee.

3.2 Responsibilities

Without limiting any other functions of the Contract Committee, the Contract Committee will (subject to the other terms of this Agreement):

- a review the Operator’s performance against its obligations under this Agreement
- b attempt to resolve disputes that are referred to the Contract Committee under the Dispute Resolution Procedure;
- c be a forum for discussing any issues relating to proposed Variations under clause 6;

- d approve the agenda and contents of any submissions to the Relationship Managers and Relationship Committee under the direction of the Relationship Managers (any such submission may include a discussion of any disputed aspects of that submission);
- e endorse each Operations Management Plan in accordance with the Operations Management Plan Schedule for submission to the Relationship Managers;
- f oversee the regular reporting function of the Operator;
- g approve methodologies, consider tender processes and any other applicable requirements for surveys required to be undertaken by the Operator under this Agreement;
- h review outputs and recommendations from any surveys carried out in accordance with this Agreement and approve any recommended actions resulting from such surveys;
- i be responsible for single-point communication between AT and the Operator regarding day-to-day operational issues;
- j review any presentations or reports on development of the Auckland Network and its Services prior to submission to the Relationship Managers and Relationship Committee; and
- k implement any initiatives for improvements to customer service or efficiency and effectiveness.

3.3 **Members and meetings**

The members of the Contract Committee will be:

- a the Operator's Manager Contracts and GM Service Delivery;
- b AT's Public Transport Service Delivery Manager, Rail Services Leader, and an AT administrator; and
- c any other attendees on a by invitation, as required basis, as agreed by AT and the Operator

The Contract Committee will meet at least once each week to review the weekly report and discuss any day-to-day operational issues and will be chaired by the AT Representative. At least once each month, the meeting will include the Relationship Managers. The weekly report will be issued by the Operator within 2 Business Days of the relevant week ending in a format determined by the Contract Committee.

AT will ensure that minutes are kept of all proceedings of the Contract Committee and distributed to members of the Contract Committee within 2 Business Days of the relevant meeting.

3.4 **Votes**

Decisions of the Contract Committee will be made by unanimous agreement. Where the Contract Committee fails to reach agreement, a dispute shall be deemed to have arisen which may be escalated in accordance with clause 19.3.

4 Appointments

The Operator must consult with AT regarding each proposed appointment of any person to any Senior Management position within the Operator's business and must give reasonable consideration to AT's views regarding such proposed appointment.

Schedule 8 Operations management plan

1 Requirements for plan

- 1.1 An Operations Management Plan will be prepared by the Operator annually. Each Operations Management Plan will:
- a include a high level transition plan that reflects AT's intentions as at the date of preparation of the plan in relation to the future strategic direction of Auckland passenger rail services for the following 4 year period;
 - b provide a rolling 3 year Operations Management Plan, the first of which commences from the Variation Commencement Date and is updated by the Operator annually so that on each anniversary of the Variation Commencement Date the Operations Management Plan is extended for a further year. Each annual update of the Operations Management Plan will provide, in relation to the 3 year period from 1 July of the year in which it commences, the level of detail required by paragraph 1.1c below;
 - c set out in reasonable detail the Operator's management and operating strategies and plans for the provision of the Services for the relevant 3 year period and will include:
 - i in relation to the first Full Year that falls during such 3 year period:
 - A an Operating Plan;
 - B a Direct Cost Budget;
 - C a Fare Revenue Target (including a Revenue Protection and Enhancement Strategy);
 - D details of anticipated Timetabled Services and special event Train Services, together with any applicable Timetable, being the current Timetable, an Upgrade Timetable and/or a Special Timetable (as applicable) prepared in accordance with the Operating Services Schedule;
 - E a Rolling Stock Allocation Plan prepared in accordance with the Operating Services Schedule;
 - F an Upgrades Management Plan;
 - G KPI benchmarks for reliability, punctuality and customer satisfaction, together with all assumptions made when setting those KPI benchmarks; and
 - H a Safety Improvement Plan;
 - I a review of the level of public liability insurance cover to be held by the Operator under clause 11.1; and
 - ii in relation to each of the second and third Full Years that fall during such 3 year period:
 - A a Direct Cost Budget;

- B an annual Fare Revenue Target;
- C indicative KPI benchmarks for reliability, punctuality and customer satisfaction together with all assumptions made when setting those KPI benchmarks; and
- D key initiatives for each of those two Full Years,

together with such other information that is reasonably required to allow AT to make an informed assessment of the accuracy and completeness of the Operations Management Plan for the purposes of this Agreement.

- 1.2 An updated Operations Management Plan will be prepared by the Operator for successive 3 year periods commencing on each anniversary of the Variation Commencement Date that falls during the term of this Agreement, notwithstanding that some Operations Management Plans will relate to periods that extend beyond the Expiry Date. Each Operations Management Plan that ends on or after the Expiry Date will incorporate the requirements of the then current Exit Plan but will take into account the fact that the Operator is not expected to be providing the Services (other than Exit Services) after the Expiry Date.

2 Plan components

An “**Operating Plan**” is an operating plan for the provision by the Operator of the Operating Services which will set out, for the relevant Full Year:

- a the proposed Timetable(s), either approved by the Timetable Committee under the Common Access Terms or (pending such approval) consistent with the requirements in the Operating Services Schedule;
- b human resource plan detailing locomotive engineer, train manager and passenger operator numbers and training requirements, including recruitment of locomotive engineers;
- c any proposed Variations to Senior Management or the management structure; and
- d expected monthly Reliability KPI and Punctuality KPI results for each of the Eastern Line Services (in aggregate), Western Line Services (in aggregate), Southern Line Services (in aggregate), Onehunga Line Services (in aggregate), and Manukau Line Services (in aggregate) each of which shall provide for continuous improvement over the results set out in the Operating Plans for previous Full Years.

A “**Direct Cost Budget**” is a budget of the projected Direct Costs of the Operator providing the Services and performing its other obligations under this Agreement for the relevant Full Year:

- a separately identifying Direct Costs by category (as identified in a budget approved in writing by AT from time to time);
- b separately identifying any payments to be made under each Relevant Agreement;
- c separately identifying Non-reimbursable Costs (to the extent that the Operator is reasonably able to make any projection regarding such costs);
- d separately identifying projected minor capital item acquisitions;

- e based on the previous Direct Cost Budget in the most recent Approved Operations Management Plan and the forecast results of Full Year 1 and Full Year 2 of the most recent Approved Operations Management Plan;
- f Variation Proposals in hand which will impact on the next Full Year and estimated costs of initiatives identified for Full Year 2 and Full Year 3; and
- g prepared in accordance with the accounting policies determined in accordance with clause 9.2,

together with a copy of any draft or final budget or other financial information received by the Operator under any Relevant Agreement.

A “**Revenue Budget**” comprises:

- a a budget for the projected Train Fares (based on the existing fare schedule);
- b a budget for other revenue, identified separately from Projected Train Fare Revenue;
- c the fare schedule;
- d opportunities and strategies for patronage and Train Fare revenue growth; and
- e the strategies proposed by the Operator for managing patronage in order to enhance and protect Train Fare revenue through the collection of uncollected Train Fares (including fare evasion) by means within the Operator’s control such as appropriate manning levels and training (a “**Revenue Protection and Enhancement Strategy**”).

A “**Patronage Forecast**” comprising the forecasted patronage for each of the five Full Years following the end of the relevant Full Year (which may extend beyond the Expiry Date) for each of the Eastern Line Services, the Western Line Services, the Southern Line Services, the Onehunga Line Services, and the Manukau Line Services.

A “**Safety Improvement Plan**” is a plan for improving safety in relation to the Operating Services in a manner which is consistent with the Operator’s Rail Operator Licence and the requirements of any Relevant Agreement, with specific measurable targets for improvement, including an assessment of actual performance to date against the relevant safety improvement plan. The plan must also meet any requirements of the NZTA with respect to the Railways Act 2005.

An “**Upgrades Management Plan**” means a plan to minimise (to the extent reasonably possible) the number, duration and extent of disruptions to Timetabled Services during periods of planned track possessions and/or station unavailability required to upgrade the network or stations.

3 Approval of plan

- 3.1 The Operator will prepare and provide a draft Operations Management Plan to AT by:
 - a in the case of the draft Operations Management Plan for the Full Year from 1 July 2012, 1 March 2012; and
 - b in the case of any subsequent draft Operations Management Plan, 1 December of the Full Year preceding the Full Year in which that Operations Management Plan is to take effect.

- 3.2 On receipt, AT will promptly review the relevant draft Operations Management Plan. AT must reject any aspect of a draft Operations Management Plan if, in AT's opinion, the relevant draft Operations Management Plan:
- a does not comply with the requirements set out in this schedule; or
 - b provides for activities (and their associated costs) not required by AT other than Services (and associated costs) that directly relate to the Operating Services or other activities which the Operator is obliged by law to undertake with respect to the Auckland Network.
- 3.3 From the date of receipt of the draft Operations Management Plan to the date it provides notification under paragraph 3.4, AT may request further information from the Operator (including any request for written answers to questions or meetings with AT) in order to assess the draft Operations Management Plan for the purposes of this Agreement. The Operator will promptly provide to AT any such information requested by AT.
- 3.4 In the case of the Operations Management Plan for the Full Year that commences on the Variation Commencement Date, AT shall notify the Operator by 1 May 2012 that AT:
- a accepts the draft Operations Management Plan, (in which case the draft Operations Management Plan is then the "**Provisional Operations Management Plan**"). Any such acceptance shall be conditional upon receipt by AT of requisite funding approvals from AT's external funding providers as part of the AT Annual Plan development and approval process. Pending confirmation of such approvals, the Direct Cost Budget shall not exceed the amount allocated in the Direct Cost Budget for the prior Full Year;
 - b accepts the draft Operations Management Plan subject to certain amendments (in which case the amended draft Operations Management Plan is then the "**Provisional Operations Management Plan**"). Any such acceptance shall be conditional upon receipt by AT of requisite funding approvals from AT's external funding providers as part of the AT Annual Plan development and approval process. Pending confirmation of such approvals, the Direct Cost Budget shall not exceed the amount allocated in the Direct Cost Budget for the prior Full Year; or
 - c rejects all or part of the draft Operations Management Plan.
- 3.5 In the case of the Operations Management Plan for each Full Year subsequent to the Full Year that commences on Variation Commencement Date, AT shall notify the Operator by the occurrence of 1 February that immediately precedes the commencement of the relevant Full Year that AT:
- a accepts the draft Operations Management Plan, (in which case the draft Operations Management Plan is then the "**Provisional Operations Management Plan**"). Any such acceptance shall be conditional upon receipt by AT of requisite funding approvals from AT's external funding providers as part of the AT Annual Plan development and approval process. Pending confirmation of such approvals, the Direct Cost Budget shall not exceed the amount allocated in the Direct Cost Budget for the prior Full Year;
 - b accepts the draft Operations Management Plan subject to certain amendments (in which case the amended draft Operations Management Plan is then the "**Provisional Operations Management Plan**"). Any such acceptance shall be conditional upon receipt

by AT of requisite funding approvals from AT's external funding providers as part of the AT Annual Plan development and approval process. Pending confirmation of such approvals, the Direct Cost Budget shall not exceed the amount allocated in the Direct Cost Budget for the prior Full Year; or

- c rejects all or part of the draft Operations Management Plan.
- 3.6 If AT gives notice under paragraph 3.4c or 3.5c above then:
- a AT will provide with such notice an explanation (in reasonable detail) of its decision set out in such notice; and
 - b promptly on receipt of such notice by the Operator, the Contract Committee will discuss the outstanding matters raised by such notice, with the intention that the draft Operations Management Plan will be approved by AT in sufficient time to accommodate any funding requirements of the Operator under this Agreement in AT's Annual Plan. If the Operator and AT have resolved all outstanding matters regarding the draft Operations Management Plan then the draft Operations Management Plan, as amended as a result of resolution of all outstanding matters, is the "**Provisional Operations Management Plan**".
- 3.7 The Parent and the Operator acknowledge that, in relation to the draft AT Annual Plan:
- a AT has discretion to determine any amount included in the draft Annual Plan with respect to the provision of the Services or any other matter relating to this Agreement;
 - b AT must consult on the draft Annual Plan before the adoption of the draft Annual Plan in accordance with the Local Government Act 2002; and
 - c the amended Provisional Operations Management Plan is deemed to be the submission of the Parent and the Operator regarding the draft Annual Plan.
- 3.8 On the adoption of the Annual Plan by AT, the amount approved for the provision of the Services by AT from the total amount stated in the Annual Plan relating to passenger rail Services will be the Approved Direct Cost Budget in the amended Provisional Operations Management Plan is deemed to be amended to the extent provided for by such allocation. The adoption of the foregoing amounts shall be conditional upon receipt by AT of requisite funding approvals from AT's external funding providers as part of the AT Annual Plan development and approval process.
- 3.9 If AT's Annual Plan is inconsistent with the amended Provisional Operations Management Plan (except as provided for in paragraph 3.8), then the Contract Committee will meet as soon as reasonably practicable, but in any event within 10 Business Days of adoption of the Annual Plan, to determine any adjustment in the Services or the amended Provisional Operations Management Plan (as the case may be) required as a result of the Annual Plan.
- 3.10 If the Contract Committee cannot resolve each outstanding matter in relation to the Provisional Operations Management Plan on or before the date which is 20 Business Days before the beginning of the relevant Full Year, then AT may request the Operator to provide information regarding the effect on the Approved Direct Cost Budget of a higher or lower level of service specification (or such other matter relating to the Provisional Operations Management Plan as

it considers appropriate) and the Operator will provide such information (in reasonable detail to allow AT to make an informed decision) as soon as possible. AT may in its discretion require the Operator to (and the Operator will promptly) amend the Provisional Operations Management Plan to reflect any higher or lower service specification considered appropriate by AT. For avoidance of doubt, the parties acknowledge that such amendment to the Provisional Operations Management Plan is not subject to any Dispute Resolution Procedure or other proceedings.

- 3.11 The Provisional Operations Management Plan, as amended under paragraphs 3.8,3.9 or 3.10, is the “**Approved Operations Management Plan**” for the relevant Full Year for the purposes of this Agreement. Until such amendment, AT will continue to make the Quarterly Direct Costs payment in accordance with this Agreement at the level for the previous Full Year and the Operator will continue to provide the Services to the best of its ability in accordance with this Agreement.
- 3.12 An executive summary and as much other information as is required to give an overview understanding of the Approved Operations Management Plan will be notified to the Relationship Committee by AT.

4 Amendments and updates to the plan

- 4.1 The Contract Committee may amend an Approved Operations Management Plan at any time during the relevant Full Year provided that the amendment is treated as a Variation under clause 6.
- 4.2 On or before 15 October in each year, the Operator shall provide AT with a written update of the forecast Direct Cost Budget and the annual Fare Revenue Target for the subsequent Full Year (i.e. year 2) of the Operations Management Plan including any relevant key initiatives that would impact on the Approved Direct Cost Budget or the Fare Revenue Target.

5 Non-performance of Direct Cost work

If any of the activities, the cost of which forms part of the Direct Costs, are not actually performed by the Operator in accordance with the timeframes required in this Agreement or the Approved Operations Management Plan (including any time allowed for remedial action), AT may, without prejudice to any of its other rights and remedies reduce the amount of the Direct Cost payable to the Operator, in the relevant month in which any such non-performance occurred, by an amount determined by the Contract Committee as being appropriate in the circumstances.

Schedule 9 Financial

1 Principles governing financial risks and rewards

1.1 The Operator shall be remunerated and shall assume risk in accordance with the following principles:

a Remuneration and payment are linked more directly to performance and achievement of required outcomes to incentivise ongoing service improvement.

b Transfer 100% of the risk of exceeding the Approved Direct Cost Budget to the Operator but allowing the Operator to retain savings against the Approved Direct Cost Budget should Direct Costs incurred by the Operator be lower than the Approved Direct Cost Budget.

c [REDACTED]

d [REDACTED]

e [REDACTED]

f Rebates shall be paid to AT on a per incident basis, as well on a monthly average performance basis, but compensation under the incident management regime in the Performance Regime Schedule shall be capped at [REDACTED] per annum in any Full Year.

g The Operator will use best endeavours to achieve agreed annual Fare Revenue and passenger patronage targets with a view to growing passenger numbers and reducing fare leakage.

h The Operator will be rewarded for growth of annual Fare Revenue but will bear the risk of underachievement.

2 Payment

Except as expressly provided otherwise in this Agreement, payments to and by the Operator are made by reference to the above principles and shall be determined on the following basis:

2.1 Direct Costs and Not At Risk Direct Costs Margin

AT shall, in respect of each Full Year, pay the Operator upon invoice one quarter of the Approved Direct Cost Budget and one quarter of the Not At Risk Direct Costs Margin for that Full Year on the first Thursday of the Quarter, less any Rebates payable, but not previously paid, by the Operator to AT in respect of that Quarter, under paragraph 4 of the Performance Regime Schedule.

2.2 At Risk Direct Costs Margin

AT will, in respect of each Full Year, pay to the Operator the At Risk Direct Costs Margin for that Full Year, calculated as provided below. All instalments of the At Risk Direct Costs Margin that become payable to the Operator shall be subject to deduction of any Rebates payable, but not previously paid by the Operator to AT, under paragraph 4 of the Performance Regime Schedule. Payment of any instalments of the At Risk Direct Costs Margin that are due to the Operator shall be made at Quarterly intervals within 60 days of the end of each Quarter, provided that AT has all information required to calculate the At Risk Direct Costs Margin. If AT does not have all information it requires to calculate any such instalment then such instalment shall be paid in the next payment run after the month in which AT receives all information it requires for such purpose.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted text block]

2.3 [Redacted text]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

2.4 **Payment Following Termination**

If following termination of this Agreement, it is no longer practical to effect any payment by way of deduction from any other amount payable under this Agreement, payment must be made in cash, on the same payment date as would have been the case, had this Agreement not terminated.

3 Annual review

AT will provide to the Operator as soon as possible after the end of each Full Year an Efficiency Audit Report for the relevant Full Year.

The Operator will provide to the Contract Committee, as soon as possible after the end of each Full Year:

- a the audited Financial Statements of the Operator for the relevant Full Year, together with an unqualified Audit Report; and
- b the Operator's analysis and recommendations in response to any issues identified in the Efficiency Audit Report for the relevant Full Year satisfactory to the Contract Committee.

The Contract Committee will then promptly undertake a review of the Direct Costs for each Full Year no later than 10 Business Days after receipt of the audited Financial Statements of the Operator, the unqualified Audit Report, the Efficiency Audit Report and the Operator's analysis and recommendations in response to the Efficiency Audit Report for the purpose of determining, for that Full Year, the actual:

- c Direct Costs;
- d Non-reimbursable Costs; and
- e Fare Revenue collected by the Operator.

4 Information

The Operator must provide to AT upon request information as required by AT to establish or verify for each relevant Full Year:

- a Fare Revenue,
- b Direct Costs,
- c Fare Revenue Bonus,
- d Fare Revenue Reimbursement,
- e Rebates under the performance regimes in the Performance Regime Schedule,
- f a reasonable breakdown of Direct Costs.

5 Definitions

In this Agreement:

"At Risk Direct Costs Margin" means that part of the Direct Cost Margin that may become payable by AT to the Operator, subject to the Operator's achievement of agreed KPIs.

"Direct Cost Margin" is the sum derived by multiplying the Approved Direct Cost Budget by the agreed percentage for the relevant Full Year. [REDACTED]

“Direct Costs” means all cash costs reasonably incurred or to be incurred by the Operator in the performance of the Services and its other obligations under this Agreement if the Operator were to perform its obligations in an efficient and effective manner and, subject to the foregoing, may include:

- a fringe benefit tax, rates, ACC levies and customs and excise duties paid or payable by the Operator, to the extent they relate to the performance by the Operator of the Services and its other obligations under this Agreement and which is not otherwise recoverable by the Operator from a third party, excluding any income tax;
- b any premium payable or deductible for an insurance claim under any insurance held by the Operator as required under this Agreement to the extent met or suffered by the Operator, except to the extent such amounts are within the definition of Non-reimbursable Costs; and
- c by way of example only:
 - i salaries and wages incurred by the Operator after the Variation Commencement Date;
 - ii fees under its Rail Operator Licence;
 - iii utilities costs (i.e. telephone, electricity water, sewerage, waste disposal);
 - iv employee training costs;
 - v ticketing costs;
 - vi legal fees;
 - vii audit fees;
 - viii administrative expenses;
 - ix building security, cleaning and maintenance costs; and
 - x cash collection/banking fees,

but does not include Non-reimbursable Costs.

“Non-reimbursable Costs” means any cost, expense, loss or liability suffered or incurred by the Operator, which cost is to the account of the Operator and which will not be reimbursed or otherwise funded by AT in the form of, or resulting from, the following:

- a subject to clause 11.6, any excess or deductible or increase in premium in relation to the Primary Insurance Policy or any other insurance held by the Operator in accordance with this Agreement which is attributable (and, in the case of any increase in premium, only to the extent to which such increase is attributable) to the fraud, default or negligence of the Operator, the Parent or the Guarantor (or any Associated Person of the Guarantor);
- b any dispute under this Agreement;
- c the fraud, negligence or default of the Operator, the Parent or the Guarantor (or any Associated Person of the Guarantor), including any:

- i Operator Event of Default;
 - ii failure by the Operator to perform its obligations under this Agreement or any Relevant Agreement and the cost of remedying any non-compliance; or
 - iii any damage or loss caused to the Operator's property by any third party and any claim made against the Operator by any third party where the loss, damage or claim is attributable to the fraud, negligence or default of the Operator;
- d any payment by the Operator, the Parent or the Guarantor (or any Associated Person of the Guarantor) to AT under this Agreement or the Guarantee;
 - e asset renewal, depreciation, write-down, capital, cost of capital (or similar) charges, unless provided for in the current Approved Direct Cost Budget;
 - f except in relation to the Approved Working Capital Facility, any financing or capital movements (including borrowing, repayments, raising or returning capital) and related interest or distributions (including dividends) and transaction costs and fees, and the cost of the Performance Bond and any bonds, Guarantees and other credit securities;
 - g any payment in respect of a sub-contract which is not an approved sub-contract under paragraph 3.1 of the Operator Restrictions Schedule;
 - h any redundancy or severance payment or amount payable in respect of a personal grievance claim payable by the Operator, except to the extent that such payment is provided for in the relevant Approved Direct Cost Budget or arises as a result of any action of the Operator approved by the Contract Committee or Relationship Committee;
 - i any costs associated with the transfer of Senior Management to or from the Operator under paragraph 2.3 of the Parent's Undertakings Schedule;
 - j except to the extent approved by AT, the costs of preparing any submission, report or other documentation relating to any amendment of or Variation to this Agreement; and
 - k any costs associated with completion of the Establishment Plan (including wages, salaries and other remuneration of employees of, and independent contractors and advisors to, the Parent or Operator).

"Not At Risk Direct Costs Margin" means that part of the Direct Cost Margin that may become payable by AT to the Operator without reference to agreed KPIs.

Schedule 10 Performance Regime

1 Service quality

- 1.1 The Operator must perform the Services to a consistently high standard that results in a high level of customer satisfaction, as demonstrated by regular customer satisfaction surveys and low levels of customer complaints. Where service standards are not met the Operator must demonstrate to AT's satisfaction that it is taking prompt and effective action to remedy any failure to meet service standards at no additional cost to AT.
- 1.2 In addition to the general obligations of the Operator relating to the performance of the Services set out elsewhere in this Agreement, the parties have agreed specific performance standards and key performance indicators ("**KPIs**") in relation to the following key areas that are directly related to delivery of AT's required service outcomes and that are measured in a more immediate way with financial incentives related to their achievement or non-achievement by the Operator:
- a Service reliability
 - b Service punctuality
 - c Customer satisfaction
 - d Effective Incident management
- 1.3 In the event that KPIs for service reliability, service punctuality and customer satisfaction are not agreed before an annual Operating Management Plan is due to take effect then the relevant KPIs will be set at a standard that is no lower than the KPIs that applied in relation to the prior Full Year.

2 Revision of service standards

- 2.1 Whenever the Services are varied or the new Services are agreed, AT may review the service standards and, following that review, AT may revise the service standards or introduce new standards as AT reasonably considers appropriate either through the annual Operating Management Plan process or by requesting a Variation under clause 6.
- 2.2 In order to ensure that the service standards continue to reflect the expectations of its customers and stakeholders, AT may conduct periodic reviews of service standards and, following each such review, AT may revise the service standards or introduce new standards as AT reasonably considers appropriate either through the annual Operating Management Plan process or by requesting a Variation under clause 6.

3 Specific service standards

3.1 Service reliability

Service reliability shall be measured using the methodology set out in paragraph 6 of the Reporting Services Schedule and as described in paragraph 6 of this schedule. KPI benchmarks for service reliability for the 2012/13 Full Year shall be set as part of the process in the Establishment Plan. Pending agreement, the default KPI benchmarks for service

reliability set out in the Establishment Plan shall apply for the 2012/13 Full Year (including the KPI 'fail' threshold for the purpose of the Performance Notice regime). KPI benchmarks for service reliability for subsequent Full Years shall be set as part of the annual Operating Management Plan process. Pending agreement, the default KPI benchmarks for service reliability for the previous Full Year shall continue to apply (including the KPI 'fail' threshold for the purpose of the Performance Notice regime).

3.2 Service punctuality

Service punctuality shall be measured using the methodology set out in paragraph 5 of the Reporting Services Schedule and as described in paragraph 6 of this schedule. KPI benchmarks for service punctuality for the 2012/13 Full Year shall be set as part of the process in the Establishment Plan. Pending agreement, the default KPI benchmarks for service punctuality set out in the Establishment Plan shall apply for the 2012/13 Full Year (including the KPI 'fail' threshold for the purpose of the Performance Notice regime). KPI benchmarks for service punctuality for subsequent Full Years shall be set as part of the annual Operating Management Plan process. Pending agreement, the default KPI benchmarks for service punctuality for the previous Full Year shall continue to apply (including the KPI 'fail' threshold for the purpose of the Performance Notice regime).

3.3 Customer satisfaction

Customer satisfaction shall be measured using the customer satisfaction surveys referred to in paragraph 5 of this Schedule as follows:

- a A full customer satisfaction survey shall be undertaken every 6 months; and
- b A targeted subset of the customer satisfaction survey shall be undertaken monthly.

KPI benchmarks for customer satisfaction for the 2012/13 Full Year shall be set as part of the process in the Establishment Plan. Pending agreement, the default KPI benchmarks for customer satisfaction set out in the Establishment Plan shall apply for the 2012/13 Full Year (including the KPI 'fail' threshold for the purpose of the Performance Notice regime). KPI benchmarks for customer satisfaction for subsequent Full Years shall be set as part of the annual Operating Management Plan process. Pending agreement, the default KPI benchmarks for customer satisfaction for the previous Full Year shall continue to apply (including the KPI 'fail' threshold for the purpose of the Performance Notice regime).

3.4 Incident management

The Incident management regime shall operate as set out in paragraph 4 of this schedule. The incident management regime shall be reviewed through the annual Operating Management Plan process and otherwise as provided in paragraph 2 of this schedule.

4 Incident management regime

4.1 Introduction

The parties agree that it is essential to the success of the passenger rail services that the Operator is required to provide under this Agreement that those services are perceived by customers to be safe, reliable, efficient, and customer-friendly.

Although overall levels of customer satisfaction will be measured by periodic surveys conducted as described above, the Operator’s performance will also be assessed in relation to management of individual incidents that have the potential to seriously impair customer perceptions of those Services under the following performance standard.

4.2 Definition of ‘Significant Incident’

A “**Significant Incident**” is any service failure incident that AT, acting reasonably, considers likely to impair AT’s reputation as a provider of safe, reliable, efficient, and customer-friendly passenger rail Services. A Significant Incident may:

- a adversely affect many passengers; or
- b cause serious disruption or inconvenience to one or more passengers.

Examples of Incidents that may become Significant Incidents include (without limitation):

- c a prolonged service disruption or delay that affects many passengers
- d a failure to communicate adequately with passengers who suffer a disruption to their Train Service.

4.3 Management of incidents

The effective management of Incidents is a key element of passenger network operation and is an important priority for AT. As part of its obligation to prevent and mitigate the adverse outcomes caused by Incidents, the Operator must develop adequate plans to deal with foreseeable Incidents, force majeure events, and other Incidents within or outside the control of the Operator and to execute those plans in a manner that minimises the adverse effect of any Incident that arises, even where the initial cause of the Incident was unforeseeable or arose outside the control of the Operator, such as system wide power failures, or infrastructure breakdown, or Excepted Risks. In each case AT’s determination as to whether or not the Operator is responsible for a Significant Incident will take into account whether or not AT is reasonably satisfied with Incident management response plan development, plan execution and the outcomes for customers that resulted from the Operator’s actions.

4.4 Rebates for Significant Incidents

Subject to paragraph 1.1f of Schedule 9, the Operator shall pay a Rebate to AT for each Significant Incident in accordance with the scale set out below. Where a service failure involves multiple Significant Incidents, damages shall be payable on a cumulative basis provided that the Operator’s liability for each service failure [REDACTED]

| Significant Incident | Rebates payable |
|--|-----------------|
| A prolonged service disruption or delay that results in an adverse impact upon many passengers | [REDACTED] |
| A failure to communicate adequately with passengers who suffer a disruption to their Train Service | [REDACTED] |

| | |
|---|----------------------|
| | ██████████ |
| Other Incidents which impair AT's reputation as a provider of safe, reliable, efficient and customer friendly passenger rail services provided there are two independent customer complaints related to such Incidents. | ████████████████████ |

4.5 Process for identifying Significant Incidents and determining Rebates

The following process may only be initiated by AT's Relationship Manager or Chief Executive. Whenever AT's Relationship Manager or Chief Executive becomes aware of an Incident that might be considered a Significant Incident, AT's Relationship Manager or Chief Executive may determine whether or not the incident is a Significant Incident using the following process:

- a **Information gathering:** AT shall seek information that may be relevant to AT's assessment of the incident from any person:
 - i involved in the Incident, which may include AT personnel,
 - ii affected by the Incident,
 - iii who witnessed the Incident, and
 - iv who may have relevant knowledge that may assist AT to assess the incident or to determine responsibility for the Incident.
- b **Investigation:** AT shall investigate the Incident based on the information it receives and may make such inquiries as it considers appropriate in order to determine:
 - i whether or not the Incident is a Significant Incident; and
 - ii the amount of Rebates payable by the Operator in relation to any Incident that is determined to be a Significant Incident.

In conducting its investigation AT shall consider all relevant information it obtains, including all relevant information submitted by the Operator as part of the process. AT may engage third party experts or consultants to assist AT. The Operator shall advise AT as to:

- i what plans were in place prior to the Incident to manage the Incident;
- ii how those plans were executed in relation to the to Incident;
- iii the Operator's views concerning the effectiveness of those plans and their execution;
- iv outcomes achieved as a result of the Operator's actions in relation to the Incident;
- v what risk assessments have been prepared by the Operator in relation to the Incident; and

- vi what mitigation measures the Operator had in place to mitigate risks related to the Incident.
- c **Determination:** AT's determination as to whether or not a particular Incident is a Significant Incident shall primarily be based on whether or not AT is reasonably satisfied with the Operator's management of the Incident. AT may also consider the Operator's risk assessment, planning, and the execution of the Operator's response. In making this determination AT shall consider:
- i as a threshold issue, whether or not the management of the Incident involves any failure by the Operator to perform its obligations. Where the Operator demonstrates to AT's reasonable satisfaction that an Incident arose without fault or failure on the part of the Operator and was managed effectively by the Operator in accordance with its obligations in a way that minimised adverse outcomes, that Incident cannot be a Significant Incident;
 - ii the impact of each Incident, (or cumulative impact in the event of multiple Incidents) in terms of the severity of the Incident and the number of persons who have been or are likely to be adversely affected by the Incident, as well as the financial costs suffered or likely to be suffered by AT or others as a result of the Incident. In assessing the severity of impact of each Incident AT shall consider the extent to which the adverse affects of the Incident were mitigated by prompt and effective remedial action by the Operator, or exacerbated by the failure of the Operator to take such action; and
 - iii with regard to whether or not AT's reputation as a provider of safe, reliable, efficient, and customer-friendly passenger rail services has been, or is likely to be, impaired as a result of the Incident; the nature and extent of criticism and comment communicated to AT in relation to the Incident, such as feedback received from customers, stakeholders, and members of the public (both favourable and unfavourable) as well as favourable and unfavourable publicity in any media of which AT is aware (including electronic media and social media).

The amount of Rebates payable by the Operator for each Significant Incident shall be determined by AT in accordance with the scale of Rebates set out above under the heading 'Rebates for Significant Incidents'. AT, at its discretion, may require the Operator to pay as Rebates any amount that falls within the range specified for each relevant category of Significant Incident.

- d **Report:** AT shall produce a report that sets out AT's determination as to whether or not a particular Incident amounts to a Significant Incident and the Rebates, if any, payable by the Operator and shall deliver a copy of such report to the Operator. If AT reaches a view that an Incident could well be considered a significant Incident then, before making a determination AT, shall deliver to the Operator an interim report setting out:
- i AT's provisional view,
 - ii AT's reasons for its provisional view, and

- iii the amount of Rebates that AT proposes should be payable by the Operator in the event that the incident is determined by AT to be a Significant Incident.

AT shall give the Operator an opportunity to respond to such interim report within a period of not less than 5 Business Days after delivery of the interim report to the Operator. If the Operator wishes to respond it shall deliver to AT within such period any further information and comment that the Operator wishes AT to consider before AT makes its determination. After considering any further information and comment that has been delivered by the Operator within the requisite timeframe, AT shall produce a final report that sets out its determination and shall deliver a copy of such final report to the Operator. The final report shall set out each Significant Incident identified by AT and the Rebates payable by the Operator in relation to each Significant Incident.

- e **Payment of Rebates:** The Operator shall pay in full any Rebates that are determined by AT to be payable by the Operator in relation to each Significant Incident within 10 Business Days after delivery of AT's final report to the Operator, notwithstanding that the Operator may refer AT's determination to expert determination under the dispute resolution process below.
- f **Dispute resolution process:** If the Operator disagrees with any determination made by AT concerning any Significant Incident, either with regard to liability or calculation of Rebates (or both), then the Operator may refer the matter to expert determination under the Dispute Resolution Procedure by giving written notice to AT of such referral within 10 Business Days after delivery of AT's final report to the Operator provided that the Operator's liability to pay Rebates exceeds \$15,000 in relation to any single Incident.
- g **Operator's responsibilities:** The Operator shall fully co-operate with the above process in good faith and shall ensure that all its personnel do so. The Operator shall provide AT with all information in its possession or control that is relevant to each Incident and shall promptly comply with any request to provide further information or assistance that may be relevant to AT's investigation. The Operator shall ensure that its personnel provide full and accurate answers to all questions raised by AT in relation to the above process.
- h **Finality of process:** AT shall conduct the above process in good faith. However the parties acknowledge and agree that:
 - i the process is a discretionary process, not a judicial process;
 - ii AT's determination shall be final, subject only to expert determination under the dispute resolution process set out above;
 - iii neither AT nor any expert appointed under the dispute resolution process is required to observe the requirements of natural justice or judicial fairness; and
 - iv no part of the process shall be subject to review or challenge in any judicial proceeding or arbitration.

5 Customer Satisfaction

The customer satisfaction survey for the purposes of the KPI regime will be the Customer Satisfaction Monitoring of Auckland Public Transport Services – Rail Only report produced by Gravitas Research.

6 Punctuality and Reliability

The measurement of Punctuality and Reliability is in compliance with paragraph 5 of Reporting Services Schedule. This information is managed through the TOPS system implemented by the Operator or alternative approved by AT. TOPS records all train arrival/departure data and whether Services have been cancelled or to where they ran if they were short cancelled and automatically calculates the Punctuality and Reliability figures in compliance with paragraph 5 of the Reporting Services Schedule for any given period. The Operator shall implement and maintain a robust audit process of this information to ensure its accuracy. This auditing uses information from information gathered by the Operator and other parties such as ONTRACK, to validate the accuracy of the information in TOPS used for the calculation of Punctuality and Reliability. The Operator shall make such information and the findings of the audit process available to AT upon request.

The requirement of this audit process is to ensure as much as possible that all delayed and cancelled trains are entered into TOPS. The following different forms of information are used by the Operator to ensure that the Punctuality and Reliability calculations are as accurate as possible:

- a ONTRACK Train Control graphs - daily;
- b the Operator Running sheets - daily;
- c the Operator Service Delivery Manager Reports – daily;
- d AT's CCTV Report – daily; and
- e ONTRACK Occlogs – per event.

The auditing procedure occurs for every day of operation. There may be periods where there is a few days 'lag' between the data being entered into TOPS and that information being audited; however, by the end of the month all of the data in TOPS has been audited to ensure the accuracy of the Punctuality and Reliability figures that will be used for the Performance Regime Schedule.

Speed Restrictions

As part of the Punctuality component of the KPI regime, it has been agreed that if Speed Restrictions across the Auckland Network (as defined in the Agreement and the Common Access Terms) increase above a 15 minute threshold then the Operator pays no Rebate if performance falls below the Lower threshold. The Operator tracks all TSR's on the network using an excel spreadsheet, which calculates the resulting time impact of those TSR's as a result of their length and reduction in Line-speed for the section of track that the TSR is imposed upon. This spreadsheet is updated each time either a TSR is imposed or removed. This information regarding TSR's is taken directly from the daily bulletins provided by

ONTRACK which inform and provide updates of the TSR's that are in effect on the Auckland Network. The formula used in the calculation factors the length of a double DMU or 80m into this calculation; however, no factoring for acceleration or de-acceleration is used to determine the impact. Heat 40's are not included in the calculation of the impact of TSR's.

7 Patronage

The measurement of Patronage that is used by the Operator is determined directly from the ticket sales report produced by a ticket management system approved by AT. A methodology that has been approved by AT is applied to ticket types such as monthly tickets etc, to allocate a consistent number of passenger journeys to that ticket type.

Calculation

The number of tickets used in any period is calculated when the onboard staff member pays-in. The number of tickets sold is then calculated by subtracting the non-issued tickets.

The number of journeys is then calculated by calculating the number of tickets sold by the no of journeys for each ticket type. For single stage fares this equates to a single passenger journey. For other tickets types the number of journeys this equates to is detailed below:

| | |
|------------------|----|
| Single | 1 |
| Return | 2 |
| 10 Trip | 10 |
| Monthly | 43 |
| Adult Day Rover | 3 |
| Family Day Rover | 8 |

This methodology differs slightly from the AT methodology, where complimentary tickets and other types of non value tickets are factored into the overall Patronage figure giving a figure slightly higher than the Operator determined number; however, it is the Operator methodology that will be used for the purposes of determining Patronage for the purposes of the Performance Regime Schedule.

8 Revenue

Revenue is the monthly Fare Revenue take inclusive of Agent sales but exclusive of GST. This information is managed through Green Tree (the Operator's accounting system), and is provided to AT on a weekly basis. This is the basis from which the annual Fare Revenue total will be derived for the purposes of the Financial Schedule.

Schedule 11 Restrictions on the Operator

1 Operational restrictions

The Operator will not, without the prior written approval of AT:

- a create or permit to exist any security interest (as defined in the Personal Property Securities Act) over or affecting its assets; or
- b act other than in accordance with its constitution; or
- c give a Guarantee, indemnity or other financial assurance; or
- d lend money or provide other financial accommodation to another person; or
- e make or threaten to make a substantial change in the nature or scope of its business as conducted at the Variation Commencement Date; or
- f either by a single transaction or series of transactions, whether related or not and whether voluntary or involuntary, except to the extent expressly provided for in the relevant Operations Management Plan:
 - i dispose of all or a substantial part of its assets; or
 - ii acquire any asset; or
- g except in relation to the Relevant Agreements, provide Services to or accept Services from a person other than for proper value and on reasonable commercial terms; or
- h become party to an arrangement or agreement whereby the liability of any of its shareholders in respect of unpaid or uncalled capital is released, reduced or cancelled.

The Operator may only own assets, incur liabilities and undertake activities to the extent necessary to perform the Services and its other obligations under this Agreement.

The Operator will own or lease (under any Relevant Agreement or otherwise on terms previously approved by AT) all assets required for the provision of the Services. In particular, all information technology systems (including, but not limited to, payroll, accounting and timetabling software) required by the Operator to perform its obligations under this Agreement must be owned or licensed for use (on terms previously approved by AT) by the Operator. Upon termination of this Agreement the Operator or a New Operator (as the case may be) must be able to retain all such licences (at no additional cost) for a period of [REDACTED]

2 Contractual restrictions

The Operator will not, without the prior approval of AT, enter into any agreement or arrangement which:

- a entitles another person to terminate that agreement or arrangement, or gives rise to any other rights or obligations, if:
 - i this Agreement terminates; or

- ii there is a change in control of the Operator; or
 - iii all or substantially all of the Operator's shares or assets are transferred to another person; and
- b if so terminated would have a material adverse effect on the provision of the Services.

3 Material contracts

3.1 Operator may sub-contract

The Operator may enter into a sub-contract for any part of the Services or for any input required for the provision of the Services where such sub-contract:

- a has been approved by AT (such approval not to be unreasonably withheld); or
- b is a Pre-approved Subcontract, and

has been entered into in accordance with this paragraph 3.

3.2 Arms' length contracting and Open Book Basis

The Operator must ensure that any sub-contract is, and continues to be, on an arms' length basis and on an Open Book Basis unless approved by AT. If, in breach of the terms of this paragraph 3, the Operator enters into a sub-contract other than on an arms' length basis, then the Operator will, at the direction of AT:

- a amend that contract on terms satisfactory to AT; or
- b terminate that contract,

and any costs associated with such amendment or termination will be Non-reimbursable Costs.

3.3 Material contracts

AT may, by written notice to the Operator, require the Operator, in respect of any proposed subcontract which is not a Pre-approved Subcontract, to either (at AT's option):

- a tender the supply of that subcontracted service or input; or
- b demonstrate to AT's satisfaction that the proposed cost of that input has been determined efficiently, either by benchmarking or some other means.

3.4 Operator responsible

- a The Operator is solely responsible for the selection of each sub-contractor so as to ensure, in each case, that the sub-contractor is qualified, credit worthy and has the relevant experience to perform the work it is required to carry out for the Operator.
- b The Operator is, and remains, fully responsible as primary obligor for all work carried out by any sub-contractor, all materials used by a sub-contractor and for any act or omission on the part of any sub-contractor, whether or not the Relationship Committee, the

Contract Committee or AT has given approval for, or is aware of, the Operator's engagement of that sub-contractor.

3.5 **Sub-contracts**

Unless otherwise approved by AT, the Operator must ensure that every sub-contract it enters into with a sub-contractor:

- a provides that the benefits of all warranties that are the subject of that sub-contract are also to be available for the benefit of a New Operator;
- b provides that the benefits of all indemnities and rights of recourse available to the Operator under the sub-contract are also to be available for the benefit of a New Operator;
- c contains no terms inconsistent with the terms of this Agreement;
- d provides for the assignment and transfer of the sub-contract to a New Operator, following the termination of this Agreement, at no cost;
- e provides for the early termination of those sub-contracts without payment of any sums of money additional to unpaid fees and charges for work properly done by that sub-contractor for the Operator; and
- f otherwise includes terms that give effect to any of the terms of this Agreement by which the Operator must, by implication or otherwise, procure a sub-contractor to do, or not to do, something.

The Operator must provide AT with a copy of each sub-contract (certified true and correct) to which the Operator and a sub-contractor is a party within [REDACTED] of the date of its signing by both parties.

4 **Corporate restrictions**

The Operator may not, without the prior written approval of AT:

- a amend its constitution;
- b issue, redeem or repurchase its shares;
- c approve any transfer of its shares;
- d amalgamate or participate in any other form of reorganisation;
- e enter into or make any proposal for compromise (as defined in the Companies Act 1993), except on terms previously approved by AT in writing;
- f provide financial assistance for purchase of its shares;
- g enter into a major transaction (as defined in the Companies Act 1993); or
- h hold equity or debt securities of any other entity.

Schedule 12 Parent's undertakings

1 Call Option

The Parent will, on receiving from AT an Exercise Notice, either:

- a if the Exercise Notice is in relation to all of the shares (and other equity securities) of the Operator, enter into an agreement with the New Parent for the purchase of the Specified Asset in the form set out in Appendix 1 (with such amendments as may be agreed between the Parent and the New Operator); or
- b if the Exercise Notice is in relation to the assets of the Operator, procure the Operator to enter into such a sale and purchase agreement with the New Operator (with all necessary modifications).

For the purposes of this schedule:

"Exercise Notice" means a notice from AT to the Parent which:

- a gives notice to the Parent of AT exercising the Call Option;
- b specifies the purchaser (being AT, or either the New Parent (if the Specified Asset is the shares of the Operator) or the New Operator (if the Specified Asset is the assets of the Operator));
- c specifies the Specified Asset;
- d specifies the completion date for the sale and purchase of the Specified Asset, such date being at least [REDACTED] after issue of such notice; and
- e specifies the purchase price for the Specified Asset, which may be a nominal amount (but not less than [REDACTED] and

"Specified Asset" means either (at the option of the New Parent):

- a all of the assets and liabilities of the Operator, as at the date of the Exercise Notice; or
- b all of the shares (and other equity securities) of the Operator;

"assets" includes real and personal property, contractual rights and choses in action, Intellectual Property Rights, receivables, and any NZTA-approved safety system; and

"liabilities" means the liabilities of the Operator (other than, for the avoidance of doubt, liabilities relating to taxation (including GST)) which result in any cost which in the absence of termination would continue to be one of the Direct Costs (except to the extent that AT has made payment to the Operator in respect of such Direct Costs).

2 Other undertakings

2.1 Financial and reporting undertakings

The Parent will:

- a as soon as available and in any event within [REDACTED] after the end of every Full Year, deliver to AT a separate Annual Report for the Parent and the Guarantor (including audited Financial Statements as at the end of and for that Full Year);
- b promptly deliver to AT:
 - i details of any litigation, arbitration or administrative proceeding relating to the Parent or the Guarantor which is or is reasonably likely to have a material adverse effect on the ability of the Parent to perform its obligations under this Agreement or the Guarantor to perform its obligations under the Guarantee; and
 - ii any other information relating to the business, affairs, financial condition or operations of the Guarantor and any Associated Person of the Guarantor which AT may reasonably request.

2.2 Operator

The Parent will not (and will procure that the Guarantor does not), except as a result of the Call Option and otherwise without the prior written approval of AT, transfer, grant any security interest (as defined in the Personal Property Securities Act 1999) or otherwise dispose of (or so dispose of any interest in) any shares (or other equity securities) or the assets of the Operator.

2.3 Relationship Committee and Senior Management

The Parent will (and will procure that the Guarantor will) appoint and maintain suitable Senior Management who

- a have the skills, qualities, attributes and experience to fulfil the roles assigned to them; and
- b manage the performance of the Services in a capable and professional manner; and;
- c participate in the Relationship Committee as contemplated by and the monthly Contract Committee meetings as required by this Agreement; and
- d always engage co-operatively and constructively with AT's senior management.

The Parent will either:

- a ensure that the employment agreement for each member of Senior Management may be terminated on termination of this Agreement without entitlement to any redundancy compensation or severance or other payment from the Operator; or
- b pay any such payment as a Non-reimbursable Cost.

Schedule 13 Exit Costs

The "Exit Costs" are:

- [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]
- | [REDACTED]

Schedule 14 Exit Services

1 General description

1.1 Requirement

Upon expiry or termination of this Agreement for any reason, it is essential to AT that there is an orderly transition from the Services that are provided by the Operator to replacement Services that are performed by another operator, or by AT itself, without disruption to the rail passenger Services for which AT is responsible. The Parent and the Operator shall provide AT with all information and assistance that AT considers necessary or desirable to enable a smooth and orderly handover from the Operator to AT, or to a New Operator nominated by AT ("**Exit Services**").

The scope, nature and extent of the Exit Services are specified in this schedule. The Exit Services must allow for an orderly and timely:

- a transfer of the assets of or shares in the Operator under the Call Option; and
- b migration of responsibility for providing the Services to the New Parent and/or the New Operator (as the case may be),

with no, or minimal, disruption to the Services.

1.2 Scope of Exit Services

In order to help achieve a smooth and orderly handover, the Operator shall, as requested by AT:

- a continue to supply the Services and to make available all resources and personnel in accordance with this Agreement as reasonably requested by AT;
- b carry out all tasks allocated to it under any current Exit Plan that has been approved by AT;
- c provide all reasonable co-operation and assistance to AT and any New Operator engaged by AT, including during any period in which the Services are being supplied concurrently with any services that are supplied by any New Operator; and
- d do all things, execute all documents, and provide AT with all assistance and information which AT reasonably considers necessary or desirable to enable the Services to be replaced with alternative Services including, without limitation, by continuing to make available all records and information referred to in clause 9.

1.3 Management of handover

AT may determine at its discretion:

- a the timing and manner in which the Services will be reduced or phased out;
- b what Exit Services are required to be performed;
- c where Exit Services are required to be performed; and

- d whether and to what extent Exit Services will be supplied concurrently with other Services provided by AT or a New Operator.

The Operator and AT shall diligently carry out the respective tasks allocated to them in the Exit Plan. AT may at any time, on prior written notice to the Operator, make any changes to the Exit Plan that AT reasonably considers appropriate or desirable to ensure an orderly transition through the Variation Proposal procedure.

1.4 Provision of Services

Subject to paragraph 1.5, for so long as AT requires any Services:

█ [REDACTED]

- b the Operator will continue to perform the Services as reasonably required by AT;
- c the Operator will perform Exit Services, as reasonably required by AT, to effect an orderly transition in accordance with any current Exit Plan that has been approved by AT, and otherwise as set out in this Schedule; and

█ [REDACTED]

1.5 No charge upon termination for Operator breach

Notwithstanding any other provision in this Agreement, if AT terminates this Agreement for default under clause 18 then the Operator shall perform the Exit Services at no charge to AT.

2 Exit Plan

2.1 Preparation and review of the Exit Plan

The Operator will, as part of the preparation of the Operations Management Plan for each Full Year, review the adequacy of the then current Exit Plan (if any) and, if it is in AT's best interests to do so, prepare and submit to AT a draft revised plan (the **Exit Plan**):

- a allowing for the orderly and timely migration of responsibility for providing the Services from:
 - i the Parent to the New Parent (in the case of a share sale under the Call Option); and/or
 - ii the Parent and the Operator to the New Parent and the New Operator (in the case of an asset sale under the Call Option),with no, or minimal, disruption to the Services; and
 - b which complies with this schedule,
- for approval in accordance with paragraph 2.2.

2.2 Approval of the Exit Plan

The Exit Plan must be approved by AT in order to become effective. If a Termination Notice is issued before such approval is obtained, it is agreed that the provisions of this schedule will provide the basis for those tasks which (as a minimum) each party is required to perform in order to bring about the results referred to in paragraph 1.

The parties will use their best endeavours to ensure that the draft Exit Plan is developed and amended as necessary by AT and so that it is approved by AT within [REDACTED] after the date referred to in paragraph 2.1.

If the Exit Plan submitted under paragraph 2.1 is not approved within the timeframe referred to above in this paragraph 2.2, the remaining areas of contention in the submitted Exit Plan will be subject to the Dispute Resolution Procedure.

2.3 Maintenance and amendment of the Exit Plan

The Exit Plan will be in the form of a single document kept in the possession of the Operator, AT, and the Parent.

Following approval of the initial Exit Plan, the Exit Plan will be maintained and updated by the Operator (with the approval of AT), at the end of each Full Year, to reflect the then current state of the Services and the assets and activities of the Operator.

2.4 Provisions of the Exit Plan

The Exit Plan will list and describe the activities, resources and personnel to be used to provide the Exit Services. The Exit Plan must not contain anything which is inconsistent with the provisions of this schedule. More specifically, the Exit Plan will:

- a address the processes and procedures to give effect to the obligations and responsibilities set out in the other provisions of this schedule; and
- b include a detailed description of the following:
 - i the management structure and roles and responsibilities of the personnel to be used for the Exit Services (including the transfer process);
 - ii a timetable (based on likely scenarios);
 - iii the hand-over plans, including for the assets owned or used by the Operator;
 - iv the transfer of such of the Operator's personnel to the New Operator as the New Parent determines;
 - v any consultancy and training support services to be provided;
 - vi appropriate communications (in consultation with AT) with the Operator's personnel, trade unions and suppliers in order to avoid any detrimental impact on the provision of the Services (both during and following the provision of the Exit Services);

- vii the rights of access to, and use of, any premises which are owned or leased by the Parent or the Operator and used in the provision of the Services by the Operator (together with charges payable (if any)); and
- viii the estimated Exit Costs.

3 Tendering

3.1 Tenderers

The Parent and the Operator acknowledge that AT may, before, on, or following the commencement of Exit Services, invite any person to tender for the provision of all or any part of the relevant Services.

3.2 Succession Package

The Operator will, [REDACTED] of the Variation Commencement Date, prepare the information required to ensure that the New Parent and any New Operator could have immediate access to relevant information following an invitation to tender for the provision of all or any of the Services (a **Succession Package**). The Succession Package includes information regarding the following:

- a the Services provided (including all reports required under the Reporting Services and in relation to the Related Agreements and all draft and Approved Operations Management Plans to date), details of all Technical Information or intellectual property and any other processes or methodologies (including IT systems) used (whether proprietary to the Parent or the Operator or otherwise) in the provision of the Services, and contact details for any person responsible for administering such IT systems;
- b the assets used to perform or support the performance of the Services including descriptions, locations and the name, address, email address and telephone number of each other party to any contract (including any lease agreement) relating to them;
- c all contracts (including any lease, licence and insurance policy) and other arrangements necessary or desirable for the provision of the Services, together with the name, address, email address and telephone number of each other party to each such agreement or arrangement;
- d to the extent lawfully permitted, a list of all employees and contractors engaged, whether wholly or partly, in the provision of the Services and, in respect of each person:
 - i a skills profile and brief job description;
 - ii a statement of remuneration and other benefits;
 - iii confirmation as to whether such person is a contractor or employee;
 - iv confirmation as to whether such person is wholly or partly engaged in the provision of the Services; and

- v copies of all related agreements (including collective and individual employment agreements); and
- e identification of personnel occupying key positions who are essential to the provision of the Services, including home address, email address and telephone numbers and mobile telephone numbers.

The Operator will ensure that the information in the Succession Package is recorded at all times in an easily accessible form and kept safe and secure.

The Operator will make the information in the Succession Package available for inspection on request. The Operator will send a copy of all, or such parts of, such information to AT within 5 Business Days of any request by AT.

3.3 Assistance with the re-tendering process

The Parent and the Operator will, following an invitation from AT to a tenderer as described in paragraph 3.1:

- a provide reasonable assistance in the tendering process for the relevant Services;
- b provide a tenderer, within [REDACTED] of a request by AT, with copies of the Succession Package;
- c provide AT and all tenderers reasonable access to the personnel, assets, Contracts and any materials, data, records and information relevant to the provision of the Services;
- d provide reasonable assistance with the verification of any information relating to the provision of the Services, including the provision of answers to verification questions; and
- e ensure that all information provided by it is true and correct in all material respects and is not misleading, whether by omission or otherwise.

3.4 Assistance to facilitate seamless migration

The Operator will:

- a do all things reasonably necessary to facilitate the orderly and timely migration of responsibility for the provision of the Services to the New Parent and/or the New Operator (as the case may be) up until the date on which the New Parent and/or the New Operator (as the case may be) takes over full responsibility for the provision of the services (the **Exit Period**), including:
 - i continuing the provision of the Services throughout the Exit Period, including during the migration activities; and
 - ii complying with the provisions of the Exit Plan; and
- b not do anything which prejudices or frustrates such seamless migration of the responsibility for the provision of the Services.

3.5 Personnel

The Operator will:

- a use its reasonable endeavours to ensure that an appropriate number of personnel (having sufficient skills, qualifications and experience) are available to be employed or engaged by the New Operator at the end of the Exit Period for it to provide the Services; and
- b during the Exit Period will (unless it has the written consent of AT):
 - i not, through its own act or omission, increase or decrease the number of personnel;
 - ii not materially increase, or contract to increase, any payment, remuneration or benefits of, or to, personnel;
 - iii use its reasonable endeavours to prevent personnel who wish to leave the employment of, or cease to be engaged by, the Operator from doing so, if such leaving or ceasing to be engaged would adversely affect the provision of the Services; and
 - iv in the case of an asset sale under the Call Option, use its best endeavours to ensure that the selected personnel of the Operator are transferred to the New Operator in a manner which does not result in, or minimises, any liability for compensation for technical redundancy or other severance payments.

3.6 Conduct of business

The Operator will, during the Exit Period:

- a operate and conduct the activities and assets of the Operator in the normal course of business in accordance with the business practices employed by the Operator, and as specified in this Agreement, as at the start of the Exit Period; and
- b maintain the Operator's assets in as good a state of operating condition and repair as they are at the start of the Exit Period, except for ordinary depreciation and fair wear and tear.

Schedule 15 Administrator

1 Appointment of Administrator

Subject to clause 18, AT may (in addition to and without prejudice to any of its other rights), at any time after the issue of a Termination Notice, appoint in writing (and remove, replace and fix the remuneration and other terms of appointment of) one or more persons (jointly and severally) (each, an **Administrator**) in respect of the assets and activities of the Operator on terms considered necessary or expedient by AT for the purposes of managing the activities of the Operator (including the continued provision of the Services) until such time as AT has procured a New Operator.

2 Administrator agent of Operator

An Administrator is the agent of the Operator. The Parent is solely responsible for the acts and defaults of an Administrator where the Administrator has been appointed as a result of an Operator Event of Default.

3 Administrator's rights

Subject to any restriction imposed by AT, an Administrator has all the rights conferred on receivers and managers by law (including under the Receiverships Act 1993).

Schedule 16 Performance Bond

Veolia Transport Auckland Limited (the **Operator**) and Veolia Transport Australasia Pty Limited (the **Parent**) have entered into a Passenger Service Agreement (the **Agreement**) with Auckland Transport (the **Principal**) in connection with the provision of certain passenger rail services in Auckland.

THIS DEED OF BOND AND UNDERTAKING is made on [date]

BY [name of financial institution] at [Auckland] (Surety)

IN FAVOUR OF the Auckland Transport at Auckland (Principal)

IN CONSIDERATION of the Principal agreeing to accept the form of this deed, the Surety provides this deed and undertakes on the terms and conditions which appear in this deed.

BY THIS DEED:

- 1 The Surety unconditionally and irrevocably undertakes to the Principal to pay on demand to a bank account advised by the Principal in Auckland (and subject to clause 2) any sum or sums which may from time to time be demanded by the Principal under the Agreement up to a maximum amount of [REDACTED] (the **Guaranteed Amount**) and is bound for payment of the Guaranteed Amount to the Principal.
- 2 Should the Surety be notified in writing, purporting to be signed by the Principal that the Principal desires payment to be made of the whole or part of the guaranteed amount, it is unconditionally agreed that such payment or payments will be made to the Principal forthwith without further reference to the Operator and notwithstanding any notice given by the Operator to the Surety not to pay the guaranteed amount.
- 3 Subject to clause 4, the undertaking contained in this deed will be a continuing undertaking and the liability of the Surety under it will not be affected in any way for any reason, and without limitation, the Surety will not be released from any liability:
 - a by any alteration of the terms of the Agreement; or
 - b by an alteration in the extent or nature of the obligations to be completed, observed or performed by the Operator or the Parent under the Agreement; or
 - c by any allowance of time by the Principal under the Agreement; or
 - d by the forbearance or waiver by the Principal in respect of any of the obligations of the Operator or the Parent or any Operator Event of Default in accordance with the Agreement.
- 4 The undertaking contained in this deed will terminate upon the earlier of the following events:
 - a upon payment by the Surety of the Guaranteed Amount in aggregate in accordance with clause 1; or

b the Principal notifies the Surety in writing that this undertaking is no longer required.

5 Any demand for payment of any moneys which may become payable pursuant to the provisions of this deed shall be deemed to have been sufficiently made if made in writing signed by the Principal or by any director, secretary, employee or officer of the Principal, and if served personally on, or posted as a registered letter addressed to the Surety at its registered office, or its principal place of business in New Zealand, or any other address notified to the Principal by the Surety. Such demand for payment, if sent by registered post, shall be deemed to be received by the Surety on the third day following the day it was handed into the care of an office of the New Zealand postal system.

6 The benefit of this deed is personal to the Principal and is not transferable or assignable.

7 This deed will be governed by New Zealand law.

8 This bond expires on [].

9 **SIGNED BY**)
[bank name])
in the presence of:)

Signature of witness

Name of witness

Occupation of witness

Address of witness

Schedule 17 Guarantee

Deed of Guarantee and Indemnity

relating to

the Passenger Services Agreement with Veolia Transport Auckland Limited and Veolia Transport Australasia Pty Limited

Veolia Transport SA

Guarantor

and

Auckland Transport

AT

Date

This **Deed of Guarantee and Indemnity** is made on

2012

between (1) **Veolia Transdev SA** a French société anonyme, registered at RCS PARIS number 521 477 851, Paris (**Guarantor**)

and (2) **Auckland Transport (AT)**

Introduction

AT has agreed to enter into the Passenger Services Agreement with the Parent and the Operator on condition that the Guarantor enters into this Deed.

It is declared

1. Interpretation

1.1 Definitions

In this Deed, terms defined in the Passenger Services Agreement and not defined in this Deed have the same meaning in this Deed and, unless the context otherwise requires:

Event of Default means any event or circumstance that, either immediately, or with the giving of notice, lapse of time or fulfilment of another requirement, would enable AT to require immediate payment of any Guaranteed Obligations by the Parent or to make demand under this Deed;

Guaranteed Obligations means the obligations of the Parent in relation to:

- (a) the following provisions of the Passenger Services Agreement:
 - (i) clause 1 (Warranties); and
 - (ii) schedule 9 paragraph 5 (Non-reimbursable Costs); and
 - (iii) clause 4.1d (Operator's services) and clause 4.2 (Parent's services); and
 - (iv) clause 14.1 (Security) and clause 14.2 (Call Option); and
- (b) an Insurance Default;

Insurance Default means:

- (a) any failure or delay by the Operator in the due and punctual performance of any of its obligations under clause 11 of the Passenger Services Agreement; or
- (b) any act or omission of the Operator, the Parent, the Guarantor or any Associated Person of the Guarantor which causes or contributes to cover under the Primary Insurance Policy (or any other insurance which the Operator is required to maintain in accordance with the Passenger Services Agreement) being declined or unavailable (in whole or in part) or which results in the lapse, avoidance or cancellation (in whole or in

part) of any such insurance (including any act or omission which constitutes negligence or wilful misconduct);

Passenger Services Agreement means the passenger services agreement relating to passenger rail services between AT, Veolia Transport Auckland Limited (the Operator) and Veolia Transport Australasia Pty Limited (the Parent) dated on or about the date of this Deed;

Relevant Documents means this Deed, the Passenger Services Agreement and each other agreement (present or future) evidencing or relating to Guaranteed Obligations;

Relevant Party means the Guarantor, the Parent and each other party to a Relevant Document (other than AT).

1.2 Construction of certain references

In this Deed, unless the context otherwise requires:

something having a **material adverse effect** on a person is a reference to it having a material adverse effect:

- (a) on that person's financial condition or operations; or
- (b) on its ability to comply with its obligations under any Relevant Document,

and references to **material adverse change** are to be construed accordingly;

tax(es) includes any tax, levy, impost, stamp or other duty and any other charge, deduction or withholding of a similar nature (including any penalty or interest payable in connection with any failure to pay or any delay in paying any of the same).

If AT reasonably considers that an amount paid by a Parent or the Guarantor under a Relevant Document is capable of being avoided or otherwise set aside on the liquidation of the Parent or the Guarantor otherwise, then that amount shall not be considered to have been irrevocably paid for the purposes of the Relevant Documents.

Headings and the table of contents are to be ignored in construing this Deed.

2. Guarantee and indemnity

2.1 Guarantee

The Guarantor:

- (a) unconditionally and irrevocably guarantees to AT on demand the due and punctual performance by the Parent of the Guaranteed Obligations; and
- (b) separately indemnifies AT against any Recoverable Loss which may be suffered or incurred by AT or the Operator in connection with any failure or delay by the Parent in the due and punctual performance of any of the Guaranteed Obligations.

2.2 Limited liability

The maximum aggregate liability of the Guarantor under this Deed is [REDACTED] in each Full Year.

For the purpose of this clause 2.2 only, the value of any payments made by the Guarantor under this clause 2.2 is deemed to be reduced to the extent that the Operator or the Parent (or their representative member if either is group registered under the Goods and Services Tax Act 1985) is entitled to a deduction or an input tax credit under the Goods and Services Tax Act 1985 in respect of that amount paid or payable or the Recoverable Loss relating to that payment.

2.3 Unenforceability of obligations

As a separate and continuing undertaking, the Guarantor unconditionally and irrevocably undertakes to AT that, should any Guaranteed Obligations not be enforceable (or any amount owing to AT in relation to the Guaranteed Obligations not be recoverable) from the Parent under any Relevant Document for any reason, including a provision of any Relevant Document or an obligation (or purported obligation) of the Parent to perform or make payment in respect of any Guaranteed Obligations being or becoming void, voidable, unenforceable or otherwise invalid, whether or not that reason is or was known to AT and whether or not that reason is:

- (a) a defect in or lack of powers of the Parent or the Guarantor or the irregular exercise of those powers; or
- (b) a defect in or lack of authority by a person purporting to act on behalf of the Parent or the Guarantor; or
- (c) a legal or other limitation (whether under the Limitation Act 1950 or otherwise), disability or incapacity of the Parent or the Guarantor; or
- (d) a liquidation, amalgamation, change in status or constitution, reconstruction or reorganisation of the Parent or the Guarantor (or the commencement of steps to effect the same),

the Guarantor will, as a sole and independent obligation, pay to AT on demand the amount that AT would otherwise have been able to recover (on a full indemnity basis). In this clause, the expression "Guaranteed Obligations" includes any obligations or indebtedness that would have been included in that expression but for anything referred to in this clause.

2.4 Suspense account

All amounts from time to time received by AT in respect of the Guaranteed Obligations from or on account of the Guarantor may be placed in a suspense account (the **Suspense Account**) with a view to preserving the rights of AT, to the extent permitted by law, to prove for the whole of the Guaranteed Obligations in the event of any proceeding in, or analogous to, liquidation, amalgamation, change in status or constitution, reconstruction or reorganisation of a Relevant Party. Any interest paid on the amount for the time being in the Suspense Account shall not be payable by AT to the Guarantor.

2.5 Interest on overdue amounts

If AT does not receive, when due, any amount payable to it under this Deed, the Guarantor shall pay interest on that overdue amount from its due date to the date of its receipt by AT (after as well as before judgment).

Default interest will be payable, without the need for demand, on the last day of successive periods selected by AT and, if not paid, will compound as from the last day of each such period. The rate of default interest will be [REDACTED] per annum above AT's cost of funding the overdue amount by whatever means AT reasonably determines.

3. Nature of Guarantee and indemnity obligations

3.1 Liability as sole principal

As between the Guarantor and AT (but without affecting the obligations of the Parent) the Guarantor is liable under this Deed in relation to the Guaranteed Obligations as a sole and principal debtor and not as a surety.

3.2 No discharge

The Guarantor is not discharged, nor are its obligations affected, by:

- (a) any time, indulgence, waiver or consent at any time given to a Relevant Party or another person; or
- (b) an amendment (however fundamental) to, or replacement of, a Relevant Document or to another security interest, guarantee or other agreement (whether or not that amendment increases the liability of the Parent or the Guarantor); or
- (c) the existence, validity or enforceability of, or the enforcement of or failure to enforce, or the release of any person or property from, any Relevant Document or other security interest, guarantee or agreement; or
- (d) the liquidation, amalgamation, change in status or constitution, reconstruction or reorganisation of any Relevant Party or another person (or the commencement of steps to effect any of these); or
- (e) anything else whatsoever.

AT is not liable to the Guarantor in respect of any of these matters, even though the Guarantor's rights in subrogation or otherwise may be prejudiced as a result.

3.3 Continuing Guarantee

This Deed and each of the Guarantor's obligations under this Deed:

- (a) is a continuing security, notwithstanding intermediate payments, settlement of accounts or anything else;
- (b) is in addition to, and not to be merged in, any Security Document; and

- (c) is to remain in full force and effect until the execution by AT of an unconditional discharge of the Guarantor's obligations under this Deed.

3.4 **Unconditional discharge of Guarantee**

If, in the opinion of AT:

- (a) the Parent has performed all the Guaranteed Obligations; and
- (b) AT is not required to make available any further payment or other financial accommodation in respect of any Guaranteed Obligations,

AT will, at the request and cost of the Guarantor, execute an unconditional discharge of the obligations of the Guarantor under this Deed. All documents that are necessary in connection with this discharge are to be in the form required by AT.

4. **No competition with AT**

The Guarantor will not, without the written consent of AT:

- (a) take, accept or hold a security interest from the Parent or, in relation to Guaranteed Obligations, from another person; or
- (b) take steps to recover (whether directly or by set-off, counterclaim or otherwise) or accept money or other property or exercise or enforce rights in respect of indebtedness of the Parent to the Guarantor or, in relation to Guaranteed Obligations, indebtedness of another person to the Guarantor; or
- (c) claim, prove or accept payment in composition by, or a liquidation of, the Parent or, in relation to Guaranteed Obligations, another person,

and until such time as the Guaranteed Obligations has been fully paid, the Guarantor waives all rights of subrogation to which it would otherwise be entitled by reason of performance of the Guarantor's obligations under this Deed. If, notwithstanding this clause, the Guarantor holds or receives any such security interest, money or property, the Guarantor is to pay or transfer it to AT immediately and, pending that payment or transfer, will hold it on trust for AT.

5. **Representations**

5.1 **Representations**

The Guarantor represents to AT that:

- (a) it is a société anonyme duly incorporated and validly existing under French law;
- (b) it has the power to enter into and perform its obligations under this Deed;
- (c) everything required to be done (including the obtaining of any necessary consents and the passing of all necessary resolutions) to:

- (i) enable it lawfully to enter into, exercise its rights and perform and comply with its obligations under, this Deed;
 - (ii) ensure that those obligations are legal, valid, binding and enforceable in accordance with their respective terms; and
 - (iii) make this Deed admissible in evidence in the courts of New Zealand,
- has been duly done;
- (d) its entry into, and the exercise of its rights and performance of and compliance with its obligations under this Deed does not and will not:
 - (i) contravene any law to which it is subject; or
 - (ii) contravene any of the documents constituting it; or
 - (iii) exceed any limitation on, or constitute an abuse of, the powers of its directors or officers; or
 - (iv) contravene any agreement to which it or any Associated Person is a party or which is binding on any of its/their assets; or
 - (v) result in the creation of, or oblige it or any Associated Person (absolutely or contingently) to create or permit to exist, any security interest over or affecting its/their assets;
 - (e) its obligations under this Deed are legal, valid, binding and enforceable in accordance with their respective terms;
 - (f) it is not, nor is any Associated Person, to an extent or in a manner which has or could have a material adverse effect on it, in default under:
 - (i) any agreement relating to indebtedness for borrowed money, including indebtedness for and in respect of money borrowed and raised by any means (including acceptances, deposits, financial leases, debt factoring with recourse and sale and repurchase agreement) and for the deferred purchase price of assets and services; or
 - (ii) any guarantee; or
 - (iii) any other agreement, to an extent or in a manner which has or could have a material adverse effect on it or the Parent or the Operator;
 - (g) it satisfies the solvency test (as defined in section 4 of the Companies Act 1993) as if it was a company for the purposes of the Companies Act 1993;
 - (h) no security interest (as defined in the Personal Property Securities Act 1999) exists over or affects, nor is there any agreement to give or permit to exist any security interest over or affecting, any asset of the Operator;
 - (i) there has been no material adverse change in respect of the Guarantor or any Associated Person of the Guarantor since the balance date in its most recent Financial Statements, provided to AT; and

- (j) no litigation, arbitration or administrative proceeding is current or pending or, to its knowledge, threatened:
 - (i) to restrain its entry into, or the exercise of its rights or the performance of or compliance with or enforcement of its obligations under, this Deed; or
 - (ii) which has or could have a material adverse effect on it or on AT's ability to exercise or enforce its rights under this Deed.

5.2 Representations continuing

Each of the representations in this clause will be deemed to be repeated continuously so long as this Deed remains in effect by reference to the facts and circumstances then existing.

6. Currency indemnity

If any of the Guaranteed Obligations have to be converted from the currency (the **first currency**) in which it is payable into another currency (the **second currency**) for the purpose of:

- (a) making or filing a claim or proof against a Relevant Party; or
- (b) obtaining an order or judgment in any court; or
- (c) enforcing any order or judgment,

then the Guarantor shall indemnify AT by payment in immediately available funds upon demand, in the currency stipulated by AT, against each cost incurred by AT as a result of any discrepancy between:

- (d) the rate of exchange used for that purpose to convert the sum in question from the first currency to the second currency; and
- (e) the rate of exchange at which AT may in the ordinary course of business purchase the first currency with the second currency.

Each amount due under this clause is to be due as a separate debt and is not to be affected by, or merged into, any judgment obtained from sums due.

7. Payments

7.1 Mode of payments

Each payment to AT under a Relevant Document is to be made on the due date in immediately available freely transferable funds in the manner that AT, by notice to the Guarantor, specifies from time to time.

7.2 Payments to be free and clear

Each payment by the Guarantor to AT under a Relevant Document is to be made:

- (a) free of any restriction or condition; and
- (b) free and clear of and (except to the extent required by law) without any deduction or withholding for or on account of tax or on another account, whether by way of set-off, counterclaim or otherwise.

7.3 Reinstatement

If a payment made by the Guarantor to AT pursuant to a Relevant Document is avoided by law:

- (a) that payment will be deemed not to have discharged or affected the relevant obligation of the Guarantor; and
- (b) AT and the Guarantor will be deemed to be restored to the position in which each would have been if that payment had not been made.

7.4 Gross-up

If:

- (a) the Guarantor is required by law to make a deduction or withholding for or on account of tax from an amount paid or payable by the Guarantor to AT under a Relevant Document; or
- (b) AT is required by law to make a payment on, or calculated by reference to, an amount paid or payable by the Guarantor to AT under a Relevant Document (excluding tax on its overall net income),

the amount in respect of which that deduction, withholding or payment is required to be made is to be increased so that AT actually receives and retains (free from any liability in respect of any deduction, withholding or payment) a net amount equal to the amount that it would have received and retained had no deduction, withholding or payment been made.

8. General provisions

8.1 Nature of indemnities

The indemnities in this Deed are unconditional, irrevocable and are to survive payment of the Guaranteed Obligations and are not to be discharged or impaired by any act, omission, matter or thing that might discharge or impair it but for this clause.

8.2 No obligation to marshal

AT is not required to marshal, enforce or apply under any security interest, guarantee or other entitlement held at any time by it or any money or property that it holds at any time or is entitled to receive.

8.3 Benefit and burden of this Deed

This Deed is binding upon and enures for the benefit of the parties and their respective successors and permitted assignees or transferees.

8.4 **Transfer**

AT may assign or transfer any of its rights or obligations under this Deed without the consent of the Guarantor. Each assignee or transferee is to have the same rights against the Guarantor under this Deed as if named in this Deed as AT.

The Guarantor may not assign or transfer any of its rights or obligations under this Deed without the prior written consent of AT.

8.5 **Disclosure of information**

AT may disclose, on a confidential basis, to a potential assignee, transferee or other person with whom contractual relations in connection with this Deed are contemplated, any information about the Guarantor whether or not that information was obtained in confidence and whether or not that information is publicly available.

8.6 **Notices**

Each notice or other communication under this Deed is to be made in writing and sent by facsimile, personal delivery or by post to the addressee at the facsimile number or address, and marked for the attention of the person or office holder (if any), from time to time designated for the purpose by the addressee to the other party. The initial facsimile number, address and relevant person or office holder of each party is set out under its name in the Schedule.

No communication will be effective until received. A communication to the Guarantor is, however, deemed to be received:

- (a) in the case of a letter, on the third Business Day after posting; and
- (b) in the case of a facsimile, on the Business Day on which it is despatched or, if despatched after 5.00 p.m. (in the place of receipt) on a Business Day or on a non-Business Day, on the next Business Day after the date of despatch.

8.7 **Costs**

The Guarantor will pay each cost directly and reasonably incurred by AT in connection with:

- (a) the registration and release of this Deed;
- (b) each amendment to, waiver in respect of, or discharge of, this Deed; and
- (c) the exercise, protection or enforcement of AT's rights under this Deed,

in each case on demand and on a full indemnity basis.

8.8 **Remedies and waivers**

Time is of the essence in respect of all dates and times for compliance by the Guarantor with the Guarantor's obligations under this Deed. However, no failure to exercise, and no delay in exercising, a right of AT under this Deed will operate as a waiver of that right, nor will a single or partial exercise of a right preclude another or further exercise of that right or the

exercise of another right. No waiver by AT of its rights under this Deed is effective unless it is in writing signed by AT.

The rights of AT under this Deed are cumulative and not exclusive of any rights provided by law.

8.9 Amendments

No amendment to this Deed is effective unless it is in writing signed by all parties.

8.10 Partial invalidity

The illegality, invalidity or unenforceability of a provision of this Deed under any law will not affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of another provision.

8.11 Certificates conclusive

A certificate by AT of any amount payable under this Deed is conclusive evidence for all purposes, including for any proceedings, save in case of fraud or manifest error.

8.12 Counterparts

This Deed may be signed in any number of counterparts all of which, when taken together, will constitute one and the same instrument. A party may enter into this Deed by executing any counterpart.

9. Governing law and jurisdiction

9.1 Governing law

This Deed is governed by and is to be construed in accordance with New Zealand law.

9.2 In New Zealand

Each of the parties irrevocably and unconditionally agrees that the Courts of New Zealand shall have jurisdiction to hear and determine each suit, action or proceeding (proceedings), and to settle disputes, that may arise out of or in connection with this Deed and for these purposes irrevocably submits to the jurisdiction of those courts.

9.3 Other jurisdictions

This submission to jurisdiction does not limit the rights of any party to take proceedings against the other party in another court of competent jurisdiction.

9.4 Service in New Zealand

The Guarantor agrees that the process by which any suit, action or proceeding in New Zealand is begun may be served on it by being delivered to the Operator without prejudice to any other lawful means of service.

CERTIFICATE OF NON REVOCATION OF POWER OF ATTORNEY

I, _____ (full name), certify that, at the time of signing this deed as the attorney of **Veolia Transdev SA** pursuant to a Power of Attorney dated _____ (insert), I have not received notice of revocation of, or any limitation of my powers under, that Power of Attorney.

Signature of attorney

SIGNED by Auckland Transport)
in the presence of :)

David Warburton, Chief Executive

Witness signature

Witness name (print)

Witness occupation

Witness place of residence

Schedule 1: Party details

| | |
|---------------------|---|
| Name | Veolia Transdev SA |
| Address for notices | Managing Director 36-38 Avenue Kleber Paris 75016, France |
| Facsimile number | +331 7175 1364 |

AT details

| | |
|---------------------|---|
| Name | Auckland Transport |
| Address for notices | Manager, Public Transport Operations Level 4, Bledisloe House, 24 Wellesley Street, Auckland New Zealand |
| Facsimile number | +64 9 355 3550 |

Appendix 1: Call Option sale and purchase agreement

Agreement

relating to

sale and purchase of all the shares of [*Operator*] Limited

[**Parent**]

as Vendor

and

[**Successful tenderer**]

as Purchaser

Date

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This **Agreement** is made on

between (1) **[Parent]** (the **Vendor**)

and (2) **[Successful tenderer]** (the **Purchaser**)

Introduction

- A. The Vendor owns all of the shares in [*Operator*].
- B. The Vendor has agreed to sell all of the shares in [*Operator*] to the Purchaser and the Purchaser has agreed to purchase those shares on the terms set out in this Agreement.

It is agreed

1. Interpretation

1.1 Definitions

In this Agreement, terms defined in the Passenger Services Agreement but not defined in this Agreement have the same meaning in this Agreement and unless the context otherwise requires:

Assets means all assets owned or used by the Company as at the Completion Date;

Balance Date means [30 June [●]];

Business means the passenger rail services operation carried on by the Company under the Passenger Services Agreement;

Business Day means a day on which registered banks are open for general banking business other than a Saturday or Sunday in Auckland;

Company means [*Operator*] Limited;

Completion means the performance by the Vendor and the Purchaser of their respective obligations under clause [6] or, as the context may require, the time when such performance is completed;

Completion Date means [*insert date*] or such other date as may be agreed between the Vendor and the Purchaser or, as the case may require, the date on which Completion takes place;

Conditions means the conditions precedent set out in sub-clause [3.1];

Confidential Information means the know-how, trade secrets, technical processes, information relating to products, finances, contractual arrangements with customers or suppliers and other information relating to the Business and the Company which by its

nature, or by the circumstances of its disclosure to the holder of the information, is or could reasonably be expected to be regarded as confidential;

Consent means:

- (a) any authorisation, approval, consent, licence, permit, franchise, permission, order, notification, filing, registration, lodgement, agreement, declaration or exemption from, by or with a Public Authority; and
- (b) in relation to anything which will be prohibited or restricted in whole or part by law if a Public Authority intervenes or acts in any way within a specified period after lodgement, filing, registration, or notification, the expiry of such period without such intervention or action;

Default Interest means interest calculated at the Bill Rate plus [2] per cent per annum;

Distribution has the meaning given in section 2 of the Companies Act;

Environment has the meaning given in the Resource Management Act 1991;

Environmental Consents means all Consents required for the operation of the Business under Environmental Law;

Environmental Law means any law, and any regulations and documents with the force of regulations, relating to the Environment (including the Resource Management Act 1991 and the Hazardous Substances and New Organisms Act 1996);

Financial Statements means:

- (a) the [un][audited] statement of financial position of the Company as at the Balance Date;
- (b) the [un][audited] statement of movements in equity of the Company for the [twelve] month period ended on the Balance Date;
- (c) the [un][audited] statement of financial performance of the Company for the [twelve] month period ended on the Balance Date; and
- (d) the [un][audited] statement of cashflows of the Company for the [twelve] month period ended on the Balance Date;

GAAP means generally accepted accounting practice in New Zealand as defined in section 3 of the Financial Reporting Act 1993;

Income Tax Act means the Income Tax Act 1994;

Intellectual Property Rights means all trade marks, trade names, patents, designs, licences, inventions and technical information (whether registered or not) and any copyright material, the right to all lists of customers and suppliers of the Company and all other intellectual property rights and Confidential Information, used by or owned by the Company;

Material Adverse Effect in relation to a person means a material adverse effect on that person's financial condition or operations or on the consolidated financial condition or operations of it and its subsidiaries taken as a whole;

Passenger Services Agreement means the passenger services agreement in relation to passenger rail services in Auckland between the ARC, the Vendor and the Company dated [●];

Properties means all the real property owned or occupied by the Company [as detailed in schedule 2];

Public Authority means:

- (a) any government in any jurisdiction whether national, federal, state, regional, territorial or local; and
- (b) any minister, department, office, commission, delegate, instrumentality, agency, board, authority or organisation of any government or any state-owned enterprise;

Purchase Price means the purchase price for the purchase of the Shares as provided for in sub-clause [4.1];

Shares means [*insert number and description*] shares in the Company;

Tax Act means the Income Tax Act, the Tax Administration Act 1994 and the Goods and Services Tax Act 1985;

Tax Indemnity means the indemnity contained in clause [9];

Tax Warranties means the warranties contained in paragraph [15] in schedule 1;

Warranties means the warranties in schedule 1; and

Vendor's Solicitors means [*name of firm*].

1.2 Construction of certain references

In this Agreement, unless the context otherwise requires:

- (a) **agreement** includes a contract, deed, licence, franchise, undertaking, arrangement or understanding (in each case whether oral or written) or other document recording obligations (whether mutual or otherwise);
- (b) **assets** includes the whole or any part of the relevant person's business, undertaking, property, revenues or choices in action, in each case, present or future;
- (c) **disposal** of an asset includes a sale, gift, transfer or any other disposition of, or the grant of an option over, a right or interest, whether legal or equitable, in that asset or an agreement for any of those acts (and references to **dispose** are to be construed accordingly);
- (d) **encumbrance** includes a debenture, mortgage, charge, pledge, lien, hypothecation, title retention, equitable right, deferred purchase, option, right of pre-emption, tenancy, right of occupation and any other security interest or third party right whether legal or equitable;

(e) **event** includes any act, omission, transaction or other occurrence (whether or not any Group Company is a party to it) and includes Completion. References to the result of any event on or before the Completion Date include the combined result of two or more events, the first of which has taken place on or before that date;

(f) **relief** includes:

(i) any relief, loss, allowance, credit, deduction, or set-off in computing income, profits or gains for the purposes of taxation, or any grant conferred on any person; or

(ii) any right to repayment of taxation (whether or not including interest) available to that person,

whether in New Zealand or elsewhere;

(g) **subsidiary** has the meaning given to that term in section 5 of the Companies Act;

(h) **taxation** includes:

(i) all forms of taxation, withholding, duties, dues, imposts, levies and rates of New Zealand or elsewhere and, in particular (but without limitation), income tax, fringe benefit tax, stamp duty, goods and services tax, gift duty, customs or excise duties, regional or local taxes, municipal taxes, accident compensation levies and withholding taxes; and

(ii) all costs, charges, interest, penalties, fines and expenses, incidental and relating to or arising in connection with any such taxes, duties, dues, imposts, levies and rates or the negotiation of any settlement of any dispute as to the liability of any person for them, or any actual or threatened taxation claim or proceedings of whatever nature and wherever undertaken in connection with them,

which are not Reimbursable Costs; and

(i) **taxation claim** includes any notice, demand, assessment, letter or other document issued, or action taken, by or on behalf of any Public Authority or other person, whether in New Zealand or elsewhere, and in particular (but without limitation), the Inland Revenue Department, the Customs Department and the Accident Rehabilitation and Compensation Insurance Corporation in New Zealand (or any overseas body with similar functions or powers), whereby the Purchaser or a Group Company may be, or be sought to be, placed under any or any increased liability to taxation or may be deprived or sought to be deprived of any relief which might otherwise have been available.

1.3 General references

In this Agreement, unless the context otherwise requires:

(a) a reference to a clause, schedule is a reference to a clause of, schedule to this Agreement;

(b) a reference to this Agreement or another instrument includes any variation, novation, or replacement of either of them;

- (c) 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 (whether before or after the date of this Agreement);
- (d) references to and expressions used in connection with financial calculations, valuations, accounting or financial reporting functions or their description in this Agreement bear the respective meanings ascribed to like expressions or expressions to similar intent under GAAP;
- (e) the singular includes the plural and vice versa;
- (f) the word person includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a state and an agency of state, in each case, whether or not having a separate legal personality;
- (g) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, persons taking by novation) and permitted assigns;
- (h) an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally;
- (i) a reference to \$ or dollars is a reference to the lawful currency of New Zealand and, unless otherwise specified, all amounts payable by a party under this Agreement are to be paid in that currency; and
- (j) words importing one gender include the other genders.

1.4 Headings

Ignore headings in construing this Agreement.

2. Sale and purchase

2.1 Agreement to sell Shares

The Vendor will sell and the Purchaser will purchase legal and beneficial title to the Shares on the terms and conditions set out in this Agreement.

2.2 Condition of the Shares

The Shares will on transfer to the Purchaser be free from any encumbrances and will have the benefit of all rights attaching to them on or after the date of this Agreement.

3. Conditions

3.1 Conditions precedent

[Completion of this Agreement is subject to:

- (a) **[Due diligence:**

the Purchaser conducting a due diligence review of the Company and the Business and all documentation and records relating to the Company and the Business and the results of that review being satisfactory to the Purchaser in its absolute discretion;]

(b) **[Material agreements:**

the Vendor obtaining approval to the change of control of the Company and the Business in favour of the Purchaser in a form and on terms acceptable to the Purchaser in its absolute discretion, under the following agreements:

[Drafting note: list all material agreements the Purchaser requires].]

(c) **[Other Conditions:**

Key employees agreeing to continue employment following Completion]].

3.2 **Benefit of Conditions**

[The parties acknowledge that the Conditions set out in:

- (a) paragraph [●] have been inserted for the benefit of the Purchaser;
- (b) paragraph [●] have been inserted for the benefit of the Vendor; and
- (c) paragraph [●] have been inserted for the benefit of both the Vendor and the Purchaser.]

3.3 **Fulfilment of Conditions**

[Each of the Vendor and the Purchaser must:

- (a) use all reasonable endeavours to procure the fulfilment of the Conditions *[but this does not apply to clause 3.1 (a, i.e.) the Purchaser's satisfaction (or otherwise) with the results of its due diligence.]*
- (b) as soon as possible make all appropriate applications, diligently pursue those applications, and do all acts, matters and things within its power and control and supply all information as is reasonably necessary or convenient to satisfy the Conditions; and
- (c) promptly notify the other parties in writing if any Condition is satisfied or cannot be satisfied.

The obligations under this clause 3.3 do not require any party to pay any money, other than customary fees and charges, provide any other consideration or incur any liability, actual or contingent, in order to satisfy the Conditions.]

3.4 **Non-fulfilment of Conditions**

- (a) [If the Conditions set out in clause [●] have not been fulfilled or (to the extent that they are capable of waiver) waived by the party for whose benefit they are inserted by [date], or such later date as agreed in writing by the Vendor and the Purchaser, then this Agreement will terminate.

- (b) If the Conditions set out in clause [●] have not been fulfilled or (to the extent that they are capable of waiver) waived by the party for whose benefit they are inserted by [date], or such later date as agreed in writing by the Vendor and the Purchaser, then this Agreement will terminate.]

3.5 Consequences of termination

[If this Agreement is terminated under sub-clause [3.4];

- (a) except as set out in clauses [3.5(b), (c), [and 6.4(c),]] this Agreement has no further effect;
- (b) no party is to have any claim against any other party arising under or in connection with that termination other than in respect of any breach of clause [6.4(c)] or clause [17] or any breach of this Agreement occurring before termination.]

4. Purchase Price

4.1 Amount

The Purchase Price for the purchase of the Shares is [*\$insert sum*].

4.2 Core acquisition price

- (a) The purchase price does not include any capitalised interest and the parties agree that the Purchase Price is the "lowest price" for the purposes of valuing property in accordance with section EH 48(3)(a) of the Income Tax Act.
- (b) The parties agree that they will compute their taxable income for the relevant period on the basis that the Purchase Price includes no capitalised interest and they will file their tax returns accordingly.

5. Pending Completion

5.1 Conduct prior to Completion

Pending Completion the Vendor must, unless it has the prior written consent of the Purchaser to act otherwise:

- (a) **Passenger Services Agreement:**

perform its obligations under the Passenger Services Agreement and ensure that the Company performs its obligations under the Passenger Services Agreement;

- (b) **Notify Purchaser:**

promptly notify the Purchaser of any events which may be material to the Assets, the Business or to the Company;

- (c) **Rights attaching to shares:**

ensure that no action is taken, or omitted to be taken, by the Company, the Vendor or any other person which may adversely affect the rights attaching to the Shares;

(d) **Legal matters:**

promptly notify the Purchaser of any legal claims, proceedings or investigations which may occur, be threatened, brought, asserted or commenced against the Company or its directors; and

(e) **Employees:**

ensure that the Company does not employ any new employees with an annual remuneration package in excess of [insert sum], or terminates the employment of any employees except for the termination of any employee's employment for cause.

(f) **[Others]**

5.2 Repayments

The following must be paid at or before Completion:

- (a) all money owed to the Company by the Vendor or any Associated Person of the Vendor; and
- (b) all money owed by the Company to the Vendor or any Associated Person of the Vendor.

5.3 Access for due diligence

The Vendor must ensure that from the date of this Agreement, the Purchaser and its representatives will have such access as they may reasonably request to the Properties and to the Company's employees, accounts, records, agreements, plant and equipment, stock and all information relating to the Company. The Vendor must cause the Company's directors, employees, auditors and lawyers [*other advisers*] to co-operate with, and make all information relating to the Company available to the Purchaser and its advisers in a full and timely manner.

5.4 Breach of Warranty

The Vendor will:

- (a) disclose immediately in writing to the Purchaser any matter or circumstance which may arise or become known to it after the date of this Agreement and before Completion which does, or may constitute a breach of, or is inconsistent with, any of the Warranties or could have a Material Adverse Effect on the Company; and
- (b) pending Completion, not do, or omit to do, or allow anything to be done, as a result of which any Warranty is or may be untrue, misleading or inaccurate as at Completion.

5.5 Risk and damage

(a) **Material Damage**

The Purchaser may cancel this Agreement by giving notice in writing to the Vendor at any time before Completion if any Asset which is material to the conduct of the Business in the Purchaser's reasonable discretion is destroyed, lost or rendered unusable through damage or destruction. If this Agreement is cancelled under this clause [5.5] or under clause [8.9]:

- (i) except as set out in clause [5.5(a)(ii)], this Agreement has no further effect;
- (ii) no party has any claim against any other party in connection with that termination other than for any breach of clause [14] or any breach of this Agreement occurring before notice of cancellation.

This right of cancellation is in addition to, and not limited by, any other rights or remedies of the Purchaser against the Vendor. If the Purchaser does not exercise its rights under this clause its other rights and remedies are not prejudiced.

(b) **Immaterial damage**

If before Completion any Asset is destroyed lost or rendered unusable and the asset is, in the Purchaser's reasonable opinion, not material to the conduct of the Business, the Purchaser must complete the purchase at the Purchase Price, less a sum equal to the amount of the reduction in value of the Shares as a result of the Asset being destroyed, lost or rendered unusable. If the Purchaser and the Vendor cannot agree on the amount of the reduction in value of the Shares before the Completion Date, Completion will proceed based on the Purchaser's reasonable estimate of the amount of the reduction and the amount of the reduction in value is to be determined under the Dispute Process. Any adjustment required will be made immediately following determination of the Dispute Process.

6. Completion

6.1 Time and place

Completion is to take place at [2 pm] on the Completion Date at the offices of the [Vendor's Solicitors].

6.2 Vendor's obligations

At Completion the Vendor must deliver to the Purchaser the following items:

(a) **Vendor certificate:**

an unqualified certificate executed by the Vendor confirming that as at the Completion Date no Warranty is untrue, misleading or has been breached in any material respect;

(b) **Share transfers and certificates:**

registrable transfers of the Shares executed by the Vendor in favour of the Purchaser, or the Purchaser's designated nominee, together with the relevant share certificates or a certificate from a director of the Company certifying that no share certificates have been issued;

(c) **Waivers:**

any waivers or consents, whether under the Company's constitution or otherwise, which are required to enable the Purchaser or its nominee to be registered as the holder of the Shares, each waiver or consent to be in a form acceptable to the Purchaser;

(d) **Resignations:**

the written resignations of all the directors of the Company from their respective offices as director with written confirmation that they are owed no money by the Company and have no claim against the Company, in a form acceptable to the Purchaser;

(e) **Statutory books:**

the common seal (if any), certificate of registration, minute book, share register, interests register and all other statutory registers of the Company;

(f) **Releases:**

releases of all encumbrances over the Shares or the Assets and releases of any guarantees or indemnities given by the Company, in a form acceptable to the Purchaser;

(g) **Repayment of debt:**

evidence acceptable to the Purchaser that all moneys have been repaid under sub-clause [5.2];

(h) **Board resolutions:**

a unanimous resolution in writing of the board of directors of the Company (passed prior to the taking effect of the resignations referred to at paragraph 6.2(d) above):

- (i) revoking all mandates to bankers and giving authority in favour of the directors appointed under clause (i) below, or other persons nominated by the Purchaser, to operate the Company's bank accounts;
- (ii) approving for registration the transfers of the Shares;

(i) **Shareholder resolutions:**

a unanimous resolution in writing of the shareholders of the Company appointing such persons as the Purchaser may nominate to be directors of the Company;

(j) **[Other:**

e.g., evidence of restructuring transactions, new contracts...]; and

(k) **Other records:**

all such other resolutions, documents or records as may reasonably be required by the Purchaser (and notified to the Vendor) to implement this Agreement.

6.3 **Payment**

On the Completion Date, immediately after the Vendor has complied with clause [6.2], the Purchaser must deliver to the Vendor's Solicitors the amount of the Purchase Price.

6.4 **Method of payment**

All payments to be made by the Purchaser under this Agreement will be made on the due date in same day cleared funds in the manner specified by the Vendor to the Purchaser.

7. **Default**

7.1 **Vendor in default**

If the Vendor does not fulfil the Vendor's obligations in clause [6] then, without prejudice to any other rights or remedies available to the Purchaser, the Purchaser may:

- (a) sue the Vendor for specific performance; or
- (b) cancel this Agreement and sue the Vendor for damages.

7.2 **Purchaser in default**

If the Purchaser does not fulfil the Purchaser's obligations in clause [6] then, without prejudice to any other rights or remedies available to the Vendor, the Vendor may:

- (a) sue the Purchaser for specific performance; or
- (b) cancel this Agreement and sue the Purchaser for damages.

7.3 **Default Interest**

If any party does not pay any sum payable by it under this Agreement as and when due and in the manner provided in this Agreement, it must pay Default Interest on that unpaid sum. Default Interest is to accrue on any unpaid sum from day to day from the due date to the date of actual payment, both before and after judgment. Interest on overdue payments is to be capitalised monthly. The demand for or the payment of Default Interest is not in substitution for, or to the exclusion of, any rights or remedies otherwise available to a party under this Agreement.

8. **Warranties**

8.1 **Vendor's representations**

The Vendor represents and warrants to the Purchaser in the terms of the Warranties in the knowledge that the Purchaser is entitled to rely on the truth of the statements contained in the Warranties.

8.2 Warranties repeated

Each of the Warranties is to be repeated continuously from the date of this Agreement until Completion, and remain in effect by reference to the facts and circumstances then existing.

8.3 Notice of Warranty claims

All Warranty claims made by the Purchaser under this Agreement are to be in writing and delivered to the Vendor's Solicitors and any notice under this sub-clause is to specify in reasonable detail the matter which gives rise to the breach, the nature of the breach and the amount claimed. All claims so made are to be deemed to have been made against the Vendor.

8.4 Period for Warranty claims

The Purchaser may not:

(a) **Non-tax claims:**

make any Warranty claims, other than Tax Warranty claims, after the end of the period of 12 months following the Completion Date; or

(b) **Tax claims:**

make any Tax Warranty claim, unless the Purchaser gives the Vendor notice of the claim prior to the end of the period during which the Inland Revenue Department or any other body concerned with the imposition, collection or assessment of taxation is entitled to assess the Purchaser or the Group Company in relation to any period up to and including the Completion Date.

8.5 Warranties qualified

Each of the Warranties (other than the Tax Warranties) is given subject to any thing done, or omitted to be done, either under any express provision of this Agreement or after the date of this Agreement at the request in writing, or with the prior written approval, of the Purchaser but is subject to no other qualification. No other information relating to the Company of which the Purchaser has knowledge (whether actual, constructive or implied) is to preclude or effect any claim for a breach of Warranty or reduce any amount recoverable by the Purchaser.

8.6 Reduction of Purchase Price

Any monetary compensation received by the Purchaser as a result of any breach by the Vendor of any Warranty is to be in reduction and refund of the Purchase Price.

8.7 Indemnity

The Vendor must indemnify and keep indemnified the Purchaser against any loss, damage, cost or expense (including legal or other costs associated with the enforcement of this Agreement) suffered or incurred by the Purchaser or by the Company arising directly or indirectly from the breach of any Warranty or other provision of this Agreement (**Stipulation**) such loss, damage, cost and expense to include (without limitation):

- (a) any cost of correcting or restoring the subject matter to the warranted or covenanted state or condition; and

- (b) any difference in value between the actual value of the subject matter of any Stipulation on the Completion Date and the value it would have had if the relevant Stipulation were true and accurate or had otherwise been complied with.

The loss, damage, cost or expense is to be determined without taking account of any increase in the value of the Shares arising from any offsetting factor or the method of calculating the Purchase Price. The indemnity contained in this sub-clause [8.7] is (for the purposes of the Contracts (Privity) Act 1982) intended to create a benefit in favour of and be enforceable by the Purchaser and the Company.

The indemnity given under this clause does not extend to any liability which is a Reimbursable Cost.

8.8 **Gross-Up**

If:

- (a) the Vendor is required by law to make any deduction or withholding from any sum payable by it to the Purchaser under this Agreement; or
- (b) the Purchaser or any person on its behalf is required by law to make any payment on account of taxation in relation to any amount received or receivable by the Purchaser or that person under this Agreement,

then the sum payable by the Vendor will be increased to the extent necessary to ensure that after the making of that deduction, withholding or payment the Purchaser or that person receives and retains (free of any liability in respect of any such deduction, withholding or payment) a net sum equal to the sum that the Purchaser or that person would have received and retained had no deduction, withholding or payment been made.

8.9 **Cancellation**

If, pending Completion:

- (a) the Vendor fails to perform any of the Vendor's obligations under this Agreement;
- (b) any circumstances exist or arise which have the effect of making any of the Warranties incorrect or untrue; or
- (c) the Vendor or the Purchaser becomes aware of any event or circumstance which has or may have a Material Adverse Effect on the Company,

the Purchaser may, at the Purchaser's absolute discretion, give the Vendor notice cancelling this Agreement at any time prior to Completion. This right of cancellation is in addition to, and not limited by, any other rights or remedies of the Purchaser against the Vendor. If the Purchaser does not exercise its rights under this sub-clause its other rights and remedies under this Agreement or at law are not to be prejudiced.

Any notice given under this clause [8.9] is to be effective as against the Vendor if given to the Vendor's Solicitors.

8.10 **Truth of the Warranties**

The Vendor acknowledges that the Vendor and the Purchaser have agreed that:

- (a) the truth of the statements contained in the Warranties; and
 - (b) the fulfilment by the Vendor of all of its obligations under this Agreement,
- are essential to the Purchaser.

9. Tax Indemnity

9.1 Purchaser indemnified

The Vendor indemnifies the Purchaser and the Company and undertakes to keep the Purchaser and the Company at all times fully and effectively indemnified from and against any taxation or taxation claim, whether made against the Purchaser or the Company or any other person, in respect of the Company, which:

- (a) arises from or relates to any actual or deemed income, profits or gains earned, received or arising on or before the Completion Date; or
- (b) attributable to any event occurring on or before the Completion Date.

The undertakings contained in this clause [9.1] are (for the purposes of the Contracts (Privity) Act 1982) intended to create a benefit in favour of and be enforceable by the Purchaser and the Company.

9.2 Deemed loss of relief

For the purposes of calculating the Vendor's liability under the Tax Indemnity, to the extent that the taxation claim will cause the Purchaser or the Company to suffer a loss of relief, the quantum of the loss suffered by the Purchaser or the Company as a result of the taxation claim shall be deemed to be (at the election of the Purchaser):

(a) **Amount of liability for tax:**

an amount equal to the liability for taxation arising as a result of the loss of relief, which amount will be payable when such liability for taxation becomes payable by the Purchaser or the Company (as the case may be); or

(b) **Net present value:**

an amount equal to the net present value of the liabilities for taxation arising from the loss of relief, calculated on the basis of the following assumptions:

- (i) the relevant rate of taxation will be that applying at the date of the loss of relief, unless a new rate of taxation has been enacted or announced, in which case that new rate will apply;
- (ii) the discount rate will be *[insert number]*% per annum; and
- (iii) each liability for taxation will be deemed to have arisen on the last day of each relevant period in which the liability for taxation is predicted by the Purchaser to arise.

9.3 Vendor's obligation to pay

Any payment the Vendor is required to make in relation to any claim under the Tax Indemnity:

(a) **Pay three days before tax due:**

if it relates to a taxation liability must be made at least three Business Days before the last date on which payment may be made by the Purchaser or the Company of the relevant liability to the relevant taxation authority without incurring any liability to pay any penalty or interest;

(b) **Otherwise on demand:**

otherwise is to be paid to the Purchaser on demand being made by the Purchaser; and

(c) **Refund of Purchase Price:**

is to be made to the Purchaser in reduction and refund of the Purchase Price.

9.4 Dispute of taxation claim

If the Purchaser or the Company receives a taxation claim which may give rise to a claim under the Tax Indemnity against the Vendor, the Purchaser will give notice of that taxation claim to the Vendor in accordance with clause [9.4] as soon as possible after receiving notice of the taxation claim. If so requested by the Vendor in writing and subject to receipt by the Purchaser from the Vendor of the full amount due under clause [19.3] the Purchaser will ensure that:

(a) **No prejudice of defence:**

no payment (except to the extent required by law) or admission of liability in respect of the taxation claim is made or other steps are taken which may in any way prejudice any challenge to it or defence to that claim without the prior written consent of the Vendor which consent will not be unreasonably withheld or delayed; and

(b) **Purchaser will defend:**

the Purchaser will, in the name of the *[Company/Purchaser]*:

- (i) challenge the taxation claim or issue a notice of response or notice of proposed adjustment, as is appropriate;
- (ii) refer the matter to a lawyer or accountant ("Counsel") nominated by the Vendor and approved by the Purchaser and experienced in tax matters for an opinion on the likelihood of a challenge being successful if the Vendor requires an assessment to be challenged in court in New Zealand *[or such other country as may be appropriate]*;
- (iii) at its option, request a case to be stated to a court, or to prepare and file a challenge to the assessment in court, if the opinion of Counsel is that there is a reasonable prospect of the challenge being successful;
- (iv) if the challenge or an appeal is decided against it, after notifying the Vendor of the decision forthwith after receipt by it of the written decision, at its option, and

subject to a recommendation by the Counsel, appeal the decision to any relevant appellate body (as the case may be);

- (v) instruct Counsel to act and advise in the conduct of all such court proceedings and any related correspondence and negotiations; and

(c) **Repayment of tax refund:**

if the challenge or appeal (in respect of which the Purchaser has previously received a payment under clause 9.3) is ultimately successful in whole or in part and the Purchaser or the Company receives any tax credit or refund the Purchaser or the Company will promptly pay to the Vendor (to the extent that it does not exceed that amount previously paid by the Vendor) an amount equal to the amount of that tax, credit or refund together with any interest (net of tax) which the Purchaser or the Company has received from any revenue authority on such tax credit or refund.

9.5 **Consultation**

The Purchaser will, at all times prior to taking any action, act in consultation with the Vendor and its professional advisers in relation to the conduct and progress of all such objections, challenges or court proceedings and any related correspondence and negotiations, to keep the Vendor and its professional advisers fully informed on this progress and, to provide the Vendor and its professional advisers with copies of all relevant documents, including drafts. The Purchaser, following such consultation, shall take into account all reasonable concerns and issues raised by the Vendor in all action that is taken by the Purchaser following consultation.

9.6 **Expenses**

All costs and expenses properly incurred by the Purchaser or the Company in connection with any consultation, objection, challenge or appeal on a taxation claim will be paid by the Vendor. The Vendor undertakes to the Purchaser that before the Purchaser or the Company takes any of the steps set out in clause 19.4(b) the Vendor will pay to the Purchaser such sum as the Purchaser estimates as being payable in respect of costs and expenses and will pay such further sums to the Purchaser as may be required by the Purchaser or the Company if the actual costs and expenses exceed the estimate.

9.7 **Period for Tax Indemnity claims**

The Purchaser may not make any claim under the Tax Indemnity unless the Purchaser gives the Vendor notice of the claim prior to the end of the period during which the Inland Revenue Department or any other body concerned with the imposition, collection or assessment of taxation is entitled to assess the Purchaser or the Company in relation to any period up to and including the Completion Date.

10. **Expenses**

Whether or not any of the transactions contemplated by this Agreement are completed, each of the parties is to (unless otherwise specified in this Agreement) bear its own legal and accountancy costs and other expenses of and incidental to the preparation, execution and Completion of this Agreement.

11. Delay

11.1 Time of essence

Time is of the essence in the performance by the parties of their obligations under this Agreement.

11.2 Exercise of rights and waivers

No delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence by one party in respect of any breach of any other party's obligations under this Agreement is to:

- (a) operate as a waiver of or prevent the subsequent enforcement of that obligation; or
- (b) be deemed a delay, grant of time, release, compromise, forbearance (whether partial or otherwise) or other indulgence in respect of, or a waiver of, any subsequent or other breach.

No waiver by the Vendor or the Purchaser of its rights under this Agreement will be effective unless it is in writing and signed by the Vendor or the Purchaser (as the case may be).

12. Further assurances

Each party must sign, execute and do all deeds, schedules, acts, documents and things as may reasonably be required by any other party effectively to carry out and give effect to the terms and intentions of this Agreement, whether before or after Completion.

13. Non merger

The obligations, warranties, undertakings and indemnities undertaken or given pursuant to this Agreement, to the extent not already performed at Completion, are not to merge on Completion, or on the execution or delivery of any document, pursuant to this Agreement, but are to remain enforceable to the fullest extent, notwithstanding any rule of law to the contrary.

14. Confidentiality and announcements

14.1 Business information

The Vendor will, both before and after Completion:

- (a) not use or disclose to any person any Confidential Information it has or acquires and will make every effort, including issuing legal proceedings, to prevent the use or disclosure of Confidential Information by any person, including, without limitation, any other person who was considered as a potential purchaser of the Shares; and
- (b) ensure that each person who is at any time an Associated Person of the Vendor complies with clause [14.1(a)].

14.2 Negotiations

Each party must keep this Agreement and its terms, and any confidential information about any other party to this Agreement which was obtained during the course of negotiations relating to this Agreement, confidential and no party is to make any public disclosure or announcement of this Agreement or its terms without the prior written consent of the other parties.

14.3 Exceptions

The obligations contained in clauses [14.1] and [14.2] do not apply:

- (a) to the extent required by law or by the listing requirements of any relevant stock exchange; or
- (b) to the extent reasonably required by a party to fulfil the Conditions; or
- (c) to the extent that such information is already in the public domain.

The parties are to consult with each other and use reasonable endeavours to agree on the form and timing of any public announcements or disclosure referred to in this sub-clause.

15. Entire agreement

This Agreement (except to the extent provided for in the Passenger Services Agreement):

- (a) constitutes the entire understanding and agreement of the parties relating to the sale and purchase of the Shares; and
- (b) supersedes and extinguishes all prior agreements and understandings between the parties relating to that sale and purchase.

16. Assignment

16.1 Successors

This Agreement is to be binding on, and enure for the benefit of, the parties and their respective successors and permitted assignees or transferees.

16.2 Vendor

The Vendor may not assign or transfer all or part of their respective rights or obligations under this Agreement. The Vendor acknowledges that the Purchaser may rely on the warranties and undertakings in this Agreement in giving warranties and undertakings to any subsequent purchaser of all or any of the Shares.

16.3 Purchaser

The Purchaser may assign or transfer its rights and obligations under this Agreement. Following assignment, the Purchaser will remain liable to the other parties in respect of any obligations so assigned.

16.4 Assignee

Each assignee or transferee of the Purchaser is to have the same rights against the other parties to this Agreement as if named in this Agreement as Purchaser.

17. Notices

17.1 Form of notice

Each notice or other communication under this Agreement is to be in writing, is to be made by facsimile, personal delivery or by post to the addressee at the facsimile number or address, and is to be marked for the attention of the person or office holder (if any), from time to time designated for the purpose by the addressee to the other parties. The initial facsimile number, address and relevant person or office holder of each party is set out under its name at the end of this Agreement.

17.2 Notice effective

No communication is to be effective until received. A communication is to be deemed to be received by the addressee:

- (a) in the case of a facsimile, on the Business Day on which it is sent or, if sent after 5 pm (in the place of receipt) on a Business Day or, if sent on a non-Business Day, on the next Business Day after the date of sending;
- (b) in the case of personal delivery, when delivered; and
- (c) in the case of a letter, on the third Business Day after posting by fastpost or by airmail.

18. Amendments

No amendment to this Agreement is to be effective unless it is in writing and signed by all the parties.

19. Counterparts

This Agreement may be executed in any number of counterparts each of which is to be deemed an original, but all of which together are to constitute a single instrument.

A party may enter into this Agreement by executing any counterpart.

This Agreement may be executed on the basis of an exchange of facsimile copies and execution of this Agreement by such means is to be a valid and sufficient execution.

20. Governing law

20.1 New Zealand law

This Agreement is to be governed by and construed by the laws of New Zealand.

20.2 Submission to jurisdiction

Each of the parties irrevocably and unconditionally agrees that the New Zealand courts have jurisdiction to hear and determine each suit, action or proceeding (Proceedings), and to settle disputes, which may arise out of or in connection with this Agreement and for those purposes irrevocably submits to the jurisdiction of the New Zealand courts.

20.3 Non-exclusive jurisdiction

The submission to jurisdiction in clause [23.2] does not (and is not to be construed to) limit the rights of a party to take Proceedings against any of the other parties in another court of competent jurisdiction, nor is the taking of Proceedings in one or more jurisdictions to preclude the taking of Proceedings in another jurisdiction, whether concurrently or not.

20.4 Service of proceedings

[Overseas party] hereby appoints [person] of [a firm], at [address], New Zealand to accept service or proceedings in New Zealand on its behalf.

Execution

Executed as an agreement

SIGNED by [Vendor])
in the presence of :)

Witness signature

Print name

Witness occupation

Place of residence

Address of [Vendor]

Address

Facsimile

Attention

Telephone

SIGNED by **[Purchaser]**)
in the presence of :)

Witness signature

Print name

Witness occupation

Place of residence

Address of [Purchaser]

Address

Facsimile

Attention

Telephone

Schedule 1: Warranties

1. Information

1.1 All information

All information:

- (a) contained in the Introduction to this Agreement and the Due Diligence Material; and
- (b) in respect of the Company given by or on behalf of the Vendor (whether by any director, agent, employee or professional adviser of the Vendor) to the Purchaser or any adviser or representative of the Purchaser,

is accurate and complete and is not misleading in any material particular, whether by inclusion of misleading information or omission of material information.

1.2 No omission

No material information known, or which should have been known, by the Vendor has been omitted to be disclosed by the Vendor to the Purchaser in writing which, if disclosed, would be likely to lead a proposing Purchaser for value of the Shares to reverse its decision to purchase the Shares on the terms of this Agreement.

2. Material circumstances

2.1 No insolvency action

No Insolvency Event has occurred and is continuing, or is threatened, in relation to the Company.

2.2 No events of default

There are no circumstances existing:

- (a) which give any person, or with the passing of time or giving of notice or both will give any person, the right to call, or which are likely to cause any person to exercise a right to call, for termination of any Relevant Agreement or Subcontract; or
- (b) which will, or with the passing of time or giving of notice or making of any court order may, result in the liquidation or removal of the Company from the Companies Register or the appointment of a receiver or statutory manager of the Company or any of its Assets.

2.3 No adverse effect

Neither the execution of this Agreement, nor the transfer of the Shares to the Purchaser or its nominee pursuant to this Agreement, nor any other provision of this Agreement, will:

- (a) constitute a breach of any agreement to which the Company is a party; or

- (b) entitle any person to cancel, terminate earlier than would otherwise have been the case, or adversely modify any agreement or any right or benefit available to the Company, or any material provision of any agreement; or
- (c) entitle any person to acquire, or to require the Company to dispose of, all or any interest in, any right or benefit to which the Company is entitled; or
- (d) otherwise cause, or be likely to cause, any right or benefit of or pertaining to the Company to be cancelled, terminated, lost, adversely qualified or impaired, except as a result of any unlawful act or omission by any third party.

2.4 Power of attorney

Except as provided in the Passenger Services Agreement, the Company has not granted any power of attorney which is still in force or conferred on any person, other than its directors and employees, any subsisting authority to bind the Company in any way.

3. The Shares

3.1 Title

The Vendor has legal and beneficial title to the Shares free of encumbrances.

3.2 Power

The Vendor has the right and power to sell the Shares on the terms set out in this Agreement.

3.3 No other shares or rights

The Shares comprise all the issued shares in the capital of the Company. The Company has not issued any option to subscribe for equity capital or loan capital in the Company to any person. No person has any right to call for the issue or transfer of equity capital or loan capital in the Company at any time, except as provided for in the Passenger Services Agreement.

4. Financial matters

4.1 Accuracy of the financial statements

The Financial Statements:

- (a) comply with the provisions of the Financial Reporting Act 1993 and have been prepared under GAAP, and are complete and accurate in all respects;
- (b) have been prepared on a basis consistent with the basis on which all [*audited*] financial statements of the Company have been prepared in respect of the [*three*] annual financial periods ending on the balance date;

- (c) give a true and fair view of the assets and liabilities and the state of affairs, financial position and results of the Company as at the Balance Date and the financial performance of the Company for the financial period ending on the balance date;
- (d) make full provision for all liabilities including liabilities for long service leave and annual leave entitlements; and
- (e) give full particulars in the notes of all contingent liabilities and commitments and any other liabilities which cannot be quantified under GAAP.

4.2 Financial books and records

The books and records of the Company (other than the Financial Statements) accurately set out and disclose in all material respects the financial condition of the Company. All financial transactions of the Company have been accurately recorded in all material aspects in such books and records. Such books and records:

- (a) accurately reflect in all material respects the basis for the financial condition and the revenues, expenses, results of operations and financial performance of the Company shown in the Financial Statements; and
- (b) present fairly in all material respects the financial condition and the revenues, expenses, results of the operations and financial performance of the Company.

4.3 No outside storage

No information, records or systems pertaining to the operation or administration of the Company are in the possession of, recorded, stored, maintained by or otherwise dependent upon any other person.

4.4 Financing

The Company has not and is not engaged in financing of a type which is not required to be shown or reflected in its financial statements.

5. Assets

5.1 No encumbrances

The Company has legal and beneficial title to all of its Assets, free from encumbrances.

5.2 No other interest

No person other than the Company, is entitled to possession of, or any interest in, any Assets.

5.3 Plant in working order

All the plant and equipment of the Company (including spare parts, fixed plant, vehicles, machinery and office equipment) is in good condition and working order having regard to its age and book value and is capable, (subject to fair wear and tear) of doing the work for which

it has been used prior to Completion. All motor vehicles are licensed and registered appropriately for the purposes for which they are used.

5.4 Fixed assets

All fixed assets of the Company are detailed in the asset register and there are no other fixed assets used in the operations of the Company. No other person uses any fixed asset of the Company.

6. Intellectual property

6.1 Ownership of Intellectual Property Rights

The Company owns absolutely:

- (a) all Intellectual Property Rights, free from any encumbrance; and
- (b) all rights in intellectual property necessary or desirable for the operation of the Business as it is currently conducted.

6.2 Intellectual Property

To the Vendor's knowledge there has not been:

- (a) any infringement of the Intellectual Property Rights;
- (b) any act or omission which may affect the validity or enforceability of any Intellectual Property Rights; or
- (c) any claim by any third party relating to Intellectual Property Rights.

6.3 Disclosure of Confidential Information

The Company has not, and to the Vendor's knowledge no other person has, disclosed to any person other than the Purchaser, any Confidential Information regarding the Company.

7. Material commitments

7.1 Relevant Agreement

The Company has observed and performed all of its material obligations under the Relevant Agreements.

7.2 Material commitments

Except for the Relevant Agreements, the Company is not party to any agreement which:

- (a) relates to the provision of financial accommodation to the Company;

- (b) requires payment of any sum by or to the Company in any currency other than New Zealand dollars;
- (c) requires authorisation under Part II of the Commerce Act 1986 for its legality or validity;
- (d) involves the Company giving a guarantee, indemnity or letter of comfort in respect of, or to be otherwise contingently liable for, the obligations of, any other person;
- (e) involves any express warranty or guarantee, or any obligation to maintain, service, repair, repurchase or otherwise do or refrain from doing anything, in respect of goods or services provided by the Company;
- (f) is with the Vendor or any Associated Person of the Vendor;
- (g) confers on any person any rights as a consequence of a change in the shareholding in or composition of the board of directors of the Company.

8. Properties

8.1 Complete list

The Properties comprise all lands and buildings owned or occupied by the Company or in which the Company has any interest.

8.2 Title

The Company has good and marketable title to each Property set beside its name in schedule 2, free from any encumbrance and is entitled to vacant possession and quiet enjoyment of that Property.

8.3 Use permitted

The use of the Properties for the purposes for which they are now used:

- (a) is not precluded by any restrictive covenant or provision, legislation or order;
- (b) is authorised under Environmental Law; and
- (c) is in accordance with all Environmental Consents.

8.4 No breach

The Company is not in breach of any agreement with respect to, or any obligation affecting, any Property.

8.5 No third party right

No rights, easements, quasi-easements or privileges exist in favour of any person in respect of any Property.

8.6 **Enforcement action**

There are no outstanding enforcement or other notices, requisitions, requirements or proceedings issued or, to the Vendor's knowledge, threatened, in respect of any Properties by any Public Authority, landlord, tenant or other person.

8.7 **Public works**

No Property is subject to or affected by any planning permission or development permit or any proposals for road widening or subject to any order or resolution for the compulsory acquisition.

8.8 **Repairs**

There is no liability for repairs or dilapidations or to carry out works in respect of any Property.

8.9 **Rates**

There are no arrears of general or water rates or charges outstanding for any Property.

9. **Compliance with laws**

There are no applicable requirements of all Applicable Laws or Public Authority with which the Company has not complied fully and in a timely manner.

10. **Legal proceedings**

10.1 **No litigation**

The Company is not:

- (a) party to any investigation, prosecution, litigation, arbitration, proceedings or any other form of mediation or dispute resolution (except as plaintiff in normal debt collection proceedings); or
- (b) subject to any investigation by any Public Authority.

10.2 **No cause of action**

There is no cause of action relating to the Company or the Assets that could or might be used to commence legal proceedings, either civil or criminal.

10.3 **No proceedings**

There are no enquiries pending before or, to the Vendor's knowledge, threatened by, any Public Authority, and in particular the Company is not involved in any dispute with the Commissioner of Inland Revenue.

11. Statutory records

11.1 All records kept

The Company holds all accounting and other records which it is required by law to retain either indefinitely or for a particular period or periods and such records are properly and fully maintained.

11.2 Documents of title

All documents of title, or documents that otherwise evidence title, to the Assets are in the Company's possession or under the control of the Company.

12. Employees

12.1 Full disclosure

The Vendor has provided to the Purchaser the following details of each employee of the Company:

- (a) all of the terms and conditions of the employment;
- (b) all benefits provided (including discretionary benefits);
- (c) details of any applicable redundancy policies;
- (d) details of length of service;
- (e) accrued entitlements to leave (including, without limitation, annual leave, special leave (as defined in the Holidays Act 1981) and long service leave); and
- (f) details of any employee [*who has a total remuneration package which costs the Group Company in excess of \$[insert sum] per annum*] who has given or received notice of termination of employment.

12.2 No disputes with employees

The Company is not involved in any personal grievance, wrongful dismissal claim, dispute, or any other claim with any of its employees, or former employees, or any person representing any employee or former employee. No event has occurred which might give rise to such a claim.

12.3 Health and safety

The Company is not involved in any health and safety investigation by any Public Authority nor have any events occurred which might give rise to any audit, prosecution, investigation or claim related to health and safety.

12.4 **ACC Rating**

The Company's experience rating under the Accident Rehabilitation and Compensation Insurance (**Experience Rating**) Regulations 1993 has not led to its basic ACC employer premium being increased or loaded in the past or in the current premium liability year. To the Vendor's knowledge, there is no event that is likely adversely to affect the experience rating attributable to the Company.

12.5 **[Superannuation]**

[There is no claim for, nor is the Company under any legal liability to pay, any superannuation, pension, retirement, death, disability, employee insurance premium or any other similar payment to any past or present director, employee or contractor of the Company or any of their families or dependants and no such pension or payment is now being paid voluntarily.]

13. **No joint venture**

The Company is not a party to any joint venture, partnership, syndicate, consortium, or other body or association, whether incorporated or not.

14. **Environmental**

14.1 **Harmful substances**

No contaminant (as defined in the Resource Management Act 1991) or hazardous substance (as defined in the Hazardous Substances and New Organisms Act 1996) has been deposited or discharged:

- (a) onto or beneath the surface of any of the Properties; or
- (b) anywhere else, in circumstances where the contaminant or hazardous substance belongs to the Company or results from the Company's operations.

14.2 **Expenditure**

There is no action or significant expenditure required by the Company to comply with actual requirements or possible future requirements of any Public Authority under Environmental Law.

14.3 **No limitation of Environmental Consents**

There is no matter that may result in the cancellation, limitation, review, variation or non-renewal of any Environmental Consents nor of any complaint, order, proceedings, judgment, requisition or notice under Environmental Law.

14.4 **Prior use**

No aspect of the Company's occupation or use of any of the Properties could give rise to loss, liability, claims, prosecutions or legal proceedings against the Company as owner or occupier of the Properties.

15. Taxation

15.1 Full provision

The Financial Statements make full provision or reserve for all taxation liable to be assessed on the Company or for which it may be accountable, including in particular (but without limitation) taxation of profits, gains, income, receipts, benefits and other items subject to taxation for any period ending on or before, and for any transactions or events occurring on or before the [*Balance Date/Completion Date*].

15.2 Taxation liability after the Balance Date

All of the Company's liability for taxation in respect of the period from the Balance Date to the Completion Date has been incurred in the ordinary course of business.

15.3 No assessment on disposal of capital assets

No gross income would arise if any capital asset of the Company were treated as having been sold, disposed of or distributed on Completion Date other than would be treated as revenue in the carrying on of its business, except any depreciation recovery under section EG 19 of the Income Tax Act.

15.4 No deduction disallowed

Since the Balance Date, the Company has not paid or agreed to make any payment or transfer which would not be allowable as a deduction in computing the profits of the Company in the relevant financial year for taxation purposes, other than in relation to the purchase of fixed assets in respect of which a depreciation allowance is available to the Company under section EG 1 of the Income Tax Act.

15.5 All deductions made

Since Balance Date the Company has:

- (a) made all appropriate deductions from payments made by it and all consequent payments due as a result to the Inland Revenue Department and other relevant authorities; and
- (b) remitted the amount of these deductions to the Inland Revenue Department or any other relevant authority.

15.6 Provisional taxation paid

Since Balance Date the Company has made and will make payment in full when due to the Inland Revenue Department or any other relevant authority for each instalment of provisional tax of the Company in respect of periods commencing on or before Completion, together with any additional tax payable thereon.

15.7 No taxation arising from sale of the Shares

No taxation will become payable by the Company because of the sale of the Shares.

15.8 **No taxation relief refused**

No transaction or event has occurred or arrangement been entered into in consequence of which the Company:

- (a) has or may be deprived of relief otherwise available to it; or
- (b) is or may be held liable for any taxation relating to any period up to Completion, including taxation primarily chargeable against some other company or person (whether by reason of any such other company being or having been a member of the same group of companies or otherwise);
- (c) for which provision has not been made in the Financial Statements or if occurring or entered into after the Balance Date has been incurred otherwise in the ordinary course of business.

15.9 **All returns made**

The Company has made all returns and supplied all information to the Inland Revenue Department, the Customs Department and other relevant authorities as is required by law. All returns and information supplied were correct and made on a proper basis and are not the subject of any dispute. The Company has kept and preserved those records as are required to be kept and preserved for the purpose of taxation and any Tax Act.

15.10 **Binding rulings**

If the Company has obtained a binding ruling under the Tax Administration Act 1994, it has been disclosed:

- (a) to the Inland Revenue Department as required by that Act; and
- (b) to the Purchaser.

15.11 **Residence**

The Company is tax resident in New Zealand and not in any other country or jurisdiction and has had no branch, agency, place of business or permanent establishment outside New Zealand which may result in the Company being subject to tax in that other country.

15.12 **Thin capitalisation**

The Company is not and has not been a company to which the interest apportionment rule in section FG 8 of the Income Tax Act can apply.

15.13 **Credit account balances**

The imputation credit accounts, dividend withholding payment accounts and any other similar memorandum accounts (if any) maintained by the Company for tax purposes will not have debit balances on Completion Date, calculated after taking into account any tax refunds that the Company might be entitled to that relate to any periods up to Completion Date.

15.14 **Registration**

The Company:

- (a) is a registered person for the purposes of the Goods and Services Tax Act 1985;
- (b) has complied in all respects with that Act; and
- (c) is not in default of any obligation to make any payment or return or notification under that Act.

15.15 **Accounting year**

The Company has an accounting year for New Zealand income tax purposes ending on *[insert date]* of each year.

15.16 **No taxation evasion**

The Company has not at any time:

- (a) obtained or sought to obtain a taxation advantage through any fraud or evasion; or
- (b) obtained a taxation advantage from any arrangement to which section BG 1 of the Income Tax Act or section 76 of the Goods and Services Tax Act 1985 applies; or
- (c) made or entered into any arrangement, undertaking or scheme which was at the time it was entered into a sham or fiscal nullity.

Schedule 2: Properties

[Full description of its properties including full legal easements and appurtenances plus any known leases]