

**PROFESSIONAL  
SERVICES  
AGREEMENT**

**TRANS-MIT PTY LTD**

**AG001635**

**VicTrack**

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**THIS AGREEMENT** is made on

2013

**BETWEEN VICTORIAN RAIL TRACK** ABN 55 047 316 805 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) of Level 8, 1010 LaTrobe Street, Docklands, Victoria 3008 (**"VicTrack"**)

**AND** The party named and described as the Contractor in Schedule 1. (**"Contractor"**)

## **INTRODUCTION**

- A. VicTrack wishes to appoint the Contractor to perform the Services.
- B. The Contractor has agreed to accept the appointment and to perform the Services on the terms and conditions contained in this Agreement.

## **IT IS AGREED**

### **1. DEFINITIONS AND INTERPRETATION**

#### **1.1 Definitions**

In this Agreement, unless the context otherwise requires:

**"Access Procedures"** means the access procedures, from time to time, of VicTrack and of any relevant Transport Operator. In the event of any inconsistency, the more onerous access procedures will prevail to the extent of that inconsistency;

**"Agreed Rates"** means the fixed rates (if any) set out in Schedule 2 payable to the Contractor for the provision of the Services under clause 9;

**"Agreement"** means this document, including its schedules and annexures (if any), and any document referred to in the schedules and annexures as being incorporated into this Agreement;

**"Approval"** means any consent, registration, filing, agreement, notarisation, certificate, licence, approval, permit, authority, assurance, exemption or similar right or thing;

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

**"Completion Date"** means the date specified in Schedule 1;

**"Contractor"** includes the employees, agents and sub-contractors (if any) of the Contractor;

**"Contractor's Key Personnel"** means the personnel specified in Schedule 1 and any replacement of any of them made in accordance with clause 14;

**"Contractor's Representative"** means the person appointed and named in Schedule 1 and any replacement of that person made in accordance with clause 13.2;

**"Documents"** means all material stored by any means and produced or used by the Contractor in connection with the Services including drawings and specifications, sketches, plans, designs, reports, files and data;

**"Fees"** means the fees payable to the Contractor by way of Agreed Rates or a Fixed Fee;

**"Fixed Fee"** means the fixed lump sum fee (if any) set out in Schedule 2 payable to the Contractor for the provision of the Services under clause 9;

**"Insolvency Event"** means the happening of any of these events:

- (1) suspension of the payment of debts;
- (2) in the case of a body corporate:
  - (a) that body corporate becomes an externally-administered body corporate under the *Corporations Act 2001*;
  - (b) a controller (as defined in section 9 of the *Corporations Act 2001*) is appointed of any of the property of that body corporate;
  - (c) that body corporate is taken to have failed to comply with a statutory demand within the meaning of section 459F of the *Corporations Act 2001*; or
  - (d) a resolution is passed for the reduction of capital of that body corporate or notice of intention to propose such a resolution is given, without the prior written consent of VicTrack; or
- (3) in the case of a natural person:
  - (a) that person authorises a registered trustee or solicitor to call a meeting of his or her creditors or proposes or enters into a deed of assignment or deed of arrangement or a composition with any of his or her creditors;
  - (b) another person holding a security interest in assets of that person enters into possession of or takes control of any of those assets or takes any steps to enter into possession of or take control of any of those assets; or
  - (c) that person commits an act of bankruptcy;

**"Intellectual Property"** includes any copyright, design, patent, trademark, semiconductor or circuit layout (whether registered,

unregistered or applied for), trade, business, company or domain name, know-how, inventions, processes, confidential information (whether in writing or recorded in any form) and any other proprietary, licence or personal rights arising from intellectual activity in the business, industrial, scientific or artistic fields;

**"Law"** includes any requirement of any statute, rule, regulation, proclamation, order, ordinance or by-law whether judicial, commonwealth, state, territorial or local;

**"Moral Rights"** has the meaning provided in Part IX of the Copyright Act 1968 (Cth);

**"Occupational Health & Safety Requirements"** means the Occupational Health & Safety Requirements, from time to time, of VicTrack;

**"Program"** means a program approved by VicTrack under clause 6;

**"Proposal"** means the Contractor's response to the Request for Services;

**"Reimbursable Expenses"** means those expenses incurred by the Contractor in connection with the Services and specified in Schedule 2;

**"Request for Services"** means the document issued by VicTrack seeking a proposal (which may include a tender) for the provision of the Services;

**"Security of Payment Act"** means the *Building and Construction Industry Security of Payment Act 2002* (Vic);

**"Services"** means the services described in Schedule 3, which are to be performed by the Contractor in accordance with this Agreement;

**"Services Brief"** means the document which describes the Services to be performed by the Contractor, a copy of which is attached to Schedule 3;

**"Transport Operator"** means a person who carries out the provision of services related to supporting or facilitating the movement of people or goods between places, including the provision of any form of information to or about such people or goods; and

**"VicTrack's Representative"** means the person appointed and named in Schedule 1 or such other person as is appointed by VicTrack in accordance with clause 13.1.

## 1.2 Interpretation

In this Agreement:

(1) Reference to:

- (a) one gender includes the others;
- (b) the singular includes the plural and the plural includes the singular;
- (c) any thing includes the whole and each part of it separately;
- (d) a person includes a body corporate;
- (e) a party includes the party's executors, administrators, successors and permitted assigns;

- (f) a statute, regulation or provision of a statute or regulation ("Statutory Provision") includes that Statutory Provision as amended or re-enacted from time to time, a statute, regulation or provision enacted in replacement of that Statutory Provision and another regulation or other statutory instrument made or issued under that Statutory Provision; and
  - (g) a body which has been reconstituted or merged must be taken to be to the body as reconstituted or merged and a body which has ceased to exist and the functions of which have been substantially taken over by another body must be taken to be to that other body.
- (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 this Agreement or the inclusion of the provision in this 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.
  - (7) The time between 2 days, acts or events includes the day of occurrence or performance of the second but not the first day, act or event.

### 1.3 Parties

- (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.

### 1.4 Priority of interpretation

- (1) If there is any inconsistency or discrepancy between provisions of the body of this document and of its schedules or any other document comprising this Agreement, the provision of the body of this document will prevail to the extent of that inconsistency or discrepancy.

- (2) Subject to clause 1.4(1), if there is any error, omission, ambiguity or discrepancy in this Agreement, then VicTrack may direct the Contractor as to the interpretation and construction to be followed and the Contractor must comply with that direction.

## **2. EXECUTION OF SERVICES**

### **2.1 Time for Performance and Extension of Time**

- (1) The Contractor must:
  - (a) commence to perform the Services promptly on execution of this Agreement and proceed to perform the Services with due diligence;
  - (b) perform the Services in accordance with any Program approved by VicTrack; and
  - (c) complete the Services by the Completion Date.
- (2) Subject to clause 2.1(3), the Contractor is entitled to an extension of time to the Completion Date where the completion of the Services is delayed by reason of an act, default or omission of VicTrack or a breach of this Agreement by VicTrack.
- (3) The Contractor must request an extension of time under this clause 2.1 within 7 days after it becomes aware of the relevant event giving rise to the delay.
- (4) VicTrack's Representative will promptly assess any request for an extension of time made under this clause 2.1 and notify the Contractor accordingly. The Completion Date will be extended to the date specified in VicTrack's Representative's notice.
- (5) VicTrack may extend the Completion Date at any time by written notice to the Contractor, for any reason.
- (6) The Contractor's entitlement to an extension of time under this clause 2.1 is the Contractor's sole entitlement arising out of any delay to the Services.

### **2.2 Standard of Performance**

The Contractor must perform the Services:

- (1) professionally and with all due skill, care and diligence;
- (2) in accordance with the requirements of this Agreement; and
- (3) in accordance with high quality standards and methods as would be used by leading, highly skilled and experienced contractors engaged for services of a similar value, importance and complexity to the Services.

### 2.3 Provision of Advice, Skills and Staff

- (1) The Contractor must provide all professional advice and skills which are required for the provision of the Services.
- (2) The Contractor must employ staff with qualifications and experience appropriate to the provision of the Services or that part of the Services for which they are employed.

### 2.4 Compliance

- (1) The Contractor must comply with all Laws applicable to the Services and all directions which VicTrack may give in relation to the Services.
- (2) The Contractor must obtain all Approvals necessary in connection with the provision of the Services and comply with the requirements of all such Approvals.
- (3) If requested by VicTrack, the Contractor must promptly provide to VicTrack copies of Approvals referred to in clause 2.4(2).

### 2.5 Directions

VicTrack may give to the Contractor any directions or instructions which VicTrack considers may be required in relation to the Services, including the order in which any of the activities comprised in the Services is to be carried out, and the Contractor must comply with all such directions and instructions.

## 3. **CONTRACTOR'S WARRANTIES**

### 3.1 Contractor's Warranties

The Contractor warrants that:

- (1) the Services will be carried out personally by the Contractor's Key Personnel;
- (2) the Services will be carried out in accordance with the requirements of clause 2.2;
- (3) all information contained in the Proposal is correct;
- (4) the Contractor's Key Personnel are members of the professional body stated in the Proposal and will remain members whilst performing the Services; and
- (5) it has not relied on any information provided by or on behalf of VicTrack in connection with the Services or the works to which they relate and it enters into this Agreement based on its own investigations.

### 3.2 Document Warranties

Where the Services include the provision of any Documents, the Contractor warrants that those Documents will:

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- (1) be fit for their purpose;
  - (2) be prepared professionally and in accordance with high quality standards of design and practice as would be used by leading, highly skilled and experienced contractors engaged for services of a similar value, importance and complexity to the Services;
  - (3) comply with all Laws and Approvals;
  - (4) be consistent and in all respects achieve the requirements of the Services Brief;
  - (5) comply in all respects with the requirements of this Agreement; and
  - (6) be free from defects in design and accurate in all respects.
- The Contractor agrees that the warranties in this clause 3.2 will not be discharged or affected in any way by reason of VicTrack having reviewed or permitted the use of any Document.

### 3.3 VicTrack's Reliance

The Contractor acknowledges that VicTrack has entered into this Agreement in reliance on the warranties contained in this clause 3.

## 4. VARIATION OF SERVICES

- 4.1 VicTrack may, at any time, direct the Contractor to vary the scope of the Services.
- 4.2 The Contractor is bound to comply with that direction even if any adjustment to the Fee applicable to the varied scope of the Services has not been agreed or determined in accordance with clause 4.4.
- 4.3 The Contractor has no entitlement to any adjustment to the Fees or to any other compensation if it varies the scope of the Services without having first received a written direction from VicTrack.
- 4.4 Any adjustment to the Fees payable to the Contractor as a consequence of a direction issued under this clause 4 must be agreed in writing between the parties or, where the parties fail to agree, determined in accordance with clause 22.

## 5. ACCESS PROCEDURES AND OCCUPATIONAL HEALTH & SAFETY

Where the Contractor requires access to land vested in or controlled by VicTrack for the purposes of performing the Services, the Contractor must:

- (1) comply with the Access Procedures and the Occupational Health & Safety Requirements; and
- (2) at all times be responsible for its employees, agents and sub-contractors who are on or about any such land.

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## **6. PROGRAM**

- 6.1 If requested by VicTrack, the Contractor must submit for approval by VicTrack a program for the delivery of the Services to meet the Completion Date.
- 6.2 The Program must be in a form which is reasonably acceptable to VicTrack.
- 6.3 The Contractor must not without reasonable cause depart from a Program approved by VicTrack.
- 6.4 The Contractor must notify VicTrack if at any time it is, or is likely to be, unable to comply with the Program.
- 6.5 VicTrack may direct the Contractor to deviate from the current Program, submit a revised Program or implement any remedial action which VicTrack reasonably considers necessary if VicTrack considers that the Contractor is unlikely to be able to comply with an existing Program. The Contractor is not entitled to any adjustment to the Fees or any other compensation as a result of any such direction.
- 6.6 The submission by the Contractor of a Program or any approval of the Program by VicTrack does not relieve the Contractor from any of its obligations under this Agreement.

## **7. DOCUMENTS**

- 7.1 Application of Clause  
This clause 7 applies where the Services include the provision of any Documents.
- 7.2 Compliance with Warranties  
The Contractor must ensure that all Documents comply with the warranties contained in clause 3.2.
- 7.3 Certification of Documents by Contractor's Representative  
All Documents prepared by or on behalf of the Contractor in the course of providing the Services must be certified by the Contractor's Representative as having been prepared by personnel with appropriate qualifications and experience and otherwise as satisfying the requirements of this Agreement.
- 7.4 Submission of Documents to VicTrack
  - (1) The Contractor must provide to VicTrack the number of copies of the Documents specified in Schedule 1.
  - (2) All Documents prepared by or on behalf of the Contractor must be promptly submitted by the Contractor to VicTrack within the period specified in the Program, or where no period is specified, within a reasonable time.

- (3) In the case of any Document which VicTrack believes does not comply with the requirements of this Agreement, VicTrack will advise the Contractor accordingly and the Contractor must promptly submit a new or amended Document, at its cost.
- (4) Neither the review of, nor the approval by VicTrack of, any Document submitted by or on behalf of the Contractor under this Agreement relieves the Contractor from responsibility or liability for any defects, errors or omissions whatsoever (including defects, errors or omissions in design) contained in the Document or the Contractor's obligations to comply with this Agreement.

## **8. QUALITY ASSURANCE**

- 8.1 If requested by VicTrack, the Contractor must establish and maintain a documented quality system in respect of the Services in accordance with the appropriate AS/NZS ISO 9000 Series Standards.
- 8.2 The Contractor must provide VicTrack's Representative or other person nominated by VicTrack with reasonable access to all premises, personnel and documents necessary to permit auditing of the Contractor's quality system, at regular intervals during the performance of the Services.

## **9. FEES FOR SERVICES**

- 9.1 VicTrack must pay the Fees to the Contractor for the provision of the Services satisfactorily provided in accordance with this Agreement.
- 9.2 Progress payments will be made in accordance with Schedule 2.
- 9.3 The Fees are inclusive of all costs and expenses of the Contractor whether foreseen or unforeseen, including without limitation, insurance, duties, imposts and taxes, which must be paid by the Contractor, except for the Reimbursable Expenses.

## **10. INVOICING AND PAYMENT**

- 10.1 The expressions "tax invoice" and "adjustment note" set out in this clause 10 and in Schedule 2 bear the same meaning as those expressions have in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 10.2 The Contractor must give to VicTrack a tax invoice in respect of the Services and any Reimbursable Expenses in accordance with Schedule 2. The Contractor is not entitled to receive any payment and VicTrack is not obliged to pay the Contractor unless and until the Contractor has provided VicTrack with a valid tax invoice and, if required, an adjustment note in accordance with Schedule 2.
- 10.3 Subject to the Contractor having complied with paragraph 3.1 of Schedule 2 and any other pre-conditions to payment set out elsewhere in this Agreement, VicTrack must pay the amount of the Fees and Reimbursable Expenses due from VicTrack to the Contractor, as specified

in the relevant payment schedule issued to the Contractor, within 30 days after the receipt of the payment claim.

- 10.4 Payment of any money by VicTrack to the Contractor is not evidence or an admission that the Services have been provided in accordance with this Agreement or evidence of the value of the Services provided but must be taken only as payment on account.
- 10.5 VicTrack may set off against any sum owing to the Contractor any amount owing by the Contractor to VicTrack.

## 11. **GST**

- 11.1 Save for defined terms in this Agreement, capitalised expressions set out in this clause 11 bear the same meaning as those expressions have in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 11.2 The Contractor must have an Australian Business Number and be registered for GST.
- 11.3 Except where express provision is made to the contrary, and subject to this clause 11, any amount that may be payable under this Agreement is exclusive of any GST. If a party makes a Taxable Supply in connection with this Agreement for a Consideration which represents its Value, then the Recipient of the Taxable Supply must also pay, at the same time and in the same manner as the Value is otherwise payable, the amount of any GST payable in respect of the Taxable Supply. A party's right to payment under this clause 11 is subject to a valid Tax Invoice being delivered to the Recipient of the Taxable Supply.
- 11.4 To the extent that one party is required to reimburse another party for costs or expenses incurred by the other party, those costs or expenses do not include any amount in respect of GST for which the other party is entitled to claim an Input Tax Credit.
- 11.5 To the extent that any Consideration payable to a party under this Agreement is determined by reference to a cost incurred by that party, the GST exclusive amount of that cost must be used.

## 12. **RECORDS**

The Contractor must:

- (1) maintain full and proper records of the Services provided including the Reimbursable Expenses incurred and the number of hours worked by the Contractor's Key Personnel;
- (2) provide copies of these records to VicTrack's Representative when required and allow VicTrack's Representative to have access to and to inspect the relevant records at all reasonable times; and
- (3) maintain such records for not less than seven years after the Completion Date.

### **13. VICTRACK'S REPRESENTATIVE AND CONTRACTOR'S REPRESENTATIVE**

#### 13.1 VicTrack's Representative

- (1) VicTrack's Representative may exercise VicTrack's duties, discretions and powers under this Agreement. If no person is appointed and named as VicTrack's Representative in Schedule 1, then VicTrack may appoint a person as VicTrack's Representative and must notify the Contractor of the appointment.
- (2) The appointment of VicTrack's Representative does not prevent the exercise of any duty, discretion or power by VicTrack and VicTrack may, at any time, cancel the appointment. VicTrack may appoint another person as VicTrack's Representative and must notify the Contractor of the appointment.
- (3) VicTrack's Representative is appointed by VicTrack as agent of VicTrack and not as an independent assessor, valuer or certifier with any quasi-judicial or quasi-arbitral function.

#### 13.2 Contractor's Representative

- (1) The Contractor must appoint a Contractor's Representative. The Contractor's Representative as at the date of this Agreement must be named in Schedule 1. The Contractor may, with the prior written approval of VicTrack, which approval may not be unreasonably withheld, cancel the appointment and must nominate another Contractor's Representative.
- (2) The Contractor's Representative may exercise the Contractor's duties, discretions and powers under this Agreement. Matters within the knowledge of the Contractor's Representative are deemed to be within the knowledge of the Contractor. Directions and instructions given to the Contractor's Representative are deemed to be directions and instructions given to the Contractor.

### **14. CONTRACTOR'S KEY PERSONNEL**

- 14.1 The Services must be provided by the Contractor's Key Personnel.
- 14.2 The Contractor must not replace any of the Contractor's Key Personnel without first obtaining the written consent of VicTrack.
- 14.3 VicTrack may, where it considers that any one or more of the Contractor's Key Personnel are not performing the Services in accordance with this Agreement, direct the Contractor to ensure that such Contractor's Key Personnel perform the Services in accordance with this Agreement, remove or replace the Contractor's Key Personnel with another person approved by VicTrack within the time specified in the direction or take whatever other action may be reasonably requested by VicTrack.

## 15. SUB-CONTRACTING OR ASSIGNMENT

- 15.1 The Contractor must not, without the prior written approval of VicTrack, subcontract or assign the performance of the whole or any part of the Services or any rights or obligations under this Agreement. In giving written approval, VicTrack may impose such terms and conditions as it considers appropriate.
- 15.2 The Contractor is fully responsible for carrying out the Services notwithstanding that the Contractor has sub-contracted or assigned the performance of any part of the Services.
- 15.3 Notice of Intention to Suspend
- (1) The Contractor must promptly give to VicTrack a copy of any notice of intention to suspend work that the Contractor receives from any of its subcontractors under the Security of Payment Act where that work forms part of the Services. In such an event, VicTrack may, in its absolute discretion, pay such a subcontractor the money that it is owed for its work under the subcontract by the Contractor and the amount of such payment by VicTrack will be a debt due from the Contractor to VicTrack. Payment by VicTrack of any amount under this clause 15.3(1) will not relieve the Contractor of any of its obligations and liabilities under this Agreement.
  - (2) The Contractor indemnifies, and will keep indemnified, VicTrack in respect of all liabilities, damages, losses, costs and expenses (including legal costs on a full indemnity basis) incurred by VicTrack arising from any notice of intention to suspend work, or a suspension of work, by a subcontractor under the Security of Payment Act where that work forms part of the Services or any failure of the Contractor to notify VicTrack as required under clause 15.3(1).

## 16. CONFIDENTIALITY

- 16.1 The Contractor consents to VicTrack or the Victorian Government publishing (on the internet or otherwise) the name of the Contractor and the amount of the Fees and Reimbursable Expenses together with the conditions of this Agreement generally. Subject to this right of publication, VicTrack will treat as confidential all information provided to it in the Proposal.
- 16.2 All information provided to the Contractor by or on behalf of VicTrack under or in connection with this Agreement or in the Request for Services ("Confidential Information") must be treated as confidential by the Contractor. The Contractor agrees that the Contractor must not disclose to any person any Confidential Information.
- 16.3 All Confidential Information remains the property of VicTrack and must (where possible) be returned to VicTrack's Representative on completion of the Services or upon the expiration or termination of this Agreement.

- 16.4 The Confidential Information must be used only for the provision of the Services or as directed by VicTrack's Representative and must not be used for any other purpose.
- 16.5 The Contractor's and VicTrack's obligations under this clause 16 do not extend to information already in the public domain other than due to a breach of this Agreement or any disclosure required by law.

## **17. MEDIA CONTACT**

- 17.1 The Contractor must not, and must ensure that its employees, agents, consultants and sub-contractors do not:
- (1) issue, or allow to be issued, for publication in any media any information, image, publication, document or article concerning the Services, or any project to which the Services relate; or
  - (2) communicate in any way with any media in respect of any matter connected with the Services, or any project to which the Services relate,  
except with the express prior written approval of VicTrack, which approval may be given, conditionally given or withheld by VicTrack in its absolute discretion.
- 17.2 The Contractor must, and must ensure that all of its employees, agents, consultants and sub-contractors, immediately refer to VicTrack any enquiries made by any media concerning the Services, or any project to which the Services relate.

## **18. CONFLICT OF INTEREST**

- 18.1 The Contractor warrants that it does not hold any office or possess any property, is not engaged in any business, trade or calling and does not have any obligations by virtue of any contract whereby, directly or indirectly, duties or interests are, or might be, created in conflict with, or might appear to be created in conflict with, its duties and interests under this Agreement.
- 18.2 The Contractor must immediately inform VicTrack of any matter which may give rise to an actual or potential conflict of interest at any time and VicTrack may regard a conflict of interest as a breach of a fundamental term of this Agreement and may elect to terminate this Agreement under clause 23.3.

## **19. INTELLECTUAL PROPERTY**

- 19.1 **Warranty by Contractor**  
The Contractor warrants that it is entitled to use any Intellectual Property which may be used by it in connection with the provision of the Services.
- 19.2 **Indemnity by Contractor**

The Contractor indemnifies and will at all times keep VicTrack indemnified against any action, claim, suit or demand, including a claim, suit or demand for or liability to pay compensation or damages, and costs or expenses arising out of or in respect of any breach of any third party's Intellectual Property rights.

19.3 Material created is VicTrack's Property

The ownership of all Intellectual Property in all Documents created as a result of or in connection with the provision of Services will vest in VicTrack. The Contractor assigns ownership of all Intellectual Property rights in such Documents to VicTrack and must ensure that its employees, consultants, sub-contractors and agents execute all documents necessary to assign to VicTrack all such rights.

19.4 Moral Rights

The Contractor must procure in writing from any author that is an employee or agent of the Contractor or an employee or agent of its subcontractors in relation to all Moral Rights in any Documents, the Services or the works the subject of the Services, an irrevocable consent in favour of VicTrack (VicTrack's assignees and licensees) to use, reproduce, adapt and modify the Documents, Services or the works by or for VicTrack for any purpose relating to the business of VicTrack, without VicTrack having to observe any right of attribution of authorship or right of integrity.

## 20. INDEMNITY

20.1 The Contractor indemnifies VicTrack and each of its officers, employees and agents ("Indemnified Parties") against all damages, costs, expenses, loss or damage which any Indemnified Party may incur or sustain and all actions, proceedings, claims and demands whatsoever which may be brought or made against any Indemnified Party by any person in respect of or by reason of or arising out of:

- (1) the performance by or on behalf of the Contractor of the Services;
- (2) any negligence or other wrongful act or omission of the Contractor or the Contractor's Key Personnel or other employees or sub-contractors or of any other persons for whose acts or omissions the Contractor is vicariously liable;
- (3) any negligence or other wrongful act or omission of the Contractor's visitors, invitees or licensees;
- (4) death, injury, loss of or damage to the Contractor, the Contractor's Key Personnel or its other employees, agents, sub-contractors, licensees, invitees or visitors; and
- (5) any breach of this Agreement by the Contractor.

20.2 The Contractor's liability under clause 20.1 will be reduced to the extent to which any action, proceeding, claim or demand arises out of any negligence or other wrongful act or omission of any Indemnified Party.



20.3 VicTrack holds the benefit of the indemnity under clause 20.1 on trust for each of the Indemnified Parties, and may enforce the indemnity on their behalf.

## 21. **INSURANCE**

### 21.1 Professional Indemnity Insurance

The Contractor must effect and maintain a professional indemnity insurance policy for an amount not less than the amount stated in Schedule 1 and with an insurer and on terms and conditions reasonably acceptable to VicTrack. The Contractor must maintain such insurance for a period of seven years after the Completion Date.

### 21.2 Public Liability Insurance

- (1) Where it is stated in Schedule 1 that the Contractor is to effect public liability insurance, the Contractor must effect and maintain a public liability policy of insurance covering the Contractor, VicTrack and their employees, agents and sub-contractors against liability for death of or injury to any person or loss of, destruction of or damage to property arising from or related to the provision of the Services and for an amount not less than that stated in Schedule 1 in respect of any one claim with an insurer and on terms and conditions reasonably acceptable to VicTrack.
- (2) Where it is stated in Schedule 1 that VicTrack is to effect public liability insurance then:
  - (a) for the purposes of this clause 21.2(2) "VicTrack's Insurance" means a policy of insurance in respect of public liability in the form of the policy contained, or referred to, in the Request for Services;
  - (b) prior to the date of this Agreement, VicTrack must effect VicTrack's Insurance and must maintain that insurance until completion of the Services;
  - (c) the Contractor and its subcontractors and consultants must be named as insureds under VicTrack's Insurance and confirmation of such insurance must be provided to the Contractor within 7 days after the date of this Agreement;
  - (d) the parties agree to comply with their obligations as insureds under VicTrack's Insurance and the Contractor must ensure such compliance by its subcontractors and consultants; and
  - (e) if a claim is, or could be, made under VicTrack's Insurance, the Contractor is liable for, and must promptly pay on demand by VicTrack or the relevant insurer, the amount of any deductible payable in respect of that claim.

- 21.3 Insurance of Employees  
The Contractor must insure against liability for death of or injury to persons employed by the Contractor, including liability by statute and at common law.
- 21.4 Insurances Required by Law  
The Contractor must effect and maintain all other insurances that it may be required to effect and maintain under any Law, including any insurances required under the *Building Act* 1993 (Vic).
- 21.5 Proof of Policies  
Before commencing the Services, the Contractor must effect the insurances it is required to effect under this clause 21 and provide to VicTrack proof that it has done so. VicTrack may terminate this Agreement if the Contractor does not comply with this clause 21.

## 22. DISPUTES

- 22.1 If a dispute arises between the parties in relation to any matter the subject of this Agreement ("Dispute"), any party seeking to resolve the Dispute must do so strictly in accordance with the provisions of this clause 22.
- 22.2 Compliance with the provisions of this clause 22 is a condition precedent to any entitlement to a claim, relief or remedy, whether by way of proceedings in a court or otherwise, in respect of the Dispute. Nothing in this clause 22 prejudices the right of either party to seek urgent injunctive or declaratory relief from a court in connection with a Dispute without first having to attempt to negotiate and then settle the Dispute by mediation.
- 22.3 A party seeking to resolve a Dispute must notify the existence and nature of the Dispute to the other party in writing ("Notification").
- 22.4 Upon receipt of a Notification, the parties must negotiate with a view to resolving the Dispute.
- 22.5 If the Dispute is not resolved by negotiation within 7 days after the Notification is given or such other period as both parties agree in writing, then either party may refer the Dispute to mediation by requesting the Chair of The Institute of Arbitrators and Mediators Australia (Victorian Chapter) or his or her nominee to appoint a mediator. The mediation must be conducted in accordance with The Institute of Arbitrators and Mediators Australia Mediation Rules (current as at the date of this Agreement).
- 22.6 If the Dispute is not resolved by mediation within 20 Business Days after the appointment of the mediator, either party may have the Dispute dealt with by a court or tribunal of competent jurisdiction as appropriate.
- 22.7 Despite the existence of a Dispute, each party must continue to perform its obligations under this Agreement. In particular, VicTrack must continue to comply with its payment obligations, except that VicTrack is entitled to withhold its reasonable assessment of the amount the subject of the Dispute.

## 23. SUSPENSION AND TERMINATION

### 23.1 Suspension

- (1) VicTrack may direct the Contractor to suspend or defer the provision of the Services or any part of them for such time as VicTrack thinks fit.

The Contractor's sole entitlement to an adjustment to the Fees or any other compensation in connection with such a direction will be for reimbursement of any expenses properly and reasonably incurred by the Contractor solely as a consequence of the direction.

- (2) The Contractor will not be entitled to any adjustment to the Fees or any other compensation where the suspension or deferral the subject of the direction was caused or contributed to by an act, default or omission of the Contractor or a breach of this Agreement by the Contractor.
- (3) VicTrack may lift the suspension or deferral by giving a notice in writing to that effect to the Contractor at any time, after which the Contractor must promptly resume the performance of the Services.

### 23.2 Termination for Convenience

- (1) Notwithstanding anything otherwise contained in this Agreement, either party may in its absolute discretion terminate this Agreement at any time by giving six (6) months' prior written notice of termination to the other party. This Agreement is terminated 60 days after the formal notice is issued by either party.
- (2) VicTrack must within 30 days after termination of this Agreement under this clause 23.2, pay to the Contractor the amount due to the Contractor pursuant to this Agreement for Services performed and Reimbursable Expenses incurred by the Contractor up to the date of termination, as agreed between VicTrack and the Contractor or, failing agreement, as determined by VicTrack.
- (3) The Contractor's entitlements under this clause 23.2 are its sole entitlement to any payment or compensation of any kind from VicTrack following the termination of this Agreement under this clause 23.2. For the avoidance of doubt, the Contractor will not be entitled to any additional amount in respect of any Services not performed at the date of termination, including any loss of profits.

### 23.3 Termination for Breach

- (1) If the Contractor fails to carry out any of its obligations or duties under this Agreement, VicTrack may by notice to the Contractor specify the breach and request that the breach be remedied within 14 days after receipt of such notice.
- (2) If the Contractor fails to remedy the breach to the satisfaction of VicTrack within the period of the notice given under clause 23.3(1), then VicTrack may terminate this Agreement at any time by written notice to the Contractor.

23.4 Insolvency  
If an Insolvency Event occurs in relation to the Contractor, VicTrack may terminate this Agreement immediately by written notice.

## 24. NOTICES

24.1 Notices to be in writing  
A notice or other communication connected with this Agreement ("Notice") has no legal effect unless it is in writing.

24.2 Method of delivery  
In addition to any other method of service provided by law, the Notice may be sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified, sent by facsimile to the facsimile number of the addressee set out in this Agreement or subsequently notified or delivered at the address for service of the addressee set out in this Agreement or subsequently notified.

24.3 Time of delivery  
If the Notice is sent or delivered in a manner provided by clause 24.2, it must be treated as given to and received by the party to which it is addressed:

- (1) if sent by post, on the second Business Day (at the address to which it is posted) after posting;
- (2) if sent by facsimile before 4 p.m. 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
- (3) if otherwise delivered before 5 p.m. on a Business Day at the place of delivery, upon delivery and otherwise on the next Business Day at the place of delivery.

24.4 Failed deliveries  
Despite clause 24.3:

- (1) 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
- (2) 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.

## 25. MISCELLANEOUS

### 25.1 Continuing obligations – no merger

- (1) Each indemnity and warranty of a party in this Agreement continues in force despite completion of the Services or the termination of this Agreement.
- (2) Each obligation of a party in this Agreement which by its nature survives the termination of this Agreement or the completion of the Services continues in force despite the termination of this Agreement or the completion of the Services.
- (3) For the avoidance of doubt, and without limiting clause 25.1(1) or clause 25.1(2), the Contractor's obligations under clauses 16, 19 and 20 continue in force despite completion of the Services or the termination of this Agreement.

### 25.2 Cumulative Rights

The rights, powers and remedies provided in this Agreement are in addition to those provided by law independently of this Agreement.

### 25.3 Execution of counterparts

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.

### 25.4 Nature of relationship

The relationship between VicTrack and the Contractor will at all times be that of independent contracting parties. Nothing in this Agreement creates any joint venture, agency, partnership, trust, fiduciary or other relationship between VicTrack and the Contractor.

### 25.5 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.

### 25.6 Severability

If anything in this Agreement is unenforceable, illegal or void then it is severed and the rest of this Agreement remains in force.

### 25.7 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.

### 25.8 Variation

An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

### 25.9 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.

25.10 Conditions of VicTrack consent or approval

Subject to the terms of this Agreement, any consent or approval which may be given by VicTrack to the Contractor under this Agreement may be given subject to such terms and conditions as VicTrack may in its sole and absolute discretion deem fit, and will not be binding on VicTrack unless in writing signed by a duly authorised officer of VicTrack.

25.11 Obligations of Contractor at Contractor's cost

Unless expressly stated otherwise in this Agreement, any obligation, undertaking, covenant or agreement to be carried out by the Contractor under this Agreement must be done at the Contractor's sole cost and expense.

25.12 Adjudication under the Security of Payment Act

If the Contractor applies for adjudication under the Security of Payment Act, the parties agree that the authorised nominating authorities for the purposes of the Security of Payment Act in respect of such an adjudication application are the bodies stated in Schedule 1.

25.13 Governing law and jurisdiction

The law of Victoria governs this Agreement. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

**EXECUTED as an Agreement.**

SIGNED for and on behalf of Victorian Rail Track in the presence of: )  
)  
)

.....

Signature

Signature of Witness

Name

Position of signatory

Name of Witness

DATE

EXECUTED by the Contractor in accordance with section 127 of the Corporations Act 2001: )  
)  
)

.....

Director/Company Secretary

Director

Name of Director/Company Secretary  
(BLOCK LETTERS)

Name of Director  
(BLOCK LETTERS)

DATE

DATE

## SCHEDULE 1

**Item (i)** Contractor:

**Trans-Mit Pty Ltd ACN 100 711 957**

**Item (ii)**

The Completion Date (clause 1.1): **31 August 2016**, subject to the right for VicTrack, in its sole and absolute discretion, to extend the Completion Date by two further periods, each of one year.

Commencement Date:

**1 September 2013**

**Item (iii)** Contractor's Key Personnel (clause 1.1):

**Rodney Sheppard – Manager**

**Item (iv)** Contractor's Representative (clause 1.1):

**Ron Cranston – Developer**

**Item (v)** VicTrack's Representative (clause 1.1):

**Kristen Georgakopoulos – IT Manager**

Level 8

1010 LaTrobe Street

Docklands Victoria 3008

PH: 03 9619 8509

FAX: 03 9619 8851

**Item (vi)** Number of copies of Documents (clause 7.4(1)):

**2 Hard copies and one electronic**

**Item (vii)** Insurance (clause 21):

Professional Indemnity **\$10,000,000 in aggregate**

Public Liability

The Contractor is to effect public liability insurance for an amount not less than **\$20,000,000 per occurrence.**



**Item (viii)** Notices (clause 24):

VicTrack

Address: Level 8, 1010 LaTrobe Street, Docklands, Victoria  
3008

Fax: (03) 9619 8851

Trans-Mit Pty Ltd

Address: 7 Wendy Court, Hampton Park VIC 3976

Fax: (03) 8787 5722

**Item (ix)** Authorised Nominating LEADR

Authorities

(Clause 25.12):

Building Adjudication Victoria Inc

Rialto Adjudications Pty Ltd

## SCHEDULE 2

### Fees, progress payments and Reimbursable Expenses

**1. Agreed Rates (clause 1.1):**

Fixed hourly rates of \$121.50 + GST apply where VicTrack exceed the 400 hours of service and support during the initial 3 year term.

**2. Fixed Fee (clause 1.1):**

\$48,600.00 AUD + GST p.a. based on 400 hours of service and support per annum.

**3. Progress Payments (clause 9.2):**

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

- (1) VicTrack will pay the Contractor on a quarterly basis for Services performed, subject to receipt of valid quarterly tax invoice. The quarterly fee for the duration of this Agreement will be \$12,150.00 AUD + GST.
- (2) An early payment claim will be deemed to have been made on the date for making that claim set out in clause 3.1 (1) of this schedule 2.
- (3) Each payment claim must be given in writing to VicTrack's Representative in the form of or accompanied by a tax invoice. Such claim 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 Contractor pursuant to this Agreement.
- (4) Despite any other provision in this Agreement to the contrary, but only to the extent permitted by law, the Contractor 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 Contractor or determined in accordance with clause 22 of this Agreement.
- (5) VicTrack's Representative must, within 10 Business Days after receiving a payment claim, issue to the Contractor 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 Contractor 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 Contractor to VicTrack.

- (6) If the Contractor does not make a payment claim in accordance with paragraph 3.1(1), VicTrack's Representative may issue the payment schedule referred to in paragraph 3.1(5).
- (7) if there is a difference between the amount claimed by the Contractor in a payment claim and the amount assessed by VicTrack's Representative in the corresponding payment schedule, the Contractor must issue an adjustment note to VicTrack within 5 Business Days after receipt of the relevant payment schedule.
- (8) The Contractor acknowledges that VicTrack's Representative issues the payment schedule to the Contractor on behalf of VicTrack.

**4. Reimbursable Expenses (clause 1.1):**

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

- 4.1 \$135.00 +GST per hour during business hours (8am – 6pm AEST).
- 4.2 \$202.50 +GST per hour outside of business hours (6pm – 8am AEST)

A minimum of 2 hours travel time will be charged for the rates in clauses 4.1 and 4.2 of this schedule 2, irrespective of destination.

## SCHEDULE 3

### Services Standard Maintenance and Support

The Contractor shall at all reasonable times and with VicTrack's prior approval, have remote access to the equipment described in Table 2 via a secure SSH connection. Such access will be for the purpose of testing and delivering, in accordance with this Agreement, escalated support and maintenance services for the equipment described in table 3. Any on site access by the Contractor to the installation sites (being those data centres within the Melbourne Central Business District nominated by VicTrack from time to time) must only be with prior authorisation from VicTrack

**TABLE 2 SERVICES AND SLA'S**

	<b>Service Description</b>	<b>Service Level Agreement (SLA)</b>	<b>Reporting</b>
<b>1.</b>	Monitoring of Software / Equipment	24 / 7	Monthly Report
<b>2.</b>	Incident – Response and Fix (Work around)	2 Hours	Monthly Report
<b>3.</b>	Rectification (Permanent Fix)	8 Hours	Monthly Report
<b>4.</b>	Reporting <ul style="list-style-type: none"> <li>- HRS used;</li> <li>- Maintenance;</li> <li>- IT Support;</li> <li>- Modifications;</li> </ul> Enhancements	Within 5 Business days at the end of the Calendar month	Monthly Report
<b>5.</b>	Product Development / Upgrades / License Fees	Quote < 2 Business Days	N/A
<b>Each of the above Services and Performance Standards are related to the software and equipment listed in Table 3 (below)</b>			

**TABLE 3 – INSTALLATION SITES | EQUIPMENT | SOFTWARE AND VERSION**

As at the commencement date of this Agreement, this Table 3 identifies the software (inclusive of software version) and equipment relevant to the Services.

<p><b>Data Centres Located within the Melbourne CBD</b></p>	<p>Telmax21 Network Management application software</p>	<p>Version 2.0v24</p>
	<p>Bilmax21Web Billing application software</p>	<p>Version 3.0/4.0</p>
	<p>Pre-Processor application software</p>	<p>Version Milestone 6</p>
	<p>SCO Unix operating system software installed on virtual servers... telmax21</p>	<p>Version Open Server 6.0.0 Enterprise Edition 10 user SCO Open Server 10 additional user licences</p>
	<p>IBM Informix database Engine software</p>	<p>Version SE 5, 5 user</p>
	<p>IBM Informix database SQL software</p>	<p>Version SQL 4.16 Version 2.10 5 user</p>
	<p>IBM Informix dynamic 4GL runtime</p>	<p>Version 1.0</p>
	<p>Intranet browser based web directory</p>	

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

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

**END OF AGREEMENT**