

1. Abbreviations and Acronyms

In this document the following definitions apply unless the context requires otherwise.

“**access**” means access to the Network or part of the Network, to operate freight services or passenger services.

“**Access Agreement**” means the agreement (if any) executed by the Access Provider and the Operator pursuant to which the Operator may have access to the Network.

“**Access Application**” means an application for access which is:

- (a) in the form contained in Schedule 1; and
- (b) contains the Required Information and (if relevant) any further information required by the Access Provider under paragraph 3.7.

“**Access Arrangement**” has the meaning given in the Act.

“**Access Provider**” means Metro Trains Melbourne Pty Ltd ABN 43 136 429 948.

“**Accreditation**” means accreditation obtained in accordance with the requirements of the Rail Safety Act 2006 (Vic), including any guideline, regulation or ordinance made pursuant to that Division.

“**Act**” means the *Rail Management Act 1996* (Vic).

“**Addenda**” means the most up to date addenda to the Metropolitan Master Working Timetable published from time to time as contained in the document entitled “MTM Working Timetable System Description [WTT Addenda] dated July 2010”.

“**Additional Capacity Works Protocol**” means the Access Provider’s protocol of that name, as amended from time to time.

“**Business Day**” means a week day on which trading banks are open in Melbourne.

“**Capacity**” means the capability of the Network for the requested Train Path in accordance with the Capacity Allocation Protocols and the Capacity Use Rules.

“**Capacity Use Rules**” means the rules made by the ESC under Section 38T of the Act.

“**Capacity Allocation Protocols**” means the Access Provider’s protocols of that name, as amended from time to time.

“**Director**” means the Director of Public Transport under the *Transport Integration Act 2010* (Vic).

“**ESC**” means the Essential Services Commission or its successor.

“**Fee**” means the applicable fee described in paragraph 7.

“**Governmental Agency**” means any government or any governmental, semi-governmental or judicial entity or authority, including any self regulatory organisation or any stock exchange.

“**Guidelines**” means the guidelines made by the ESC under the Act.

“**Information Handling Protocol**” means the protocol made by the Access Provider pursuant to section 38ZZZB of the Act.

“**Information Pack**” means the information pack that the Access Provider is required to prepare and maintain pursuant to the Act and Guidelines.

“**Interconnection**” has the meaning given in the Guidelines.

“**Law**” means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.

“**Network**” means the land and infrastructure leased by the Access Provider under the Infrastructure Lease from time to time, including railway track, associated track structures and works (such as cuttings, tunnels, bridges, sidings, excavations, landfill, track support earthworks and drainage works), pedestrian crossings, over-track structures, under-track structures, service roads, signalling, notices and signs and overhead electrical power supply systems, but excluding:

- (a) buildings (including stations, platforms, sheds and shelters);
- (b) carparks;
- (c) terminals, storage and receival facilities;
- (d) workshops, depots, yards and fuel points; and
- (e) private sidings that are not leased to the Access Provider,

but includes any infrastructure leased to the Access Provider which passes through, or is immediately adjacent to, any of the infrastructure or facilities referred to in paragraphs (a) to (e) above.

“**Operator**” means the person seeking access to the Network.

“**Pro-forma Access Agreement**” means an agreement in the form of Schedule 3.

“**Related Body Corporate**” has the meaning given in the *Corporations Act 2001* (Cth).

“**Required Information**” means the information in relation to the Operator described in Schedule 2.

“**Rolling Stock**” means any vehicle that operates on or uses a railway track including a locomotive, light rail vehicle, light inspection vehicle, road/rail vehicle, trolley, carriage, diesel multiple unit and wagon (but does not include a vehicle designed to operate both on and off a railway track when the vehicle is not operating on a railway track).

“**Train**” means Rolling Stock coupled together to operate as a single unit.

“**Train Path**” means the particular time interval, including an entry time and day and an exit time and day, through which Rolling Stock may travel over a section of the Network from an origin to a destination (including stopping points).

2. Background

2.1 This process and protocol has been developed by the Access Provider in relation to access to the Network in accordance with the requirements of the *Rail Management Act 1996* (Vic) (“**Act**”) and Guidelines made under the Act as at 1 January 2006.

2.2 The Access Provider reserves the right to amend this process and protocol in the event that the Act or the Guidelines are amended after 1 January 2006.

- 2.3 Any Operator who seeks access to the Network will be bound by this Process and Protocol.

3. Application for Access

- 3.1 The Access Provider is required under the Guidelines and the Act to maintain an Information Pack containing certain prescribed information concerning the Network.
- 3.2 An Operator considering seeking access to the Network is entitled, upon request to the Access Provider and on payment of the relevant Fee, to receive an Information Pack. The Operator may also be entitled to receive further information under the Capacity Use Rules.
- 3.3 The Access Provider must provide the Information Pack to the Operator within 5 Business Days of receiving the Operator's request and the relevant Fee. Following provision of the Information Pack, the Operator may request further information from the Access Provider pursuant to the Guidelines.
- 3.4 An Operator that is seeking access to the Network must lodge an Access Application with the Access Provider in the prescribed form.
- 3.5 The Access Provider must acknowledge to the Operator in writing that it has received an Access Application within 5 Business Days of receipt. The Access Provider may request that the Operator provide further information or clarification of any aspect of the Access Application.
- 3.6 The Access Provider must, by notice in writing to the Operator within 10 Business Days of receipt of an Access Application (or such longer period that the Access Provider and the Operator may agree), advise the Operator that either:
- (a) the Access Application is in the proper form and contains the Required Information; or
 - (b) the Access Application is not in the proper form or does not contain the Required Information and is rejected ("**Rejection Notice**").
- 3.7 If the Access Provider rejects the Access Application pursuant to paragraph 3.6(b), the Access Provider must in the Rejection Notice specify the additional information that the Access Provider reasonably requires that the Operator provide.
- 3.8 If the Operator receives a Rejection Notice it may either:
- (a) provide that additional information to the Access Provider, in which case paragraphs 3.4, 3.5, 3.6 and 3.7 will apply to the relevant further information;
 - (b) refer the matter to the ESC as an "access regime dispute" under section 38ZU(1) or 38ZU(2) of the Act (if applicable);
 - (c) accept the Rejection Notice and not proceed further with the Access Application.
- 3.9 If the Access Provider does not give a Rejection Notice within 10 Business Days of receipt of the Access Application (or such longer period as the Access Provider and the Operator may agree), the Access Provider is deemed to have given an acknowledgement under paragraph 3.5.

4. Assessment of Access Application

- 4.1 Within 20 Business Days of the date (“**Acknowledgement Date**”) upon which either:
- (a) the Access Provider gives notice to the Operator under paragraph 3.5; or
 - (b) the Access Provider is deemed to have given an acknowledgement under paragraph 3.9,
- the Access Provider must determine whether Train Paths are available to meet the Operator’s request and advise the Operator accordingly.
- 4.2 In making a determination under paragraph 4.1, the Access Provider must take into account the Capacity Use Rules and Capacity Allocation Protocols.
- 4.3 Without limiting any other right that the Access Provider may have to reject the Access Application, the Access Provider may reject the Access Application if:
- (a) the Operator does not have or will not have the necessary Accreditation to lawfully operate the proposed Service;
 - (b) the Operator’s Rolling Stock does not comply with the Access Provider’s requirements;
 - (c) in the reasonable opinion of the Access Provider either:
 - (1) the management and staff of the Operator do not have the necessary knowledge or experience to carry on the proposed rail operation; or
 - (2) the Operator will not be able to engage the services of another person whose management and staff have the necessary knowledge and experience to carry on the proposed rail operations;
 - (d) the Access Operator does not have the necessary financial capacity to meet its financial obligations to the Access Provider under the Access Agreement and the financial obligations it owes to any other persons (including, but not limited to, excesses under insurance policies).
- 4.4 Subject to paragraph 4.3, if the Access Provider determines under paragraph 4.1 that there is sufficient available Capacity to meet the Operator’s request the Access Provider must include in its notice pursuant to paragraph 4.1, the proposed terms and conditions, including price, upon which the Access Provider will make the Train Path requested available to the Operator.
- 4.5 Subject to paragraph 4.3, if the Access Provider determines that there is not sufficient available Capacity to meet the Operator’s request, the Access Provider must within 25 Business Days of the Acknowledgement Date:
- (a) provide reasons to the Operator why the requested Train Paths cannot be made available to satisfy the Operator’s Request;
 - (b) if part but not all of the Operator’s request can be satisfied from available Capacity, notify the Operator of the terms and conditions, including price, upon which the Access Provider will make the requested Train Paths available to the extent of the Access Provider’s available Capacity; and

- (c) if works are required to provide additional Capacity necessary to meet the Operator's request in full, at the time of giving notification under paragraph 3.5(b), either:
 - (1) provide the Operator with an outline of the required works; or
 - (2) offer to undertake an assessment of the required works and the costs required in accordance with paragraph 6.
- 4.6 If the Access Provider determines to reject an Access Application pursuant to paragraph 4.3, the Access Provider must within 25 days of the Acknowledgement Date notify the Operator of its determination and provide reasons why the Train Paths cannot be made available to meet the Operator's Request.

5. Negotiation Protocol

- 5.1 Following provision by the Access Provider of a notice under paragraph 4.4 or 4.5, the Access Provider must:
- (a) meet and each negotiate in good faith with the Operator to seek to reach agreement on the terms and conditions, including price, on which the Access Provider will make the Train Paths available (including, if paragraph 4.5(c) applies, in relation to any works required to provide additional Capacity); and
 - (b) use all reasonable endeavours to meet the reasonable requirements of the Operator, provided that the Operator has complied with the Act and this Train Path Request Process and Protocol.
- 5.2 The Operator must negotiate the terms and conditions of access to a Train Path in good faith at all times.
- 5.3 The negotiations referred to in paragraph 4.1 will be conducted on the basis that:
- (a) the Pro-forma Access Agreement will comprise the contractual terms (except for price) applicable subject to insertion of relevant factual details concerning the relevant Train Paths and any other matters as the Access Provider and the Operator may agree;
 - (b) the price will be in accordance with the Access Arrangement;
 - (c) the negotiation and finalisation of the contractual terms will be concluded within 60 Business Days of the Access Provider's notice under paragraph 4.4 or 4.5; and
 - (d) if a dispute arises between the Access Provider and the Operator in connection with the negotiations, the process to be followed is as follows:
 - (1) first, negotiation of the dispute under paragraph 5.4, and
 - (2) second, determination of the dispute under paragraph 5.5.
 - (e) Neither the Access Provider nor the Operator may commence court proceedings or invoke the processes under Division 5 of Part 2 of the Act in relation to a dispute until the procedures in paragraph 5.3(d) have been exhausted.

- 5.4 If paragraph 5.3(d)(1) applies, within 10 Business Days of the date that either the Access Provider or the Operator notifies the other of the dispute, the chief executive officers (or equivalent) of the Access Provider and the Operator will meet and use reasonable endeavours to determine the dispute.
- 5.5 If paragraph 5.3(d)(2) applies:
- (a) within 10 Business Days of the date that it becomes clear that the process described in paragraph 4.4 has not resulted in resolution of the dispute, then (unless otherwise agreed) the Access Provider and the Operator will jointly choose and appoint an independent expert;
 - (b) in the absence of agreement as to the independent expert within such 10 Business Day period, the independent expert will be appointed on the application of the Access Provider by the President of the Institute of Arbitrators and Mediators Australia;
 - (c) the independent expert must make a determination or finding on the issue in dispute as soon as practicable and if possible, within 20 Business Days;
 - (d) the independent expert will act as an expert and not an arbitrator and may adopt such procedures as the independent expert thinks fit;
 - (e) the independent expert's decision will be final and binding on the Access Provider;
 - (f) the costs of the independent expert will be borne equally by the Access Provider and the Operator or as the independent expert may otherwise determine; and
 - (g) the Access Provider and the Operator will each bear their own costs relating to the independent expert process.

6. Additional Capacity Works

The Access Provider will undertake any assessment of the works required to provide additional Capacity to make the Train Paths requested available in accordance with the Additional Capacity Works Protocol.

7. Fees

- 7.1 The Fee that the Operator must pay to the Access Provider under paragraph 3.2 is \$1,000. The Fee is non-refundable.
- 7.2 The Fees that the Operator may charge in connection with paragraph 6 are to be calculated in accordance with the Additional Capacity Protocols.

8. Interconnection

If a person seeks Interconnection to the Network, the provisions of Clause 38V of the Act and the Guidelines will apply.

9. Confidentiality

9.1 Confidential Information

The terms and conditions of all information provided by the Access Provider or the Operator to each other under or in connection with this Process and Protocol (the **Confidential Information**) are confidential.

9.2 Prohibition of disclosure of Confidential Information

Each of the Access Provider and the Operator undertakes to the other that it, its officers, employees, agents and subcontractors will not, without the consent (which consent will not unreasonably be withheld or delayed) of the other party, disclose Confidential Information to any person, unless the disclosure:

- (a) is of Confidential Information already within the public domain other than as a result of a breach of this Process and Protocol;
- (b) is of Confidential Information already known to that person (as evidenced by the person's written records) at the date of disclosure;
- (c) is to be made to the professional advisers (including legal and financial) of the disclosing party, provided that the disclosee agrees to keep the Confidential Information confidential;
- (d) is to be made to a Related Body Corporate of the disclosing party, provided that the disclosee agrees to keep the Confidential Information confidential;
- (e) is required by Law (including the Act or the Guidelines), or any Governmental Agency acting or purporting to act within its powers and functions, or by the requirements of Accreditation;
- (f) is reasonably necessary for the purposes of any mediation, expert determination, arbitration or legal proceeding involving the Access Provider or the Operator;
- (g) relates to information consisting of aggregate freight or aggregate passenger volume data for all operators or other aggregate usage statistics provided by the Operator to the Access Provider (but this does not permit the disclosure by the Access Provider of information relating to costs, payments, receipts or profits of the Operator);
- (h) is to the ACCC for the purposes of Part IIIA of the *Trade Practices Act 1974* (Cth) or to the ESC for the purposes of the Act or the Guidelines; or
- (i) is by the Access Provider to the manager of the Victorian country rail network for the purposes of managing the interface between the Network and the Victorian country rail network, provided that the disclosee agrees to keep the Confidential Information confidential.

9.3 Disclosure for purposes of this Process and Protocol

The Access Provider and the Operator must take all steps reasonably necessary to ensure that Confidential Information is disclosed only to such of its or its Related Body Corporate's officers, employees, agents or subcontractors who require that knowledge in order to carry out their duties in relation to this Process and Protocol. The Access Provider will comply with its Information Handling Protocol.

9.4 Disclosure to State

Nothing in this paragraph 9 prevents the disclosure of Confidential Information to the Director or any minister, officer, employee, agent, adviser or consultant of the State of Victoria or a governmental agency of that State.

9.5 Confidentiality continues

The obligation of confidentiality under this paragraph is a continuing obligation and remains in force from the date upon which the Operator makes a request under paragraph 3.2 and afterwards for a period of years.

10. Schedule 1 – Access Application Form

ACCESS APPLICATION

To: Metro Trains Melbourne Pty Ltd
Level 24
1 Spring Street
Melbourne Vic 3000
(**“Access Provider”**)

This access application is made in accordance with the Access Provider's Train Path Request Process and Protocol dated 1 July 2011 (**“MTM Request Process”**) by:

Operator Name

Operator ABN
(**“Operator”**)

- 1 The Operator agrees to comply with and be bound by the MTM Request Process.
- 2 The Required Information is attached to this Access Application and the Required Information is true and correct.

Dated []

Executed by the Operator in accordance with Section 127 of the *Corporations Act* in the presence of:

Director

Director/Secretary

Name (please print)

Name (please print)

11. Schedule 2 – Required Information

The following information is required to be provided to the Access Provider by an Operator seeking access to the Network.

1. Corporate Information

- 1.1 Name.
- 1.2 ABN.
- 1.3 Names and address of directors and secretary.
- 1.4 List of any shareholders holding 5% or more of Operator's issued share capital.
- 1.5 Details of ultimate holding company.
- 1.6 If Operator is the trustee of a trust:
 - (a) copy of the trust deed;
 - (b) details of the beneficiaries of the trust.

2. Financial Information

- 2.1 Copy of the audited (including an auditor's certificate) or unaudited accounts of the Operator signed within 1 year of the application date.
- 2.2 A statutory declaration signed by a director of the Operator to the effect that there has been no material adverse change in the financial position of the Operator since the date of the audited accounts provided under paragraph 2.1.
- 2.3 A letter from an Australian bank or financial institution confirming that if the Operator is granted access to the Network the bank or financial institution will provide an unconditional performance bond in favour of the Access Provider up to \$500,000.

3. Proposed Rail Operation

- 3.1 Description of the rail operation to be carried out by the Operator, including points of origin and destination on the Network, frequency and timing between the points of origin and destination, any stops en route between origin and designation and the duration of any such stops.
- 3.2 Details of the proposed Rolling Stock, including the nature and number of wagons, the number of locomotives, total length of Trains, performance characteristics and axle loads.
- 3.3 Evidence that the Rolling Stock complies with any rolling stock standards or other requirements of the Access Provider, including the Addenda as otherwise detailed in the Pro-forma Access Agreement.
- 3.4 The type of freight to be carried including tonnage, seasonal variations, handling requirements and any safe working requirements.

4. Access Agreements

- 4.1 A schedule of any amendments to the Pro forma Access Agreement proposed by the Operator.
- 4.2 Details of the legal representatives of the Operator who would be involved in negotiation of the Access Agreement.
- 4.3 Details of any other rail access agreements in Australia to which the Operator or any Related Body Corporate is a party, including details of any material default by the Operator or Related Body Corporate under those agreements or any material dispute with the relevant access provider.

5. Operational Capacity

- 5.1 Evidence that the Operator's management have the necessary experience and qualifications to carry out the proposed rail operation.
- 5.2 Details of any prosecution or governmental inquiry involving the operations of the Operator during the last 3 years.
- 5.3 Details of any accident or material incident involving the Rolling Stock of the Operator during the last 3 years.
- 5.4 Evidence that the Operator has (or will have) the necessary Accreditation to carry out the proposed rail operation.

6. Third Party Operator

If the Operator proposes to contract operation of the proposed rail operation to a third party – the information set out in the other paragraphs of this Schedule 2 in relation to that third party.

7. Train Path Details

- 7.1 Details of the type of Train Paths to which access is sought, being a “passenger train path”, “scheduled train path” or “unscheduled train path” (as defined in the Capacity Use Rules).
- 7.2 Details as to the likely usage of the Train Paths.

8. Insurance Details

Written confirmation from an insurance company or insurance broker confirming that public liability insurance of not less than \$250 million coverage will be provided on behalf of the Operator if the Operator is granted access to the Network.

9. Contact Details

Contact details for the prime contact person of the Operator with whom the Access Provider may liaise regarding the access application.

10. Schedule 3

Pro forma Access Agreement

[provided separately]