Software Licence, Support and Maintenance Agreement

Parties

Victorian Rail Track
ABN 55 047 316 805

Trans-Mit Pty Ltd
(ABN 12 100 711 957)

Contents

Agreement dated   1 October 2014

Parties   **Victorian Rail Track ABN 55 047 316 805**
                   Of Level 8, 1010 LaTrobe Street, Docklands, Victoria, 3008
                   (**VicTrack**)

                   Transmit Pty Ltd (ABN 12 100 711 957)
                   Of 7 Wendy Court, Hampton Park, Victoria
                   (**Supplier**)

Introduction

A   VicTrack is a statutory corporation established under section 8 of the *Rail Corporations Act 1996* (Vic) and continued under section 116 of the *Transport Integration Act 2010* (Vic).

B   VicTrack and the Supplier are parties to the Existing Agreements.

C   This Agreement replaces the Existing Agreements.

D   The Supplier has represented that it is able to supply the Software and the Services to VicTrack.

E   The parties have agreed to enter into this Agreement for the Supplier to provide the Software and the Services pursuant to the terms and conditions of this Agreement.

It is agreed

1   Definitions and interpretation

1.1   Definitions

In this Agreement:

(1)   **Additional Services** means any services, not being Services, that are added to the scope of this Agreement as a result of Change Request agreed between the parties;

(2)   **Additional Services Fees** means the fees specified in the Change Request for the provision of Additional Services;

(3)   **Affected Party** has the meaning given to that term in clause 20.1;

(4)   **Agents** of a party include lawyers, accountants and other professional advisers, banks and financiers engaged or consulted by that party;

(5)   **Agreement** means this document, including any schedule or annexure to it;

(6)   **Applicable Laws** means the relevant laws, regulations, industry codes, rules and standards that apply to the Supplier or the supply or use of the Services or the Software;

(7)   **Background IP**

means any and all Intellectual Property Rights :

(a) belonging to or developed solely by one party, including its Representatives prior to the Commencement Date of this Agreement; or

(b) developed by a party, including its Representatives independently of this Agreement,

and includes any and all modifications or adaptations to any such Intellectual Property Rights, whether or not such modifications or adaptations were made in relation to this Agreement or independently.

(8) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made;

(9) **Change Request** means a change request under clause 7 and Schedule 6 to add Additional Services or vary or remove Services from the scope of this Agreement or to otherwise vary or amend the scope of this Agreement or any Fees payable by VicTrack, but excludes any request to vary the terms of this Agreement;

(10) **Claims** means actions, suits, causes of action, proceedings, claims or demands;

(11) **Commencement Date** means the date set out in Item 1 of Schedule 1;

(12) **Confidential Information** means in relation to either party (**Disclosing Party**), information (whether in oral, written or electronic form) belonging or relating to the Disclosing Party, its business affairs, technologies, designs, personnel, copyrights, concepts, methodologies, software or activities which is not in the public domain and which:

(a) the Disclosing Party has marked as confidential or proprietary;

(b) the Disclosing Party has orally or in writing has advised the other party (**Receiving Party**) is of a confidential nature; or

(c) due to its character or nature, a reasonable person in a like position and under like circumstances would treat as confidential;

but does not include information which:

(d) is or comes into the public domain other than breach of confidentiality of the Receiving Party or any of its Personnel;

(e) is lawfully disclosed by a third person to the Receiving Party without any obligation of confidence at the time of disclosure; or

(f) is independently developed by the Receiving Party or its Personnel (as evidenced by written records).

The terms of this Agreement are Confidential Information of both parties. Data is the Confidential Information of VicTrack;

(13) **Data** means information, in whatever form, which is uploaded to, transmitted to or from or stored on the Software or the database with which the Software interacts or integrates;

(14) **Developed Intellectual Property** means any and all Intellectual Property Rights created by or on behalf of the Supplier in the course of providing the Services to VicTrack under this Agreement;

(15) **Dispute** has the meaning given to that term in clause 21.2;

(16) **Dispute Escalation Notice** has the meaning given to that term in clause 21.3(3);

(17) **Dispute Notice** has the meaning given to that term in clause 21.3(1);

(18) **Documentation** means the operating manuals, training manuals and associated documentation more fully described in Schedule 2 including user's manuals, modification manuals, flow charts, drawings and software listings whether in electronic or hard copy form;

(19) **Existing Agreements** means:

   (a) Development Agreement for the commissioning and provision of an Accounts Management and processing system known as "The Pre-processor" between Victorian Rail Track and Trans-Mit Pty Ltd made on or around 5 May 2003; and

   (b) Service and Support Agreement between Trans-Mit Pty Ltd and Victorian Rail Track made on 8 October 2012.

(20) **Fees** means:

   (a) the Software Licence Fee;

   (b) the Services Fees;

   (c) the Additional Services Fees; and

   (d) any other fees and other charges payable by VicTrack in connection with this Agreement;

(21) **Force Majeure Event** is an event, including any natural disasters, health pandemics, acts of terrorism, deliberate vandalism, riots, civil disturbances, industrial disputes and strikes (other than strikes involving the Supplier, its Subcontractors, the Supplier Personnel and their agents, employees and contractors), to the extent that the event:

   (a) is outside of the reasonable control of the party claiming that the event has occurred; and

   (b) the adverse effects of which could not have been prevented or mitigated against by that party by the exercise of reasonable diligence or the taking of reasonable precautionary measures;

(22) **Further Term** means the period set out in Item 3 of Schedule 1;

(23) **Indemnified Parties** means VicTrack, its Related Bodies Corporate and their respective officers and employees;

(24) **Industry Best Practice** means in any circumstances the exercise of the highest degree of skill, care, prudence and foresight reasonably to be expected in those circumstances of skilled and experienced suppliers of information technology services anywhere in the world;

(25)   **Initial Term** means the period set out in Item 2 of Schedule 1;

(26)   **Initiating Party** has the meaning given to that term in clause 21.3(1);

(27)   **Insolvency Event** means the happening of any of these events in relation to a party (**Defaulting Party**):

    (a)   the Defaulting Party suspends payment of its debts;

    (b)   the Defaulting Party becomes an externally-administered body corporate under the *Corporations Act 2001* (Cth);

    (c)   steps are taken by any person towards making the Defaulting Party an externally-administered body corporate (but not where the steps taken consist of making an application to a court and the application is withdrawn or dismissed within 14 days);

    (d)   a controller (as defined in section 9 of the *Corporations Act 2001* (Cth)) is appointed of any of the property of the Defaulting Party or any steps are taken for the appointment of such a person (but not where the steps taken are reversed or abandoned within 14 days);

    (e)   the Defaulting Party is taken to have failed to comply with a statutory demand within the meaning of section 459F of the *Corporations Act 2001* (Cth);

    (f)   a resolution is passed for the reduction of capital of the Defaulting Party or notice of intention to propose such a resolution is given, without the prior written consent of the other party; or

    (g)   an event happens analogous to an event specified in paragraphs (a) to (f) above to which the law of another jurisdiction applies and the event has an effect in that jurisdiction similar to the effect which the event would have had if the law of Australia applied;

(28)   **Intellectual Property Rights** means copyright (including future copyright), trade mark, design, patent and circuit layout rights and all other intellectual property rights, whether registered or unregistered and whether registrable or not;

(29)   **Licence Commencement Date** means the date specified as such in Schedule 1, or if no date is specified, the Licence Commencement Date is the Commencement Date;

(30)   **Licence Term** means the period commencing on the Licence Commencement Date and expiring at the end of the period specified as the Licence Term in Schedule 1, or if no period is specified in Schedule 1, the Licence Term is perpetual;

(31)   **Loss** means any damages, losses, costs, charges, interest, penalties, fees, fines, forfeitures, assessments, expenses and liabilities whether present, unascertained, immediate, future or contingent, whether based in contract, tort, statute or otherwise;

(32)   **Maintenance Services** means the services (if any) specified in Schedule 4;

(33)   **New Release** means Software which has been made generally available from time to time during the Licence Term by the Supplier to its licensees of the Software provided primarily to provide an extension, alteration, improvement or additional functionality to the Software;

(34)   **Personal Information** has the same meaning given in the *Privacy Act* 1988 (Cth);

(35)   **Personnel**, in respect of a party, means the directors, officers, employees, agents and subcontractors of that party;

(36)   **Pre-Processor Software** means Software for an accounting system that imports records from VicTrack and third parties, and applies VicTrack charges to services.

(37)   **Privacy Laws** means:

    (a)   the Privacy Act 1988 (Cth);

    (b)   the Information Privacy Act 2000 (Vic); and

    (c)   any other Applicable Laws relating to the handling of Personal Information;

(38)   **Recipient Party** has the meaning given to that term in clause 21.3(1);

(39)   **Related Body Corporate**, **Subsidiary** and **Holding Company** each has the meaning given in section 9 of the *Corporations Act 2001* (Cth);

(40)   **Reply Notice** has the meaning given to that term in clause 21.3(1);

(41)   **Representative,** in respect of a party, means the representative for that party as set out in Item 5 of Schedule 1;

(42)   **Service Levels** means;

    (a)   in respect of a Service, any service levels specified for that Service in a Schedule to this Agreement; and

    (b)   for any Additional Services, any service levels specified in Change Request for those Additional Services;

(43)   **Services** means:

    (a)   the Maintenance Services (if any);

    (b)   the Support Services (if any);

    (c)   any Additional Services that are the subject of a Change Request that has been agreed to by the parties in accordance with clause 25.4; and

    (d)   any other services to be provided by the Supplier to VicTrack under this Agreement;

(44)   **Services Fees** means:

    (a)   the fees specified in Schedule 5 for the provision of the Maintenance Services (if any);

    (b)   the fees specified in Schedule 5 for the provision of the Support Services (if any); and

    (c)   any Additional Services Fees that are the subject of a Change Request that has been agreed to by the parties in accordance with clause 0;

(45) **Software** means the computer software described in Schedule 2, in complied executable code format and any Update or New Release or Software Enhancements of that Software (or any part of it) supplied under this Agreement;

(46) **Software Enhancement** means any and all extensions, alterations, improvements or additional functionality made to the Source Materials by or on behalf of the Supplier under this Agreement;

(47) **Software Licence Fee** means the fees payable for the licence of the Software as set out in Schedule 5;

(48) **Software Specifications** means the specifications for the Software as set out in Schedule 2 or in a Change Request as agreed by the Parties in accordance with Clause 24.4 (General Terms).

(49) **Source Materials** means in respect of the Software:

   (a)   the source code and object code of that Software.

(50) **Specifications** means:

   (a)   in respect of the Services, the specifications or requirements of the Services as set out or referred to in a Schedule to this Agreement or in a Change Request made pursuant to this Agreement; and

   (b)   in respect of the Software, the Software Specifications;

(51) **Support Services** means the services (if any) specified in Schedule 3;

(52) **Term** means the Initial Term together with any Further Terms;

(53) **Update** means Software which has been made generally available from time to time during the Licence Term by the Supplier to its licensees of the Software produced primarily to overcome defects in the Software;

(54) **VicTrack Intellectual Property** means all Intellectual Property Rights (including but not limited to the Data, Specification, Documentation and Training Manuals) that relates to the Software provided under this agreement, owned by or licensed by VicTrack which are made available or which become known to the Supplier under this Agreement;

(55) **Warranty Period** means the period specified as such in Schedule 2.

1.2   Interpretation

(1)   Reference to:

   (a)   the singular includes the plural and the plural includes the singular;

   (b)   a person includes a body corporate;

   (c)   a party includes the party's executors, administrators, successors and permitted assigns;

   (d)   a thing includes the whole and each part of it separately;

   (e)   a statute, regulation, code or other law or a provision of any of them includes:

<blockquote>
<blockquote>

(i)   any amendment or replacement of it; and

(ii)   another regulation or other statutory instrument made under it, or made under it as amended or replaced; and

</blockquote>

(f)   dollars means Australian dollars unless otherwise stated.

(2)   "Including" and similar expressions are not words of limitation.

(3)   Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

(4)   Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.

(5)   A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.

(6)   If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

</blockquote>

1.3   Parties

<blockquote>

(1)   If a party consists of more than 1 person, this Agreement binds each of them separately and any 2 or more of them jointly.

(2)   An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.

(3)   A party which is a trustee is bound both personally and in its capacity as a trustee.

</blockquote>

2   Termination of Existing Agreements

2.1   Each Existing Agreement terminates with effect on and from the date of execution of this Agreement.

3   Term

3.1   Initial Term

This Agreement commences on the Commencement Date and continues for the Initial Term unless terminated earlier.

3.2   Renewal

VicTrack may, at its option, extend the term of this Agreement for up to such number of Further Term(s) as are set out in Item 3 of Schedule 1, by written notice to the Supplier within the time limits set out in Item 3 of Schedule 1.

4   Nature of arrangement

4.1   Appointment to provide Software and Services

VicTrack appoints the Supplier to provide, and the Supplier agrees to provide, the Software and the Services on the terms and conditions specified in this Agreement.

4.2 **Non-exclusive and no commitment of business**

The Supplier acknowledges and agrees that:

(1) the relationship between VicTrack and the Supplier is not exclusive and VicTrack may engage any third person to provide goods and services similar to the Software or the Services; and

(2) VicTrack is not obliged to order, and has not made any commitment in relation to, any volume of Software or Services from the Supplier under this Agreement.

5 Software

5.1 **Grant of licence**

(1) The Supplier grants to VicTrack a non-exclusive, royalty-free licence to use and install the Software during the Licence Term for the business purposes of VicTrack. VicTrack may authorise its contractors and Related Bodies Corporate to install and use the Software (provided that such use is for the business purposes of VicTrack).

(2) The licence is subject to the additional conditions and restrictions (if any) set out in Schedule 2.

5.2 **Licensing of third party software**

To the extent that any third party software is embedded or incorporated in the Software, the Supplier must grant, or procure the grant of, a non-exclusive and royalty fee licence in favour of VicTrack from the owner of such software to use the third party software in connection with the Software, on terms and conditions no more onerous to VicTrack than the licence granted to VicTrack under clause 5.1.

5.3 **Supply and installation of the Software**

(1) The Supplier must deliver the Software to VicTrack on or before the Licence Commencement Date using such electronic media or delivery mechanism as agreed by VicTrack.

(2) If required by Schedule 2, the Supplier must install, configure and implement the Software as specified in Schedule 2. Otherwise, the Supplier must provide VicTrack with such reasonable assistance as VicTrack requires to install, configure and implement the Software.

5.4 **Acceptance**

(1) This clause 5.4 applies in the following circumstances:

(a) if Schedule 2 specifies that the Software is to be subjected to acceptance testing on delivery – at the time the Software is delivered by the Supplier;

(b) if Schedule 2 specifies that the Software is to be subjected to acceptance testing in respect of an Update or New Release – at the time the Update or New Release is delivered by the Supplier; and

(c) if Schedule 2 or a Change Request specifies that the Software is to be subjected to acceptance testing in respect of a customisation, modification or enhancement developed by the Supplier under this Agreement – at the time the customisation, modification or enhancement is delivered by the Supplier.

(d)   the Supplier must, in consultation with VicTrack, develop a test plan that can be used to demonstrate that the Software meets the Software Specifications and which must include such content as VicTrack reasonably requires, including:

(e)   the acceptance criteria for the Software;

(f)   the types of acceptance tests to be applied; and

(g)   the testing procedures and methodology;

(2)   the Supplier must submit the test plan to VicTrack for review and approval. VicTrack will not unreasonably withhold its approval;

(3)   the Supplier must notify VicTrack in writing once, in the Supplier's opinion, the Software is ready for testing;

(4)   on receipt of this notice, VicTrack and the Supplier will conduct acceptance testing of the Software in accordance with the test plan approved by VicTrack;

(5)   the Software will achieve acceptance if, and only if, the Software successfully passes all of the acceptance tests specified in the approved test plan;

(6)   if the Software fails acceptance testing, then the Supplier must remedy the relevant defect. VicTrack must, unless VicTrack considers that it is unlikely that the Software will pass acceptance testing, allow the Supplier to carry out up to three further rounds of acceptance tests.

5.5   **Documentation**

(1)   The Supplier must deliver the Documentation in the form specified in Schedule 2 to VicTrack on or before the Licence Commencement Date. The Documentation must contain sufficient information to enable reasonable use of the Software by competent technical persons.

(2)   During the Licence Term, the Supplier must update the Documentation from time to time as may become necessary and must promptly provide such updated Documentation to VicTrack.

(3)   The Supplier grants to VicTrack a non-exclusive, royalty free licence to copy and reproduce the Documentation for the purposes of using the Software (including training VicTrack's Personnel in the use of the Software).

5.6   **Restrictions on licence**

Except as permitted under this Agreement or with the prior written approval of the Supplier, VicTrack must not:

(1)   modify, vary, improve or adapt the Software;

(2)   reverse engineer, disassemble, decompile or otherwise reduce the Source Material into any human-readable form, except to the extent authorised by any applicable law;

(3)   sublicense, sell, distribute, publish, transmit or otherwise make available to any third party any part of the Software;

(4)   permit or allow any other person access (directly or indirectly) to the Software, except VicTrack's Personnel; or

(5)   use the Software for hire or rental, timesharing or service bureau.

5.7   **Additional warranties in relation to the Software**

(1)   The Supplier warrants that the Software is free from any material design or programming errors.

(2)   Without limiting any provisions of this Agreement, the Supplier warrants that the Software will perform in accordance with the Software Specifications during the Warranty Period.

(3)   If, during the Warranty Period, the Supplier becomes aware (whether by VicTrack notifying the Supplier or otherwise) that the Software does not perform in accordance with the Software Specifications, then the Supplier must, at its own expense and as soon as practicable, rectify the defect or replace the Software at no additional charges to VicTrack.

6   Services

6.1   **Provision of Services**

(1)   The Supplier must perform the Services from the Commencement Date for the duration of the Term.

(2)   Where any Additional Services are included within the scope of this Agreement as a result of a Change Request, the Supplier must perform the Additional Services in accordance with the time for performance specified in that Change Request.

6.2   **General obligations**

In providing or performing the Services, the Supplier must:

(1)   perform all Services in accordance with the requirements in this Agreement and the relevant Specifications;

(2)   minimise any adverse effects on VicTrack or its customers;

(3)   comply with all Applicable Laws and not cause VicTrack to be in breach of any applicable Laws;

(4)   consult with VicTrack on all material industrial, insurance, safety, regulatory or public relations matters, and matters where litigation arises or is threatened or there are grounds for litigation arising, which are known to the Supplier or any Supplier Personnel arising out of, or in connection with, this Agreement or the Services;

(5)   perform the Services cost effectively and promptly, with the skill, prudence and foresight reasonably to be expected of skilled and experienced information technology suppliers; and

(6)   perform the Services in a manner that is consistent with Industry Best Practice.

6.3   **Additional obligations**

Without limiting any other provision of this clause 6, the Supplier must:

(1)   perform the Additional Services in accordance with the requirements set out in the relevant Change Request;

(2)   perform the Maintenance Services in accordance with the requirements set out in Schedule 4; and

(3)   perform the Support Services in accordance with the requirements set out in Schedule 3.

6.4   **Service Levels**

(1)   The Supplier must perform the Services at a level of standard which meets the Service Level (if any). The Supplier must use reasonable endeavours to exceed those Service Levels.

(2)   The Supplier must, at no charge to VicTrack, implement such measurement, monitoring and management tools and procedures as are necessary to measure and report to VicTrack on its compliance with each of the Service Levels, and provide VicTrack with direct access to such tools and reports generated by such tools.

6.5   **Failure to meet Service Levels**

If the Supplier fails to meet any of the Service Levels then:

(1)   the Supplier must promptly provide VicTrack with a written report identifying the cause and consequence of the failure and the Supplier's procedures for correcting it and ensuring that it will not be repeated; and

(2)   the consequences (if any) set out in Schedule 3, Schedule 4 or a Change Request in respect of that failure will apply. Such consequences do not limit any rights and remedies available to VicTrack.

6.6   **Rebates, credits and liquidated damages**

(1)   In addition to any other rights of VicTrack, where a Relevant Schedule provides for a rebate, service credits or liquidated damages regime, the Supplier agrees to pay to VicTrack the amount as specified in that Relevant Schedule as a result of any failure of Supplier to meet a Service Level calculated in accordance with, and subject to any caps and limitations set out in, the Relevant Schedule for the Service (**Service Credit**).

(2)   The parties agree that the Service Credits represent a reasonable and genuine pre-estimate of the minimum anticipated or actual loss or damage which would be incurred by VicTrack as a result of the Supplier not meeting the Service Levels. The parties want to avoid the difficulties of proof of damages and agree that the Service Credits (if any) payable to VicTrack are reasonable and not a penalty.

(3)   Unless otherwise set out in the relevant Schedule for the Service, the Supplier will apply all Service Credits against future invoices issued under this Agreement. If there are any unapplied Service Credits at the expiry or termination of this Agreement, the Supplier must pay VicTrack the balance as a sum of money on demand.

7 Change Request

7.1 Change Request Process

Any Update, New Release or Software Enhancement will be made in accordance with VicTrack's internal Change Request process in the Form set out in Schedule 6 and billed in accordance with Schedule 3.

7.2 Changes to be agreed in accordance with the change request process

(1) A Change Request will only be effective after it has been agreed to by both VicTrack and the Supplier and approved in accordance with Change Request process.

(2) Any amendments to the terms of this Agreement that are outside the Change Request process are to be made in accordance with Clause 25.4 (Variation).

8 Supplier's Personnel

8.1 General

The Supplier must only engage or employ personnel to perform the Services who are properly qualified and adequately experienced.

8.2 Compliance with VicTrack policies

The Supplier must ensure that all of the Supplier's Personnel, in performing the Services, complies with all procedures, policies, rules and standards of conduct of VicTrack that are notified to the Supplier from time to time including acting in a safe and lawful manner and complying with all of VicTrack's security, IT and occupational health and safety standards (as amended from time to time) while present at any of VicTrack's premises or accessing any VicTrack system.

9 Governance

9.1 Review meetings

(1) The principal point of contact between the parties in relation to this Agreement will be the VicTrack Representative and the Supplier's Representative.

(2) The parties agree that if required by VicTrack:

(a) The parties agree that if required shall ensure that the VicTrack Representative and the Supplier Representative meet for the purposes of discussing any issues arising out of this Agreement; and

(b) each party must ensure that its respective Representative works with the other Representative in good faith to resolve any issues that do arise and establish processes and procedures to prevent issues arising in the future.

9.2 Maintenance of Records

The Supplier must maintain records of information brought into existence by the Supplier for the purpose of or in the course of performing or monitoring the performance of any Services and records of any other matters notified by VicTrack to the Supplier.

9.3   **Provision of information generally**

The Supplier must:

(1)   provide information to VicTrack when requested by VicTrack in the format or by the means requested by VicTrack;

(2)   provide copies of the records referred to in clause 9.2 to VicTrack when required and allow the authorised representatives of VicTrack to have access to and to inspect and copy the records at all reasonable times; and

(3)   maintain the records referred to in clause 9.2 for not less than 1 year after the expiration or termination of this Agreement.

10   Subcontracting

10.1   **No subcontracting without permission**

The Supplier must not sub-contract to any third person any of its obligations in respect of this Agreement without the prior written consent of VicTrack, such consent may be withheld by VicTrack in its absolute discretion.

10.2   **Supplier remains responsible**

If VicTrack, in its absolute discretion, consents to the subcontracting of the performance of any of the Services:

(1)   the Supplier remains fully responsible for the performance of the Services and must continue to comply with each and every one of its obligations under this Agreement;

(2)   without limitation, all acts and omissions of any subcontractor or other person will be deemed acts or omissions of the Supplier; and

(3)   the Supplier must ensure that any subcontractor so engaged complies with, and enters into a written agreement with the Supplier under the terms of which the subcontractor agrees to comply with, all relevant provisions of this Agreement as if it were a party to this Agreement.

11   Fees and payment

11.1   **Fees**

(1)   In consideration of the Supplier providing the Software and the Services, the Supplier will invoice, and VicTrack will pay the Fees in accordance with this clause 11.

(2)   If any of the Fees are calculated on a time and material basis, the Supplier must:

(a)   Use reasonable endeavours to minimise the Fees payable by VicTrack; and

(b)   Submit a timesheet or other similar written records substantiating time spent, at the same time the Supplier submits an invoice to VicTrack in respect of those Fees.

(3)   VicTrack is not liable to pay any amount in respect of the performance by Supplier of its obligations under this Agreement which were not supplied in accordance with this Agreement or which were only required due to Supplier's negligent, inefficient or deficient performance of those obligations. Without limiting the foregoing, VicTrack is not liable to pay for any unsuccessful installation, upgrade, patch or configuration of the Software arising from or necessary due to the fault of Supplier.

11.2   Invoicing and payment

(1)   The Supplier must submit an invoice for all Fees, at the interval specified in the relevant Schedule or Change Request and otherwise in a form acceptable to VicTrack. The invoice must:

(a)   Be sent to the address set out in Item 4 of Schedule 1;

(b)   Include a description of the Software or the Services that are the subject of the invoice in sufficient detail to communicate the identity, nature and extent of the Software or the Services;

(c)   Be a valid tax invoice and specify any GST payable in respect of that invoice;

(d)   Include the Supplier's address for payment, and

(e)   Include such other information as reasonably required by VicTrack.

(2)   Subject to clause 11.3, VicTrack will pay each invoice within 30 days from the date of receipt by VicTrack of those invoices.

11.3   Disputed Invoices

If VicTrack reasonably disputes in good faith its obligation to pay part or all of an invoice submitted by the Supplier under this Agreement, then VicTrack may withhold the disputed amount, but will pay the undisputed amount in accordance with this Agreement, The dispute will be submitted to clause 21 for resolution.

11.4   Set Off

(1)   VicTrack may reduce any payment due to the Supplier by any amount for which the Supplier is liable to VicTrack, including costs, charges, and expenses. This clause does not limit VicTrack's rights to recover these amounts in other ways.

(2)   To avoid doubt, VicTrack is entitled to deduct any unpaid Service Credit which has become due and payable by the Supplier to VicTrack, from any subsequent Fees which becomes due and payable by VicTrack to the Supplier.

12   Goods and services tax

12.1   Definitions

In this clause 12:

(1)   **GST** means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended (**GST Act**) or any replacement or other relevant legislation and regulations;

(2)   words or expressions used in this clause which have a particular meaning in the **GST law** (as defined in the GST Act, and also including any applicable legislative

determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires;

(3)　　　any reference to GST payable by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member;

(4)　　　any reference to an input tax credit entitlement by a party includes any corresponding input tax credit entitlement by the representative member of any GST group of which that party is a member; and

(5)　　　if the GST law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the tax period to which that part of the supply is attributable, such part of the supply is to be treated as a separate supply.

12.2　**Consideration**

Unless GST is expressly included, the consideration to be paid or provided under any other clause of this Agreement for any supply made under or in connection with this Agreement does not include GST.

12.3　**Taxable supply**

To the extent that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the taxable supply.

12.4　**Indemnities**

To the extent that a party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

13　Warranties by the Supplier

13.1　**General**

The Supplier warrants that:

(1)　　　it will comply with the requirements of this Agreement and all Applicable Laws;

(2)　　　it has the level of skill, knowledge, experience and ability which may be expected of a professional organisation experienced in providing services of the same type and complexity as the Services;

(3)　　　where VicTrack expressly or by implication makes known to the Supplier any particular purpose for which the Services are required or the result that VicTrack desires the Services to achieve, the provision of the Services will be performed in such a way as to achieve that result;

(4)　　　the Services will:

(a)   comply with the requirements set out in this Agreement, the relevant Schedules and Specifications; and

(b)   will be performed in a timely and professional manner by personnel who are suitably qualified and experienced to perform the Services and will be of a standard commensurate with the qualifications and experience of those personnel;

(5)   it will exercise all due care and skill in the provision of the Services and in any action undertaken for the purposes of or in relation to this Agreement, and will at all times act in a timely manner and in the best interests of, and to the benefit and advantage of, VicTrack;

(6)   it will provide the Services using (as far as consistent with its obligations under this Agreement) technology and processes which have a demonstrable record of being applied successfully in the provision of such services;

(7)   it has authority to grant the rights granted to VicTrack under this Agreement and that neither the Services or the Software, their provision, or use will infringe any Intellectual Property Rights or other rights of any person, or give rise to any obligation on the part of VicTrack to pay compensation or royalty to any person;

(8)   all information and materials which Supplier has provided to VicTrack prior to the date of this Agreement are true and correct in every respect and are not misleading or deceptive and Supplier has not withheld from VicTrack any information concerning Supplier, its experience or expertise which might reasonably be supposed to be material to VicTrack in determining whether or not to enter into this Agreement;

(9)   the Supplier is not the subject of any Insolvency Event; and

(10)   the Supplier has disclosed in writing to VicTrack prior to the Commencement Date:

(a)   any suit, cause of action, proceeding, application, claim or investigation (including without limitation any product liability or workers' compensation claim), whether current, pending, threatened or in prospect against the Supplier;

(b)   the existence of any material breach or default or alleged material breach or default of any agreement, award or order binding upon the Supplier; and

(c)   matters relating to the commercial, technical or financial capacity of the Supplier,

that may materially adversely affect the Supplier's ability to perform any of its obligations under this Agreement.

14   Intellectual Property

14.1   Ownership of Source Material and Data

(1)   Except as provided for in clause 15.3, VicTrack acknowledges that nothing in this Agreement confers or gives rise to any title or ownership rights in the Source Material of any Software in favour of VicTrack.

(2)   The Supplier acknowledges that nothing in this Agreement confers or gives rise to any title or ownership rights in the VicTrack Intellectual Property in favour of the Supplier.

14.2   **Ownership of Background Materials**

(1)   Ownership of any Background IP of the Supplier remain with the Supplier.

(2)   The Supplier grants VicTrack a non-exclusive, perpetual, irrevocable, royalty-free licence to use all Background IP to the extent required or desirable for VicTrack to make full use of, or otherwise enjoy the benefits of the Software, the Services or Developed Intellectual Property.

14.3   **Developed Intellectual Property**

(1)   As between the parties, any and all Developed Intellectual Property vests in and is the property of the Supplier from the time of creation of the relevant Intellectual Property Rights.

(2)   The Supplier grants VicTrack a non-exclusive, perpetual, irrevocable, royalty-free licence to use all Developed Intellectual Property for VicTrack's internal business purposes.

14.4   **VicTrack Intellectual Property**

(1)   All VicTrack Intellectual Property vest in and remains the property of VicTrack or the relevant third party licensor and the Supplier acknowledges that nothing in this Agreement confers or gives rise to any rights in or ownership of the VicTrack Intellectual Property on or in favour of the Supplier.

(2)   The Supplier agrees that it will only use the VicTrack Intellectual Property for the purposes of the provision of the Services in accordance with this Agreement, and will return all materials, notes, drawings, documents and the like (whether in physical or electronic form) which incorporates or contains VicTrack Intellectual Property and cease to use the VicTrack Intellectual Property on and from the termination or expiry of this Agreement or completion of the relevant Services.

14.5   **Moral rights**

The Supplier must procure from all of its Personnel who are authors or makers of any Developed Intellectual Property (and any contract with any third party for the creation of Developed Intellectual Property must include a provision which requires such person to obtain from its Personnel), a consent in writing authorising:

(1)   VicTrack;

(2)   VicTrack's licensees and successors in title; and

(3)   any other person authorised by VicTrack or by such a licensee or successor in title, including any Related Bodies Corporate of VicTrack,

to use all such Developed Intellectual Property for the purpose for which it was created and for that party's business purposes, including exercising for any of those purposes, all rights comprised in the copyright in the Developed Intellectual Property even if that use would, apart from this clause 14.5, infringe any moral rights or without limitation, other Intellectual Property Rights. The Supplier must ensure that any consents of its Personnel are genuinely given and not obtained by duress or by the making of any false or misleading statement and must promptly provide VicTrack with written evidence of all such consents if required by VicTrack. If requested by VicTrack, the Supplier must procure such further consents as VicTrack may require in respect of the use of the Developed Intellectual Property for specific purposes.

15   Pre-processor Software

15.1   Given the Pre-processor Software was developed for VicTrack's business purposes, if the Supplier cannot Update or provide Updates, New Releases and Enhancements of the Pre-processor Software to VicTrack in accordance with the terms of this Agreement for any reason, then subject to clause 15.2, the Supplier will enter into an agreement with a third party to ensure that the Pre-processor Software is maintained and the Supplier will continue to provide Updates, New Releases and Enhancements of the Pre-processor Software to VicTrack for the Term of this Agreement.

15.2   The Supplier will obtain VicTrack's written approval prior to engaging a third party to Updates, New Releases and Enhancements of the Pre-Processor Software.

15.3   If the Supplier wishes to sell the Pre-processor Source Material, the Supplier will offer VicTrack the first right to purchase the Pre-Processor Source Material, including all Intellectual Property Rights subsisting in the Pre-processor Software and its Source Material.

15.4   If, in response to the offer made under clause 15.3, VicTrack provides the Supplier written confirmation that it refuses to or is unable to purchase the Pre-processor Software and its Source Material, then the Supplier can offer the Pre-processor Software and its Source Material for sale to others, provided that the Supplier:

   (1)   will procure from the purchaser an undertaking in writing in favour of VicTrack that it will license the Pre-processor Software to VicTrack, and that it will comply with the terms of this Agreement with respect to maintenance of the Pre-processor Source Material; and

   (2)   agrees that the Fees under this Agreement will be adjusted, effective as at the date of sale to a purchaser to reflect that (other than Fees payable by VicTrack to the Supplier up to the date of sale) VicTrack will not be making any further payments to the Supplier for the Pre-processor Software.

16   Confidentiality

16.1   **Non disclosure**

Each party (**Receiving Party**) must:

   (1)   treat the Confidential Information of the other party (**Disclosing Party**) as secret and confidential;

   (2)   not use Confidential Information for any purpose other than the exercise of its rights or the performance of its obligations pursuant to this Agreement, without the prior written consent of the Disclosing Party;

   (3)   restrict the disclosure of Confidential Information to:

      (a)   those of its employees, officers and Agents who require Confidential Information (on a strictly confidential basis) to enable the Receiving Party to exercise its rights or perform its obligations pursuant to this Agreement or to advise the Receiving Party; and

      (b)   any person to whom the Receiving Party is required to disclose the Confidential Information by law, and provided that the Receiving Party has given at least 24 hours notice on a Business Day to the Disclosing Party of this requirement and its intention to disclose the Confidential Information;

(3)   maintain proper and secure storage and custody of the Confidential Information;

(4)   take all reasonable steps to ensure that its Personnel do not make public or disclose the other party's Confidential Information; and

(5)   use its best endeavours to cause all of its employees, officers and Agents who receive or have access to the Confidential Information of the Disclosing Party to observe all of the Receiving Party's obligations and undertakings contained in this Agreement.

16.2   Destruction and return of Confidential Information

(1)   As soon as is practicable after the completion of the relevant Services or the termination of this Agreement, the Supplier must deliver and return all of VicTrack's Confidential Information which is in its possession or control and is in a physical form, including all copies of computer files, to VicTrack.

(2)   As soon as is practicable after a request by VicTrack, the Supplier must securely destroy the relevant Confidential Information of VicTrack (in the case of computer data, by erasing it from the magnetic or other media on which it is stored such that it cannot be recovered or in any way reconstructed or reconstituted), and must notify VicTrack in writing that the information has been destroyed.

16.3   Publicity

The Supplier must not make any public announcement relating to this Agreement or use the fact of this Agreement for any advertising, informational or promotional material without the prior written consent of VicTrack.

17   Privacy

17.1   Compliance with privacy law

In performing this Agreement, each party must comply with all applicable Privacy Laws.

17.2   Specific obligations

The Supplier must in respect of any Personal Information which it receives or has access to in the course of performing the Services or otherwise in connection with this Agreement:

(1)   Only use the Personal Information to the extent necessary to perform the Services;

(2)   Only disclose the Personal Information to its employees to the minimum extent necessary to perform the Services and ensure that any person to whom the Personal Information is disclosed will manage the Personal Information consistently with the Supplier's obligations under this clause 17;

(3)   Maintain and comply with procedures and systems reasonably specified by VicTrack, including a privacy policy;

(4)   Take all reasonable measures to ensure that the Personal Information is protected against loss, unauthorised access, use, modification or disclosure;

(5)   Not do any act, engage in any practice or permit, or authorise by subcontract, any act or practice that would breach the Privacy Laws in relation to the Personal Information;

(6)   Not transfer or export any Personal Information outside Victoria or Australia unless expressly authorised in writing by VicTrack; and

(7)   Immediately provide VicTrack with the details of any complaint received by Supplier regarding Personal Information handling practices and cooperate with VicTrack in the resolution of any such complaint.

18   Indemnities

18.1   General

Without limiting any of VicTrack's other legal rights, the Supplier hereby indemnifies the Indemnified Parties from and against any Loss suffered or incurred by the Indemnified Parties arising from or in connection with any of the following:

(1)   Any breach of this Agreement by the Supplier;

(2)   Any breach of Applicable Laws by the Supplier or any of the Supplier's employees, contractors, officers or agents;

(3)   Any wilful, unlawful or negligent act or omission of the Supplier or any of the Supplier's Personnel;

(4)   Wilful misconduct of the Supplier or any of the Supplier's employees, contractors, officers or agents;

(5)   Any warranty given by the Supplier under this Agreement being incorrect or misleading in any way;

(6)   The provision of the Services or any activity directly or indirectly associated with the provision of the Services;

(7)   Damage or loss to any real and tangible property of any Indemnified Party, the Supplier or of any other person whatsoever caused by the Supplier or any of the Supplier's Personnel; or

(8)   Death of or injury to any person, including any Indemnified Party, any of the Supplier's Personnel or to any third person caused by the Supplier or any of the Supplier's Personnel.

18.2   IP Indemnity

(1)   Without limiting any of VicTrack's other legal rights, the Supplier hereby indemnifies and must keep indemnified the Indemnified Parties from and against any Losses suffered or incurred by any one or more of the Indemnified Parties arising from or in connection with any Claim by any person against any one or more of the Indemnified Party alleging that the Services, the Software or their use infringes the Intellectual Property Rights of any person (**IP Claim**).

(2)   If an IP Claim is made against an Indemnified Party:

(a)   VicTrack must promptly notify the Supplier of the IP Claim;

(b)   The Indemnified Party will provide all reasonably requested information and assistance to the Supplier required for the Supplier to defend such a Claim (at the cost and expense of the Supplier); and

(c)   The Indemnified Party gives the Supplier the right to defend and settle the IP Claim (provided that the Supplier may not settle a Claim without the prior consent of VicTrack, such consent not to be unreasonably withheld).

(3)   If an IP Claim is successful, or if it is agreed that there is an infringement of the Intellectual Property Rights of the relevant person, then the Supplier must either:

(a)   Modify the affected Service or the Software (but without adversely affecting its functionality or performance) to render it, or its use, non-infringing within a reasonable period specified by VicTrack; or

(b)   At no cost to VicTrack, render the relevant activity non-infringing by procuring the right or consent to exercise the relevant Intellectual Property Rights.

18.3   Provisions relating to indemnity

(1)   If an indemnity payment is made by the Supplier under this clause 18, the Supplier must also pay VicTrack an additional amount equal to any tax which is payable by the recipient in respect of that indemnity payment.

(2)   Each of the Indemnified Parties, whether or not a party to this Agreement, is entitled to the benefit of clauses 18.1 and 18.2 and they may be enforced by VicTrack on their behalf. VicTrack holds on trust for the Indemnified Parties, jointly and severally, the benefit of the indemnity under clause 18.1 or 18.2 or any other provision of this Agreement.

19   Insurance

The Supplier must (and must ensure that any sub-contractors appointed under this Agreement obtain and maintain the types of insurance specified in Item 6 of Schedule 1 for the term set out in Item 6 of Schedule 1 and up to the levels specified in Item 6 of Schedule 1. That insurance must be taken out with a reputable insurer. The Supplier must provide VicTrack with evidence of the currency of any insurance it is required to obtain on or prior to submitting its first invoice to VicTrack under this Agreement, and otherwise on request from VicTrack, so that at all times VicTrack holds evidence that all such insurance is current.

20   Force Majeure

20.1   No liability for breach during Force Majeure Event

If a Force Majeure Event occurs and prevents a party (**Affected Party**) performing its obligations under this Agreement, that party must promptly notify the other party of the event, the time it started and likely duration, the extent that its obligations are affected and the measures proposed to remedy or mitigate its consequences. Subject to clause 20.2 the Affected Party's obligations are then suspended solely to the extent it is able to demonstrate that it is prevented from performing them by the Force Majeure Event.

20.2   Obligations on party claiming Force Majeure

A party prevented from performing any of its obligations under this Agreement by a Force Majeure Event must:

(1)   continue to perform all unaffected obligations in accordance with this Agreement;

(2)   use reasonable endeavours to continue to perform the affected obligations, whether by way of a work-around or other methods agreed with the other party;

(3)   use reasonable endeavours to overcome the effects of the Force Majeure Event as soon as possible; and

(4)   notify the other party as soon as it is no longer affected by the Force Majeure Event.

20.3   Options of VicTrack

If a Force Majeure Event substantially prevents, hinders or delays the performance of the Services by the Supplier for a period in excess of 1 month then VicTrack may, at its option, immediately terminate this Agreement by written notice to the Supplier and the rights and obligations of the parties will be treated in the same manner as if this Agreement had been terminated by the VicTrack under clause 22.1.

21   Dispute resolution

21.1   Injunctive or interim relief

Nothing in this clause 21 prevents a party seeking urgent injunctive or similar interim relief from a court.

21.2   Resolution of dispute in good faith

(1)   The parties must use best endeavours to resolve in good faith any dispute arising out of or in connection with this Agreement (**Dispute**). Each party must follow the procedures in this clause before starting court proceedings (except for urgent injunctive or declaratory relief).

(2)   Despite the existence of a Dispute, the parties must continue to perform their other obligations under this Agreement that are not affected by the Dispute.

21.3   Initial procedure to resolve a Dispute

(1)   Any party (**Initiating Party**) claiming that a Dispute has arisen must give the other party (**Recipient Party**) a notice setting out brief details of the Dispute (**Dispute Notice**). Within 10 Business Days of service of a Dispute Notice, the Recipient Party must give the Initiating Party a notice setting out brief details of the Recipient Party's position on the Dispute (**Reply Notice**).

(2)   If a Dispute Notice and Reply Notice are given, the parties must make representatives with authority to settle the Dispute available for the purpose of meeting in an effort to resolve the Dispute. At least one meeting of the authorised representatives must take place within 15 Business Days of service of a Reply Notice.

(3)   If the Dispute is not resolved in accordance with clause 21.3(2) within 20 Business Days after the Reply Notice is given, or the Recipient Party does not give a Reply Notice or make its authorised representatives available for a meeting, then either party may, by written notice (**Dispute Escalation Notice**) to the other party, escalate the dispute to the executives of each party in accordance with clause 21.4.

21.4 **Executive escalation**

(1) Within 5 Business Days after issuing a Dispute Escalation Notice, each party must by written notice to the other party:

    (a) Nominate a member of its executive management with authority to settle the Dispute to represent it in discussions;

    (b) Nominate a range of times and venues when discussions can take place; and

    (c) Ensure that its nominated executive manager is reasonably available to discuss the Dispute.

(2) Each party must ensure that its nominated executive manager makes every effort to meet and otherwise progress discussions aimed at resolving the Dispute, acting reasonably and in good faith.

21.5 **Compulsory mediation**

If the Dispute remains unresolved 20 Business Days after the Dispute is escalated to the executives under clause 21.4, then the parties must refer the Dispute to mediation, to be conducted in Melbourne, Victoria and administered by the Australian Commercial Disputes Centre according to its Mediation Guidelines. These Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.

21.6 **Optional expert determination**

(1) If the Dispute is not settled within 30 Business Days after the appointment of the mediator under clause 21.5, then:

    (a) either party may commence litigation; or

    (b) if the parties both agree, the Dispute may be referred to binding expert determination in accordance with clause 21.6(2).

(2) The binding expert determination will be conducted in Melbourne, Victoria and administered by the Australian Commercial Disputes Centre according to its Expert Determination Guidelines. The Guidelines set out the procedures to be adopted, the process of selection of the expert and the costs involved.

(3) The outcome of the determination and any decision made by the expert is binding on the parties, in the absence of manifest errors.

22 Termination

22.1 **Termination without cause**

VicTrack may terminate this Agreement at any time upon giving the Supplier not less than 6 months prior written notice.

22.2 **Termination with cause**

VicTrack may immediately terminate this Agreement by written notice to the Supplier if:

(1) the Supplier is the subject of an Insolvency Event;

(2)   the Supplier fails to remedy to VicTrack's satisfaction, any breach of this Agreement (which in VicTrack's opinion can be remedied) within 14 days after the date on which VicTrack issues the Supplier a written notice requiring the Supplier to remedy the breach;

(3)   the Supplier breaches this Agreement and in VicTrack's opinion the breach cannot be remedied;

(4)   the Supplier acts in a way that may bring VicTrack or VicTrack's reputation into disrepute by being associated with the Supplier, the Software or the Services;

(5)   in VicTrack's reasonable opinion, the Supplier or any of the Supplier's Personnel are guilty of fraud, dishonesty or any other serious misconduct; or

(6)   there is a change in the identity of the person who controls the Supplier (within the meaning of the *Corporations Act 2001* (Cth)) from that which was in effect on the Commencement Date without the prior written consent of VicTrack (which consent must not be unreasonably withheld).

22.3   Termination by the Supplier

(1)   If VicTrack fails to pay any Fees within 30 days after the date the invoice in respect of those Fees is due for payment under this Agreement, and those Fees are not the subject of a bona fide dispute, then:

    (a)   the Supplier may notify VicTrack in writing that those Fees are due to be paid, and serve on VicTrack notice of its intention to terminate this Agreement under this clause; and

    (b)   if the Fees remain unpaid for a further 14 days following receipt by VicTrack of a notice under clause 22.3(1)(a), then the Supplier may terminate this Agreement in whole by giving VicTrack at least 14 days written notice of termination. The notice is automatically withdrawn if VicTrack pays the outstanding amount during the notice period.

(2)   To the extent permitted by law, except as set out in clause 22.3(1), the Supplier waives all rights and powers it may have (whether in contract, in tort, in equity or under common law or statute) to terminate this Agreement for any reason whatsoever (including in respect of breach or repudiation of this Agreement by VicTrack).

22.4   Partial termination

If VicTrack is entitled to terminate this Agreement, VicTrack may, at its discretion, terminate this Agreement in whole or in part (including in respect of certain Services or Software).

22.5   Consequences of termination

(1)   If this Agreement is terminated for any reason:

    (a)   termination, however caused, is without prejudice to any rights or liabilities of the parties accruing as at the date of termination;

        and

    (b)   the Supplier is not entitled in contract, tort or otherwise to any payment or compensation for losses incurred as a result of the termination of the Supplier's engagement.

(2)   If VicTrack terminates this Agreement under clause 22.1, or if the Supplier terminates this Agreement under clause 22.3, then VicTrack must pay to the Supplier the Fees for, and only for, the Services and Software provided up to and including the date of termination, determined by VicTrack (acting reasonably), less any amount VicTrack is entitled to deduct or withhold under this Agreement, including under any indemnity or set-off.

(3)   If VicTrack terminates this Agreement under clause 22.2:

(a)   the Supplier will not be entitled to any compensation or payment as a consequence of such termination; and

(b)   the rights and liabilities of the parties are the same as they would be at common law if the Supplier had wrongfully repudiated the Agreement and VicTrack had elected to treat the Agreement as at an end and recover damages.

(4)   For the purpose of clauses 22.3 and 22.5 of this Agreement, in the absence of a method of calculation as to Fees to be refunded to VicTrack or due to be paid by VicTrack in respect of Services rendered, such Fees shall be determined on a pro rata basis by reference to the proportion of the Services rendered to that date.

22.6   **Survival**

(1)   Termination or expiry of this Agreement, however caused, will not affect:

(a)   the indemnities contained in this Agreement given by the Supplier to VicTrack; and

(b)   any other provisions which, by their nature, are intended to survive this Agreement.

23   **VicTrack's right to delegate**

23.1   **Acknowledgement**

The Supplier acknowledges that VicTrack may delegate any power, function or responsibility which VicTrack has under this Agreement.

23.2   **Delegation**

VicTrack's delegation may be:

(1)   revoked, changed or delegated; and

(2)   limited or may be subject to such conditions as VicTrack determines from time to time.

23.3   **Right to request**

The Supplier is entitled to request details of the delegation of any power, function or responsibility by VicTrack under this Agreement where a person purports to be acting under such a delegation. Once those details are obtained, the Supplier is entitled to rely on them unless and until given notice of revocation of that delegation.

23.4   **Notice**

If VicTrack delegates any power, function or responsibility under this Agreement to an individual, VicTrack must give notice of such delegation in a prescribed form to the Supplier (including the identity and address of any person to whom such power, function or responsibility is delegated). Where such notice has been given by VicTrack, the Supplier is entitled to rely upon such notice unless and until given notice of revocation of that delegation.

23.5   **Powers and authority of delegate**

Any person to whom a power, function or responsibility is delegated by VicTrack has, to the extent of that delegation and subject to compliance with the terms and conditions of that delegation, full power and authority to act for and on behalf of and to bind VicTrack under this Agreement.

24   Transfer of functions

24.1   **Acknowledgement**

The Supplier acknowledges that VicTrack may be reconstituted, renamed or replaced and that some or all of the powers, functions or responsibilities of VicTrack may be transferred to or vested in another entity.

24.2   **References**

If VicTrack is reconstituted, renamed or replaced or if some or all of its powers, functions or responsibilities are transferred to or vested in another entity, references in this Agreement to VicTrack must be deemed to refer, as applicable, to that reconstituted, renamed or new entity to the extent that the entity has assumed or has had transferred to or vested in it those powers, functions or responsibilities.

25   General terms

25.1   **Further assurance**

Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

25.2   **Relationship of parties**

Nothing in this Agreement is to be construed as constituting one party as employer, agent or partner of the other party or in joint venture with the other party. No party has authority to bind or purport to bind the other party. The Supplier is an independent contractor of VicTrack.

25.3   **Entire understanding**

This Agreement is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement and supersedes any prior agreement or understanding on anything connected with that subject matter.

25.4   **Variation**

Subject to Clause 7 an amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

25.5 **Assignment**

(1) Without limiting clause 24, VicTrack may assign or otherwise deal with its rights and novate its obligations under this Agreement by written notice to the Supplier without the Supplier's prior written consent provided that VicTrack forms the reasonable opinion that the assignee has sufficient financial capacity to perform its obligations under this Agreement.

(2) The Supplier must not assign or otherwise deal with its rights or novate its obligations under this agreement without VicTrack's prior written consent (which must not be unreasonably withheld).

25.6 **Waiver**

A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right. The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right. A waiver is not effective unless it is in writing. Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

25.7 **Severability**

All or part of any provision of this Agreement that is illegal, invalid or unenforceable will be severed from this Agreement and the remaining provisions (and parts of provisions) will continue in force.

25.8 **Notices**

(1) A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing.

(2) In addition to any other method of service provided by law, the Notice may be:

(a) sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified;

(b) sent by facsimile to the facsimile number of the addressee set out in this Agreement or subsequently notified; or

(c) delivered at the address of the addressee set out in this Agreement or subsequently notified.

(3) If the Notice is sent or delivered in a manner provided by clause 25.8(2), it must be treated as given to and received by the party to which it is addressed:

(a) if sent by post, on the 2nd Business Day (at the address to which it is posted) after posting;

(b) if sent by facsimile before 5pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or

(c) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

(4) Despite clause 25.8(3)(b):

<ol type="a" start="1">
(a) a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission of the number of pages in the Notice; and
(b) a facsimile is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 3 hours after the transmission ends or by 12 noon on the Business Day on which it would otherwise be treated as given and received, whichever is later.

(5) A Notice sent or delivered in a manner provided by clause 25.8(2) must be treated as validly given to and received by the party to which it is addressed even if:

<ol type="a">
(a) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
(b) the Notice is returned unclaimed.

25.9 Costs and outlays

Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.

25.10 Governing law and jurisdiction

The laws of State of Victoria govern this Agreement. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

25.11 Counterparts

(1) This Agreement may be executed in any number of counterparts. Each counterpart is an original but the counterparts together are one and the same agreement.

(2) This Agreement is binding on the parties on the exchange of executed counterparts. A copy of an original executed counterpart sent by facsimile machine or by email:

<ol type="a">
(a) must be treated as an original counterpart;
(b) is sufficient evidence of the execution of the original; and
(c) may be produced in evidence for all purposes in place of the original.

Executed as an agreement

Signed for and on behalf of **Victorian Rail Track** ABN 55 047 316 805 by its authorised signatory in the presence of:

(signature)
_____
Witness

SANTINA   STRAUBE
_____
Name of Witness
(BLOCK LETTERS)
Date   10/10/14
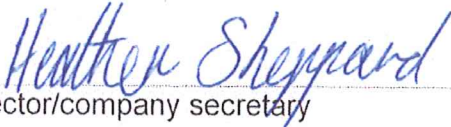
(signature)
_____
Authorised Signatory

SCOTT   OLDFIELD
_____
Name of Authorised Signatory
(BLOCK LETTERS)
Date   10/10/14

Executed by **Trans-Mit Pty Ltd** (ABN 12 100 711 957) in accordance with section 127 of the _Corporations Act 2001_ (Cth):

(signature)
_____
Director/company secretary

HEATHER   SHEPPARD
_____
Name of director/company secretary
(BLOCK LETTERS)
Date   7/10/2014

(signature)
_____
Director

RODNEY   JOHN   SHEPPARD
_____
Name of director
(BLOCK LETTERS)
Date   7/10/2014

Schedule 1 – Agreement Details

Item	Description	Details	
Item 1	**Commencement Date (clause 3.1)**	1 October 2014	
Item 2	**Initial Term (clause 3.1)**	Three (3) years	
Item 3	**Extension Option(clause 3.2)**	Up to two Further Terms(s) of one (1) year each.	
		VicTrack must give notice to exercise the option no later than **1 month** prior to the end of the then current Term.	
Item 4	**Address for invoices**	VicTrack	
		Robyn Douglas	
		Business Services	
		Information System Analyst/Administrator	
		GPO Box 1681	
		Melbourne 3001	
Item 5	**Representatives**	VicTrack:	
		Scott Oldfield	
		Manager, Business Applications	
		Business Services	
		Level 8 / 1010 LaTrobe Street	
		Docklands Vic 3008 Phone: (03) 9619 8666 Fax: (03) 9619 8551	
		Email: scott.oldfield@victrack.com.au	
		Supplier:	
		Rodney Sheppard	
		Software Engineer - Development Manager	
		Trans-Mit Pty Ltd	
		7 Wendy Court, Hampton Park, VIC, 3976	
		Phone: (03) 8787 8744 Fax: (03) 8787 5722 Email: rod@transmit.com.au	

Item	Description	Insurance required	Term of insurance
Item 6	**Insurance**	Professional indemnity insurance (on a claims made basis), of not less than AUD$10 million per event.	From the Commencement Date until no less than 7 years after the termination or expiry of the Agreement
		Public liability insurance (on an occurrence basis) of not	From the Commencement Date until no less than 12

Item	Description	Details	
		less than AUD$10 million per event.	months after the termination or expiry of the Agreement
		Worker's compensation insurance in accordance with the statutory requirements of any jurisdiction in which the Supplier engages employees, consultants or contractors in connection with the manufacture or supply of the goods or services	Duration of the Agreement

Schedule 2 – Software and Equipment

Install sites | equipment | software and version

As at the Commencement Date the following table identifies the software (inclusive of software version) and equipment included in the Services.

Installation sites	Software and Equipment – Owned by Transmit	Current Version as at August 2013
Data Centres Located within the Melbourne CBD	Telmax21 Network Management application software	Version 2.0v24
	Bilmax21 Billing application software	Version 3.0/4.0
	Pre-Processor application software	NewPP 1.4.1.5 PP System 1.2.0.3
	Unix operating system software installed on virtual servers. telmax21	
	IBM Informix database Engine software	Version SE 5, 5 user
	IBM Informix database SQL software	Version SQL 4.16
	IBM Informix dynamic 4GL runtime	Version 2.10 5 user
	Intranet browser based web directory	Version 1.0

Installation Sites	Equipment and Software	Current Version as at August 2013
UCP- VRTCUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- SMECUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- SHRCUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- VLPCUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- ESTCUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- MTMCUCM	Cisco Call Manager Virtual Logger	Version 2.8
UCP- KDRCUCM	Cisco Call Manager Virtual Logger	Version 2.8
Call Logging Units- Physical		
SSC	Call Logging Unit Software	Version1.3
SSD	Call Logging Unit Software	Version1.3
ART	Call Logging Unit Software	Version1.3
BNL	Call Logging Unit Software	Version1.3
CFD	Call Logging Unit Software	Version1.3
FLC	Call Logging Unit Software	Version1.3
WOD	Call Logging Unit Software	Version1.3
MDA	Call Logging Unit Software	Version1.3
PLD	Call Logging Unit Software	Version1.3
PNL	Call logging Unit Software	Version 1.3
VCS – RRCN	Call logging Unit Software	Version 1.5

SP3 - RRCN		
	Call logging Unit Software	Version 1.5
10.3.3.11	Terminal Server, for modem polling call logging units	Version Open Gear CM4116 – 8 port
10.3.4.11	Terminal Server, for modem polling call logging units	Version Open Gear CM4116 – 8 port

Acceptance Testing regime	The Supplier will perform system unit testing of the application and any modifications to the application and or components of the application to ensure it operates as designed.
	On successful unit testing the Supplier will install the upgraded application or modifications to the VicTrack test environment for VicTrack to perform user acceptance testing.
Documentation	Documentation for the applications and modifications will be provided if requested by VicTrack. The cost for the documentation will be agreed between the parties.
Installation and implementation obligations	The Supplier will perform installation of the application and modifications into the VicTrack test environment and production environment as directed by VicTrack.
Warranty Period	The Warranty Period for modifications to the application is 90 days from the date that the modifications have complied with VicTrack's user acceptance testing.

Schedule 3 – Support Services

The Supplier shall provide 400 hours, per annum of Services for the Software and equipment at the Installation Sites specified in Schedule 2 from the Commencement Date.

The Supplier shall at all reasonable times and with the prior approval of the VicTrack have remote access to the equipment via a secure SSH connection for the purpose of testing and delivering escalated support and maintaining the equipment. Any on site access to the installation sites by the Supplier will be with prior authorisation from VicTrack and subject to compliance with VicTrack's access procedures (as updated from time to time).

	Service Description	Service Levels	Reporting Frequency
1.	Monitoring of Software / Equipment Monitor the call loggers to ensure they operate as designed. Monitor call data collated by the call loggers and provide exception reports where anomalies are identified.	24 / 7	Monthly Report
2.	Incident – Response and Fix (Work around) Provide services to identify the cause of an incident and recommend a fix and apply the fix under direction of the VicTrack Request Process.	2 Hours subject to VicTrack Change Request	Monthly Report
3.	Rectification (Permanent Fix) Provide services to resolve the systems where defects have been identified.	8 Hours	Monthly Report
4.	Reporting (Service Reconciliation Report) - HRS used; - Maintenance; - IT Support; - Modifications; Provide modifications to the system as directed by VicTrack. Recommend modifications to VicTrack where it is identified that the system can be improved to operate more effectively or more securely.	Within 10 Business days at the end of the Calendar month	Monthly Report
5.	Product Development / Upgrades / License Fees / Alterations / Improvements / Additional Functionality	Quote < 5 Business Days using Fixed hourly rate in Schedule 5 and the Change Request Form set out in Schedule 6	Monthly Report

Schedule 4 – Maintenance Services

The Supplier will update components of the Software as requested from time to time by VicTrack. The updates will include modifications sought by VicTrack to improve existing capability, add functionality, or resolve existing vulnerabilities to the Software.

In some cases the Supplier may offer an update to the system or components of the system that is not a direct result of VicTrack requesting a modification to the system. The acceptance of this update is at the discretion of VicTrack.

Schedule 5 – Service Fees

1.   **Agreed rates:**

(a)   Subject to sub-clause (b) below, fixed hourly rates of $121.50 (AUD) + GST will apply where VicTrack exceed the 400 hours of Services during the Initial Term.

(b)   During the Term, any unused hours of Services at the expiry of any 12 month period will be added to the following 12 month period at no extra charge.

2.   **Fixed fee:**

$48,600.00 AUD + GST per annum based on 400 hours of Services per annum.

3.   **Progress payments:**

3.1   The following provisions apply to the making of progress payments:

(1)   The Supplier may make a payment claim quarterly in advance for Services performed. The quarterly fee for the Initial Term of 3 years and during the further 2 options will be $12,150.00 + GST, AUD;

(2)   An early payment claim will be deemed to have been made on the date for making that claim set out above;

(3)   Each payment claim must be given in writing to VicTrack's Representative, in the form of or accompanied by a tax invoice, and must include details of the value of Services performed and reimbursable expenses, together with evidence of the incurring of those reimbursable expenses, and may include details of other moneys then due to the Supplier pursuant to this Agreement;

(4)   Despite any other provision in this Agreement, but only to the extent permitted by law, the Supplier is not entitled to, and must not, include in a payment claim any claim for a variation, or any other claim under this Agreement which may result in any addition to the Fees, or any claim for damages for breach of contract, quasi-contract or quantum merit, unless the amount claimed has been agreed between VicTrack and the Supplier or determined in accordance with Clause 21 of this Agreement;

(5)   VicTrack's Representative must, within 14 Business Days after receiving a payment claim, issue to the Supplier a payment schedule identifying the payment claim to which the payment schedule relates and including VicTrack's Representative's assessment of the moneys due from VicTrack to the Supplier pursuant to the payment claim and reasons for any difference. In carrying out the assessment, VicTrack's Representative may, amongst other things, allow for any moneys owing by the Supplier to VicTrack;

(6)   If the Supplier does not make a payment claim in accordance with paragraph 3.1(1) above, VicTrack's Representative may issue the payment schedule referred to in paragraph 3.1(5) above;

(7)   if there is a difference between the amount claimed by the Supplier in a payment claim and the amount assessed by VicTrack's Representative in the corresponding payment schedule, the Supplier must issue an adjustment note to VicTrack within 5 Business Days after receipt of the relevant payment schedule; and

(8)   The Supplier acknowledges that VicTrack's Representative issues the payment schedule to the Supplier on behalf of VicTrack.

4.   Reimbursable expenses:

Any attendance on site to either 1010 LaTrobe Street, Docklands, or 595 Collins Street, Melbourne, by the Supplier's Personnel authorised by VicTrack shall be charged at:

   i. $135.00 + GST (AUD) per hour during business hours (8am – 6pm AEST).
   ii. $202.50 + GST (AUD) per hour outside of business hours (6pm – 8am AEST)

NB: For each of the above a minimum of 2 hours travel time is charged irrespective of destination.

Schedule 6 – Change Request Process

The following Change Request form will be used for changes made in accordance with clause 7 of the terms of the Agreement:

Change Request Form
Software Licence, Support and Maintenance Agreement between Victorian Rail Track and Trans-Mit Pty Ltd, dated on or about [insert date].

CHANGE REQUEST FORM

Change Request number	
Change Details	
Reason for Change	
Business Impact	
Implementer	
Configuration	
Details of change proposal	
Requested Start Date	
Requested End Date	
Test Plan	
Rollback Plan	
Support Service Quote	