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# RAIL OPERATOR ACCESS AGREEMENT FOR PORT BOTANY

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Date:

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## 1 Parties

<b>Patrick</b>	Name	<b>Patrick Stevedore Operations Pty Limited</b>
	ABN	64 056 292 687
	Address	Gate 105A, Penrhyn Road, Port Botany
	Email	[Insert]
	Attention	[Insert]
<b>Access Holder</b>	Name	<b>[Insert Access Holder Details]</b>
	ABN	[Insert Access Holder Details]
	Address	[Insert Access Holder Details]
	Email	[Insert Access Holder Details]
	Attention	[Insert Access Holder Details]

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## 2 Background

This Access Agreement sets out the terms and conditions on which Patrick agrees to allow the Access Holder to Access the Patrick Rail Terminal and to provide the Rail Terminal Services at Port Botany.

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## 3 Rail access windows and services to be provided by Patrick

### 3.1 Rail Terminal Services

The Access Holder agrees to acquire and Patrick agrees to provide in accordance with this Access Agreement the Rail Terminal Services and the Patrick Loading and Unloading Services.

### 3.2 Rail Access Windows

- (a) The Access Holder is allocated the Rail Access Windows set out in Schedule 1.

### 3.3 Compliance with information provision requirements and withdrawal of Rail Access Windows

- (a) The Access Holder must comply with the information provision obligations set out in the Terminal Access and Operating Protocol, including but not limited to the BAPLIE Train Consist information requirements, PRA and EIDO information.
- (b) The Access Holder acknowledges that Patrick may withdraw the Access Holder's allocated Rail Access Windows in accordance with the terms of Terminal Access and Operating Protocol or this Access Agreement.

- (c) In the event that any of the Access Holder's Rail Access Windows are to be withdrawn in accordance with the Terminal Access and Operating Protocol or this Access Agreement:
    - (i) Patrick will give the Access Holder not less than one (1) month's written notice of the withdrawal; and
    - (ii) upon expiration of that period of notice, the Rail Access Window allocated by Patrick to the Access Holder shall be adjusted accordingly.
  - (d) The Access Holder acknowledges that Patrick may need to carry out maintenance at the Patrick Rail Terminal from time to time:
    - (i) for scheduled maintenance, Patrick will use all reasonable endeavours to provide affected Access Holders with at least one (1) weeks' notice of the maintenance and any likely impact on the Access Holder's Access or use of the Patrick Rail Terminal; or
    - (ii) for unscheduled maintenance, Patrick will provide notice to affected Access Holders as soon as reasonably practicable after becoming aware of the need to undertake such maintenance.
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## 4 Terminal Access and Operating Protocol

Patrick and the Access Holder acknowledge and agree that this Access Agreement is subject to the provisions of the Terminal Access and Operating Protocol as amended from time to time. A copy of the Terminal Access and Operating Protocol is available on Patrick's website.

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## 5 Service and Access Charges

### 5.1 Applicable Charges

- (a) In consideration of allowing the Access Holder to Access the Rail Terminal Services in accordance with this Access Agreement and the provision of the Patrick Loading and Unloading Services, the Access Holder will pay to Patrick the relevant fees as specified in the Ministerial Direction.
- (b) The Access Holder will pay to Patrick all other applicable container terminal fees and charges as specified in the Public Container Terminal Tariff Schedule. The Access Holder acknowledges that the Public Container Terminal Tariff Schedule may be amended by Patrick from time to time.
- (c) The Access Holder acknowledges and agrees that Patrick will not load or unload any Container that is subject to unpaid fees or charges, including storage fees.

### 5.2 Cancellations

- (a) If a scheduled Rail Access Window is cancelled either by Patrick or the Access Holder 48 hours or more prior to the scheduled commencement time for the Rail Access Window, Patrick will not charge for that cancelled Rail Access Window.
- (b) If the Access Holder cancels a scheduled Rail Access Window less than 48 hours prior to the time that the Rail Access Window was due to commence (**Access Holder Cancelled Rail Access Window**), Patrick may charge the Access Holder for that Access Holder Cancelled Rail Access Window an amount that will not exceed the maximum amount that Patrick would be entitled to charge, if it had performed:
  - (i) 36 lifts in the first 60 minutes after the commencement time for that Access Holder Cancelled Rail Access Window; and

- (ii) 9 lifts in each 15 minute period thereafter until the end time of that Access Holder Cancelled Rail Access Window.
- (c) If Patrick cancels a scheduled Rail Access Window less than 48 hours prior to the time that the Rail Access Window was due to commence (**Patrick Cancelled Rail Access Window**):
  - (i) Patrick will not charge the affected Access Holder in relation to that Patrick Cancelled Rail Access Window; and
  - (ii) the amount that Patrick charges the affected Access Holder for performing Rail Terminal Services and Patrick Loading and Unloading Services in relation to the next Rail Access Window which has an equivalent duration to the Patrick Cancelled Rail Access Window must be reduced by an amount which is equal to the maximum that Patrick would have been entitled to charge, if Patrick had performed:
    - (A) 36 lifts in the first 60 minutes after the commencement time for that Patrick Cancelled Rail Access Window; and
    - (B) 9 lifts in each 15 minute period thereafter until the end time of that Patrick Cancelled Rail Access Window.
- (d) For the avoidance of doubt, if there is an accumulation of Patrick Cancelled Rail Access Windows such that there is more than one Patrick Cancelled Rail Access Window of the same duration before a reduction under clause 5.2(c)(ii) is made, clause 5.2(c)(ii) will apply separately in relation to each Patrick Cancelled Rail Access Window and the second reduction will only apply in relation to the second accumulated Patrick Cancelled Rail Access Window, and so on for the remaining accumulated Patrick Cancelled Rail Access Windows.
- (e) If the amount that Patrick may charge for performing the lifts is required to be decreased or reduced to an amount that is less than zero (**Negative Amount**), the Negative Amount will be carried forward as a reduction to the amount that Patrick next charges for performing Rail Terminal Services and Patrick Loading and Unloading Services.

### 5.3 Access Holder Payment

- (a) The Access Holder must pay each tax invoice issued by Patrick within thirty (30) days of the date of the tax invoice without discount, deduction, counterclaim or set-off. Payments must be made in accordance with the payment instructions specified on the relevant tax invoice (unless otherwise agreed by Patrick in writing).
- (b) If the Access Holder disputes any aspect of a tax invoice issued by Patrick, the Access Holder must notify Patrick of the issue, in writing, within fourteen (14) days of the date of the tax invoice.

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## 6 Rights and Responsibilities

- (a) The Access Holder and its Associates' Access to the Patrick Rail Terminal is conditional upon the Access Holder and each of its Associates complying with the terms of this Access Agreement, the Terminal Access and Operating Protocol, the Patrick Systems and the Patrick Code of Conduct.
- (b) The Access Holder and its Associates' Access to the Patrick Rail Terminal is conditional upon the Access Holder and each of its Associates completing the Rail Site Induction which must be conducted every two years unless refresher training is required earlier as determined by Patrick in its discretion.
- (c) The Access Holder and its Associates must provide Patrick with any information that Patrick reasonably requires for the efficient conduct of the provision of the Rail Terminal Services,

including any notice or other information specified in this Access Agreement or in the Terminal Access and Operating Protocol, in a timely manner.

- (d) The Access Holder and its Associates must be and remain compliant with all applicable laws and regulations and have and maintain all necessary accreditations, licences and approvals (including under the Rail Safety Act), and provide Patrick with all necessary assistance, information and documentation to enable Patrick to comply with such laws and to verify compliance with such laws by the Access Holder and its Associates.
- (e) The Access Holder and its Associates must remain compliant with all of the Eligibility Requirements during the term of this Access Agreement and will provide Patrick with any information Patrick reasonably requires to ensure that the Access Holder continues to meet the Eligibility Requirements.
- (f) The Access Holder must ensure that the Access Holder's Associates are aware of and comply with all applicable laws and all reasonable lawful directions and orders given by Patrick in accordance with this Access Agreement or any person authorised by law to give directions to the Access Holder and its Associates.
- (g) The Access Holder must ensure that neither it, nor any of its Associates, enter the Patrick Rail Terminal under the influence of, or with the presence of, alcohol or illicit drugs in their system, nor drink, smoke or consume alcohol or illicit drugs while at the Patrick Rail Terminal. The Access Holder and its Associates may be required to participate in drug and alcohol testing carried out by or on behalf of Patrick.
- (h) The Access Holder and its Associates must comply with all applicable legal and regulatory obligations with respect to the provision of information relating to Containers and their cargo (including by lodging PRAs and EIDOs within the required timeframes) and the Access Holder and its Associates warrant that all information supplied to Patrick is complete and accurate in all respects.
- (i) The Access Holder and its Associates must ensure that any information or data it provides to Patrick is free from any viruses or malware.
- (j) The Access Holder acknowledges that all loading and unloading of Containers onto or from any Train in the Patrick Rail Terminal will be undertaken by and under the control of Patrick.
- (k) The Access Holder acknowledges and agrees that Patrick relies on the accuracy of data and information provided by the Access Holder and its Associates and / or by other third parties. Patrick has no ability nor obligation to verify such data and information, or to inspect a Container and no such inspection will increase Patrick's Liability under this Agreement.
- (l) If, in Patrick's reasonable opinion, an Associate of the Access Holder is not acting in accordance with the requirements of this Agreement, Patrick may require the Access Holder to replace such Associate. If the Access Holder or the relevant Associate does not comply with this requirement, Patrick may at its discretion require the Access Holder or the relevant Associate to complete refresher training, restrict Access to the Patrick Rail Terminal or declare an Event of Default, in which case clause 12 will be applicable.

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## **7 Health and Safety, Dangerous Goods and Environmental Protection**

- (a) The Access Holder will and will ensure that each of its Associates comply with the Terminal Access and Operating Protocol in respect of Health & Safety Law and Dangerous Goods Law.
- (b) Patrick and the Access Holder acknowledge and agree that each of them have obligations under the Health and Safety Law, the Dangerous Goods Law and the Environmental Laws.

- (c) Without limiting any other provision of this Agreement, the Access Holder must comply with, and ensure that its Associates comply with, the Health and Safety Law, the Dangerous Goods Law and the Environmental Laws and must retain proper, complete and accurate records of such compliance. The Access Holder shall provide details of such records to Patrick on request.
  - (d) The Access Holder must implement, maintain, enforce and regularly review its own Access Holder Systems and must take all reasonably practicable steps to ensure that its Associates are adequately trained in and understand the Access Holder Systems. If requested by Patrick, the Access Holder must produce to Patrick a copy of its Access Holder Systems together with reasonable evidence of compliance with the same.
  - (e) The Access Holder must immediately report to Patrick any instance where the Access Holder has received a notice or penalty from a relevant regulator (including any Government Agency) relating to non-compliance or potential non-compliance with the Health and Safety Law, the Dangerous Goods Law and / or the Environmental Laws.
  - (f) In certain circumstances, Patrick may be legally obligated to report serious breaches (or near-misses) of the Health and Safety Law, the Dangerous Goods Law and / or the Environmental Laws to a relevant regulator or to a Government Agency.
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## **8 Liability and Indemnities**

### **8.1 Patrick Liability**

- (a) Except to the extent caused or contributed to by a negligent act or omission of Patrick or breach of this Agreement by Patrick, Patrick will not be liable in tort, contract, bailment or otherwise to the Access Holder for anything arising out of or relating to any:
  - (i) breach of this Agreement or negligence by the Access Holder or its Associates;
  - (ii) incident, including (without limitation) discharge, spill or release of a Contaminant;
  - (iii) damage or deterioration of any tangible property (including any rolling stock, locomotive, wagon, truck or other equipment or vehicle);
  - (iv) damage to any Container or its contents; or
  - (v) acts or omissions of any third party.

### **8.2 Limitations on Liability**

- (a) The Access Holder may only make a Claim against Patrick if the Claim exceeds the Liability Floor Amount for any one event.
- (b) Patrick's Liability under this Agreement and at law will be limited in all cases and howsoever arising to loss or damage resulting directly from and only to the extent caused or contributed to by Patrick's negligence or default in accordance with the following limits:
  - (i) insofar as the Liability relates to damage to a Container and contents of a Container while at the Patrick Rail Terminal, up to a maximum of \$15,000 for any one event or a series of related events;
  - (ii) insofar as the Liability relates to damage to a Train while at the Patrick Rail Terminal, up to a maximum of \$1,000,000 for any one event or a series of related events; and
  - (iii) insofar as the Liability relates to any Liability not covered in 8.2(b)(i) or (8.2(b)(ii) above, \$100,000 for any one event or series of related events.

### **8.3 Indemnity**

- (a) The Access Holder will be liable for, and agrees to indemnify Patrick and its Associates in respect of any Liability arising from an act or omission by the Access Holder or any of its Associates which gives rise to:
- (i) damage to the Patrick Rail Terminal and / or the surrounding environment;
  - (ii) any discharge, spill or release of a Contaminant;
  - (iii) damage to, deterioration or contamination of any tangible property;
  - (iv) personal injury (including sickness or death); or
  - (v) a breach of any law or regulation,

except to the extent that the Liability was caused or contributed to by the negligent act or omission or breach of this Agreement by Patrick or its Associates.

### **8.4 Consequential Loss**

Notwithstanding anything else in this Agreement, neither party shall have any Liability to the other in connection with this Agreement, whether in tort (including in negligence), contract, bailment, under an indemnity or otherwise, for Consequential Loss.

### **8.5 Notification of Claims**

- (a) A party will not be liable for any Claim by the other party unless notice of the Claim is given to the first party within fourteen (14) days of the date of the relevant incident giving rise to the Claim.
- (b) A party will be discharged from all Liability for a Claim unless proceedings are commenced within one (1) year of the date that notice of that Claim was given to the first party.

### **8.6 Non-excludable rights**

- (a) To the extent permitted by law, and except as expressly set out in this Access Agreement, Patrick makes no and expressly excludes all warranties and representations with respect to the Rail Terminal Services and Patrick Loading and Unloading Services.
- (b) Patrick's Liability to the Access Holder for a breach of any warranty, statutory guarantee or condition regarding the Rail Terminal Services or Patrick Loading and Unloading Services that cannot by law be excluded is limited, at Patrick's option and where permitted by law, to:
- (i) supplying the Rail Terminal Services or Patrick Loading and Unloading Services again; or
  - (ii) the payment of the cost of having the Rail Terminal Services or Patrick Loading and Unloading Services supplied again.

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## **9 Insurance**

- (a) The Access Holder must, at its own expense, effect the following minimum insurances with a reputable insurer, with a minimum Standard & Poors rating of at least 'A', on or before the commencement of this Access Agreement until its cessation:
- (i) public liability insurance in respect of third party property damage and injury to persons (including damage to property in the Access Holder's care, custody or control and sudden

and accidental pollution) to a minimum value of \$20,000,000 for any one occurrence and unlimited in the aggregate; and

- (ii) physical loss or damage insurance for any Rolling Stock or locomotive used not less than \$20,000,000; and
  - (iii) employer's liability and workers' compensation insurance (including common law liability) as required under any applicable workers' compensation law; and
  - (iv) such other insurances as are required by law or good industry practice.
- (b) The Access Holder must produce evidence to Patrick of the valid insurance policies referred to in this clause 9 on request.
- (c) The Access Holder warrants to Patrick that it will maintain all of the insurances required by this clause 9 for the term of this Agreement and, in the case of insurance policies entered into on a claims-made basis, for a further six (6) years following the expiry or termination of this Agreement.

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## 10 Dispute Resolution Process

### 10.1 Dispute Resolution Process

- (a) If a bona fide Dispute arises between Patrick and the Access Holder in relation to Access to Rail Terminal Services it will be resolved in accordance with the dispute resolution process set out in this clause 10. Patrick will not consider any Vexatious Claims under the Dispute resolution process.
- (b) This clause 10 dispute resolution process does not apply to the Rail Access Window Utilisation procedure in the Terminal Access and Operating Protocol.

### 10.2 Raising a Dispute

- (a) If a Dispute arises, a party claiming the Dispute must promptly notify the other party in writing of the existence and nature of the Dispute and the parties will endeavour to settle the Dispute in good faith within ten (10) Business Days of written notification of the Dispute.

### 10.3 Negotiation

- (a) Where a Dispute cannot be settled in accordance with clause 10.2(a), senior representatives of each party must meet and undertake genuine and good faith negotiations with a view to resolving the Dispute expeditiously by joint discussion within seven (7) days.

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## 11 Force Majeure

- (a) Subject to any applicable regulatory requirements, a party will be released from its obligations under this Access Agreement (except an obligation to pay monies or that otherwise arises under the Ministerial Direction) to the extent and for the duration that performance of this Access Agreement is delayed, hindered or prevented by a Force Majeure Event.
- (b) If a Force Majeure Event occurs or is likely to occur, the affected party must give prompt notice of the Force Majeure Event to the other party and must detail what action is being taken to overcome its effects in writing (including by email).
- (c) The affected party must use its reasonable endeavours to promptly overcome any Force Majeure Event and restore its ability to perform as soon as possible. However,



- (i) nothing will oblige the affected party to settle any strike or other industrial dispute on terms contrary to the affected party's wishes; and
  - (ii) nothing will oblige the affected party to contest the validity or enforceability of any law, regulation or legally enforceable order by way of legal proceedings.
- (d) The non-affected party will provide reasonable assistance to the affected party if a Force Majeure Event occurs.
  - (e) The affected party must resume its obligations under this Agreement as soon as it is no longer affected by a Force Majeure Event.
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## 12 Default and Termination

### 12.1 Default and Termination

- (a) Without prejudice to its other rights against the Access Holder under this Agreement, Patrick may at any time after an Event of Default occurs:
  - (i) suspend the Access Holder's right (or the right of a specific Associate of the Access Holder) to Access the Rail Terminal Services; or
  - (ii) terminate this Access Agreement (or indefinitely prevent a specific Associate of the Access Holder from accessing the Rail Terminal Services),

in each case with immediate effect by giving notice in writing to the Access Holder (a **Default Notice**).

- (b) If an Event of Default relates only to a specific Associate of the Access Holder, Patrick may restrict the exercise of its rights under clause 12.1(a) to that specific Associate, where Patrick considers that doing so would be sufficient to address the Event of Default and adequately protect Patrick's business interests (including having regard to whether that Associate's failure is indicative of any broader failure of the Access Holder to impose and enforce the Access Holder Systems and otherwise require compliance by its Associates with this Agreement).
- (c) In circumstances where Patrick commits an act of default under this Access Agreement, the Access Holder may terminate this Access Agreement by notice to Patrick in writing.

### 12.2 Suspension

If Patrick elects to suspend the Access Holder's right (or the right of a specific Associate of the Access Holder) to Access the Rail Terminal Services under clause 12.1(a)(i), the Default Notice shall state:

- (a) the reason that Patrick has elected to suspend the relevant rights;
- (b) acting reasonably, the steps that the Access Holder and / or the relevant Associate must take to remedy the breach in order for the suspension to be removed; and
- (c) the date (the **Remedy Date**) by which the Access Holder must take those steps.

### 12.3 After Expiry or Termination

On expiry or termination, each party retains the rights it had against the other party in respect of any past breach, in addition to any other rights, powers or remedies provided by law.



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## 13 Miscellaneous Provisions

### 13.1 Notices

- (a) Subject to clause 13.1(b), a notice, consent or other communication by a party under this Access Agreement must be in writing and must either be delivered by hand, sent by pre-paid registered mail or courier to the registered head office of the other party or sent by email (in which case the machine from which the communication was sent must produce a report that confirms that the message was successfully delivered, in full).
- (b) A notice, consent or other communication by a party under this Access Agreement in relation to Liabilities which have or may have arisen under this Access Agreement must not be given by email.
- (c) A notice, consent or other communication that complies with this clause is regarded as being given and received:
  - (i) if it is delivered by hand, by pre-paid registered mail, by courier or by other similar traceable form of delivery - on actual receipt; or
  - (ii) if it is delivered by email, on the Business Day on which it was received (or, if received after 5:00pm local time in the place of receipt, on the next Business Day).

### 13.2 Governing Law and Jurisdiction

This Access Agreement will be governed and construed in accordance with the law applying in the Jurisdiction and each party irrevocably submits to the exclusive jurisdiction of the courts in the Jurisdiction.

### 13.3 Amendment

- (a) Patrick may amend the Terminal Access and Operating Protocol and Public Container Terminal Tariff Schedule from time to time.
- (b) Prior to making amendments in accordance with this clause, Patrick must provide the Access Holder with reasonable notice in writing of the proposed amendment, being at least one (1) months' notice, unless a shorter period of time is required in response to changes to (or the introduction of) any law or regulation or for urgent operational reasons.
- (c) Patrick may amend this Access Agreement to comply with any regulatory directions, applicable laws or otherwise as reasonably required from time to time. Patrick will notify the Access Holder of any required amendments under this clause in writing as soon as reasonably practicable.

### 13.4 Assignment

- (a) The Access Holder's rights, interests, entitlements and obligations under this Access Agreement are not capable of being assigned or transferred without the prior written consent of Patrick.
- (b) Patrick may assign or transfer this Access Agreement without the Access Holder's consent.

### 13.5 Waiver of rights

- (a) Failure to or delay in enforcing or exercising, or the partial exercise or enforcement of a right, power or remedy provided by law or under this Access Agreement does not preclude a party from exercising or enforcing that right, power or remedy in future.

- (b) Any waiver of a breach of this Access Agreement must be in writing signed by the party granting the waiver and is effective only to the extent specifically set out in that waiver. A waiver of a breach of any term of this Access Agreement will be limited to that term and instance specified.

### **13.6 Severability**

- (a) Any provision in this Access Agreement that is prohibited or unenforceable (or found to be so) in the Jurisdiction is ineffective in that Jurisdiction to the extent of the prohibition or unenforceability.
- (b) Such prohibition or unenforceability shall not invalidate the remaining provisions of this Access Agreement nor affect the validity or enforceability of that provision in any other Jurisdiction.

### **13.7 Relationship**

Nothing in this Access Agreement creates a relationship of employer and employee, principal and agent, partnership or similar between the parties.

### **13.8 Rights**

- (a) All rights, immunities, indemnities and limitations of Liability in this Access Agreement will continue to have their full force and effect in all circumstances and notwithstanding any breach of this Access Agreement by a party or any other person entitled to the benefit of such provisions, or termination of this Access Agreement.
- (b) Any right that a person may have under this Access Agreement is in addition to, and does not replace or limit, any other right that the person may have.

### **13.9 Goods and Services Tax**

- (a) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Access Agreement are exclusive of GST.
- (b) If GST is payable by a supplier, or by the representative member for a GST group of which the supplier is a member, on any supply made under this Access Agreement, the recipient will pay to the supplier an amount equal to the GST payable on the supply.
- (c) The recipient will pay the amount referred to in clause 13.9(b) in addition to and at the same time that the consideration for the supply is to be provided under this Access Agreement.
- (d) The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 13.9(b). The recipient can withhold payment of the amount until the supplier provides a tax invoice or an adjustment note, as appropriate.
- (e) If an adjustment event arises in respect of a taxable supply made by a supplier under this Access Agreement, the amount payable by the recipient under clause 13.9(b) will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.
- (f) Where a party is required under this Access Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
  - (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
  - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.

- (g) In this clause 13.9, words and expressions which are not defined in this Access Agreement but which have a defined meaning in GST Law, have the same meaning as in the GST Law.

### **13.10 Entire Agreement**

- (a) Nothing in this Access Agreement limits or excludes any Liability either party may have in connection with any representations or other communications (either oral or written) made prior to or during the term of this Access Agreement, where such Liability cannot be limited or excluded.
- (b) Subject to paragraph 13.10(a), this Access Agreement supersedes all previous agreements, understandings, negotiations, representations and warranties about its subject matter and embodies the entire agreement between the parties about its subject matter.

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## **14 Confidentiality**

### **14.1 Confidential Information**

- (a) Subject to sub-clause 14.2, a party (**Recipient**) must keep confidential any Confidential Information provided by the other party (**Discloser**) and only allow an officer, employee, agent or contractor who works for the Recipient to access that Confidential Information for the purpose of:
- (i) providing the Rail Terminal Services and the Patrick Loading and Unloading Services to the Access Holder;
  - (ii) administering this Access Agreement and the Terminal Access and Operating Protocol;
  - (iii) resolving a Dispute; or
  - (iv) as otherwise agreed by the Discloser.

### **14.2 Permitted disclosure of Confidential Information**

The Discloser is permitted to disclose Confidential Information:

- (a) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers, provided they are under a legal obligation not to disclose the Confidential Information to any third party;
- (b) to any third party appointed for the purposes of resolving a particular dispute provided they are under a legal obligation not to disclose the Confidential Information publicly or to any third party;
- (c) to NSW Ports for the purpose of NSW Ports monitoring Patrick's compliance with its open access obligations subject to NSW Ports agreeing to be bound by the same obligations not to disclose the Confidential Information publicly or to any third party; and
- (d) if, and to the extent required by law, provided that it first consults with Discloser in relation to the manner and timing of that disclosure.

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## 15 Definitions

### 15.1 Defined terms

In this Agreement:

**Access** means a right to access Rail Terminal Services for the purpose of the carriage of freight by rail by the Access Holder:

- (a) from the Commencement Point to the Patrick Rail Terminal and to the End Point; and
- (b) from the Patrick Rail Terminal and the End Point to the Commencement Point.

**Access Agreement** means this contract under and by which Patrick grants to an Applicant who meets and satisfies the Eligibility Requirements, Access to Rail Terminal Services.

**Access Holder** means an Applicant:

- (a) who meets and satisfies the Eligibility Requirements; and

who is granted Access to Rail Terminal Services by Patrick and enters into an Access Agreement with Patrick (referred to in this Access Agreement as the Access Holder).

**Access Holder Systems** means the comprehensive policies, procedures and systems in relation to compliance with and management of the Access Holder's various obligations under the Health and Safety Law, the Dangerous Goods Law and the Environmental Laws (and all other applicable laws and regulations).

**Access Proposal** means a written proposal made by an Applicant to Patrick for Access to Rail Terminal Services.

**Accredited Rail Operator** means a person accredited as an operator as defined in the Rail Safety Act.

**Applicant** means an Accredited Rail Operator who submits an Access Proposal to Patrick.

**Associate** means a party's employees, officers, servants, agents, invitees, subcontractors, customers and Related Body Corporate. For the avoidance of doubt the Access Holder is not an Associate of Patrick.

**BAPLIE Train Consist** means the business rules and structure elements associated with the UNEDIFACT BAPLIE document that is available from the 1-Stop website.

**Business Day** means a day that is not a Saturday, Sunday, Closed Port Day or public holiday in Sydney, New South Wales.

**Claim** includes a notice, demand, claim, action, litigation, judgment, damage, loss, cost, expense or proceeding however arising, made or brought by or against any person, whether present, unascertained, immediate, future or contingent, whether based in contract, tort, statute or other legal doctrine and whether involving a third party or a party to this Agreement.

**Closed Port Day** means any days which the relevant port authority or port operator designates as closed port days including, but not limited to, Christmas Day, Good Friday, Anzac Day, Labour Day and Maritime Union of Australia Picnic Day.

**Commencement Point** means that point of the Rail Terminal Track as identified on the plan in **Annexure B** of the Terminal Access and Operating Protocol.

**Confidential Information** means information provided to Patrick by the Access Holder in confidence under or in connection with this Access Agreement or the Terminal Access and Operating Protocol and vice versa.

**Consequential Loss** means any indirect, consequential, special or incidental loss or damage.

**Container** means a standard ISO shipping container unit used for storage and transport purposes in the shipping industry.

**Contaminant** means a noxious or hazardous substance which, having regard to the quantity and location of the substance and other substances in conjunction with which it is stored or used, is capable of causing or presenting risk of material harm to human health or any other aspect of the environment.

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

**Dangerous Goods** means dangerous goods as defined in the International Maritime Dangerous Goods (IMDG) Code or the Australian Dangerous Goods Code (7th Edition) and any goods / cargo which are or which may become dangerous, volatile, explosive, flammable or offensive or which are or may become harmful to any person, property or the environment.

**Dangerous Goods Law** means, insofar as it applies to the Jurisdiction, any law or regulation relating to the carriage or storage of Dangerous Goods or hazardous substances.

**Default Notice** has the meaning in clause 12.1(a).

**Dispute** means any controversy, Claim or dispute arising out of or in relation to this Access Agreement.

**EIDO** means an Electronic Import Delivery Order.

**Eligibility Requirements** means the requirements set out in clause 3 of the Terminal Access and Operating Protocol.

**End Point** means that point of the Rail Terminal Track as identified on the plan in **Annexure B** of the Terminal Access and Operating Protocol.

**Environmental Laws** means any law or regulation relating to the protection of the environment and / or natural resources, and includes the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the *Environmental Planning and Assessment Act 1979* (NSW).

**Event of Default** means any one or more of the following:

- (a) the Access Holder or any Associate fails to comply with any provision of this Access Agreement (including the payment of the fees in accordance with clause 5.1) which failure is capable of remedy and the Access Holder does not remedy that failure within five (5) Business Days after receipt of written notice from Patrick requiring it to be remedied;
- (b) the Access Holder or any Associate fails to comply with any provision of this Access Agreement (including the payment of the fees in accordance with clause 5.1) which failure is not capable of remedy;
- (c) the Access Holder or any Associate repeatedly or persistently breaches this Access Agreement, regardless of whether those breaches are capable of, or are, remedied;
- (d) the Access Holder or any Associate fails to materially comply with this Access Agreement, irrespective of whether that failure is capable of remedy (which includes a failure to participate in post incident drug and alcohol testing);

- (e) Patrick has suspended the Access Holder's right (or the right of a specific Associate of the Access Holder) to Access the Patrick Rail Terminal under clause 12.1(a)(i), and the Access Holder and / or the relevant Associate fails to remedy the breach to Patrick's reasonable satisfaction by the Remedy Date;
- (f) there is a change in control of the Access Holder;
- (g) the Access Holder is subject to an Insolvency Event; and
- (h) any other event occurs or circumstance arises which, in the reasonable opinion of Patrick, is likely to materially and adversely affect the ability of the Access Holder or any Associate to comply with this Access Agreement, and that event or those circumstances continue for five (5) Business Days after receipt of written notice to the Access Holder from Patrick.

**Force Majeure Event** means acts of god (storms, cyclones, epidemics, natural disasters etc.), strikes, terrorism, acts of a public enemy, riots, malicious damage, sabotage, and / or any production or operational shutdown which is ordered by a Government Agency or by law or regulation (albeit which is not due to the act or default of the affected party) and other similar events or circumstances, which cause a party to be delayed or unable, wholly or in part, to perform any obligations under this Agreement but which the affected party is not able to prevent or overcome, or the effects of which the affected party is not reasonably able to predict and take measures to avoid by the exercise of reasonable operational, technical and commercial diligence and prudence.

**Government Agency** means a government or government department or other body, a governmental, semi-governmental or judicial person, or a person (whether autonomous or not) who is charged with the administration of a law or regulation.

**GST Law** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Health and Safety Law** means, insofar as it applies to the Jurisdiction, any law or regulation relating to workplace health and safety including the SOLAS Requirements.

**Insolvency Event** means being in liquidation or provisional liquidation or under administration, having a controller or receiver (as defined in the Corporations Act) or analogous person appointed to it or any of its property (other than for the purpose of restructuring whilst solvent), being taken under section 459F(1) of that Corporations Act to have failed to comply with a statutory demand, being unable to pay its debts or otherwise insolvent.

**Jurisdiction** means New South Wales.

**Liability** or **Liabilities** means any Claim, loss, liability, cost or expense of any kind and however arising (whether in contract, negligence, another tort, the general law, under statute or otherwise), including damages, penalties, fines and interest, whether actual or contingent, known or unknown and including those which are prospective or contingent and those the amount of which, for the time being, is not ascertained or ascertainable. Liable has a corresponding meaning.

**Liability Floor Amount** means:

- (i) in respect of any loss of damage related to a Train or associated equipment of the Access Holder, the amount of \$20,000; and
- (j) in respect of all other loss or damage, the amount of \$1,000.

**Minimum Service Requirements** has the meaning given in the Terminal Access and Operating Protocol.

**Ministerial Direction** means a Minister's Direction under clause 18W(1) of Part 2B of the Ports and Maritime Administration Regulation 2007 issued to Patrick Stevedores Operations No 2 Pty Ltd and in force from time to time.

**Patrick Code of Conduct** means the Patrick code of conduct a copy of which is available on the Patrick website.

**Patrick Loading and Unloading Services** means the services to be provided by Patrick to the Access Holder of and for the loading and unloading of Containers on to or from any Train on the Rail Terminal Track at or in close proximity to the End Point.

**Patrick Rail Terminal** means the rail terminal more particularly described on the plan in **Annexure B** of the Terminal Access and Operating Protocol.

**Patrick Systems** means the Rail Site Induction and all other policies and procedures applicable to the Patrick Rail Terminal and all reasonable directions issued by Patrick including (without limitation) with respect to health and safety matters and drug and alcohol testing.

**NSW Ports** means Port Botany Operations Pty Limited as trustee for the Port Botany Unit Trust (ABN 25 855 834 182).

**Public Container Terminal Tariff Schedule** means the Patrick Terminal Public Tariffs as applicable to the Access Holder, copies of which are available on the Patrick website.

**PRA** means the container pre-receival advice message describing the characteristics of a Container prior to it arriving at the Patrick Rail Terminal.

**Rail Access Window** means a period:

- (a) commencing at the time allocated by Patrick to an Access Holder for a Train operated by that Access Holder to enter the Patrick Rail Terminal at the Commencement Point; and
- (b) ending at the time allocated by Patrick to that Access Holder for that Train to depart from the End Point and leave the Patrick Rail Terminal at the Commencement Point.

**Rail Access Window Utilisation** has the meaning given in Clause 8 of the Terminal Access and Operating Protocol.

**Rail Safety Act** means the *Rail Safety (Adoption of National Law) Act 2012* (NSW).

**Rail Site Induction** means Patrick's online induction for accessing the Patrick Rail Terminal.

**Rail Terminal Infrastructure** means the combination of the following:

- (a) the Rail Terminal Track; and
- (b) the associated track structures, train control system, signalling system, communications system and other equipment, installations and systems that form an integral part of the Rail Terminal Track;

but excludes the plant, equipment, systems and facilities by which Patrick provides the Patrick Loading and Unloading Services.

**Rail Terminal Services** means the rail services provided by means of Rail Terminal Infrastructure, including opening the gate to allow the Access Holder to arrive a Train and closing the gate after the Access Holder departs the Train, but does not include the Patrick Loading and Unloading Services.



**Rail Terminal Track** means the railway track delineated and more particularly described on the plan in Annexure B of the Terminal Access and Operating Protocol.

**Related Body Corporate** has the meaning given to it in the *Corporations Act 2010* (Cth).

**Remedy Date** has the meaning given in clause 12.2(c).

**Rolling Stock** means a collective term for a group of rail wagons or various types, including locomotives and freight wagons, and can include a single wagon or locomotive and freight wagon where the context requires.

**SOLAS Requirements** means any law or regulation introduced pursuant to the *Safety of Life at Sea (SOLAS) Convention* of the International Maritime Organisation.

**Terminal Access and Operating Protocol** means the rail terminal access and operating protocol published on Patrick's website.

**Train** means a unit or a combination of coupled units of Rolling Stock (one of which must be a locomotive or other self-propelled unit) which comply with the Minimum Service Requirements.

**Vexatious Claim** means a claim that is not made in good faith, pursued regardless of its merits and is unreasonable, without foundation, frivolous, repetitive, burdensome or unwarranted.

## 15.2 Interpretation

The following rules apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply:

- (a) Headings are for convenience only, and do not affect interpretation.
- (b) A reference to:
  - (i) a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
  - (ii) legislation or a code is to that legislation or code as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
  - (iii) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
- (c) A singular word includes the plural, and vice versa.
- (d) A reference to dollars, AUD or \$ is to an amount in Australian currency.
- (e) "Include" and "including" are not words of limitation.
- (f) Where the Access Holder is prohibited from acting or omitting to act in a certain way, the Access Holder must ensure that each of its Associates complies with such prohibition.
- (g) This Access Agreement must not be construed adversely to a party just because that party prepared it or caused it to be prepared.
- (h) Time is of the essence in respect of all timeframes set out in this Access Agreement.
- (i) If a provision or part of a provision of this Access Agreement is illegal, invalid or unenforceable, then that part or part is severed from this Access Agreement and this Access Agreement otherwise remains unaffected.

Signing page

**EXECUTED** by **[RAIL OPERATOR]** )  
**ACN [insert]** in accordance with )  
 Section 127(1) of the *Corporations Act* )  
 2001 (Cth) )

..... )  
 Signature of director )

..... )  
 Name of director (block letters)

..... )  
 Signature of director/company )  
 secretary\* )  
 \*delete whichever is not applicable )

..... )  
 Name of director/company secretary\* )  
 (block letters) )  
 \*delete whichever is not applicable )

**EXECUTED** by by **PATRICK** )  
**STEVEDORES OPERATIONS PTY** )  
**LTD ACN 056 292 687** in accordance )  
 with Section 127(1) of the *Corporations* )  
*Act 2001* (Cth) )

..... )  
 Signature of director )

..... )  
 Name of director (block letters)

..... )  
 Signature of director/company )  
 secretary\* )  
 \*delete whichever is not applicable )

..... )  
 Name of director/company secretary\* )  
 (block letters) )  
 \*delete whichever is not applicable )

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## Schedule 1 Rail Access Windows

Rail Access Window Term	Rail Access Window Times	Rail Access Window Lifts