



Operator Sub-Agreement

for Indicative Services in the Hunter Valley

Dated

Australian Rail Track Corporation Limited (ABN 75 081 455 754) (“ARTC”)

and

[Operator] (ABN []) (“Operator”)

and endorsed by

[Access Holder] (ABN []) (“Access Holder”)

.....
Signed

.....
Full name (Print)

.....
Authorised signatory

Operator Sub-Agreement

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Operator Sub-Agreement

Details

| | | |
|--------------------------------|--------------------------|---|
| Parties | ARTC and Operator | |
| ARTC | Name | Australian Rail Track Corporation Limited |
| | ABN | 75 081 455 754 |
| Operator | Name | |
| | ABN/ACN/ARBN | |
| Recitals | A | ARTC is the manager of the Network. |
| | B | ARTC has agreed to grant the Access Holder rights to the Network for the purpose of transporting coal upon the terms and conditions set out in the Access Holder Agreement. |
| | C | Pursuant to the Access Holder Agreement, the Access Holder has nominated the Operator to provide Services to it utilising the access rights granted under the Access Holder Agreement. |
| | D | ARTC agrees to grant the Operator rights to use and provide Services to the Access Holder on the Network upon the terms and conditions set out in this agreement and the Access Holder Agreement. |
| | E | The Operator will exercise its right to use and provide Services on the Network in accordance with this agreement and the Access Holder's access rights under the Access Holder Agreement. |
| | F | The Access Holder has endorsed this agreement as an Operator Sub-Agreement for the purposes of the Access Holder Agreement. |
| Access Holder | | |
| Access Holder Agreement | | |
| Date of this agreement | | |

Operator Sub-Agreement

General terms

1 Definitions and interpretation

1.1 Definitions

In this agreement unless the context otherwise requires:

ACCC means the Australian Competition and Consumer Commission;

Acceptable Credit Rating means a minimum long term credit rating of either BBB from Standard & Poors or Baa2 from Moody's;

Access Undertaking means:

- (a) the undertaking accepted by the ACCC from time to time under Division 6 of Part IIIA of the TPA, that covers the Network; or
- (b) if the ACCC has accepted an undertaking under Division 6 of Part IIIA of the TPA that covers the Network which has expired and there is no access undertaking currently in force, the access protocols published by the ARTC after consultation with access holders, under which ARTC agrees to offer access to the Network from time to time;

Access Holder means the person specified in the Details and includes its administrators or permitted successors, substitutes (including by way of novation) and assigns;

Access Holder Agreement means the agreement specified in the Details as amended from time to time;

Accreditation means to be an Accredited Operator or an Accredited Owner (as the case may be) as defined under the *Rail Safety Act* and "Accredited" bears a corresponding meaning;

Accredited Operator means an operator (including the Operator) who is Accredited or taken to be Accredited under the *Rail Safety Act* (being Accreditation in whatever named capacity may be applicable under the *Rail Safety Act*);

Accredited Owner means an owner (including ARTC) who is Accredited or taken to be Accredited under the *Rail Safety Act* (being Accreditation in whatever named capacity may be applicable under the *Rail Safety Act*);

ARTC's Environmental Licence means ARTC's environment protection licence under the *Protection of the Environment Operations Act 1997* (NSW) in respect of the Network or such other replacement licences that may be issued from time to time;

Associated Facilities means all associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the Network), tunnels, bridges, Network Control systems, signalling systems, communication systems and associated plant, machinery and equipment from time to time but only to the extent that such assets are related to or connected with the Network but does not include any sidings or yards;

Business Day means a day in New South Wales that is not a Saturday, Sunday or public holiday and on which banks are generally open for business;

Claim means all claims, legal actions and demands (including the costs and expenses of defending or settling any action, proceeding, claim or demand);

Code of Practice means the documents specified in **Schedule 2**, as amended from time to time by ARTC;

Commencement Date means the date that this agreement is signed by both parties;

Communications or TMS Provider means a third party responsible for:

- (a) building and operating telecommunications infrastructure on and adjacent to ARTC rail corridors and providing a communications platform for ARTC's train management system; and/or
- (b) developing and providing a train management system;

Consequential Loss includes:

- (a) any liability which does not flow naturally from the relevant breach of this agreement, even if that liability may reasonably be supposed to have been in the contemplation of both parties as a probable result of the breach at the time they entered into this agreement;
- (b) loss of profits, loss of business opportunity, loss of production, loss of revenue, loss of use, loss of contract, loss of goodwill, damage to goods being transported on the Services, payment of liquidated sums, penalties or damages payable under any agreement (other than this agreement); and
- (c) any other economic, special or consequential liabilities;

but does not include property damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death.

Consumer Price Index or CPI means the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics.

Credit Support means either:

- (a) a Parent Guarantee; or
- (b) Security;

Daily Train Plan means the daily train plan issued by ARTC;

Dangerous Goods Code means the Australian Code for the Transport of Dangerous Goods by Road and Rail prepared by the National Road Transport Commission (or successor body) from time to time;

Effective Date means the later of the Commencement Date and the date on which all of the conditions precedent in **clause 2.2** are satisfied;

Environmental Condition means any Environmental Damage or any event, circumstance, condition, operation or activity which it is reasonably foreseeable is likely to result in Environmental Damage and which, in ARTC's reasonable opinion, could result in ARTC or any other person incurring any material liability or being subjected to a direction of any competent authority;

Environmental Damage means any material injury or damage to persons, living organisms or property or any material pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

Government Authority means the Commonwealth or relevant State or Territory Government or any Commonwealth or State or Territory governmental, semi-governmental, judicial, municipal, statutory or public entity or authority but excludes ARTC and such entity or authority in its capacity as an Operator;

HVCCC means the Hunter Valley Coal Chain Co-ordinator Limited or, where that body no longer exists or has been reconstituted, renamed, replaced or whose functions have been removed or transferred to another body or agency, is the body which has the responsibility to most closely perform the functions of the first mentioned body, as reasonably determined by ARTC;

Incident means a breakdown, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:

- (a) material damage to or interference with the Network or any Associated Facilities managed by ARTC;
- (b) material damage to property;
- (c) material personal injury to any person;
- (d) an Environmental Condition;
- (e) a Category A incident or a Category B incident as defined in the Standards;
- (f) an incident which requires notification under the Rail Safety Act to the administering authority (as defined in such Act); or
- (g) an incident requiring notification under the Dangerous Goods Code;

Instructions means all instructions and directions, issued by ARTC from time to time:

- (a) which ensure, facilitate or encourage the proper, efficient, safe and lawful:
 - (i) use of and access to the Network by all Network users; or
 - (ii) management of the Network by ARTC;
- (b) which ARTC honestly believes upon the exercise of reasonable care are consistent with the Network Management Principles; and
- (c) which are given with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of ARTC (as set out in paragraphs (a) and (b) of this definition of “Instructions”) in issuing the instruction or direction,

but does not include instructions and directions:

- (d) which derogate from a Train Path or a Path Usage;
- (e) which prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or
- (f) which are given for the purpose only of achieving ARTC internal commercial objectives unrelated to the valid objectives of ARTC (as set out in paragraphs (a) and (b) of this definition of “Instructions”),

unless the instructions or directions:

- (g) are Network Control Directions properly given; or
- (h) relate to safety; or
- (i) are given to implement or support the Network Management Principles; or
- (j) are necessary to prevent or to minimise the effect of a material breach of this agreement; or
- (k) are otherwise authorised by this agreement,

and a reference to “ARTC” in this definition of “Instructions” includes also a reference to ARTC’s agents;

Material Default means any breach of a fundamental or essential term, including a breach of any term that may have an impact on the safe operation of the Network, or repeated breaches of any of the terms of this agreement;

Network means the network of railway lines as delineated or defined in **Schedule 1**;

Network Control means the control of Trains by ARTC or its agents on the Network;

Network Control Centre means the facility or facilities maintained and operated by ARTC or its agents for the purposes of Network Control;

Network Control Directions means all Instructions issued by ARTC or its agents relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains, but only to the extent such Instructions:

- (a) are honestly believed by ARTC to be consistent with the Network Management Principles; and
- (b) are made with a view to reasonably minimising the disruption to the Operator taking into account the valid objectives of ARTC in issuing the Instruction;

Network Management Principles means the principles regulating Train movements on the Network which must be consistent with the Train Decision Factors contained in the NSW Lease, as published on ARTC’s website;

NSW Lease means the Deed of Lease over the interstate and Hunter Valley rail lines and infrastructure between the State Rail Authority of New South Wales, Rail Infrastructure Corporation and ARTC dated 31 May 2004, as amended from time to time;

Parent Guarantee means a guarantee given by a Related Body Corporate of the Operator who has an Acceptable Credit Rating in substantially the same form set out in the Access Undertaking;

Passenger Priority means reasonable priority and certainty of access for rail passenger services delivered in accordance with **clause 3.4**;

Path Usage means the right granted under the Access Holder Agreement to utilise a Train Path through the operation of a Service by a nominated Operator on the Train Path and for which the Access Holder has nominated the Operator to operate that Service;

Rail Safety Act means the Acts passed by the State of New South Wales and any successor enactments, which relate to rail safety, including the *Rail Safety Act 2008* (NSW);

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth);

Remediation means the investigation, clean-up, removal, abatement, disposal, dispersal, reduction, destruction, mitigation, control, neutralisation, containment, encapsulation and other treatment of any contamination and any hazard arising from contamination, and includes without limitation the monitoring and remediation of contamination and hazards;

Rolling Stock means a locomotive, carriage, wagon or other vehicle for use on a railway;

Safeworking Rules means all policies and notices issued by ARTC for the purpose of ensuring the safe use of the Network;

Security means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by ARTC and which is in a form reasonably satisfactory to ARTC;

Service means a Train run by the Operator using the Network pursuant to this agreement;
[Drafting note: Ancillary movements which are not associated with an Access Holder will be covered by another agreement]

Service Assumptions for a Train Path, including a Path Usage, means the assumptions relating to the Services using that Path Usage set out in the applicable Train Path Schedule under the Access Holder Agreement;

Solvent means that, in the last five years:

- (a) the Operator has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a meeting has not been convened to place it in voluntary liquidation or to appoint an administrator;
- (c) an application has not been made to a court for the Operator to be wound up without that application being dismissed within one month;
- (d) a controller (as defined in the *Corporations Act 2001* (Cth)) of any of the Operator's assets has not been appointed; or
- (e) the Operator has not proposed to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement;

Standards means the Australian Standard AS4292.1 - Railway Safety Management (General and Interstate Requirements), and any other principles and standards prepared, approved and published by the Standards Association of Australia in relation to rail safety;

Term means the term of this agreement as determined in accordance with **clause 2**;

Third Party Works means any works, Remediation or the provision or maintenance of services undertaken or required to be undertaken on, over or under the Network or any Associated Facilities (including design, construction, testing and commissioning) by or on behalf of:

- (a) a Government Authority carrying out its statutory functions; or
- (b) an owner of land adjoining the Network wanting to install services across the Network to that adjoining land; or
- (c) a corporation, other than ARTC, with statutory powers to enter land or acquire an interest in or right over land (other than a Government Authority) wanting to install services across the Network to that adjoining land;

but does not include works by or on behalf of ARTC or its contractors;

Train means one or more units of Rolling Stock coupled together, at least one of which is a locomotive or other self-propelled unit;

Train Manifest means a notice (in a form specified by ARTC) prepared by the Operator in relation to a Service and containing the following details in relation to that Service:

- (a) the number of vehicles in the Train;
- (b) the gross mass of the Train;
- (c) the length of the Train;
- (d) the motive power employed by the Train; and
- (e) for each vehicle in the Train in the order in which they will be placed, leading end first, the following information:
 - (i) vehicle number;
 - (ii) vehicle classification;
 - (iii) vehicle type; and
 - (iv) gross weight of vehicle;
- (f) the access holder on whose behalf it is operating the Service;

Train Path means:

- (a) the train paths defined in the Access Holder Agreement for which the Access Holder has nominated the Operator and where such nomination has been approved by ARTC; and
- (b) all other ad hoc entitlements related to the operation of Services for the Access Holder (including train paths arising by reason of compliance with Instructions) to access to the Network which are provided by ARTC to the Operator (on behalf of the Access Holder) on the terms set out in this agreement and otherwise on such terms as ARTC may stipulate in accordance with this agreement or as otherwise agreed between the parties.

1.2 Interpretation

In this agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a party includes a person to whom any right or obligation under this agreement is transferred;
- (d) a reference to the consent of a party means the prior written consent of that party;
- (e) the words “including”, “for example” or “such as” when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (f) headings are for convenient reference only and do not affect the interpretation of this agreement;

- (g) unless otherwise indicated, a reference to a clause or a Schedule is a reference to a clause or Schedule of this agreement;
- (h) where any party comprises more than one person then all of those persons together as well as each of them individually will comply with that party's obligations under this agreement;
- (i) notices that are required to be given in writing by the Operator to ARTC, may, if so agreed by ARTC, be provided in electronic form;
- (j) a reference to any Act includes all statutes regulations, codes, by-laws, or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments or replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law;
- (k) a reference to \$ and dollars is to Australian currency; and
- (l) "relating to" includes arising from, concerning or in connection with (whether directly or indirectly).

1.3 Payment due on Business Day

If any amount becomes payable under this document on a day which is not a Business Day, that amount is payable on the next Business Day.

1.4 Amendment to Consumer Price Index

If either:

- (a) the Consumer Price Index ceases to be published quarterly; or
- (b) the method of calculation of the Consumer Price Index substantially alters,

then the Consumer Price Index is to be replaced by the nearest equivalent index and any necessary consequential amendments are to be made. That index and those amendments are to be determined by agreement between the parties or, if the parties do not agree, by the Australian Bureau of Statistics or a nominee of the Australian Bureau of Statistics (acting as an expert and not as an arbitrator), whose decision is binding and conclusive.

2 Term

2.1 Term

Subject to **clause 2.2**, this agreement commences on the Commencement Date and, unless terminated earlier under **clause 14**, will continue until the earlier of:

- (a) the termination of the Access Holder Agreement; and
- (b) [] years from the Commencement Date,

("Term").

2.2 Conditions precedent

- (a) If, at the Commencement Date:
 - (i) the Operator is unable to demonstrate to ARTC that it meets the following prudential requirements:

- (A) the Operator is Solvent;
- (B) ARTC has not given a rectification or similar notice to the Operator (or a Related Body Corporate) in the previous two years for a Material Default of any agreement with ARTC and the event giving rise to that rectification notice or similar notice has not been rectified; and
- (C) the Operator has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under this agreement, including without limitation timely payment of insurance premiums and deductibles under the required policies of insurance,

then ARTC may request the Operator to provide Credit Support on seven days' notice. If the Operator elects to provide Security, then that Security requested by ARTC must be for an amount not greater than the maximum security determined under **clause 4.1(b)** of this agreement, which for the 2011 calendar year will be \$2 million;

- (ii) the Access Holder has not endorsed this agreement;
- (iii) the Access Holder Agreement has not commenced,

then **clauses 3 to 6** (other than **clause 3.10**), **8 to 13** and **16** do not take effect until each of the conditions precedent is satisfied.

- (b) Each condition precedent is for the benefit of ARTC and may only be waived by ARTC.
- (c) If all conditions precedent are not satisfied within one month of the Commencement Date, ARTC may terminate this agreement on written notice to the Operator.

3 Track utilisation rights

3.1 Derivative right to use Train Paths for the transport of coal

- (a) ARTC agrees that the Operator may, during the Term, for the purpose of transporting coal, operate a Service on a Train Path, upon the terms and conditions set out in this agreement, subject to:
 - (i) the Operator being nominated by the Access Holder to provide a Service using a Path Usage on a Train Path for the purposes of the Daily Train Plan; and
 - (ii) the terms of access granted to the Access Holder under the Access Holder Agreement.
- (b) Notwithstanding **clause 3.1(a)**, the availability of a Train Path or a Path Usage is subject to:
 - (i) ARTC's Passenger Priority obligations under **clause 3.4** of this agreement;
 - (ii) unless otherwise agreed, presentation by the Operator to Network Control of a Train which is ready in all things for departure within 15 minutes of the time nominated in the applicable Daily Train Plan for departure of that Train;
 - (iii) emergencies or genuine and material safety considerations;
 - (iv) matters outside of the reasonable control of ARTC (except for matters which arise due to ARTC's negligence or breach of its obligations under this agreement);
 - (v) material failure of the Operator's Service;

- (vi) the Network Management Principles;
- (vii) without limiting any other clause of this agreement, any lawful order, direction or requirement given to ARTC by a Government Authority; and
- (viii) Third Party Works,

(“**Availability Exceptions**”, provided that the Availability Exceptions apply only to the extent that the occurrence of the Availability Exception prevents ARTC (acting reasonably) from making that particular Train Path or Path Usage available to the Access Holder).

- (c) The Operator agrees at all times during the Term not to access or attempt to access the Network on behalf of the Access Holder in any way other than is authorised by this agreement and the Access Holder Agreement, or as authorised under a separate valid and binding agreement.

3.2 Limited agency

- (a) The Operator agrees that, unless otherwise notified by ARTC in accordance with a request received by ARTC from the Access Holder, it is the agent of the Access Holder for the following purposes:
 - (i) providing inputs and agreeing to the final Daily Train Plan and the scheduling of Trains or changes to that plan or schedule for the Path Usages for which it is nominated by the Access Holder;
 - (ii) the use of a Path Usage for which the Operator is nominated and scheduled to use under the Daily Train Plan,
 - (A) including the giving and receiving of notices and instructions in relation to availability of Path Usages and the Services using those Path Usages in accordance with this agreement;
 - (B) but excluding the actual operation of Services on that Path Usage and, to avoid doubt, the parties agree that the Access Holder does not incur liability for Incidents as a result of this **clause 3.2**;
 - (iii) agreeing to temporary changes to a Train Path, a Path Usage, or the Service using that Train Path or Path Usage in accordance with **clauses 8 or 9**; and
 - (iv) the day to day operation of the Network for the Path Usages for which it has been nominated by the Access Holder as the Operator, including communications with the Network Control Centre, providing Train Manifests to ARTC and informing ARTC of any changes to the Services (including under **clauses 5.4(k), (l) and (m)**);
- (b) Where the Operator is acting as agent for the Access Holder under **clause 3.2**, the Operator agrees that:
 - (i) ARTC is under no obligation to deal with the Access Holder and will deal directly with the Operator; and
 - (ii) the Operator will provide notices to the Access Holder as appropriate and agreed between them.

3.3 Use of a Train Path is not exclusive

Subject to **clause 3.1(a)**, the Operator’s right to operate a Service on a Train Path or a Path Usage does not give the Operator an exclusive right to any Train Path or Path Usage. Notwithstanding the foregoing, no two Trains (whether the Operator’s Trains or the Trains of another user of the Network)

will be allotted scheduled arrival or departure times such that there are conflicts in arrival or departure times having regard to the Safeworking Rules.

3.4 Passenger Priority in New South Wales

The Operator acknowledges, and will not do anything to interfere with or breach, ARTC's obligations to at all times, in relation to the Network to:

- (a) maintain Passenger Priority in carrying out rail operations by undertaking each of the following:
 - (i) service planning for timetabling to ensure that passenger services receive priority in train path planning;
 - (ii) train programming for daily operations to achieve passenger service priority in daily programming; and
 - (iii) Network Control in accordance with the Network Management Principles;
- (b) preserve existing passenger train paths; and
- (c) apply Passenger Priority in undertaking any maintenance to the Network.

3.5 Disclaimer

Notwithstanding any other clause of this agreement, ARTC is not responsible for any loss, additional cost or other damage suffered by the Operator in the event that a Train Path or a Path Usage or any part of it is not available or that an Operator's Train will not be delivered on time to its ultimate or intermediate destination if such unavailability or failure to deliver occurred by reason of any of the matters described in **clause 3.1(b)** and without material breach of this agreement by ARTC.

3.6 Early and late Services

- (a) If a Path Usage has been scheduled for use by the Operator under a Daily Train Plan, the Operator must present to Network Control a Train which is ready in all respects for departure within 15 minutes of the time nominated in the applicable Daily Train Plan for departure of that Train.
- (b) Notwithstanding **clause 3.1(b)**, ARTC will use its best endeavours to accommodate a Service which is running early or late, is presented at the point of entry to the Network late or is presented at the point of entry to the Network more than 15 minutes early by providing another Path Usage for that Service at ARTC's first available opportunity (subject to the Network Management Principles).
- (c) Both parties will, subject to this agreement, use their best endeavours to:
 - (i) ensure that such Services which are running or presented late recover the lost time;
 - (ii) ensure that such Services which are presented more than 15 minutes early depart the Network no later than the scheduled time; and
 - (iii) in the case where the Service is a loaded or empty coal train, seek to implement the course of action determined by ARTC through liaison with the HVCCC and live run operations group as contemplated in the Network Management Principles, including, where appropriate, actions other than provided for in **paragraphs (i) and (ii) above**.
- (d) Nothing in this **clause 3.6** requires ARTC to provide a Path Usage where to do so would be inconsistent with the Network Management Principles or ARTC's obligations (consistent with the Network Management Principles) to a user of the Network other than the Operator

or the Access Holder (where such obligations had first arisen before the first entry of the Train on the Network to which this **clause 3.6** relates).

3.7 Warranty of accuracy of information

Each party represents and warrants to the other that all material information provided by the first-mentioned party to the other, whether pursuant to this agreement or otherwise, in relation to use of the Network is, to the first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.

3.8 Manner of control of the Network by ARTC

ARTC agrees at all times during the Term to control the Network in a manner which facilitates:

- (a) compliance by the Operator with the relevant Services Assumptions; and
- (b) the use by the Operator of the Path Usages, and in so doing to ensure (subject to the matters in **clauses 3.1(b)** and **3.6(c)(iii)**) that a Operator's Train which enters the Network in accordance with the Daily Train Plan or is early will exit the Network in accordance with the Daily Train Plan or as otherwise provided for in the Network Management Principles.

3.9 Light engine movements

The Operator's right to use Train Paths or Path Usages under **clause 3.1** excludes any right to access the Network for the purpose of the Operator's light engine movements other than through negotiated ad hoc entitlements as referred to in paragraph (b) of the definition of "Train Paths".

3.10 Key Performance Indicators

If requested by the Access Holder or ARTC, the Operator agrees to participate in the negotiations to agree, or reviews of, the key performance indicators to apply to the operation of the Network and the Services.

4 Credit Support

4.1 Obligation to grant Credit Support

- (a) If, at any time after the Commencement Date, the Operator is unable to demonstrate to ARTC (on request) that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under this agreement, including timely payment of insurance premiums and deductibles under the required policies of insurance, then ARTC may request the Operator to provide Credit Support on seven days' notice. If the Operator elects to provide Security, then the Security requested by ARTC must be for an amount not greater than the maximum security, as determined under **clause 4.1(b)**.
- (b) The maximum security that can be requested by ARTC (including Security given under **clause 2.2**) will be \$2 million for the 2011 calendar year and will be reviewed and escalated at the commencement of each subsequent calendar year in accordance with the following formula.

$$S_t = S_{t-1} \times (CPI_t / CPI_{t-1})$$

Where:

S_t is the maximum security that can be requested by ARTC for the calendar year which has commenced;

S_{t-1} is the maximum security which could be requested by ARTC in the previous calendar year;

CPI_t = the CPI for the September quarter immediately preceding the commencement of that calendar year; and

CPI_{t-1} = the CPI for the September quarter immediately preceding the commencement of the previous calendar year .

Drafting note: for contracts commencing in 2011, the maximum annual security that can be required by ARTC is \$2 million. This maximum annual security that can be required each calendar year by ARTC (starting in 2011) will be increased in line with CPI increases.

- (c) The amount of the Security requested under **clause 4.1(a)** (provided it is below the maximum security determined under **clause 4.1(b)**) is not subject to **clause 17**.
- (d) If the Operator is able to demonstrate that it meets the requirement under **clause 4.1(a)**, ARTC will return the Credit Support provided under this **clause 4.1**.
- (e) If the Operator has provided Security under this agreement, then, ARTC may draw on the Security on the last Business Day prior to the expiry of the Security unless, at least three Business Days before the expiry date of the Security, replacement Security to the required amount has been provided by or on behalf of the Operator.
- (f) Upon termination of the agreement, ARTC will release the Security to the Operator provided that at such time the Operator does not owe any further monies to ARTC under this agreement, in which case, the Security will be returned to the Operator less any money (disputed or undisputed) owing by the Operator to ARTC.

4.2 Exercise of Credit Support

- (a) Subject to **clause 4.2(b)**, the Credit Support will be held by ARTC as security for the performance of the obligations of the Operator under this agreement and may be called upon by ARTC in any circumstances in which ARTC suffers any loss as a result of default by the Operator under this agreement.
- (b) If ARTC holds Security, and it calls on the Security, the Operator will promptly provide a replacement Security for the amount drawn or exercised by ARTC against the Security.
- (c) Nothing in **clause 4.2** limits ARTC's entitlement to recover the full amount of ARTC's loss as a result of default by the Operator under this agreement.

5 Control and management of access to the Network

5.1 ARTC to control

As between the parties, control of the Network and management of access to the Network, remains at all times with ARTC. ARTC will control the Network in the manner described in this agreement and the Access Holder Agreement.

5.2 Network access provider's obligations

ARTC agrees at all times during the Term to:

- (a) undertake the function of Network Control over the Network;
- (b) comply with the Network Management Principles;

- (c) safely and efficiently operate the Network so that any permitted use of the Network by the Operator is facilitated promptly and effectively and in accordance with this agreement;
- (d) have Associated Facilities in place to enable the Operator to utilise the Train Paths on the terms of this agreement;
- (e) receive, record and collate information from the Operator and other users of the Network for the purposes of, and to more effectively exercise, the functions referred to in **clauses 5.2(a) and (b)**;
- (f) maintain and operate the Network Control Centre and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system;
- (g) use its best endeavours to provide the Operator with details, as soon as reasonably practicable of all operating incidents (including an Incident) which has affected or could potentially affect the ability of any Train to retain its Path Usage, or else affect its security or safety or the security and safety of the freight or passengers; and
- (h) comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to ARTC's management, control and ownership of the Network.

5.3 Rolling Stock

The Operator agrees as at the Commencement Date and at all material times during the Term to maintain each Train operated by the Operator on the Network in a condition which ensures it is fit for use on the Network having regard to the terms of this agreement.

5.4 Operator's obligations

The Operator agrees at all times during the Term:

- (a) to use its best endeavours to ensure that for each Path Usage, it complies with the Service Assumptions;
- (b) to comply with the Code of Practice;
- (c) to conduct itself in accordance with any Instructions issued;
- (d) that if it becomes aware that material non-compliance by a Service with a Train Path or a Path Usage has occurred or is a reasonable possibility, to notify the Network Control Centre immediately;
- (e) to ensure that its use of the Network is carried out in such a way as to minimise obstruction of the Network and so that use of the Network by any other user authorised by ARTC is not prevented or delayed (other than through use of the Network in accordance with this agreement or through proper compliance with an Instruction validly given);
- (f) to comply with all applicable legislation of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to operation of the Services or its use of the Network;
- (g) not to materially change, alter, repair, deface or otherwise affect any part of the Network, Associated Facilities, ARTC's property or property of third parties provided that the obligation of the Operator in this clause extends only to such matters to the extent that they were caused or contributed to by the Operator and Train operations it conducts. This does not include normal wear and tear where the Operator is accessing the Network in accordance with the terms of this agreement;

- (h) not to materially damage the Network, Associated Facilities, ARTC's property or property of third parties. For the purposes of this clause "damage" does not include normal wear and tear where the Operator is accessing the Network in accordance with the terms of this agreement;
- (i) to provide and maintain communications equipment which is compatible with the equipment used in the Network Control Centre and to use such equipment to communicate with the Network Control Centre;
- (j) where ARTC proposes to change communications equipment in the Network Control Centre:
 - (i) to share information and cooperate with ARTC and any Communications or TMS Provider to the extent that may be required to ensure that the parties' obligations in **clauses 5.3 and 5.5** are achieved;
 - (ii) if such proposal will result in the Operator having to replace or upgrade its communications equipment, ARTC will consult with the Operator and the Operator will, after such consultation and after reasonable notice from ARTC to the Operator, reasonably replace or upgrade the communications equipment to be compatible with the equipment used in the Network Control Centre;
- (k) subject to **clause 18**, to provide to ARTC such information related to the operation of the Services (excluding commercial information) as ARTC reasonably requires to enable it to properly perform its functions and discharge its obligations to the Operator, the Access Holder and other operators;
- (l) to provide to ARTC a Train Manifest in a format acceptable to ARTC for each Service not less than 15 minutes prior to that Service commencing use of the Network and to provide notice in a form specified by ARTC of any detail of the Train Manifest which changes during the course of the operation of the Service over the Network;
- (m) to inform ARTC as soon as reasonably practicable of any cancellation or intended cancellation by the Operator or the Access Holder of any Service;
- (n) to ensure that any item of freight or material, including but not limited to minerals, bulk goods or commodity (in whatever form), being hauled on or in a Train operated by the Operator does not fall, leak, spill, escape or become deposited on or adjacent to the Network.

5.5 Removal of Rolling Stock from Network

- (a) If ARTC reasonably considers that a Train operated by the Operator is obstructing the Network, the Operator will upon being notified in writing or by electronic mail of that obstruction arrange for the Train operated by the Operator to be moved by or at the time specified in such notice off or to another part or parts of the Network nominated by ARTC.
- (b) Subject to **clause 5.5(c)**, if the Operator does not so remove or move the Train operated by the Operator under **clause 5.5(a)**, the Operator consents to ARTC arranging for the Train operated by the Operator to be removed from or moved to another part or parts of the Network, at the cost and expense of the Operator in all things.
- (c) Notwithstanding any other provision of this agreement, the Operator will release and indemnify ARTC or its servant, agent, employee, contractor or volunteer for all and any injury, loss and damage arising from or related to the removal or movement arranged by ARTC under **clause 5.5(b)**, including where such injury, loss and damage is caused by the negligence of ARTC or its servant, agent, employee, contractor or volunteer.

6 Repairs and maintenance of the Network

6.1 ARTC to repair and maintain the Network

Subject to **clauses 6.2, 9.3 and 9.4** ARTC agrees at all times during the Term to maintain the Network (but only insofar as the Network is relevant to each of the Access Holder's Train Paths for which the Operator is nominated) in a condition which is fit for use by the Operator to provide a Service which meets the Services Assumptions.

6.2 Operating restrictions

When required by the condition of the Network or any part of the Network, ARTC may (to the extent of such requirement only) give notice of speed and weight restrictions and the Operator will comply with such a notice. ARTC will remove the restriction and inform the Operator of the removal of the restriction once ARTC determines the restriction is no longer necessary.

7 Accreditation

7.1 Accreditation warranty

- (a) Each party warrants that during the Term each such party has and will maintain Accreditation to the extent required by law, including, in the case of the Operator, all Accreditation required by law in relation to Rolling Stock used by the Operator on the Network.
- (b) The parties will notify each other of any material notice received from any Government Authority affecting Accreditation.
- (c) The Operator will not run Rolling Stock on the Network in breach of **clause 7.1(a)**.
- (d) Where a third party audit of equipment or maintenance practices is requested by the accrediting authority with respect to the maintenance of the Operator's Accreditation, the Operator will provide a copy of that audit to ARTC at the same time such audit report is given to the accrediting authority.
- (e) If a party loses part or all of its Accreditation or has part or all of its Accreditation suspended, that party will use its best endeavours to regain or have restored its full Accreditation as soon as is reasonably practicable.

7.2 Evidence of Accreditation

Each party will on or before the Commencement Date (and in the case of Accreditation which is obtained for the first time after the Commencement Date, then as soon as practicable after such Accreditation is obtained) provide to the other party evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation will be provided by a party to the other party on the written request of the other party.

8 Compliance

8.1 Issue of Instructions by ARTC

- (a) ARTC may issue Instructions to the Operator.
- (b) Instructions may include instructions or directions:
 - (i) to cease use of a Train Path or a Path Usage by the Service and for the Service to proceed over such path on the Network as ARTC nominates;

- (ii) to continue use by the Service of the Network subject to such variation of the applicable Train Path, Path Usage, the Service or the composition or quality of Trains as ARTC nominates;
 - (iii) to cause the Service to proceed to a point on the Network and stand there until ARTC issues a further instruction or direction in relation to the Service; or
 - (iv) without limiting the generality of **clauses 8.1(b)(i) to (iii)**, if the Service operates outside of its Service Assumptions or the Daily Train Plan, to delay or redirect the Service to allow access to the Network by another operator of a Train (including, if relevant, ARTC) whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed.
- (c) ARTC will:
- (i) in giving any Instruction have due regard to minimising the disruption to the Operator's Services; and
 - (ii) other than in an emergency, consult with the Operator in giving an Instruction concerning the use of the Operator's locomotive and its crew for the purpose of assisting in the clearing of a Network blockage.
- (d) If an Instruction which varies the Train Paths or Path Usages is intended by ARTC to be permanent, such permanent effect of the Instruction will not take effect until the procedure in **clause 9.2** for permanent variation of a Train Path has been satisfied. Until the procedure under **clause 9.2** has been satisfied such Instruction will nevertheless have a temporary effect.
- (e) As soon as is reasonably practicable and in any event before an Instruction becomes effective, ARTC will give to the Operator a written copy of the Instruction if such Instruction is ordinarily advised in writing by ARTC to operators.

8.2 Compliance by the Operator with Instructions and Network Control Directions

- (a) Subject to **clause 8.2(c)**, the Operator will comply with all Instructions and will promptly advise all relevant Train crew of any changes to or the making or giving of Instructions.
- (b) If an Instruction is a Network Control Direction, it will be complied with immediately.
- (c) Unless the Network Control Centre gives an Instruction that is a Network Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance.
- (d) The Operator will comply with all Instructions in such a way as to reasonably minimise disruption to any other person's use of the Network.
- (e) Subject to **clause 15**, ARTC is not responsible for any delay suffered or cost incurred by the Operator in complying with a lawful Instruction of ARTC, and the Operator releases ARTC from any Claim arising from such compliance.
- (f) Subject to **clause 15**, the Operator is not responsible for any delay suffered or cost incurred by ARTC in the Operator complying with a lawful Instruction of ARTC, and ARTC releases the Operator from any such Claim arising from such compliance.

8.3 Compliance

The Operator will at its own cost during the Term:

- (a) comply with all laws which affect or relate to the use of a Train Path or a Path Usage;

- (b) comply with all notices, orders and directions lawfully issued or given by or agreements with a Government Authority which affect or relate to the use of a Train Path or a Path Usage; and
- (c) obtain, maintain and comply with all approvals, licences or permits which from time to time may be necessary or appropriate for the use by the Operator of a Train Path or a Path Usage.

9 Temporary variation or cancellation of Train Paths

9.1 Examples of temporary variations of Train Paths by the giving of Instructions by ARTC

- (a) For the avoidance of doubt, and without limiting **clause 8.1(a)**, the Operator's right to utilise a Train Path or a Path Usage may be temporarily varied by the giving of Instructions:
 - (i) for the purpose of preventing potential, or in response to actual:
 - (A) breach of the Safeworking Rules or of **clause 12** by the Operator or of similar safety requirements by other operators on the Network;
 - (B) material damage to the Network, ARTC's property or any Associated Facilities;
 - (C) injury to any person or damage to any property;
 - (D) delay to the progress of Trains on the Network (but only insofar as any trains operated by a third party have priority over the Operator's Trains having regard to the Network Management Principles);
 - (E) terrorism and security matters; or
 - (ii) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its material obligations under this agreement.
- (b) The Operator must comply with the Instructions and must only utilise a Train Path or a Path Usage according to the Instructions.
- (c) The Instructions referred to in **clause 9.1(a)** may comprise, but need not be confined to, Instructions in one or more of the following terms:
 - (i) to cease use of a Train Path or a Path Usage by the Service and for the Service to proceed over such path on the Network as ARTC nominates;
 - (ii) to continue use by the Service of the Network subject to such variation of the applicable Train Path, Path Usage, Service or the composition or quality of Trains as ARTC nominates;
 - (iii) to cause the Service to proceed to a point on the Network and stand there until ARTC issues a further Instruction in relation to the Service; or
 - (iv) if the Service operates outside of its Service Assumptions or the Daily Train Plan, to delay or redirect the Service to allow access to the Network by another operator of a Train whose service would, but for the delay or redirection of the Operator's Service, be delayed or further delayed.

9.2 Permanent variations to Train Paths

ARTC can:

- (a) vary a Train Path or a Path Usage pursuant to an agreement with the Access Holder or its rights to do so under the Access Holder Agreement;
- (b) refuse the Operator the right to utilise a Train Path or a Path Usage (either permanently or temporarily) where the Access Holder has, under the Access Holder Agreement:
 - (i) notified ARTC that the Operator is no longer nominated, or nominated a new operator, to utilise those Train Paths or Path Usages which were to be utilised by the Operator; or
 - (ii) assigned, novated or traded to another access holder, all or some of the Access Holder's Train Paths or Path Usages which were to be utilised by the Operator.

9.3 Repairs, maintenance and upgrading of the Network

- (a) Notwithstanding any other provisions to the contrary in this **clause 9**, but subject only to **clauses 9.3(b), 9.3(c)** and **9.4** ARTC may, without notice to the Operator, perform repairs, maintenance or upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.
- (b) If repairs, maintenance or upgrading of the Network, the carrying out of any new work on the Network, or taking possession of the Network, are reasonably likely to materially affect a Train Path or a Path Usage, ARTC will, prior to commencement of the works:
 - (i) take all reasonable steps to minimise any disruption to the Train Path or Path Usage;
 - (ii) notify the Operator of the works as soon as reasonably practicable; and
 - (iii) use its best endeavours to provide an alternative Train Path or Path Usage,
 but need not obtain the Operator's consent to such repairs, maintenance or upgrading, or possession of the Network.
- (c) Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. ARTC will consult with the Operator a reasonable time before taking possession of the Network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to Services.

9.4 Third Party Works

- (a) The Operator acknowledges that:
 - (i) third parties (some of whom have statutory rights) may wish to carry out or require to be carried out Third Party Works on the Network during the Term; and
 - (ii) notwithstanding any other provision of this agreement, ARTC reserves the right to permit third parties to carry out Third Party Works if that party has a legal right to undertake those Third Party Works, including as arising from legislation or the NSW Lease.
- (b) Notwithstanding any other provision of this agreement, the Operator agrees that ARTC has no liability to the Operator nor will the Operator make a Claim against ARTC for any costs, expenses, losses or damages incurred by the Operator in relation to or as a consequence of Third Party Works.

9.5 Cost of variation

Subject to **clause 15**, any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under **clauses 9 (except for clause 9.2)** and **24.1** will be borne between the parties to this agreement in such proportion as the parties agree (based on negotiations carried on in good faith), or in the absence of such agreement, and subject to a party's obligation under **clause 15** to indemnify the other in the circumstances set out in that clause, by the party which incurs such losses, additional costs or other damages.

10 Inspection and audit by ARTC

10.1 Audit obligation

- (a) Subject to **clause 10.2**, ARTC may at any time by Instruction from ARTC to the Operator require a particular Service of the Operator which is using the Network to undergo an audit for the purpose of assessing:
 - (i) the Operator's compliance with the terms and conditions of this agreement, including whether the Train Manifest provided by the Operator under **clause 5.4(i)** is correct;
 - (ii) whether any one or more of the individual wagons used by the Operator in the provision of a Service is loaded in excess of its rated carrying capacity; or
 - (iii) whether any one or more of the individual wagons used by the Operator in the provision of the Service is loaded in an unsafe or potentially unsafe manner.
- (b) To avoid doubt, any audit conducted by ARTC under this **clause 10.1** is conducted at ARTC's cost.

10.2 Limitations on audit

ARTC will:

- (a) subject to **clause 10.2(b)**, carry out not more than such number of audits under **clause 10.1** as are reasonably necessary in all the circumstances; and
- (b) use its best endeavours in the conduct of such audit to minimise the disruption to the Operator's Service.

10.3 Instructions

In conducting an audit under **clause 10.1**, ARTC may give an Instruction to the Operator, including an Instruction to divert or delay a Service or make any part of a Train engaged in providing a Service available for inspection or weighing.

10.4 Audit by Operator

- (a) Subject to **clause 10.4(b)**, the Operator may at any time, at its cost and risk, audit any of the railway track and lines comprising the Network for the purpose of monitoring ARTC's compliance with **clause 6.1**.
- (b) The Operator's audit under **clause 10.4(a)** will:
 - (i) be subject to the ability of ARTC to issue an Instruction to the Operator at any time during the audit to ensure the proper, efficient, safe and lawful use of and access to the Network by the Operator and other operators;

- (ii) be conducted in such a manner so that it does not cause any disruption to any service of any other operator granted access to the Network by ARTC or the provision of services by ARTC to such operators.

11 Emergencies and Incidents

11.1 Plans for dealing with Incidents

- (a) In consultation with the Operator, ARTC will formulate and periodically review and update plans which are consistent with ARTC's Accreditation requirements.
- (b) The Operator will formulate a plan for dealing with Incidents and provide it to ARTC. The Operator's plan will be consistent with any plan prepared by ARTC under **clause 11.1(a)** and is subject to the approval of ARTC, such approval not to be unreasonably withheld.

11.2 Compliance with plans and directions and with Rail Safety Acts

The Operator and ARTC will follow any plan of the type referred to in **clause 11.1** and will comply with their respective obligations under the Rail Safety Act.

11.3 Notification of Incidents

The Operator and ARTC each agree to notify the other party to this agreement of any Incident as soon as possible after it comes to their attention and ARTC will promptly provide the Operator with a train control report describing the Incident and any associated train delays (a "**Train Control Report**").

11.4 Investigation of Incidents

- (a) Incidents will be investigated as required by law.
- (b) Each party will co-operate with an investigation under this clause and make available records and personnel relevant to the Incident.
- (c) The parties will consult with each other to determine any action to be taken as a result of any investigation.

11.5 Operator's report

Without limiting **clause 11.3**, if an Incident occurs which involves the Operator and in relation to which ARTC has given written notice to the Operator that a report is required, the Operator will promptly prepare and submit to ARTC a written report which will include the following (to the extent relevant to the Incident and reasonably possible for the Operator to ascertain):

- (a) the time and location of the Incident;
- (b) available details of all loss or damage to the Train operated by the Operator and to the Network and Associated Facilities;
- (c) the factors which may have contributed to the cause of the loss or damage to the Train operated by the Operator and to the Network and Associated Facilities (the parties acknowledging that such statement will not be binding on the Operator and will not be taken to be an admission by the Operator for any purpose, including insurance and indemnification purposes (notwithstanding the terms of any insurance policy to the contrary));
- (d) names of the Operator's staff including volunteers in any way involved in the Incident either as principals or as witnesses;
- (e) an analysis in printed format of speed recorder charts for the Train operated by the Operator;

- (f) such other information which is required to be disclosed in a report to the administering authority under the relevant Rail Safety Act; and
- (g) such other information which is required to be disclosed in a report under the Dangerous Goods Code.

11.6 No disposal of equipment

Subject to any contrary requirement at law or a pre-existing contract to which the Operator or ARTC is a party, the Operator and ARTC will not engage in conduct which would prejudice an investigation into an Incident, including the disposal of any equipment involved in such Incident (but only to the extent that such non-disposal is necessary to such investigation).

11.7 Interim responsibility for recovery costs

Until fault can be properly determined or agreed in relation to an Incident, ARTC will be responsible for recovery costs in relation to the Network and Associated Facilities and the Operator will be responsible for recovery costs in relation to all above-rail matters (including the Train operated by the Operator).

12 Safety standards

12.1 Compliance by the parties

The parties will, in relation to their respective responsibilities and rights under this agreement:

- (a) comply with all applicable safety standards and laws dealing with safety;
- (b) comply with the Safeworking Rules;
- (c) comply with the Dangerous Goods Code;
- (d) comply with the Standards (including any codes of practice developed under the Standards) to the extent not inconsistent with **clauses 12.1(a), (b) and (c)**;
- (e) in addition to the Operator's Accreditation or the Accredited Owner's Accreditation (as the case may be), obtain and maintain such additional accreditation, licences and approvals, and maintain such additional standards, which are required by law;
- (f) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in **clause 7**, ensure that their respective employees, agents and subcontractors engaged by the parties in or in connection with the Services are competent and appropriately qualified and obtain and maintain any applicable or appropriate Accreditation and training, and to provide to the other party evidence of any such matters upon reasonable request; and
- (g) except to the extent that such obligations are binding by virtue of the Accreditation requirements referred to in **clause 7**, to ensure that their respective employees and subcontractors of the parties engaged in or in connection with the use by the Operator of the Network submit to drug and alcohol tests or to such other tests as ARTC or the Operator is in the practice of requiring of its own employees or subcontractors.

12.2 Notification of breach

As soon as ARTC becomes aware of a breach by the Operator of any Safeworking Rules which occurs during or as a result of the use by the Operator of the Network ("**Breach**") ARTC will give written notice to the Operator setting out:

- (a) the time, place and a general description of the Breach;
- (b) what, in ARTC's opinion, caused the Breach and which person or persons were responsible for the Breach;
- (c) the consequences, if any, of the Breach for operation of the Services or the use by other users of the Network;
- (d) any proposed modification of its procedures which ARTC intends to make; and
- (e) any Instruction requiring modification to the Operator's procedures which ARTC considers that the Operator must make.

12.3 Provision of Safeworking Rules

ARTC will provide a copy of the Safeworking Rules to the Operator on the Operator's request, and will thereafter forward to the Operator a copy of all amendments to the Safeworking Rules.

13 Environmental requirements; dangerous goods

13.1 Compliance with environmental requirements

Each party will comply with all environmental laws and with their respective environmental policies (insofar as they comply with the law), including all applicable laws and lawful policies dealing with dangerous goods.

13.2 Environmental Management Plans

After ARTC has given to the Operator a copy of its plan for dealing with environmental effects of operating Trains on the Network, the Operator will within a reasonable time prepare its own plan for dealing with environmental effects of its operations on the Network, the plan to be consistent with ARTC's plan, and give a copy of its plan to ARTC.

13.3 Notification of carriage of certain materials

The Operator will include in all Train Manifests such detail in relation to the identification of dangerous goods as is required by the Dangerous Goods Code and as is otherwise reasonably required by ARTC (on terms not inconsistent with the Dangerous Goods Code).

13.4 Notification of Incident involving dangerous goods

The Operator will provide to ARTC details, at the earliest practicable time after the Operator becomes aware, of all Incidents (including non-compliance with relevant codes, regulations, bylaws or other statutory provisions, whether or not an Incident) involving dangerous goods including but not limited to any spillage, leakage or container or package damage associated with the movement of any Train on the Network.

13.5 Notification of Environmental Condition

Where:

- (a) ARTC becomes aware that, as a result of the activities of the Operator, an Environmental Condition exists or has occurred and ARTC reasonably considers that action or intervention is required to prevent, mitigate or remedy that Environmental Condition; or
- (b) ARTC is given a direction by a competent authority that some action or intervention is required to prevent, mitigate or remedy an Environmental Condition resulting from the activities of the Operator;

then ARTC may inform the Operator of the relevant requirements and, where practicable, any steps which ARTC reasonably considers will be necessary to prevent, mitigate or remedy the situation, and the Operator will immediately, or as soon as reasonably practicable after receiving such notice, implement such requirements, Remediation and steps and any other necessary action so that the Environmental Condition is no longer present or the Environmental Damage is rectified.

13.6 ARTC's Environmental Licence

The Operator will implement and comply with the conditions of ARTC's Environmental Licence ("**Licence Conditions**") to the extent that:

- (a) ARTC has notified the Operator of the Licence Conditions; and
- (b) the Licence Conditions apply to the Operator's operations and Trains operated by the Operator on the Network.

13.7 Operator compliance

The Operator agrees that in order to facilitate such implementation and compliance the Operator will, without limiting the Operator's obligations under **clause 13.6**:

- (a) ensure that any Trains operated by the Operator comply with the Licence Conditions;
- (b) not operate any Trains on the Network until an Environment Protection Authority ("**EPA**") approval has been obtained; and
- (c) comply with the terms of any applicable EPA approval.

13.8 Environmental Manual

The Operator will implement and comply with the environmental management system manual developed by ARTC, as amended from time to time, ("**the Manual**"), and will also maintain, implement and comply with the Operator's own environmental management plan (which will not be inconsistent with the Manual).

14 Termination

14.1 Termination for breach

- (a) If a party ("**defaulting party**") defaults in the performance of any of its material obligations under this agreement, the other party ("**aggrieved party**") may give notice in writing ("**Rectification Notice**") to the defaulting party requiring the defaulting party to:
 - (i) in the case of a failure to pay money when due, pay the outstanding amounts (including interest) within 14 days;
 - (ii) for any other default, rectify the default within a reasonable time, and respond in writing to the aggrieved party within 48 hours of the receipt of the Rectification Notice:
 - (A) indicating to the aggrieved party the steps to be taken to rectify the default within such reasonable time and a reasonable timetable for the completion of such steps; and
 - (B) confirming that the performance of the steps has commenced ("**Rectification Response**").
- (b) If the defaulting party:

- (i) does not rectify the default within a reasonable time;
- (ii) does not provide a Rectification Response within the time specified in **clause 14.1(a)(ii)**;
- (iii) does not provide a reasonably satisfactory Rectification Response meeting the requirements of **clause 14.1(a)(ii)(A) and (B)**; or
- (iv) does not comply with the timetable set out in the Rectification Response subject to **clause 14.1(a)**,

the aggrieved party may at any time thereafter suspend such rights of the defaulting party under this agreement as are necessary to prevent a continuation of the default by giving not less than:

- (v) seven days written notice in relation to a default relating to safety; or
 - (vi) 14 days written notice in relation to defaults other than relating to safety.
- (c) To avoid doubt, if the Operator is the defaulting party and the breach relates only to the Operator's utilisation of certain Train Paths or Path Usages, ARTC may suspend the Operator's use of all or some of those Train Paths or Path Usages.
 - (d) If the defaulting party does not within a reasonable time after the suspension of this agreement under **clause 14.1(b)** rectify the default, this agreement may be terminated by giving not less than the period of notice described in **clause 14.1(b)(v) and (vi)**.
 - (e) Notwithstanding that ARTC may be the defaulting party, nothing in **clause 14.1(b)** derogates from or affects ARTC's rights and powers to manage the Network and any of its other rights or powers under this agreement or any other agreement with any other person, including any track access agreement with any other operator.

14.2 Immediate termination

A party has the right to immediately terminate this agreement by notice in writing to the other party upon the occurrence of any of the following events:

- (a) the other party assigns or attempts to assign this agreement in breach of **clause 19**;
- (b) if any execution is levied against the assets of the other party which are necessary or material for the conduct of the Operator's business of running the Services or if any such assets of the other party are taken or sold by an encumbrancer or if the other party ceases to carry on business, stops payment or fails to maintain normal and continuous operation of its business for a period of in excess of 14 continuous days except for reasons wholly beyond its control;
- (c) if the other party:
 - (i) goes into liquidation otherwise than for the purpose of reconstruction or a meeting was called for the purpose of considering liquidation;
 - (ii) has a receiver or a receiver and manager appointed over any of its property;
 - (iii) proposes or enters into any scheme of arrangement or a composition with its creditor; or
 - (iv) has an official manager, receiver, inspector, administrator or controller appointed pursuant to the provisions of the *Corporations Act 2001* (Cth).

14.3 Termination of this agreement by reason of suspension or cancellation of Accreditation

If the Operator's Accreditation is:

- (i) suspended for a continuous period of longer than six months; or
- (ii) cancelled for a continuous period of longer than one month,

ARTC may terminate this agreement by notice in writing to the Operator which has had its Accreditation so suspended or cancelled.

14.4 Suspension

- (a) Without in any way limiting the rights of a party under **clause 14.1, 14.2 or 14.3**, a party who is entitled to terminate this agreement under any of those clauses may elect instead to suspend the obligations of both parties under this agreement (subject to **clause 14.4(b)**) until such time as the cause giving rise to the right to terminate is remedied.
- (b) An election referred to in **clause 14.4(a)** is revocable at any time by the party who made it and has no effect upon obligations, debts or liabilities which have accrued before the election to suspend this agreement.

14.5 Effect of termination or suspension

- (a) Upon termination or suspension of this agreement (including under **clause 2**) all rights of the Operator to use the Network (to the extent of the termination or suspension) will cease immediately.
- (b) Termination or suspension of this agreement under any circumstances will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this agreement including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (c) Upon termination or suspension of this agreement under any circumstances all covenants and agreements of ARTC and the Operator which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of this agreement will survive such termination or suspension.

15 Indemnities and Liabilities

15.1 General

- (a) The purpose of this **clause 15** is to establish a regime in which the liability of ARTC and the Operator to each other for loss or damage to their own property arising out of an Incident is clearly defined, and is determined only by reference to this **clause 15**.
- (b) ARTC and the Operator release each other from all Claims for loss or damage to their own property resulting from an Incident, including where the Incident is caused or contributed to by the negligence of one or both parties, except Claims that each party to this agreement may make against the other pursuant to this **clause 15**.
- (c) The provisions of this clause should be interpreted to give effect to the intention that where ARTC and/or the Operator are in breach of this agreement, and any such breach is the cause or a contributing factor to loss or damage to property of ARTC or the Operator arising from an Incident:

- (i) any party in breach should bear responsibility for such loss or damage to the extent of such cause or contribution, and;
- (ii) where the acts or omissions of a party other than ARTC or the Operator has caused or contributed to such loss or damage, neither ARTC or the Operator will be responsible to the other for loss or damage to the extent that the loss or damage is caused by or contributed to by the acts or omissions of that third party.

15.2 Definitions

In this **clause 15**:

- (a) “**Claim Period**” means each and every twelve month period during the Term, such that the first Claim period commences on the Commencement Date and expires at midnight on the day before the first anniversary of the Commencement Date, the second Claim Period commences on the first anniversary of the Commencement Date and expires at midnight on the day before the second anniversary of the Commencement Date, and so on;
- (b) “**loss or damage**” (other than in **clause 15.2(f)**) means loss or damage to property belonging to or leased by a party to this Agreement for the purpose of operating a Train upon the Network and the costs of recovery of any property damaged or affected by the relevant Incident and legal expenses on a full indemnity basis;
- (c) “**Prohibited Claim**” means, subject to **clause 15.5(b)**, a Claim arising from an Incident where the total value of the loss or damage suffered by a party to this agreement is less than \$50,000.00;
- (d) A reference to ARTC or the Operator includes a reference to any servant, agent, employee, contractor, supplier to, or volunteer of or associated with, or a related entity (as defined in the *Corporations Act 2001*) of ARTC or the Operator;
- (e) A reference to a “**breach**” includes a breach arising from the acts or omissions of a servant, agent, employee, contractor, supplier to, or volunteer of or associated with a related entity (as defined in the *Corporations Act 2001*) of, ARTC or the Operator.
- (f) “**third party liability**” means the liability of ARTC and/or the Operator to any third party (not being a related entity as defined in the *Corporations Act 2001*) who suffers any personal injury, property or economic loss or damage as a consequence of an Incident.

15.3 Indemnity

Where ARTC and/or the Operator suffer loss or damage as a result of an Incident, and:

- (a) if:
 - (i) there is a breach of this agreement by ARTC or the Operator; and
 - (ii) the breach is the sole cause of the Incident,
 then the party in breach will:
 - (iii) be responsible for its own loss or damage arising from the Incident; and
 - (iv) completely and effectually indemnify the other party in respect of loss or damage suffered by the other party as a result of the Incident;
- (b) if:
 - (i) there is a breach or are breaches of this agreement by ARTC or the Operator;

- (ii) there is no breach of this agreement by the other party; and
- (iii) the breach or breaches contributed to the Incident but was or were not the sole cause of the Incident;

then,

- (iv) the party in breach is to be responsible for its own loss or damage arising from the Incident;
- (v) the party in breach is to indemnify the other party (that is, the party not in breach) in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that the breach or breaches contributed to the Incident;
- (vi) the other party (that is, the party not in breach) is to be responsible for its own loss or damage arising from the Incident to the extent that the breach or breaches did not contribute to the Incident;

(c) if:

- (i) there has been a breach of the agreement by ARTC and the Operator; and
- (ii) breaches by both parties contribute to the Incident,

then each of ARTC and the Operator will:

- (iii) indemnify the other party in respect of the loss or damage suffered by the other party as a result of the Incident to the extent that its breach or breaches contributed to the Incident;
- (iv) be responsible for its own loss or damage arising from the Incident to the extent that the loss or damage was not contributed to by the breach or breaches of the other party; and
- (d) if there has been a breach or breaches of the agreement by both ARTC and the Operator, but the breach or breaches of one of them has not or have not caused or contributed to the Incident, then (whether or not there is any other person or party who has caused or contributed to the Incident) the party whose breach has caused or contributed to the Incident will bear their own loss and damage and indemnify the other party in respect of the loss or damage suffered by that other party as a result of that Incident to the extent that the breach or breaches contributed to the Incident.

15.4 No Claim for Consequential Loss

Notwithstanding:

- (a) how an Incident is caused;
- (b) that ARTC and/or the Operator is in breach of any duty of care or in breach of this agreement;
- (c) any other rights that ARTC and/or the Operator may have under this agreement;
- (d) that ARTC and/or the Operator may be liable to the other for loss or damage other than Consequential Loss,

ARTC and the Operator will not make a Claim against the other, and hereby release the other from any Claim, in respect of any Consequential Loss they suffer arising out of any Incident. For the

avoidance of doubt, it is agreed that Consequential Loss does not include any liability of ARTC or the Operator to a third party.

15.5 Prohibited Claim

- (a) Subject to sub-paragraph (b) hereof, ARTC and the Operator agree that they will not make a Claim against the other if the Claim is a Prohibited Claim.
- (b) Where, in any Claim Period, the total value of all Prohibited Claims exceeds \$250,000.00, then no further Claims arising from Incidents that occur during that Claim Period will be Prohibited Claims.

15.6 Third party liabilities

- (a) Where any third party seeks to recover a third party liability from ARTC or the Operator, ARTC and the Operator shall take the benefit of any statute or other law or contractual provision that limits, or may limit, the liability of ARTC or the Operator to any proportion of loss and damage suffered.
- (b) ARTC and the Operator shall only be entitled to seek contribution from the other in respect of any third party liability on the basis of the negligence, or breach of statutory duty of the other party, but not because of any breach or alleged breach of this agreement by the other party.
- (c) ARTC and the Operator release each other from all Claims for contribution from the other in respect of any third party liability except to the extent that such third party liability has been caused or contributed to by the negligence or breach of statutory duty of the other party to this Agreement.
- (d) To the extent that ARTC or the Operator shall have incurred legal costs in defending a claim by a third party arising out of an Incident which is caused by a breach of this agreement by ARTC or the Operator, those legal costs (to the extent that they are not recovered by the party who defends the claim, after taking all reasonable steps to recover the same) shall be indemnified by the party in breach of this agreement to the extent that that breach contributed to the Incident.

15.7 No other limitations

Nothing in this **clause 15** is intended to remove, limit, restrict, or otherwise prejudice the right of ARTC or the Operator to recover loss or damage or a contribution from a third party.

15.8 Obligation to mitigate/betterment

- (a) Each party to this Agreement will take reasonable steps to mitigate that party's losses, damages, liabilities, costs and expenses, and a party's entitlement to recover losses, damages, liabilities, costs and expenses will be determined on the basis that the party should have observed the obligation to mitigate.
- (b) Where a party restores, repairs or replaces a damaged asset to prevailing standards in the most cost efficient way available and that repair, restoration or replacement results in improved functionality of an asset, such improved functionality will not be regarded as a betterment and no reduction or adjustment of the costs of repair, restoration or replacement will be made on that account.

15.9 Obligation to pay

- (a) In this **clause 15.9**, a party liable to indemnify the other is called the “**Responsible Party**” and a party who is entitled to be indemnified is called an “Indemnified Party”.

- (b) An Indemnified Party will, as soon as practicable after an Incident, give written notice to the Responsible Party of any claim to indemnity including:
 - (i) the date of the Incident
 - (ii) brief details of the loss or damage suffered or which might be suffered; and
 - (iii) a brief description of the grounds upon which indemnity is claimed.
- (c) An Indemnified Party may deliver notices requesting reimbursement of costs or expenses incurred, or payment of other loss and damage, on an ongoing basis, as and when such costs and expenses are incurred or such other loss and damage is identified and quantified.
- (d) The Responsible Party will
 - (i) reimburse the Indemnified Party all costs or expenses incurred by the Indemnified Party in repairing or reinstating plant, equipment or other assets; and
 - (ii) pay any other loss or damage which is the subject of the indemnity,
 within 14 days of being requested in writing by the Indemnified Party to do so.
- (e) Where a Responsible Party has not complied with paragraph (d) above, the Responsible Party will also be liable to pay interest to the Indemnified Party from the time that such monies should have been paid as requested, until that amount or any outstanding balance is paid in full. The interest rate will be determined in the same manner as the interest rate is determined under **clause 15.12**.
- (f) The making of any progress or part payment by a Responsible Party to the Indemnified Party will not relieve the Responsible Party of its obligation to indemnify the Indemnified Party for all loss or damage arising out of the same Incident to the full extent to which it is liable to do so under this **clause 15**, unless the Indemnified Party has given the Responsible Party a release in writing to that effect.
- (g) The making of any payment by a party under this **clause 15.9** may be made without prejudice to any rights of that party to contest its liability to indemnify.
- (h) The liability of a party to this Agreement to make payment in accordance with this **clause 15.9** will not apply where:
 - (i) the parties have in place an established protocol for the assessment and settlement of claims for their own property damage arising out of Incidents; and
 - (ii) any claim or claims arising out of an Incident are settled, by agreement, or any claims that are being dealt with pursuant to the terms of such protocol.

15.10 Defence of Claims

The parties will render to each other all reasonable assistance in the defence of any Claim made against the other party by a third party arising out of any Incident.

15.11 No Liability other than for Incidents

Other than as set out under **clauses 15.1 to 15.10**, neither party will be liable to the other party for any Consequential Loss relating to this agreement however arising (including under this agreement, in tort including negligence, or for breach of any statutory duty).

15.12 Interest

If a party defaults in the payment of any amount due to the other party (including all amounts in an invoice issued under this agreement), the defaulting party will pay interest on that amount, or the outstanding balance, until it is paid in full. The interest rate will be 2 percentage points above the:

- (a) bench mark lending rate charged by the National Australia Bank or its successors (“NAB”), as published at the time of such default; or
- (b) if the lending rate specified in **clause 15.12(a)** does not exist at the time of such default, then the base business overdraft lending rate at that time on overdrafts of \$100,000.00 or more as determined in writing by or on behalf of the senior manager of the New South Wales head office of the NAB, currently known as the General Manager Business and Premium, at their discretion.

That interest will accrue and be recoverable from day to day.

16 Insurance

16.1 Operator’s insurance policies

- (a) The Operator will during the Term take out and maintain a liability insurance policy which provides an indemnity in respect of:
 - (i) loss of, loss of use of, and destruction or damage to, real or personal property;
 - (ii) injury to, or disease or death of, persons;
 - (iii) the Operator’s liability to ARTC under **clause 15** to the extent coverable by insurance.
- (b) The liability insurance policy referred to in **clause 16.1(a)** will:
 - (i) be with an insurer approved by ARTC (and ARTC will not unreasonably withhold such approval);
 - (ii) have a limit of liability of not less than \$250,000,000 (or such other amount as ARTC may reasonably require and notify to the Operator from time to time) for any one occurrence; and
 - (iii) contain provisions that are standard industry terms for railway operators.
- (c) The Operator will deliver to ARTC when reasonably requested by ARTC copies of such parts of the liability insurance policy referred to in **clause 16.1(a)** and the Certificates of Currency in relation to such policy, subject to the details of such policy being kept confidential by ARTC (other than for the purpose of seeking indemnification thereunder).
- (d) The liability limit referred to in **clause 16.1(b)(ii)** may at ARTC’s absolute discretion be reduced to such other amount as ARTC expressly authorises in writing from time to time.
- (e) The Operator acknowledges and agrees that:
 - (i) it is the Operator’s responsibility to assess and consider the risks and scope of insurance required for the Operator’s business;
 - (ii) nothing in this clause will exempt the Operator from any liability that is not covered by the liability insurance policy referred to in **clause 16.1(a)**; and

- (iii) nothing in this clause will impose liability on ARTC, including where ARTC approves a reduction in the liability limit referred to in **clause 16.1(b)(ii)**.

16.2 ARTC's insurance policies

- (a) ARTC will during the Term take out and maintain a liability insurance policy which provides an indemnity in respect of:
 - (i) loss of, loss of use of, and destruction or damage to, real or personal property;
 - (ii) injury to, or disease or death of, persons; and
 - (iii) ARTC's liability to the Operator under **clause 15** to the extent coverable by insurance.
- (b) The liability insurance policy referred to in **clause 16.2(a)** will have a limit of liability of not less than \$250,000,000 for any one occurrence.
- (c) ARTC will:
 - (i) deliver to the Operator when reasonably requested by the Operator copies of such parts of the liability insurance policy referred to in **clause 16.2(a)** and the Certificates of Currency in relation to such policy, subject to the details of such policy being kept confidential by the Operator (other than for the purpose of seeking indemnification thereunder);
 - (ii) publish annually the amounts paid by it by way of premiums for the insurance referred to in **clause 16.2(a)**.

17 Resolution of Disputes

17.1 Procedure to settle Disputes

- (a) If there is a dispute between the parties relating to or arising out of this agreement, ("**Dispute**") then, unless otherwise expressly agreed to the contrary by the parties, such Dispute will be resolved in accordance with this **clause 17**.
- (b) If either party reasonably considers that a dispute also involves the Access Holder, then:
 - (i) for a Dispute raised under this agreement, ARTC and the Operator consent to, and will not in any way prevent, the Access Holder from being joined to the procedure detailed in this **clause 17**; and
 - (ii) for a dispute (as defined in clause 14 of an Access Holder Agreement) raised under an Access Holder Agreement, the Operator agrees that where a notice of joinder is given by ARTC joining the Operator to the dispute, then the dispute under the Access Holder Agreement will also constitute a Dispute under this agreement. The dispute resolution procedure under this agreement and the Access Holder Agreement will be run as a joint procedure and all references to "parties" and "each party" include a reference to the Access Holder. For the purposes of joint procedures under this **clause 17.1(b)(ii)**, to the extent of any inconsistency between the dispute resolution procedures in this **clause 17** and clause 14 of the Access Holder Agreement, the terms of the Access Holder Agreement will prevail.
 - (iii) The Operator agrees that where it is joined to a dispute raised under the Access Holder Agreement:

- (A) the Operator is bound by the dispute resolution process under clause 14 of the Access Holder Agreement; and
 - (B) any expert, court or other decision maker called upon to resolve the dispute will have jurisdiction to determine any issue arising out of or in relation to both the Access Holder Agreement and this agreement to the extent that it is required to do so for the resolution of the particular dispute.
- (c) Either party may give to the other party to the Dispute notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with under this **clause 17**.
- (d) Upon the provision of a Dispute Notice under **clause 17.1(c)**, the procedure that is to be followed to settle a Dispute arising under this agreement is as follows:
- (i) first, negotiation of the Dispute under **clause 17.2**;
 - (ii) second, if the Dispute is not resolved by negotiation, then mediation under **clause 17.3**; and
 - (iii) third, if the Dispute is not resolved by mediation within one month of the appointment of the mediator, then the parties agree that any party may commence proceedings in court. To that end, the parties submit to the exclusive jurisdiction of the Supreme Court of New South Wales.

17.2 Negotiation

If there is a Dispute between the parties relating to or arising out of this agreement, then within seven days after the date of the Dispute Notice, senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions. If within 14 days of the Dispute Notice being given, the senior representatives fail to resolve the Dispute by joint discussions, then the chief executive officers of the parties will meet and use reasonable endeavours, acting in good faith, to resolve the Dispute by joint discussions.

17.3 Mediation

- (a) If the Dispute is not resolved within seven days after being referred to the chief executive officers under **clause 17.2**, the Dispute will be referred to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within 14 days of referral to mediation, a mediator appointed by the President of the Institute of Arbitrators and Mediators Australia (“**IAMA**”) acting on the request of either party.
- (b) Unless the parties otherwise agree:
- (i) the mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner), except that to the extent of any inconsistency between this agreement and the IAMA Mediation Rules, the terms of this agreement will prevail;
 - (ii) each party may appoint a person, including a legally qualified person to represent it or assist it in the mediations;
 - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
 - (iv) the costs of the mediator, and any other incidental costs, will be borne equally by the parties.
- (c) Nothing in this **clause 17.3** prohibits a party from seeking appropriate injunctive relief.

- (d) Subject to **clauses 17.3(c)** and **(e)**, a party cannot commence legal proceedings until completion of the procedures set out in this **clause 17**. If legal proceedings are initiated or continued in breach of this **clause 17.3(d)**, a party to the Dispute may apply for an order of the court staying those proceedings pending completion of the procedure set out in this **clause 17**.
- (e) This **clause 17** does not prejudice the right of a party to:
 - (i) require the continuing observance and performance of this agreement by all parties;
 - (ii) institute proceedings to enforce payment due under this agreement where the requirement for payment is not in dispute; and
 - (iii) to terminate the agreement where the basis for doing so is not in dispute.

17.4 Termination of mediation

If the Dispute is not resolved within one (1) month of the appointment of the mediator (if any) under **clause 17.3(b)**, either party may by notice in writing to the other terminate the mediation proceedings.

17.5 Extension of time periods

Any time periods set out in this **clause 17** may be extended by the written agreement of the parties.

18 Confidentiality

18.1 Acknowledgment of confidentiality

Each party acknowledges, subject to **clauses 18.2** and **18.3**, that all information provided by one party ("Provider") to the other ("Receiver") under this agreement that is designated or indicated in writing, as being the confidential information of the Provider or a Related Body Corporate of the Provider ("**Confidential Information**") is secret and confidential and that the Receiver of Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the Provider (except that Confidential Information may be provided to the Access Holder) and not use that Confidential Information for any purpose other than the provisions of this agreement allow.

18.2 Exclusions from Confidential Information

For the purposes of this **clause 18** Confidential Information does not include information which is:

- (a) in the public domain at the time of disclosure other than through the fault of the Receiver or of anyone to whom the Receiver has disclosed it;
- (b) obtained lawfully from a third party without restriction on use or disclosure;
- (c) required to be made public by operation of law (subject to the Receiver claiming any immunity, privilege or restriction on or from disclosure that it can reasonably claim), including without limitation information required by any stock exchange, rail safety or economic regulator;
- (d) derived or produced from Confidential Information but disclosed in an aggregated form, on at least a Pricing Zone basis.

18.3 Permitted disclosure

Either party may disclose Confidential Information:

- (a) necessary for the provision of advice by the Receiver's legal advisers, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (b) to its Related Bodies Corporate (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (c) subject to entering into appropriate confidentiality arrangements with the HVCCC and the RCG, to the HVCCC or the Rail Capacity Group (as defined in the Access Undertaking) for the purposes of enabling the HVCCC or the Rail Capacity Group to co-ordinate the operation and capacity development of the Hunter Valley coal chain;
- (d) to an Access Holder;
- (e) to the ACCC to the extent reasonably required to undertake its functions in relation to the Access Undertaking or under the *Competition and Consumer Act 2010* (Cth);
- (f) subject to entering into appropriate confidentiality arrangements with the auditor, to an auditor appointed under section 4.10(f) of the Access Undertaking to conduct a review of the system true up test under Schedule 2 of the Access Holder Agreement; or
- (g) to the lessor of the Network, if required under the terms of the NSW Lease.

19 Assignment or novation

19.1 By ARTC

- (a) The Operator agrees that ARTC may, by prior written notice to the Operator, assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement:
 - (i) to a successor of ARTC or to any body established by any person in relation to the management of the Network or any relevant or material part of it; or
 - (ii) on the expiration or earlier termination of the NSW Lease, to the lessor of the Network or a nominee of the lessor of the Network,

and the Operator is deemed to have given its consent to an assignment and novation of this agreement and will cooperate with ARTC and execute any instrument reasonably required by ARTC to give effect to the novation or assignment.

- (b) In all circumstances other than those referred to in **clause 19.1(a)**, ARTC may not assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Operator, which will not be unreasonably withheld.

19.2 By the Operator

The Operator may not license, assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of:

- (a) the Access Holder; and
- (b) ARTC, such consent not to be unreasonably withheld.

19.3 The effect of assignment

Assignment of this agreement will not abrogate, impair, release or extinguish any debt, obligation or liability of one party to the other which may have accrued under this agreement prior to the date of such an assignment.

20 Force Majeure

20.1 Suspension of obligations

The obligations of a party (other than an obligation to pay money) are suspended during the time and to the extent that a party is prevented from or delayed in complying with its obligations for reasons of Force Majeure.

20.2 Obligations of a party

If a party is unable to perform its obligations due to Force Majeure it will:

- (a) as soon as possible after being affected, give to the other party full particulars of the Force Majeure and the manner in which its performance is thereby prevented or delayed (but to avoid doubt, the suspension of the obligations commences from the occurrence of the relevant event and not from the provision of particulars); and
- (b) promptly and diligently take all reasonable and appropriate action to enable it to perform the obligations prevented or delayed by Force Majeure, except that the other party is not obliged to settle a strike, lockout or other industrial dispute.

20.3 “Force Majeure”

In this **clause 20 “Force Majeure”** means a circumstance beyond the reasonable control of a party which occurs without the negligence of that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, terrorism and security matters, nuclear ionisation, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator.

21 Governing Law

21.1 Law of the agreement

The law of this agreement is the law of New South Wales.

21.2 Jurisdiction

The parties to this agreement agree that the Courts of New South Wales will have exclusive jurisdiction to hear and determine all disputes which may arise out of this agreement.

21.3 Commencement

The parties agree that if either party commences or maintains any claim or proceeding relating to this agreement in any place in the world this clause may be pleaded by the other party as an absolute bar to such claim or proceeding if they are commenced anywhere other than in the State of New South Wales.

22 Change in law

22.1 New and varied Access Undertaking

- (a) Subject to **paragraph (b)**, the parties agree that any changes to the Standard Operator Sub-Agreement included in an Access Undertaking and approved by the ACCC will automatically be incorporated into this agreement.
- (b) To the extent a new or varied Access Undertaking (including approved changes to the standard operator sub-agreement) are inconsistent with changes negotiated and agreed to the standard operator sub-agreement applying at the Commencement Date, the parties must negotiate in good faith to modify this agreement to reflect the requirements of a new or varied Access Undertaking which are necessary or desirable for ARTC to safely and efficiently manage the Network and recover its costs while retaining, to the extent reasonably possible, the commercial and economic position of both parties arising from the previously agreed changes.
- (c) If the parties cannot agree, then the dispute will be a Dispute to be resolved in accordance with **clause 17**.

22.2 Other changes in law

- (a) Any present or future legislation which operates to vary the obligations of ARTC or the Operator in connection with this agreement resulting in ARTC or the Operator's rights, powers or remedies being adversely affected (including by way of delay or postponement), is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.
- (b) If there is a change in law which cannot be excluded and the change prevents a party from performing any of its obligations under this agreement or has a material adverse effect on either party, then the parties must negotiate in good faith to agree amendments to this agreement. The parties must negotiate in good faith by applying the principle, where possible, of retaining the commercial and economic position of both parties prior to the change in law. If the parties cannot agree, then the dispute will be a Dispute to resolved in accordance with **clause 17**.

23 Notices

23.1 Notice

A notice or other communication required or permitted to be given by a party to another will be in writing and:

- (a) delivered personally;
- (b) sent to an address in Australia by security post or certified mail, postage prepaid; or
- (c) sent by facsimile transmission, to the facsimile number described below.

23.2 Deemed notice

A notice or other communication is deemed given if:

- (a) personally delivered, upon delivery;
- (b) mailed to an address in Australia, on actual delivery to the addressee, as evidenced by Australia Post documentation;

- (c) sent by facsimile (and is other than a notice of termination or suspension of this entire agreement), on the next Business Day after being sent if following transmission the sender receives a transmission confirmation report or if the sender's machine is not so equipped to issue a transmission confirmation report then upon the sender receiving acknowledgment of receipt.

23.3 Addresses for service

Each party's address for service is:

- (a) in the case of ARTC:

| | |
|------------|---|
| Name: | Australian Rail Track Corporation Limited |
| Address: | Ground Floor ARTC Building off Sir Donald Bradman Drive Passenger Rail Terminal Road MILE END SA 5031 |
| Attention: | Chief Executive Officer |
| Facsimile: | (08) 8217 4578 |

- (b) and in the case of the Operator:

| | |
|------------|---|
| Name: | # |
| Address: | # |
| Attention: | # |
| Facsimile: | # |

23.4 Change of address

A party may change its address for service by giving written notice of that change to the other party.

23.5 Twenty-four hour contact details

Each party will provide to the other party, and maintain as current, the name and full details of one or more persons who, together, are available at any time on any day for emergency contact by the other party.

24 General

24.1 Variation

The variation or waiver of a provision of this agreement, or a party's consent to a departure from a provision by another party, will be ineffective unless in writing, signed by the parties and endorsed by the Access Holder.

24.2 Costs

The Operator agrees as between the parties, to pay, if payable, any legal costs of execution (including any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on this agreement and any document contemplated or allowed by this agreement, excluding any of ARTC's internal costs relating to the execution of this agreement.

24.3 Goods and services tax

(a) Definitions

In this clause:

Adjustment Note has the meaning given in the GST Legislation;

ANTS GST Act means the *A New Tax System (Goods and Services Tax) Act 1999*;

Consideration has the same meaning as in the GST Legislation but does not include the GST amount payable;

GST has the meaning given in the GST Legislation;

GST Legislation means the ANTS GST Act and associated legislation and regulations;

Input Tax Credit has the meaning given by the ANTS GST Act;

Tax Invoice means an invoice as prescribed in the GST Legislation;

Taxable Supply is a Taxable Supply as defined in the ANTS GST Act.

(b) GST exclusive prices

Unless specifically stated otherwise, all charges and prices (including amounts and variables in formulas) set out in this agreement are exclusive of GST.

(c) GST Payable

ARTC and the Operator acknowledge and agree and/or warrant (as the case may be) that if GST has application to any Taxable Supply made under this agreement by either ARTC or the Operator (“**supplier**”) to either ARTC or the Operator (“**recipient**”) as the case may be that the supplier may, in addition to the Consideration but subject to providing a Tax Invoice or Adjustment Note, as applicable, to the recipient, recover from the recipient (and the recipient will pay or reimburse the supplier) an additional amount on account of GST, such additional amount to be calculated by multiplying the Consideration by the applicable GST rate and will be paid by the recipient on the same terms and conditions as stated in this agreement.

(d) GST Groups

If a party is a member of a GST group, references to GST which the party must pay, and to input tax credits to which the party is entitled, include GST which the representative member of the GST group must pay and input tax credits to which the representative member is entitled.

(e) Payment under indemnity

If a payment under an indemnity in this agreement gives rise to a liability to pay GST, the payer must pay and indemnify the payee against the amount of that GST.

(f) Reimbursement

If either party is entitled under this agreement to be reimbursed or indemnified by the other party for a cost or expense incurred in connection with this agreement, the reimbursement or indemnity payment will not include any GST component of the cost or expense for which an Input Tax Credit may be claimed by the party entitled to be reimbursed or indemnified.

24.4 Severability

If any provision of this agreement is voidable, illegal, or unenforceable, or if the agreement would, if a particular provision were not omitted be void, voidable, illegal or unenforceable, that provision will (without in any way affecting the validity, legality and enforceability of the remainder of the agreement) be severed from the agreement and the agreement will be read and construed and take effect for all purposes as if that provision were not contained in this agreement.

24.5 Risk and cost of performing obligations

Subject to this agreement:

- (a) whenever the Operator is obliged or required under this agreement to do or effect any act, matter or thing then the doing of such act, matter or thing will, unless this agreement otherwise provides, be at the sole risk and expense of the Operator;
- (b) whenever ARTC is obliged or required under this agreement to do or effect any act, matter or thing then the doing of such act, matter or thing will unless this agreement otherwise provides, be at the sole risk and expense of ARTC.

24.6 No partnership or agency

Nothing in this agreement will constitute or be deemed to constitute a partnership between the parties or be deemed to constitute the Operator as agent of ARTC for any purpose whatsoever and the Operator has no authority or power to bind ARTC or to contract in its name or to create a liability against it in any way or for any purpose.

24.7 Other agreements

This document and any agreement between the parties covering ancillary train movements by the Operator on the Network comprises the whole agreement between the parties relating to use of the Network, and to the extent to which it is inconsistent with any existing agreement between the parties, will prevail over those existing agreements.

24.8 Counterparts

This agreement may be signed in any number of separate counterparts, which taken together are deemed to comprise the one instrument. The parties agree that copies provided to the other party by facsimile transmission evidence signing by the party sending such facsimile.

EXECUTED as an agreement

Schedule 1 - Network

New South Wales (Hunter Valley)

Mainline, crossing loops, dual gauge and turnouts as summarised below:

1. Islington Junction turnouts (116A points (164.690 km)/115A points (164.633 km)) to Port Waratah (107W points (via DEP 169.731 km)/111W points (via DEP 169.552 km)/109W points (166.311 km)/113 points (116.403 km)/PWCS boundary)
2. Scholey Street Junction turnouts (95 points (164.806 km)/98 points (164.804 km))(Via Coal) to Muswellbrook 288.800 km¹
3. Hanbury Junction turnouts (137A points (168.955 km)/136A points (168.986 km)) to Kooragang Island (107S points (via ARR 174.984 km))
4. Kooragang East Junction turnouts (142E points (168.968)/143E points (168.997 km) to Sandgate turnouts (181B points (171.334 km)/183D points (171.502))
5. Muswellbrook 288.800 km to Ulan 435.300 km
6. Muswellbrook 288.800 km to Gap² 416.000 km

¹ Includes Sandgate Flyover (for the purposes of **section 4** Pricing Principles only) which forms part of ARTC Sector 938 Sandgate – Maitland (via Main)

² To the extent where the railway line joins the rail network owned by the Country Rail Infrastructure Authority.

Schedule 2 - Code of Practice

NSW (Hunter Valley)

Network Rules

1. ARTC Network Rules;
2. ARTC Network Procedures;

Interface Requirements

3. ARTC Train Operating Conditions Manual

Copies of all of these documents are available on ARTC's website www.artc.com.au

Signing page

DATED: _____

SIGNED for and on behalf of)
AUSTRALIAN RAIL TRACK)
CORPORATION LIMITED by)
authority of its Directors in)
accordance with section 127 of the)
Corporations Act 2001:)

.....)
Signed)

.....)
Full name (Print))

.....)
Director

.....)
Signed)

.....)
Full Name (Print))

.....)
Director/secretary

SIGNED for and on behalf of)
by)
authority of its Directors in)
accordance with section 127 of the)
Corporations Act 2001:)

.....)
Signed)

.....)
Full name (Print))

.....)
Director

.....)
Signed)

.....)
Full Name (Print))

.....)
Director/secretary