

Version: NSWMC Draft  March 2010

Marked up from ARTC's 23 December 2009 version

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This indicative agreement has been prepared on the basis that a producer and its associates will enter into a single AHA.

Amendments will be required if a producer and its associates wish to enter into separate AHAs.



Access Holder Agreement

for Indicative Services in the Hunter Valley

Dated

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

and

[insert] (ABN/ACN/ARBN *[insert]*) ("Access Holder")

Access Holder Agreement

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Access Holder Agreement

Details

Parties		ARTC and Access Holder	
ARTC	Name	Australian Rail Track Corporation Limited	
	ABN	75 081 455 754	
Access Holder	Name	<i>[insert]</i>	
	ABN/ACN/ARBN	<i>[insert]</i>	
Recitals	A	ARTC is the manager of the Network.	
	B	ARTC agrees to grant the Access Holder rights to access the Network for the purposes of transporting coal on the terms and conditions set out in this agreement.	
	C	The Access Holder may only access the Network through a nominated Operator.	
	D	Each Operator nominated by the Access Holder to use the Network on behalf of the Access Holder must have an unconditional Operator Sub-Agreement with ARTC which has been endorsed by the Access Holder. The endorsed Operator Sub-Agreements are included in Annexure A.	
	E	Each Operator Sub-Agreement governs the nominated Operator's use of the Access Holder's access rights. ARTC will deal directly with the Operators in relation to the day to day operations of the Network.	
	F	The Access Holder Agreement and the Operator Sub-Agreements together comprise the basis on which ARTC grants the Access Holder access to the Network and the use of those access rights by nominated Operators.	

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Access Holder 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, until such time as that access undertaking is accepted, the draft access undertaking attached to the Deed Poll, 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,

but to avoid doubt, until an access undertaking is accepted by ACCC under paragraph (a) and comes into effect, access to the Network will be granted in accordance with the terms of the NSW RAU as provided for in **Schedule 4** of this agreement;

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

Accredited Operator means an 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*);

Actual Path Usage has the meaning given in clause 5.4(a); [Note: definition required as used in both clauses 5.4(a) and 11.4]

Ad Hoc Charges has the meaning given in **Schedule 3**;

Ad Hoc Path Usage has the meaning given in **clause 3.4(c)**;

Additional Capacity means, in relation to the Network, the capability of the Network to carry additional task by an enhancement or improvement of the

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infrastructure forming part of **or associated with** the Network; **[Note: Additional Capacity may be created by enhancing associated infrastructure.]**

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Allocation Period means the Period over which contracted Path Usages are made available to the Access Holder in a Contract Year;

Annual Contracted Path Usages means the number of Path Usages to be made available each Contract Year as specified in the Train Path Schedule for a Train Path;

Associate means in relation to an access holder;

- (a) a Related Body Corporate of that access holder;
- (b) a person, or the trustee or manager of a trust, which Controls that Access Holder;
- (c) a person, or the trustee or manager of a trust, which that Access Holder Controls;
- (d) a Related Body Corporate of a person included in **paragraph (a), (b) or (c)**;
- (e) a partnership or an incorporated or unincorporated joint venture in which the Access Holder, or any one or more of the persons mentioned in **paragraph (a), (b), (c) or (d)** holds an interest;
- (f) a body corporate, or the trustee or manager of a trust, which one or more of the persons mentioned in **paragraph (a), (b), (c), (d) or (e)** alone or together Controls; or
- (g) the trustee of a trust (including a discretionary trust) of which a person included in **paragraph (a), (b), (c), (d) or (e)** is a beneficiary (whether or not through one or more other trusts including discretionary trusts).

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For the purposes of this definition, a reference to a partnership or an unincorporated joint venture is a reference to the persons who are parties to that partnership or unincorporated joint venture;

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;

Available Capacity means Capacity that is not Committed Capacity (but does include Committed Capacity in instances where it will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed);

Availability Exceptions has the meaning given in **clause 3.6(a)**;

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Average Path Usages means the average number of Path Usages to be made available each Month as specified in the Train Path Schedule for a Train Path; **[Note: NSWMC, is confirming this definition is acceptable.]**

Base Path Usages means the number of Path Usages to be made available each Period as determined in accordance with **clause 3.2**;

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;

Cancel means, [•] and **Cancelled** and **Cancellation** have related meanings; [Note: NSWMC is drafting a definition in consultation with the HVCCC. The concept of Cancellation should extend to late presentation of a train, breakdown of a train and a failure to present a train.]

Capacity means the capability of the Network for services, including Additional Capacity, based on:

- (a) track related System Assumptions, including:
 - (i) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements;
 - (ii) the operation of work Trains;
 - (iii) requirement for surge capacity reasonably required to deliver reliable operations where demand varies, in an efficient manner; and
 - (iv) forecast members' losses;
- (b) other assumptions related to operating the Network for non-coal services as reasonably determined by ARTC;

Capacity Entitlement means the Capacity granted to the Access Holder under this agreement in the form of Train Paths and Path Usages, or a certain number of Train Paths and Path Usages to be used in a certain period;

Charges means the TOP Charge and Non-TOP Charges calculated in accordance with **Schedule 3**;

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

Coal Chain Capacity means the system wide capacity of the Hunter Valley Coal Chain, including below rail, above rail and port services as agreed with the HVCCC from time to time based on the System Assumptions;

Coal Train means a Train, the sole purpose of which is transporting coal in open coal wagons whether loaded, empty, operating in or transiting through the Network, or any part thereof;

Committed Capacity means that portion of the Capacity that is required to meet the Capacity entitlements of access holders;

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

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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, any port or shipping/demurrage costs or fees, damages or penalties payable under the Access Holder's customer contracts (whether direct or indirect); and
- (c) any other economic, special or consequential Liabilities;

Contract Year means a year commencing 1 January and ending 31 December except that if this agreement does not start or end on those dates respectively, the first Contract Year will be from the Commencement Date to 31 December of that year and the last Contract Year will be from 1 January to the date the agreement ends;

Control has the meaning given in the *Corporations Act 2001* (Cth);

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;

Deed Poll means the deed poll executed by ARTC in favour of any person who has entered into an access holder agreement (whether prior to, on or after the date of this agreement but in any case prior to approval by the ACCC of the Access Undertaking) in respect of coal haulage services on the Network;

Dispute has the meaning given in **clause 14.1(a)**;

Effective Date means the later of the Commencement Date and the date on which all of the conditions precedent under **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

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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;

Extension has the meaning given in **clause 5.7**;

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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 **unless a delay is caused by an event within this definition; [Note: If there is a genuine FM event which delays a train operated by an Operator, then this should be incorporated within the definition (e.g. if a Train is delayed due to an industrial disturbance)]**.

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Governmental 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 Access Holder;

GTK means gross tonnes multiplied by kilometres;

Hunter Valley Coal Chain means the system of moving coal from coal producers through a terminal in the Gunnedah, Sydney or Gloucester basin areas of New South Wales that utilise the Network and:

- (a) in relation to coal exported through an export terminal at Newcastle, includes those persons:
 - (i) who participate in marketing, mining, loading, transporting, unloading, stockpiling and shiploading activities;
 - (ii) who provide rail or port infrastructure or port services to facilitate those activities; or
 - (iii) who provide vessel or cargo management services, and
- (b) in relation to other coal movements in the Gunnedah, Sydney or Gloucester basin areas of New South Wales, includes those persons:
 - (i) who participate in marketing, mining, loading, transporting, unloading and stockpiling activities; or
 - (ii) who provide rail infrastructure to facilitate these activities;

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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 after having due regard of the views of access holders; [Note: NSWMC notes that, once the Service Level Agreements between the various infrastructure providers and the HVCCC have been finalised, further amendments may be required to the HVCCC's role under this AHA to take account of the HVCCC's agreed role in relation to the infrastructure providers.]

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Indicative Access Holder Agreement means the agreement attached as Annexure A to the Access Undertaking;

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

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- (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;

Indicative Access Charges means the access charges for Indicative Services as determined in accordance with the Access Undertaking (and includes any Interim Indicative Access Charges provided for in the Access Undertaking);

Indicative Services means those Services described as Indicative Services in the Access Undertaking;

Initial Term means the period specified in the Train Path Schedule for a Train Path;

Instruction has the meaning given in the Operator Sub-Agreement;

Interim Indicative Access Charges means the access charges for Interim Indicative Services provided for in the Access Undertaking;

Interim Indicative Services means those Services described as Interim Indicative Services in the Access Undertaking;

KPI Management Plan means a plan to be prepared by the party who has received a notice under clause 3.13(g) to remedy a material failure to meet one or more key performance indicators which details:

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(a) the reason for the material failure; and

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(b) a management plan;

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- (i) setting out each step or task to be undertaken to prevent a future breach of the key performance indicators; and
- (ii) a program setting out the time for each step or task to be commenced and completed.

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Liability means all liabilities, costs, damages, loss, expenses, outgoings of whatever description;

Maintenance Losses has the meaning given in **clause 3.2**;

Maintenance Month has the meaning given in **clause 3.2**;

Month means a calendar month;

Monthly Tolerance Cap means the limit for each Pricing Zone on the tolerance available to be used by access holders in that Pricing Zone in that Month as determined from time to time by ARTC having regard to Available Capacity and the provisions of clause 3.3;

Mtpa means metric (million) tonnes per annum;

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

Network Control means the control and regulation of all rail operations (including Train Movements, movements of rolling stock and track maintenance vehicles) to ensure the safe, efficient and proper operation of the Network; [Note: Consistent with the Access Undertaking]

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

Network Exit Capability means:

- (a) in the case of coal access rights sought or obtained for the purpose of transporting each cargo of coal to the Port of Newcastle, sufficient capacity allocated to the Access Holder at a coal terminal at the Port of Newcastle to offload the coal transported, or if the Access Holder is an Operator, the customer on whose behalf the coal access rights are to be used has sufficient capacity at a coal terminal at the Port of Newcastle to enable the Operator to offload the coal transported; and
- (b) in the case of coal access rights sought or obtained for the purpose of transporting each cargo of coal to a destination other than the Port of Newcastle, an ability to off load the coal transported from the Network at that particular destination;

Network Key Performance Indicators means the performance indicators to be developed by ARTC (in consultation with and having due regard to the advice and recommendations of the HVCCC) for its Network pursuant to the Access Undertaking and reported on its website. These will include performance indicators developed by Access Holders and Operators through the HVCCC that are specific to the operation of Coal Trains and focus on management of the Hunter Valley Coal Chain;

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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;

Non-Compliant Service means:

- (a) a Service using a Train Path that fails to comply with the applicable Service Assumptions prescribed for that Train Path in the Train Path Schedule; and
- (b) if a Train Path Schedule nominates more than one Operator, a Service operated by an Operator in a Period which is in excess of the number of Services specified to be operated by that Operator in the Train Path Schedule, after allowing for Services operated on Ad Hoc Path Usages, traded Path Usages and Tolerance;

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; ***[Note: Please provide a copy of the NSW Lease]***

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NSW RAU or New South Wales Rail Access Undertaking means the access undertaking given by Rail Infrastructure Corporation and Rail Corporation New South Wales pursuant to Schedule 6AA of the *Transport Administration Act 1988* (NSW) as amended from time to time;

Non-TOP Charges as calculated in accordance with **Schedule 3**;

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Operator means, for each Train Path or each Path Usage, the Accredited Operator nominated by the Access Holder to provide Services to use the Train Path or Path Usage in accordance with its Operator Sub-Agreement. If the Access Holder is also an Accredited Operator and nominates itself to use a Train Path or Path Usage, then references to Operator mean the Access Holder in that capacity;

Operator Sub-Agreement means an agreement between ARTC and each nominated Operator and which has been endorsed by the Access Holder;

Parent Guarantee means a guarantee given by a Related Body Corporate of the Access Holder who has an Acceptable Credit Rating which is in a form acceptable to ARTC (acting reasonably);

Deleted: Mtpa means metric (million) tonnes per annum; ¶

Passenger Priority means reasonable priority and certainty of access for rail passenger services delivered in accordance with **clause 3.8**;

Path Usage means a right granted under this agreement to the Access Holder to utilise a Train Path through the operation of a Service by a nominated Operator on the Train Path;

Period means a **Month** or a **Quarter**;

Pricing Zone means the grouping of segments as published by ARTC on its website from time to time which must be in accordance with the Access Undertaking;

PWCS means Port Waratah Coal Services Limited, (ABN: 99 001 363 828);

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Quarter means a calendar quarter commencing on each of 1 January, 1 April, 1 July and 1 October;

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

RCG means the Rail Capacity Group formed by ARTC to carry out certain functions prescribed in the Access Undertaking, and made up of representatives of access holders transporting coal on the Network;

Rebate is the rebate determined in accordance with **clause 5.4**;

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 to an Operator under the Operator Sub-Agreement or otherwise issued for the purpose of ensuring the safe use of the Network provided that where such policies and notices are issued by ARTC, they must be reasonable;

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Scheduled Service means [•] [Note: NSWMC, is drafting a definition in consultation with the HVCCC.]

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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 to meet the transport needs of coal producers;

Service Assumptions for a Train Path, including each Path Usage, means the assumptions relating to the Services set out under **clause 3.1** of the relevant **Train Path Schedule**;

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;

Standard Operator Sub-Agreement means the operator-sub-agreement included as a schedule to the indicative access holder agreement at Annexure A of the Access Undertaking;

Start Date has the meaning given in the Train Path Schedule: [Note: Definition required as used in the Train Path Schedule and clause 12.8]

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System Assumptions means the assumptions for the Hunter Valley Coal Chain including:

- (a) interface and live run losses between each element in the Hunter Valley Coal Chain;
- (b) agreed operating mode of the Hunter Valley Coal Chain;
- (c) surge and tolerance requirements;
- (d) capacities of fixed infrastructure;
- (e) rolling stock requirements;
- (f) vessel requirements,

as detailed in the System Assumption Document as varied from time to time and as agreed to by ARTC (acting reasonably) and, to the extent not otherwise dealt with in the System Assumptions Document, the following assumptions as reasonably determined by ARTC:

- (g) train lengths;
- (h) train speeds;
- (i) train axle loads; and
- (j) section run times;

System Assumptions Document means the document prepared by the HVCCC in consultation with ARTC and the Terminal Operators that details System Assumptions and simulation model outputs for the relevant Coal Chain Capacity scenarios;

System Availability Shortfall has the meaning given in **Schedule 2** of this agreement;

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

Terminal Operator means an operator of a coal terminal at the Port of Newcastle;

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 Governmental 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 Governmental 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;

Tolerance means the additional Path Usages available to the Access Holder in addition to the Base Path Usage as determined in accordance with **clause 3.3(a)**;

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TOP Charges means the take or pay charges for the Train Paths as determined under **clause 1.1 of Schedule 3**;

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TPA means the *Trade Practices Act 1974* (Cth);

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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 Path means:

(a) the entitlement of the Access Holder to use, through an Operator, the Network from the port or discharge point to the load point and, from the load point to the port or discharge point, as identified in the Train Path Schedule (as amended permanently from time to time under **clause 11** or under **clause 16**, or temporarily in accordance with an Operator Sub-Agreement); and

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(b) all other ad hoc entitlements from load or discharge points which are provided by ARTC to the Access Holder to use, through an Operator, on the terms set out in this agreement but does not include an ancillary Train movement except for an ancillary Train movement on the journey from the port or discharge point to the load point **or** from the load point to the port or discharge point;

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Train Path Schedule means a Schedule to this agreement that sets out the entitlement of the Access Holder to certain Train Paths which service a particular coal mine;

Wilful Misconduct means any intentional wrongful act or omission carried out:

(a) with knowledge of, or reckless indifference as to, the wrongfulness of the conduct; or

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(b) with deliberate or reckless disregard for the (foreseeable and harmful) consequences of the conduct.

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;

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- (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 Schedule priority

If a Train Path Schedule imposes additional terms in relation to a Train Path, then those terms will take priority over the body of this agreement to the extent any inconsistency arises between them.

1.5 NSW Rail Access Undertaking

Until such time as the Access Undertaking is accepted as contemplated under **clause 19.1**, the parties acknowledge and agree that all references in this document to "Access Undertaking" shall be deemed to refer to the terms of the draft access undertaking attached to the Deed Poll, save that:

- (a) where required by law or otherwise expressly required under this agreement, the NSW Rail Access Undertaking applies in accordance with **Schedule 4**; and
- (b) the pricing regime under the NSW Rail Access Undertaking applies in place of the pricing regime set out in the draft access undertaking attached to the Deed Poll.

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2 Term

2.1 Term

Subject to **clause 2.2**, this agreement commences on the Commencement Date and continues until terminated under this **clause 2** ("Term") or **clause 12**,

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2.2 Condition precedent

- (a) If, at the Commencement Date, the Access Holder has a credit rating below the Acceptable Credit Rating and the Access Holder has not delivered a Parent Guarantee or Security for an amount of at least three months' TOP Charges to ARTC, then **clauses 3 to 11**, do not take effect until this condition precedent is satisfied.
- (b) The condition precedent is for the benefit of ARTC and may only be waived by ARTC.
- (c) If the condition precedent is not satisfied within one month of the Commencement Date, ARTC may terminate this agreement on written notice to the Access Holder.

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2.3 Train Path Schedules

Each Train Path Schedule:

- (a) sets out the Train Paths and the number of Path Usages from a particular load point to be made available to the Access Holder under this agreement;
- (b) does not grant rights of access to a Train Path or additional Path Usages under this agreement until the satisfaction or waiver of all conditions precedent specified in that schedule for that Train Path or those additional Path Usages;
- (c) specifies a 10 year Initial Term **(or a shorter period in accordance with clause 2.5)** for access to a Train Path and Path Usages which may be annually renewed by an Access Holder for each year which is 10 years in advance of the Contract Year in which the Renewal Notice is submitted; and
- (d) provides that, in certain circumstances set out in the Train Path Schedule if the Access Holder has failed to renew the Train Path Schedule, ARTC will **(unless clause 2.5 applies)** provide the Access Holder with the opportunity, during the period until five years before the Train Path Schedule is due to expire, to extend the Train Path Schedule for a period of not less than one year and not more than three years notwithstanding that the Access Holder has failed to submit a Renewal Notice.

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[Drafting notes: The 10 year rolling term is intended to align the AHA with the term provided in the PWCS Terminal Access Protocol. For example, in 2011, an Access Holder may submit a Renewal Notice for 2021. If the Access Holder fails to submit a Renewal Notice in 2011, the Train Path Schedule will expire on 31 December 2021. Sub-clause (d) refers to the "right of first refusal" given under the Schedule when ARTC receives an access application for path usages which are mutually exclusive with an extension of the path usages in the Train Path Schedules and which originate in the same zone as the Train Path]

2.4 Termination on cessation of all Train Paths

This agreement automatically terminates on expiry or termination of all Train Path Schedules.

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2.5 Short mine Life

- (a) This ~~clause 2.5~~ applies where the Access Holder can demonstrate to ARTC's reasonable satisfaction that the life of a particular mine will expire sooner than 10 years from the Start Date. For the avoidance of doubt, this ~~clause 2.5~~ applies to load points servicing a mine the life of which will expire sooner than 10 years from the Start Date.
- (b) Where this ~~clause 2.5~~ applies:
- (i) the "Initial Term" shall be the term of the remaining life of the mine;
 - (ii) no right of annual extension shall apply; and
 - (iii) the Access Holder shall be entitled to extend the "Initial Term" on one occasion for a period of not less than one year and not more than three years provided it gives written notice of the extension to ARTC at least two years prior to the expiry of the Train Path Schedule.

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3 Access rights

3.1 Grant of Train Paths for transport of coal

- (a) ARTC grants to the Access Holder, for the purpose of transporting coal, the availability of, and the right to use, through an Operator, the following Path Usages in each Allocation Period:
- (i) **(Base entitlement)** the Base Path Usages for each Train Path for each Period determined in accordance with **clause 3.2**;
 - (ii) **(Tolerance)** additional Path Usages in each Period in each Pricing Zone which, in aggregate over all Train Paths contracted by the Access Holder in the Pricing Zone, do not exceed the Tolerance determined in accordance with **clause 3.3** (for example, if the Tolerance is 13 Path Usages each Month, the Access Holder can elect to use an additional 13 Path Usages in the Month above the Base Path Usages on a particular Train Path or distribute those 13 additional Path Usages across all its Train Paths in the same Pricing Zone); and
- the use of the Network for this purpose, in accordance with the terms and conditions set out in this agreement and subject to ARTC's Passenger Priority obligations and the Availability Exceptions.
- (b) **(Annual cap)** The Access Holder's entitlement to its Base Path Usages for a Train Path in a Contract Year ends when it has utilised its Annual Contracted Path Usages for that Train Path. Ad Hoc Path Usages are not counted in determining the utilisation of Annual Contracted Path Usages.
- (c) **(Tolerance caps)** The Access Holder's entitlement to use the Tolerance in relation to a Train Path in a Period is subject to the following conditions:
- (i) the Access Holder not having exceeded its Annual Contracted Path Usage in that Contract Year for that Train Path; and

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- (ii) the Monthly Tolerance Cap for the relevant Pricing Zone not being exceeded.
- (d) **(Ad Hoc Path Usages)** This **clause 3.1** does not prevent ARTC providing Ad Hoc Path Usages to an Access Holder on request where such Path Usages are available.

(e) (New access arrangements) If the Access Holder wishes to use a train which has a different capacity to that set out in the Train Path Schedule, the Access Holder and ARTC acknowledge that the Access Holder must submit an application in accordance with the Access Undertaking. If that application is accepted, the Access Holder shall be entitled to retain the Train Paths to which it is entitled under this agreement.

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3.2 Determination of Base Path Usages

Before the commencement of each Contract Year, ARTC will determine the Access Holder's Base Path Usages for the following Contract Year in accordance with the following steps.

(a) ARTC will consult with the HVCCC and the relevant Terminal Operator on the impact of Network Exit Capability and System Assumptions on Coal Chain Capacity and will use its reasonable endeavours to align, to the extent practicable, its planned maintenance program and any known Availability Exceptions with the Network Exit Capability so that there will be sufficient Base Path Usages in each Period to allow utilisation of each access holder's Network Exit Capability. The purpose of this clause 3.2(a) is to facilitate alignment of the Access Holder's track capacity and its Network Exit Capability in clauses 3.2(c)(iv) or 3.2(c)(v) (as the case may be).

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(b) Following consultation with the HVCCC and the relevant Terminal Operators on the impact of Network Exit Capability and System Assumptions on Coal Chain Capacity, ARTC will publish by 1 July of each Contract Year:

- (i) its annual maintenance assumptions for the Network for the following Contract Year and specify those Months in which major Network outages are planned ("**Maintenance Months**"); and
- (ii) for each Maintenance Month, the aggregate number of path usages lost in each Pricing Zone as a result of the major Network outage in that month ("**Maintenance Losses**"); and
- (iii) any known Availability Exception which ARTC reasonably anticipates will have a material impact on the Capacity entitlements of access holders in the following Contract Year.

(c) ARTC will determine, for each Period of the following Contract Year, the Access Holder's Base Path Usages for each Train Path in accordance with the following principles:

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- (i) ARTC will reduce the Access Holder's entitlement to Path Usages below the Average Path Usages in each Period in which a Maintenance Month occurs on the basis of all access holders with train paths for Coal Trains in that Pricing Zone bearing an equitable share of the Maintenance Losses and any known Availability Exceptions for that Month;

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- (ii) ARTC will increase the Access Holder's entitlement to Path Usages above the Average Path Usages in other Periods in that Contract Year to make up for the reduction for Maintenance Losses and any known Availability Exceptions in the Maintenance Month, and in doing so, will take into account the number of days in a Month.
- (iii) The Base Path Usages for each Period in the Contract Year must in aggregate equal the Annual Contracted Path Usages for that Contract Year.
- (iv) If the Path Usages are for the purpose of transporting coal to the Port of Newcastle, ARTC will consult with the HVCCC and will use its reasonable endeavours to ensure that the Access Holder's Base Path Usages align with the Access Holder's Network Exit Capability to the extent practicable.

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- (v) If the Path Usages are for the purpose of transporting coal to a Network exit point other than the Port of Newcastle, ARTC will consult with the HVCCC and will use its reasonable endeavours to ensure that the Access Holder's Base Path Usages align with the Access Holder's Network Exit Capability.

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- (d) By 30 September of each Contract Year, ARTC will notify the Access Holder of the Base Path Usages for the next Contract Year. If the Access Holder disputes the Base Path Usages, it must notify ARTC of that dispute under **clause 14** within one month of being notified and the dispute will be determined by expert determination in accordance with **clause 14.4**. If the Access Holder does not notify a dispute within this time, it is deemed to have accepted the Base Path Usages.

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- (e) If the Access Holder has nominated more than one Operator for a Train Path, then the Base Path Usages will be proportionately allocated to the Operators in accordance with the same proportions applying for the Average Path Usages.

3.3 Tolerance

- (a) If the Access Holder has an Allocation Period of a Month, the Access Holder's Tolerance in each Pricing Zone for each Month will be determined in accordance with the following formula:

Tolerance = the higher of:

- (i) $10\% \times \sum (AVPU_{TP1} \dots AVPU_{TPN})$; or
- (ii) 13 Path Usages;

where:

$\sum (AVPU_{TP1} \dots AVPU_{TPN})$ = the sum of the Average Path Usages for each Train Path in that Pricing Zone in the Month as set out in the Train Path Schedules. If a Train Path spans more than one Pricing Zone, then the Average Path Usages for that Train Path will count towards the Tolerance in each Pricing Zone.

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For example, if the Access Holder has 150 Path Usages on a Train Path that spans Pricing Zone 3 (where the mine is located) and Pricing Zone 1 (where the Port is located), the Access Holder will have a Monthly Tolerance of 15 Path Usages in each of Pricing Zone 1 and 3. A Train which runs on the Train Path from the port to the mine and back will consume one of the Path Usages in the Monthly Tolerance for both Pricing Zones. If the Access Holder also has another mine located in Pricing Zone 1 and has 200 Path Usages on the Train Path associated with that mine, then the Access Holder will have a total Monthly Tolerance of 35 Path Usages in Pricing Zone 1 and 15 Path Usages in Pricing Zone 3.

- (b) If the Access Holder has an Allocation Period of a Quarter, the Access Holder's Tolerance in each Pricing Zone for each Quarter will be determined in accordance with the following formula:

Tolerance = the higher of:

- (i) $10\% \times 0.33 \sum (AVPU_{TP1} \dots AVPU_{TPN})$; or
- (ii) 13 Path Usages;

where:

$\sum (AVPU_{TP1} \dots AVPU_{TPN})$ = the sum of the Average Path Usages for each Train Path in that Pricing Zone in the Quarter. If a Train Path spans more than one Pricing Zone, then the Average Path Usages for that Train Path will count towards the Tolerance in each Pricing Zone.

- (c) If **paragraph (a)** gives rise to a fractional number, it will be rounded up where it is 0.5 or greater and otherwise rounded down to the nearest whole Path Usage.

- (d) Note: If the timing of acceptance of the AU is delayed much beyond April 2010, it may be difficult to obtain meaningful data by this date. Within six months of the date an Access Undertaking is accepted by the ACCC covering the Network first comes into effect, ARTC will commence a consultation with access holders and the HVCCC (to be completed within [3] months of that date) on the level and application of Tolerance available.

- (e) ARTC will commence a consultation with access holders and the HVCCC on the level and application of Tolerance available:

- (i) within [1] month of Additional Capacity becoming available or use by access holders; and

- (ii) in any case, at intervals of not less than 1 year, commencing 1 year after the date of completion of the review referred to in clause 3.3(d).

- (f) A review undertaken in accordance with clauses 3.3(d) or 3.3(e) must be completed within [3] months of the date on which ARTC commences consultation. The purpose of each review is to:

- (i) consider the impact of the level of Tolerance on Coal Chain Capacity and to consider what amendments to Tolerance (if any)

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30 September 2010; and

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are appropriate in order to ensure efficiency in the Hunter Valley Coal Chain; and

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(ii) to provide information to the annual review of capacity under section 6.4(d) of the Access Undertaking.

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(g) ARTC will provide a report to the RCG summarising the results of each review under clauses 3.3(d) or 3.3(e) and will seek the endorsement of the RCG pursuant to the Access Undertaking as to the appropriateness of any proposed recommendations and the resulting changes to Coal Chain Capacity arising out of that review.

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(h) ARTC must not amend Tolerance without the endorsement of the RCG.

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(i) ARTC will notify the Access Holder of any recommendations that are endorsed by the RCG. The Access Holder and ARTC agree that this clause 3.3 shall be deemed to be amended to reflect the changes to Tolerance as endorsed by the RCG. *[Note: This clause 3.3 will also need to be addressed in the AU.]*

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3.4 Identification of Path Usages

Subject to clause 16.5 and unless otherwise agreed between the Access Holder and ARTC in writing, a Path Usage utilised for a particular Train Path in an Allocation Period will:

- (a) first, count towards the Base Path Usages, until the Base Path Usages for that Train Path have been exhausted;
- (b) second, count towards the applicable Tolerance until the Annual Contracted Path Usages for that Train Path has been reached, the Tolerance has been exhausted or until the applicable Monthly Tolerance Cap has been reached, whichever occurs first; and
- (c) thereafter be taken to be an ad hoc path usage (“Ad Hoc Path Usage”).

3.5 Identification of Allocation Period

- (a) If the Access Holder and its Associates:
 - (i) have aggregate load point allocations less than or equal to five Mtpa at the terminals operated by PWCS for any Contract Year between 1 January 2010 and 31 December 2011; or
 - (ii) have aggregate load point allocations less than or equal to three Mtpa to the terminals operated by PWCS for any Contract Year from 1 January 2012 until the expiry of this agreement,
 then, the Access Holder is eligible to elect, by notice in writing to ARTC, an Allocation Period of a Quarter for that Contract Year.
- (b) If the Access Holder wishes to elect an Allocation Period of a Quarter for a Contract Year, the Access Holder must:
 - (i) submit an election notice to ARTC as at the Commencement Date for the first Contract Year and otherwise by 31 August of the preceding Contract Year establishing to ARTC’s reasonable

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satisfaction that its aggregate nominations at the terminals operated by PWCS (taking into account any renewals and extensions) is less than or equal to the applicable maximum amount specified in **clause 3.5(a)** for that Contract Year; and

- (ii) provide ARTC with a copy of an executed contract with PWCS as at the Commencement Date for the first Contract Year and otherwise by 10 December of the preceding Contract Year confirming that it has aggregate load point allocations less than or equal to the applicable maximum amount specified in **clause 3.5(a)** for that Contract Year.
- (c) The Access Holder will use its reasonable endeavours to achieve an even spread of Path Usages during each Period and over the Contract Year.
- (d) To avoid doubt, all Train Path Schedules will have the same Allocation Period in a Contract Year and if the Access Holder does not meet the criteria in **clause 3.5(a)**, or if the Access Holder does not elect an Allocation Period of a Quarter in accordance with **clause 3.5(b)** the Allocation Period for that Contract Year will be a Month. [Note: This clause 3.5 will also need to be addressed in the Access Undertaking]

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3.6 Availability Exceptions

- (a) The availability of a Train Path or a Path Usages is subject to:
 - (i) ARTC's Passenger Priority obligations under **clause 3.8** of this agreement;
 - (ii) emergencies or genuine and material safety considerations;
 - ~~(iii) [Note: ARTC to provide examples of when the Force Majeure provisions are likely not to be sufficient] material failure of an Operator's Service;~~
 - ~~(iv) the Network Management Principles;~~
 - ~~(v) without limiting any other clause of this agreement, any lawful order, direction or requirement given to ARTC by a Governmental Authority relating to the Network; and~~
 - ~~(vi) Third Party Works,~~

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(“**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.

- (b) The Access Holder agrees at all times during the Term not to access or attempt to access the Network in any way other than is authorised by this agreement, or as authorised under a separate valid and binding access holder agreement.
- ~~(c) Whenever reasonably practicable, ARTC must use its reasonable endeavours to consult with the Access Holder about the likely impact of an Availability Exception prior to that Availability Exception applying.~~

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3.7 Use of a Train Path is not exclusive

The Access Holder's rights to the Train Paths do not give the Access Holder an exclusive right to any Train Path. Notwithstanding the foregoing, no two Trains (whether the Trains run by the Access Holder's Operators 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.

3.8 Passenger Priority in New South Wales

The Access Holder acknowledges, and will not do anything to interfere with or breach, ARTC's obligations 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 or future passenger train paths; and
- (c) apply Passenger Priority in undertaking any maintenance to the Network.

3.9 Early and late Services

- (a) If a Path Usage has been scheduled for use by the Access Holder's nominated 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 3.9(a)**, 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 on that Train Path for that Service at ARTC's first available opportunity (subject to the Network Management Principles).
- (c) Nothing in this **clause 3.9** 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 Access Holder or its nominated Operator (where such obligations had first arisen before the first entry of the Train on the Network to which this **clause 3.9** relates).

3.10 Warranty of accuracy of information

- (a) Subject to **clause 3.10(b)**, 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

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the Network is, to the first-mentioned party's knowledge, accurate in all material respects and is not, whether by omission or otherwise, misleading.

- (b) Each party agrees that forward looking information and representations as to future matters are, subject to uncertainties and that the warranty in **clause 3.10(a)** does not apply to forward looking information and representations as to future matters, however, each party must use reasonable endeavours, at the time such information is provided to the other party, to ensure the accuracy of the forward looking information and representations as to future matters, in so far as is reasonably practicable.

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3.11 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 an Operator with the Service Assumptions for each Train Path; and
- (b) the use by an Operator of the Path Usages, and in so doing ensure (subject to the matters in **clause 3.6(a)**) that an 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.

3.12 Light engine movements

The Access Holder's entitlement to Train Paths and 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".

3.13 Key performance indicators

- (a) Within six months of the Commencement Date, ARTC and the Access Holder will use their best endeavours to agree:

- (i) appropriate key performance indicators and minimum levels of performance relating to the areas set out in clause 3.13(c); and

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- (ii) timeframes to meet for the review of the key performance indicators and minimum performance levels will be at least once a Contract Year, and in any case, promptly following a review of the Network Key Performance Indicators (including any performance indicators specific to the Hunter Valley Coal Chain).

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- (b) Where a change to the key performance indicators or minimum performance levels is agreed under this clause 3.13 and the change has or is reasonably likely to have a material impact on ARTC, the Access Holder or its Operator's operations or infrastructure, the affected party will have up to 2 years to fully implement the change.

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(c) In developing key performance indicators under this agreement ARTC and the Access Holder will have regard to the following areas:

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<u>ARTC</u>	<u>Access Holder/Operators</u>
<u>Track availability (including Capacity reductions due to planned and unplanned maintenance)</u>	<u>Train reliability</u>
<u>Track quality</u>	<u>Train availability</u>
<u>Track reliability</u>	<u>Compliance with Daily Train Plan</u>
<u>Safety</u>	
<u>Speed restrictions</u>	

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(d) ARTC and the Access Holder acknowledge that, in agreeing appropriate key performance indicators, ARTC's objective is to have a common set of key performance indicators and minimum performance levels for all access holders and a set of key performance indicators and minimum performance levels for ARTC which are consistent with:

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(i) the applicable System Assumptions;

(ii) coal chain system performance indicators which the HVCCC determines are to be used in order to assess the efficiency and Capacity of the Network and the Hunter Valley Coal Chain; and

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(iii) other incentives and measures of ARTC's performance including the performance indicators contained in the NSW Lease and the application of the periodic True-Up Test under **Schedule 2** of this agreement.

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and, where applicable, ARTC will have regard to the Network Key Performance Indicators.

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(e) If requested by a party, the other party agrees to include one or more Operators in the negotiations, and periodic review, of the key performance indicators.

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(f) ARTC and the Access Holder agree that each party's performance against the key performance indicators agreed under this agreement will be monitored by:

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(i) ARTC in relation to Network Key Performance Indicators and other incentives and measures referred to in clause 3.13(d)(iii), and ARTC will report the results of the monitoring to the Access Holder annually, commencing on the first anniversary of the Commencement Date; and

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(ii) the HVCCC in relation to applicable System Assumptions and other coal chain system performance indicators referred to in clauses 3.13(d)(i) and 3.13(d)(ii), and the HVCCC will report the results of the monitoring to ARTC and to the Access Holder

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annually, commencing on the first anniversary of the Commencement Date. *[Note: subject to the HVCCC confirming it will undertake this role.]*

(g) Without prejudice to any other rights which a party may have under this agreement, if an annual performance report under clause 3.13(f) indicates that a party (First Party) has materially failed to comply with one or more key performance indicators, the other party may notify the First Party of this and require the First Party to promptly issue a KPI Management Plan.

(h) The First Party must comply with the KPI Management Plan and, without prejudice to any other rights which a party may have under this agreement, a failure to comply with the KPI Management Plan shall be deemed to be a material breach for the purposes of clause 12.1.

(i) If:

(i) the parties have not agreed the key performance indicators, minimum levels of performance and timeframes for the key performance indicators in accordance with this clause 3.13; or

(ii) a dispute arises in relation to compliance with or the review of the key performance indicators or the contents of a KPI Management Plan,

then clause 14 will apply.

3.14 Network Exit Capability requirement

- (a) If the Access Holder is seeking to transport a particular cargo of coal to the Port of Newcastle and the HVCCC or a Terminal Operator advises ARTC that the Access Holder does not have sufficient Network Exit Capability to offload the anticipated coal at a coal terminal at the Port of Newcastle, then ARTC must not make available a Path Usage to the Access Holder for the period where it does not have sufficient Network Exit Capability.
- (b) To avoid doubt, the Access Holder's obligation to pay TOP Charges is not reduced as a result of ARTC not making available Path Usages under clause 3.14(a).

4 Operators

4.1 Only Operators may run Services

The Access Holder agrees it is only entitled to utilise a Train Path through an Operator and that it is the Operator who will operate Services on the Train Path. To avoid doubt, the Access Holder can be the Operator provided it has an unconditional Operator Sub-Agreement and complies with this clause 4.

4.2 Nominated Operators

- (a) The Access Holder has nominated, and ARTC has approved, the Accredited Operators specified in the Train Path Schedule to use each Train Path according to the Daily Train Plan.

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- (b) The Access Holder may nominate, on at least 48 hours' written notice, an Operator already approved by ARTC under this agreement to be an Operator for another Path Usage or Train Path. ARTC may only refuse the nomination if:
 - (i) the nominated Operator has received a rectification notice or similar notice from ARTC for material breach of any agreement with ARTC and the event giving rise to that rectification notice or similar notice has not been rectified; or
 - (ii) the Operator's Services do not comply with the Services Assumptions applicable to that Train Path or Path Usage.
- (c) Where an Access Holder has nominated more than one Operator for a Train Path, the Access Holder will, or will procure its Operators, to inform ARTC which Operator is using each Path Usage for that Train Path, in accordance with the ARTC requirements for determining and issuing a Daily Train Plan.

4.3 Operator Sub-Agreements

- (a) The Access Holder agrees that an Operator's use of a Train Path is governed by the relevant Operator Sub-Agreement and the availability and use of a Train Path may be affected by the terms of that agreement.
- (b) The Access Holder acknowledges and warrants that it has read and agrees to each Operator Sub-Agreement, including any variation from the Standard Operator Sub-Agreement that it has endorsed, following such variation.

4.4 Nomination of new Operators

- (a) The Access Holder may nominate a new Accredited Operator (who is not currently an approved Operator for any Train Path under this agreement) on 10 Business Days' written notice to ARTC. The notice must include sufficient information (to be specified on ARTC's website from time to time) about the Accredited Operator to enable ARTC to consider the nomination.
- (b) ARTC will use its best endeavours to approve or reject that nomination within 10 Business Days of the later of receiving notice or the required information. ARTC is only entitled to reject a nomination if:
 - (i) the Operator is not ~~Accredited~~ at the time of the nomination;
 - (ii) the Accredited Operator does not have an unconditional Operator Sub-Agreement with ARTC endorsed by the Access Holder;
 - (iii) the nominated Operator has received a rectification notice or similar notice from ARTC for material breach of any agreement with ARTC and the event giving rise to that rectification notice or similar notice has not been rectified;
 - (iv) ARTC forms the view, acting reasonably, that the Accredited Operator is not of sufficient financial capacity to meet potential liabilities under the Operator Sub-Agreement provided that ARTC is only able to form this view if it has requested Credit Support

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from the Operator and the Operator has not provided the Credit Support within the timeframe provided under the Operator Sub-Agreement.

4.5 No valid Operator nomination

- (a) The Access Holder agrees that ARTC has no obligation to make a Train Path or Path Usage available for use where:
- (i) the Access Holder has failed to nominate an Accredited Operator for that Train Path or Path Usage;
 - (ii) the nominated Operator is not, or is no longer, an Accredited Operator, or its Operator Sub-Agreement for that Train Path or Path Usage is conditional or has been suspended, terminated or expired; or [Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]
 - (iii) the Operator seeking to use a Path Usage is not the Operator notified under the Daily Train Plan for that Train Path or Path Usage unless ARTC has given its consent to the change (not to be unreasonably withheld),
- and the occurrence of any of these events does not relieve the Access Holder's obligation to pay the TOP Charges.
- (b) The Access Holder must promptly nominate a new Operator for the affected Train Paths or Path Usages if a nominated Operator's Operator Sub-Agreement is terminated or expires and there are no other Operators nominated for those Train Paths.

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4.6 Limited agency

[Drafting note - the purpose of this clause is to ensure ARTC deals with the Operators rather than the Access Holders in relation to the daily operation of the network.]

- (a) If the Access Holder is not also the Operator for a Path Usage, the Access Holder appoints each nominated Operator, as its agent 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 including giving and receiving notices and instructions in relation to availability of Path Usages and the Services using those Path Usages in accordance with the Operator Sub-Agreement;
 - (iii) agreeing to temporary changes to Train Paths, Path Usages or the Services in accordance with clauses 3.2(a) and 9 of the Operator Sub-Agreement; 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

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in accordance with **clause 4** of the agreement and the Train Path Schedule, 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) of the Operator Sub-Agreement),

but the actual operation of Services on any Path Usage remains the responsibility of the Operator and, to avoid doubt, the Access Holder does not incur liability for Incidents as a result of this **clause 4.6(a)**.

- (b) The Access Holder agrees:
- (i) that where an Operator is acting as its agent under **clause 4.6(a)**:
 - (A) the Access Holder is bound by, and releases ARTC from any Liability to the Access Holder relating to the acts or omissions of the Operator;
 - (B) ARTC will deal directly with the Operator and is under no obligation to provide notices or deal with the Access Holder; and
 - (C) to indemnify ARTC from any Claims made by the Operator arising from the Operator's action or omissions as agent of the Access Holder, except to the extent such Claims arise from ARTC's negligence or breach of this Agreement;
 - (ii) to any changes to Services, Path Usages or Train Paths arising as a result of an Operator complying with its obligations under the Operator Sub-Agreement (including under clauses 5.4(c), 5.5, 8.1, 8.2 and 9.1 of the Operator Sub-Agreement) irrespective of whether the Access Holder has been given prior notice.

5 Charges and payment

5.1 Charges

The Access Holder must pay the Charges for each Train Path and each Path Usage as set out or determined under **Schedule 3** and in accordance with this **clause 5**.

5.2 Payment of TOP Charges

- (a) **Subject to clause 5.2(d)**, on the Effective Date and at the beginning of each Month, ARTC will issue to the Access Holder an invoice for TOP Charges for that Month or part of the Month if applicable.
- (b) The Access Holder must pay the invoice by the later of:
 - (i) the 21st day of that Month; or
 - (ii) **twenty-one** days from the date that the invoice was received.
[Note: This is consistent with the Interstate Agreement]

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- (c) Except for manifest error, an Access Holder is not entitled to dispute an invoice for TOP Charges. If an Access Holder disputes an invoice for TOP Charges, it is only required to pay the undisputed amount.
- (d) ARTC will not be entitled to issue an invoice under **clause 5.2(a)** if the Operator Sub-Agreement has not become unconditional as a result of an act or omission of ARTC.

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5.3 Payment of Non-TOP Charges and Ad Hoc Charges

- (a) After the end of each Month, ARTC will issue an invoice to the Access Holder setting out:
 - (i) the Non - TOP Charges incurred in relation to each Path Usage on which a Service was operated by an Operator for the Access Holder under this agreement in the previous Month; and
 - (ii) the Ad Hoc Charges incurred in relation to each Train Path on which a Service was operated by an Operator for the Access Holder under this agreement in the previous Month.
- (b) The Access Holder must pay the invoice by the later of:
 - (i) the 21st day of that Month; or
 - (ii) ~~twenty-one~~ days from the date the invoice was received. **Note:** This is consistent with the Interstate Agreement
- (c) If the Access Holder disputes an invoice, it must pay the undisputed amount of the invoice. **Clause 14** applies to the dispute.

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5.4 Calculation of TOP Rebate

- (a) Within 20 Business Days of the end of each Contract Year, ARTC will undertake an annual reconciliation of the Rebate owing to the Access Holder for each Train Path in each Pricing Zone determined in accordance with the following formula (“**Annual Reconciliation**”):

If $APU < ACP$

Where:

APU is the Actual Path Usages being, subject to **clause 16.5**, the total number of Path Usages in the Pricing Zone in respect of which the Operator actually operated a Service for the Access Holder on that Train Path in the previous Contract Year;

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ACP is the unconditional Annual Contracted Path Usages for that Train Path in the Pricing Zone specified in the Train Path Schedules;

then the Access Holder is entitled to a Rebate equal to the lesser of the rebate applicable for the annual deficiency in contracted Path Usages for that Train Path in the Pricing Zone and the sum of the accrued system rebates **under Schedule 2** in respect of that Train Path in the Pricing Zone, as determined in accordance with the following formulae:

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- (i) if $(ACP - APU) \times TOP_{PU} \leq \sum (SPR_1 \dots SPR_N)$,
 $(ACP - APU) \times TOP_{PU}$
- (ii) if $(ACP - APU) \times TOP_{PU} > \sum (SPR_1 \dots SPR_N)$,
 $(SPR_1 \dots SPR_N)$

Where:

TOP_{PU} is the Train Path TOP Charge associated with a Path Usage for that Train Path in that Pricing Zone which will be calculated by dividing the sum of the Train Path TOP Charge for that Pricing Zone in that Contract Year (the Train Path TOP Charge for each Month for the initial year are set out in column 10 of the tables in **clause 3.2 and 3.3 of the Train Path Schedule**) by the Annual Contracted Path Usages (which for the initial year are set out in column 2 of the tables in **clause 3.2 and 3.3 of the Train Path Schedule**);

$\sum (SPR_1 \dots SPR_N)$ is the sum of the system rebates accrued by the Access Holder for that Train Path in that Pricing Zone in the previous Contract Year, calculated in accordance with **Schedule 2** of this agreement.

APU and ACP have the meaning set out in **clause 5.4(a)**

- (b) Within 20 Business Days of performing the Annual Reconciliation ARTC will make a payment to the Access Holder of the Rebate determined under **clause 5.4(a)**.

- (c) Except as required under **clause 5.8**, ARTC is not required to pay any interest in relation to the Rebate.

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- (d) If the Access Holder disputes the amount of the Rebate, it must notify ARTC of that dispute under **clause 14** within one month of the date of the issue of the Annual Reconciliation and the dispute will be determined by expert determination in accordance with **clause 14.4**. If the Access Holder does not notify of a dispute within this time, it is deemed to have accepted the Rebate as accurate and waives any right to make a Claim in respect of that Rebate or the TOP Charges payable in the previous Contract Year.

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- (e) Any revenue rebated by ARTC under this clause will be deemed to be revenue received by ARTC and included for the purposes of annual compliance with the pricing principles in the Access Undertaking.

- (f) **Subject to clause 13,** the sole remedy of the Access Holder for the failure by ARTC to make available a Path Usage or a Train Path for any reason is a TOP Rebate and any such failure does not constitute a default under this agreement. ***[Note: NSWMC is of the view that ARTC should be required to pay twice the Rebate where it has provided less than 95% of the Base Path Usages in more than one Period in each contract year or less than 90% of the Base Path Usages in any one Period.]***

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5.5 Payment following dispute resolution

Following the resolution of a dispute under this **clause 5**, the parties will make such adjustments as are necessary, and, unless otherwise agreed, the party who is liable to make payment to the other will also be liable to pay interest in accordance with **clause 5.8** from the time that such monies should have been paid.

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5.6 Variation of Charges

(a) Subject to **clause 5.6(b)**, ARTC will immediately pass on to the Access Holder any net effect of any imposition of new taxes or charges, increases or decreases in taxes or charges (other than income tax) which is a tax, royalty, rate, duty, levy or impost of general application imposed on ARTC by any government or regulatory authority and which is directly attributable to the provision by ARTC to the Access Holder of access to the Network.

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(b) ARTC will not pass on any such tax or charge which becomes payable as a result of ARTC failing to comply with any applicable law or any applicable provision of this agreement.

5.7 Extensions

(a) In the event that ARTC, at its cost, adds infrastructure not forming part of the Network ("**Extensions**") and the parties agree to the Access Holder being granted access to the Extensions as part of the extended Network, **this clause 5.7 will apply.**

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(b) **ARTC and an Access Holder will enter into an agreement setting out the Access Holder's terms of access to the Extension. ARTC may charge an Access Holder (either as a separate charge over time or as an increase to TOP Charges) for access to an Extension as a term of it agreeing to build the Extension an amount which it determines as being reasonable after taking into account:**

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(i) the **reasonable** costs incurred by it in constructing the Extensions and the recovery of such costs over the time such Extensions can be utilised by all access holders;

(ii) the location of the Extensions;

(iii) the number of access holders that ARTC estimates will use the Extensions; and

(iv) any other legitimate commercial factors which ARTC might reasonably consider.

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(c) **Clause 14** does not apply to ARTC's determination under this clause.

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5.8 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:

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- (a) bench mark lending rate charged by the National Australia Bank or its successors (“**NAB**”), as published in the Australian Financial Review newspaper, at the time of such default; or
- (b) if the lending rate specified in **clause 5.8(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.

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

5.9 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 Access Holder 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 Access Holder (“**supplier**”) to either ARTC or the Access Holder (“**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.

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(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.

6 Capacity shortfall

6.1 Identification of Shortfall in existing Capacity

(a) If, at any time during a Month, ARTC identifies that there is likely to be a shortfall in Capacity to meet all remaining unconditional Capacity entitlements held by all access holders in that Month, after taking into account likely usage of access holders with an allocation period of a Quarter, and the shortfall arises other than as a result of planned maintenance provided for in **clause 3.2**, (“**Capacity Shortfall**”) then ARTC will:

(i) as soon as reasonably practicable, inform each access holder (if affected), Terminal Operators and the HVCCC of the expected duration of the Capacity Shortfall but to avoid doubt, ARTC’s representation of the expected duration of the shortfall is not binding on ARTC; and

(ii) subject to meeting its obligations under **clause 6.2** and **clause 6.3**, consult with the HVCCC with the objective of coordinating **and aligning** its response to the Capacity Shortfall with the Terminal Operators and above rail providers.

(b) For the purposes of this **clause 6**, the Capacity entitlement held by an access holder will be considered an unconditional Capacity entitlement if all conditions precedent to the conferral of that Capacity entitlement on the access holder under the terms of the relevant access agreement, including the completion of designated projects, have been satisfied, or waived by ARTC.

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6.2 Capacity Shortfall of less than five days

If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of five days or less, and there will be insufficient Capacity to meet all

remaining unconditional Capacity entitlements held by all access holders in that Month after taking into account likely usage of access holders with an allocation period of a Quarter, ARTC will allocate the Capacity available in accordance with the following principles:

- (a) Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*;
- (b) Capacity remaining after the allocation of Capacity under **subsection (a)** will be allocated to access holders at ARTC's discretion taking into account ARTC's contractual obligations under the access agreements and any impact on the efficient utilisation of Capacity and Coal Chain Capacity.

6.3 Capacity Shortfall of greater than five days

If ARTC expects that an event resulting in a Capacity Shortfall will be for a duration of more than five days or an event resulting in a Capacity Shortfall subsequently has a duration of more than five days, and there will be insufficient Capacity to meet all remaining unconditional Capacity entitlements held by all access holders in that Month after taking into account likely usage of access holders with an allocation period of a Quarter, ARTC will allocate the Capacity available in accordance with the following principles:

- (a) Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*.
- (b) To the extent practicable:
 - (i) contracted path usages from load points not affected by the Capacity Shortfall (for example, load points east of a constraint in the Network), will not be reduced by the Capacity Shortfall and access holders should continue to be able to use contracted path usages originating from unaffected load points; and
 - (ii) an access holder who has been affected by the Capacity Shortfall shall be entitled to make-up its lost path usages from its unaffected load points (if any) and/or from future ad hoc path usages.
- (c) ARTC will, to the extent practicable, reduce the number of path usages for each affected load point with the objective that each affected load point will at the end of the Month have borne an equitable pro-rata share of the Capacity Shortfall.

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6.4 Shortfall in creation of Additional Capacity

Where there is a delay in the completion of a project creating Additional Capacity such that some, but not all, Additional Capacity becomes available, that capacity will be allocated among the access holders who have entitlements to the Additional Capacity on an equitable pro-rata basis. By way of example, if one access holder had 60% of all contracted entitlements to the Additional Capacity created by that project, then 60% of the available Additional Capacity will be allocated to that access holder.

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7 Credit Support

7.1 Obligation to grant Credit Support - credit rating test

- (a) If, at any time after the Commencement Date, the Access Holder does not have an Acceptable Credit Rating, then ARTC may request the Access Holder to provide Credit Support on seven days' notice. If the Access Holder elects to provide Security, then that Security must be for an amount of at least three months' TOP Charges.
- (b) The amount of the Security will be reviewed every 12 months from the Effective Date to reflect any increase in TOP Charges. The results of the review are not subject to **clause 14**.
- (c) The Access Holder must promptly notify ARTC of any downgrade in the Access Holder's credit rating (or that of the person providing a Parent Guarantee) below the Acceptable Credit Rating.
- (d) If the Access Holder's credit rating is upgraded to an Acceptable Credit Rating, ARTC will return the Credit Support provided under **clause 2** or this **clause 7.1**.
- (e) If the Access Holder has provided Security, 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 Access Holder. In such case, ARTC must promptly repay the Security drawn once the replacement Security is provided.
- (f) Upon termination *or expiry* of the agreement, ARTC will release the Security to the Access Holder provided that at such time the Access Holder does not owe any further monies to ARTC under this agreement, in which case, the Security will: **[Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]**
- (i) if an amount has not at that time become due and payable, be retained by ARTC until such time as the amount is paid or becomes due and payable; and
- (ii) if an amount is, or becomes due and payable, but has not yet been paid, be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.
- (g) **Clauses 7.1(e) and 7.1(f)** survive termination or expiry of this agreement.

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7.2 Obligation to grant Security - payment default

- (a) If ARTC does not already hold Security, then, subject to **clause 7.2(b)**, the Access Holder will deliver to ARTC and keep current at all times during the Term, Security in the amount of one month's TOP Charges.
- (b) The Security referred to in **clause 7.2(a)** will be provided by the Access Holder within seven days of the Access Holder receiving a request from ARTC. ARTC may only serve such a notice on the Access Holder under this **clause 7.2(b)** if the Access Holder has defaulted in the payment of any monies owed by it to ARTC under this agreement and has not remedied

that default before the expiry of seven days (unless the moneys due are the subject of a dispute).

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(c) The request for Security by ARTC is in addition to, and without derogation from, any other rights ARTC may exercise against the Access Holder by reason of the breach of this agreement. Subject to **clause 7.2(d)**, the continuance of the Security (or any replacement thereof under **clause 7.2(b)**) is a condition of the performance by ARTC of its obligations under this agreement. The decision of ARTC to issue a notice under **clause 7.2(b)** is not subject to **clause 14**.

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(d) If, after Security has been provided in accordance with this **clause 7.2**, the Access Holder has not been in default in the payment of monies owed by it to ARTC under this agreement for a continuous period of three months, ARTC will, on request of the Access Holder, promptly release the Security to the Access Holder. This **clause 7.2(d)** does not preclude ARTC from issuing a further notice under **clause 7.2(b)** if the circumstances described in that clause apply.

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(e) The amount of the Security will be reviewed every 12 months from the Effective Date to reflect any increase in TOP Charges. The results of the review are not subject to **clause 14**.

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(f) Subject to **clause 7.2(d)**, the term of the Security will be for at least [364 days]. 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 Access Holder, and in such case, ARTC will promptly repay the Security drawn once the replacement Security is provided.

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(g) Upon termination or expiry of the agreement, ARTC will release the Security to the Access Holder provided that at such time the Access Holder does not owe any monies to ARTC under this agreement, in which case, the Security will: [Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]

(i) if an amount has not at that time become due and payable, be retained by ARTC until such time as the amount is paid or becomes due and payable; and

(ii) if an amount is due and payable but has not yet been paid, be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.

(h) **Clauses 7.2(f) and (g)** survive termination or expiry of this agreement. [Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]

7.3 Exercise of Credit Support

(a) The Credit Support will be held by ARTC as security for the performance of the obligations of the Access Holder 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 Access Holder under this agreement.

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- (b) If ARTC holds Security, and it calls on the Security, the Access Holder will promptly provide a replacement Security for the amount drawn or exercised by ARTC against the Security.
- (c) Nothing in **clause 7.3** limits ARTC's entitlement to recover the full amount of ARTC's loss as a result of default by the Access Holder under this agreement.

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8 Control and management of access to the Network

8.1 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 Operator Sub-Agreements.

8.2 Warranty of entitlement to grant access

ARTC warrants that it is entitled to grant to the Access Holder all of the Access Holder's rights of access to the Network described in this agreement (but in the case of that part of the Network owned or managed by another person, subject to the terms by which that other person permits the Access Holder access to such part of the Network or by which that other person permits ARTC to allow the Access Holder to have access to such part of the Network).

8.3 Network Access provider's obligations

ARTC agrees at all times during the Term:

- (a) to undertake the function of Network Control over the Network;
- (b) to comply with the Network Management Principles;
- (c) to have Associated Facilities in place to enable an Operator to use the Train Paths on the terms of this agreement;
- (d) to receive, record and collate information from an Operator and other users of the Network for the purposes of generating the invoices referred to in **clause 5** and more effectively exercising the functions referred to in **clauses 8.3(a) and (b)**;
- (e) to maintain and operate the Network Control Centre and a communication system for the purpose of communication with an Operator and other users of the Network, and to facilitate an Operator's access to that communication system;
- (f) to use its best endeavours to provide an Operator with details, as soon as reasonably practicable of all Incidents which have 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
- (g) to 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.

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8.4 Conduct of ARTC

(a) In formulating its Indicative Access Charges, ARTC will comply with the provisions of the Access Undertaking. *[Note: There is no reason why some but not all of the provisions of the Access Undertaking dealing with this area are incorporated into the AHA under this clause. We have taken the approach of removing the wording for simplicity and relying on the Access Undertaking. If the AHA is to be executed prior to approval of the Access Undertaking, agreed provisions will need to be incorporated, here]*

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(b) Without limiting **clause 8.4(a)**, if:

- (i) ARTC sells a train path for an Indicative Service to a third party (“**Third Party Train Path**”); and
- (ii) the Access Holder considers, acting reasonably, that the Third Party Train Path is a like train path when compared to a Train Path for an Indicative Service purchased by it under this agreement (“**Like Train Path**”); and
- (iii) the Access Holder has evidence to suggest that the Third Party Train Path has been sold by ARTC for a price less than that charged by ARTC to the Access Holder for the Like Train Path,

then the Access Holder may make a written submission to ARTC claiming that the Indicative Access Charges payable by it under this agreement for the Like Train Path should be reduced to that charged by ARTC for the Third Party Train Path, such submission detailing at least the following:

- (iv) the Indicative Access Charges payable by it for the Like Train Path;
- (v) why the Like Train Path and the Third Party Train Path are to be considered like train paths in the context of **clause 8.4(a)**;
- (vi) the Indicative Access Charges that the Access Holder asserts ARTC is charging the third party for the Third Party Train Path.

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(c) ARTC will, within 30 days of receipt of a written submission under **clause 8.4(b)**, notify the Access Holder whether:

- (i) it agrees with the submission and that the Access Holder’s Indicative Access Charges have been reduced accordingly; or
- (ii) it disagrees with the submission and the reasons why.

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(d) In the event that the Access Holder does not agree with ARTC’s decision under **clause 8.4(c)(ii)** and the reasons for it, the Access Holder may give ARTC a notice under **clause 14**, whereupon the dispute will be resolved in accordance with **clause 14**.

8.5 Provision of information to the HVCCC

(a) ARTC will provide the HVCCC with a copy of each access holder’s train path schedules, as amended from time to time, for the purpose of enabling the HVCCC to determine whether an access holder has an entitlement to a path usage before scheduling a Service.

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(b) ARTC will promptly confirm to the HVCCC (as and when requested by the HVCCC from time to time to enable the HVCCC to assist the Terminal Operators in determining cargo assembly requirements and vessel loading items) whether it has sufficient Train Paths to satisfy each access holder's entitlements to Path Usages, having regard to any Capacity constraints at that time. [Note: this is consistent with the "tick-the-box" approach in clause 6.3(a)(iii) of the PWCS Operating Protocol. It should also be incorporated into the Access Undertaking]

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9 Repairs and maintenance of the Network

9.1 ARTC to repair and maintain the Network

Subject to **clauses 11.2** and **11.3** ARTC agrees at all times during the Term to maintain the Network (but only insofar as the Network is relevant to the Access Holder's Train Paths) in a condition which is fit for use by an Operator to provide a Service which meets the Service Assumptions.

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10 Accreditation

10.1 Accreditation Warranty

- (a) ARTC warrants that during the Term it has and will maintain Accreditation to the extent related to the Network and required by law.
- (b) ARTC will notify the Access Holder of any material notice received from any Government Authority affecting Accreditation.
- (c) In relation to the Network, if ARTC loses part or all of its Accreditation or has part or all of its Accreditation suspended, ARTC will use its best endeavours to regain or have restored its full Accreditation as soon as is reasonably practicable.

10.2 Evidence of Accreditation

ARTC will, on or before the Effective Date, provide to the Access Holder evidence of its Accreditation. A copy of all documents evidencing renewal or amendment of Accreditation will be provided by ARTC to the Access Holder on the written request of the Access Holder.

11 Permanent variation of Train Paths

11.1 Permanent variation to Train Paths

- (a) This **clause 11.1** sets out the procedure to be followed by the parties if it is intended that a Train Path (including the number of Path Usages for that Train Path) is to be permanently varied.

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- (b) A Train Path may be varied for the remainder of the Term (or for such other duration as may be agreed) if:
- (i) one party to this agreement (“**Requesting Party**”) sends a notice to the other party (“**Notified Party**”) stating:
 - (A) that the Requesting Party wishes to vary the rights of the Access Holder to a Train Path;
 - (B) the reason or reasons for the proposal by the Requesting Party; and
 - (C) if the Requesting Party is ARTC, whether or not the Requesting Party will relieve the Access Holder of its obligation to pay TOP Charges; and [Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]
 - (ii) subject to the qualifications set out in **clauses 11.1(b)(iii), 11.1(e), 11.6, 16.3 and 16.4**, the Notified Party consents to the Requesting Party’s proposed variation, such consent to be withheld only upon reasonable grounds.
 - (iii) For the purpose of **clause 11.1(b)(ii)**, the Access Holder cannot withhold consent in the case of variations required:
 - (A) by reason of ARTC’s obligations relating to safety of the Network;
 - (B) for the purpose of Passenger Priority; and
 - (C) for the purpose of maximising the use and the reliability of the Network, provided the variations do not materially adversely affect the Access Holder’s entitlement to the Path Usages set out in the Train Path Schedule.
 - (c) Subject to **clauses 11.2 to 11.5, 16.3 and 16.4**, the Requesting Party will give not less than 30 days notice of a variation request under **clause 11.1(b)(i)**.
 - (d) The Notified Party’s response as to whether it consents or not under **clause 11.1(b)(ii)** to the Requesting Party’s notice given under **clause 11.1(b)(i)** and if the Notified Party is ARTC, its response as to whether it will adjust the Access Holder of its obligation to pay TOP Charges, will be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party’s response is to refuse consent, the Notified Party will within such time also provide full reasons for refusal in writing to the Requesting Party.
 - (e) Unless **clause 11.1(b)(iii)** applies or unless otherwise agreed by ARTC (in its absolute discretion), a variation agreed under this **clause 11.1** will not relieve the Access Holder of its obligations to pay the TOP Charges.
 - (f) If the Notified Party fails to respond within the 28 day period referred to in clause 11.1(e), the Requesting Party will be entitled to issue a notice (Second Notice) indicating that, if the Notified Party does not respond

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within a further 28 days from the date of Second Notice, the Notified Party shall be deemed to have given its consent to the variation request. If the Notified Party does not respond to the Second Notice in accordance with this clause 11.1(f), its consent shall be deemed to have been given to the variation request. *[Note: Whilst NSWMC acknowledges that deemed consent could have a significant impact on ARTC/the Access Holder, it is not appropriate that if an Access Holder has requested a change ARTC could simply not respond without any recourse by the Access Holder. Whilst the dispute resolution provisions could be invoked, this is not an area which is well suited to the mediation process envisaged by clause 14. 56 days should be more than sufficient for a party to respond to a request.]*

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(g) If ARTC has advised the Access Holder, in accordance with clause 11.1(d) that it will not adjust the Access Holder’s TOP Charges, then the Access Holder is entitled to withdraw a notice provided under clause 11.1(b)(i), notwithstanding that ARTC may have consented to that notice.

(h) If ARTC enters into or varies an access holder agreement with another party for a train path which is the same as, or substantially similar to, a Train Path varied in accordance with this clause 11.1, the Access Holder's obligation to pay the TOP Charges (if continuing) ceases with effect on and from the date of that access holder agreement.

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11.2 Repairs, maintenance and upgrading of the Network

(a) Notwithstanding any other provisions to the contrary in this clause 11, but subject only to clause 11.2(b), 11.2(c) and 11.3, ARTC may, without notice to the Access Holder or the relevant 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.

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(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, ARTC will, prior to commencement of the works:

- (i) take all reasonable steps to minimise any disruption to the Train Path;
- (ii) notify the Access Holder and relevant 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 Access Holder or 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 Access Holder and the relevant 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 and ARTC may at its discretion waive the TOP Charges applicable to any Services affected by

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this clause 11.2, *[Note: NSWMC is still considering whether it is appropriate for ARTC to have discretion to waive the TOP Charges]*

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11.3 Third Party Works

- (a) The Access Holder 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.
- (b) If ARTC expects that planned Third Party Works are reasonably likely to have a material effect on a Train Path or Path Usage, ARTC will, as soon as reasonably practicable, and in any case, prior to the commencement of the works (except in the case of emergency):

(i) *take and ensure the Third Party takes all reasonable steps to minimise any disruption to the Train Path. [Note: We do not consider this to be an unreasonable requirement and it is consistent with NSWMC's approach of aligning outages/Availability Exceptions to allow optimum use of Capacity under clause 3.2(a).]*

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(ii) notify the Access Holder and the relevant Operator of the Third Party Works; and

(iii) use its reasonable endeavours to provide an alternative Train Path or Path Usage,

but need not obtain the Access Holder or Operator's consent to such Third Party Works.

- (c) Subject to ARTC complying with clause 11.3(b) but notwithstanding any other provision of this agreement, the Access Holder agrees that ARTC has no Liability to the Access Holder nor will the Access Holder make a Claim against ARTC for any costs, expenses, losses or damages incurred by the Access Holder in relation to or as a consequence of Third Party Works.

11.4 Removal of Path Usages for Under-utilisation

- (a) Subject to clause 11.4(b), if, following the end of a Period for a Train Path the:

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Actual Path Usages_{M,...M-5} / Base Path Usages_{M, M-5} < 80%

then, provided the Access Holder cannot demonstrate to ARTC's reasonable satisfaction a sustained requirement for the Path Usages that were not utilised in the previous six months, ARTC has the right to elect, by notice in writing to the Access Holder (of not less than 30 days), to delete Path Usages from the relevant Train Path Schedule in accordance with clause 11.4(b).

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Where:

Actual Path Usages_{M, ..., M-5} is the aggregate number of Path Usages for that Train Path on which the Operator operated a Service for the Access Holder in that Month and the immediately preceding five Months as determined under **clause 11.4(d)**;

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Base Path Usages_{M, ..., M-5} is the aggregate Monthly Base Path Usages for that Train Path in that Month and the immediately preceding five Months, or if the Access Holder has an Allocation Period of a Quarter for that Contract Year, the Quarterly Base Path Usages in that Quarter or three months, as applicable and the immediately preceding Quarter or three months, as applicable;

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(b) ARTC will not exercise its rights under **clause 11.4(a)**, if:

(i) the Access Holder has a Allocation Period of a Month and for that Month or in any of the five immediately preceding Months for any Pricing Zone spanned by the relevant Train Path, the result of the system-wide monthly true-up test carried out in accordance with **Schedule 2** is that the System Availability Shortfall for that Pricing Zone is greater than zero; or

(ii) the Access Holder has an Allocation Period of a Quarter and, for that Quarter or for the immediately preceding Quarter for any Pricing Zone spanned by the relevant Train Path, the result of the system-wide quarterly true-up test carried out in accordance with **Schedule 2** is that the System Availability Shortfall for that Pricing Zone is greater than zero.

(c) If ARTC elects to delete Path Usages under **clause 11.4(a)**, then it may delete a number of Path Usages from a Train Path up to, but not exceeding Base Path Usages_{M, ..., M-5} - Actual Path Usages_{M, ..., M-5}. If no Path Usages remain in a Train Path Schedule, then the schedule terminates.

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(d) Other than if the parties agree to substitute an alternative Path Usage, a Path Usage will not be an Actual Path Usage for the purposes of **clause 11.4(a)** if:

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(i) the relevant Operator has failed to present a Train at the scheduled entry point onto the Network; or

(ii) the relevant Train is in fact, loaded with and transports a quantity of coal which is less than 90% of the assumed gross tonnes per Service (loaded) identified in the Train Path Schedule for that Train Path.

(e) If ARTC elects to delete any Path Usage under **clause 11.4(a)**, then the Access Holder's obligations to pay the TOP Charges from the date of deletion will be reduced to reflect the removal of the Path Usage.

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(f) To avoid doubt, if the Access Holder has been unable to utilise Train Paths as a result of Force Majeure, an Availability Exception or any reasonable operational reason affecting the level of production at a relevant mine (such as longwall moves or adverse geological conditions), then ARTC must, after consulting with the Access Holder, take into account the impact of that occurrence in applying this **clause 11.4** by adding the number of Base

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Path Usages for the Period during which they could not be used to the number of Actual Path Usages.

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11.5 Non-compliance with Service Assumptions

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[Note: Parts of these provisions will require incorporation into the Access Undertaking and may be better suited to the Access Undertaking, once approved]

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(a) If the Access Holder consistently uses Non-Compliant Services and,

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(i) ARTC reasonably considers that the use or operation of the Non-Compliant Services has a material adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder;

(ii) ARTC reasonably considers that there is a material difference in the TOP Charges paid by the Access Holder for those Path Usages and the TOP Charges that would otherwise be payable for those Path Usages had the Service Assumptions reflected the characteristics of the Non-Compliant Service; or

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(iii) the Services used are Non-Compliant Services due to the train type used to operate the Services,

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ARTC must issue a warning notice requiring the Access Holder to use a Service which complies with the Service Assumptions in the applicable Train Path Schedule. The parties acknowledge that ARTC will not be in a position to apply this clause 11.5(a) in circumstances where it is not possible for ARTC (acting reasonably) to promptly and reasonably attribute the cause of the Non-Compliant Service. [Note: It will be relatively easy for ARTC to identify rolling stock issues, track conditions and other user issues. NSWMC acknowledges that identifying whether section, run times are met is more difficult. The use of "reasonable consider" and the words at the end of the clause, should be sufficient to overcome this issue and consequently, NSWMC, consider that it is reasonable that ARTC be required to issue a warning notice.]

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(b) ARTC will withdraw a warning notice provided under clause 11.5(a) if ARTC is reasonably satisfied that:

(i) the Access Holder had grounds for using a Non-Compliant Service; and

(ii) the Access Holder will not continue to use a Non-Compliant Service without ARTC's consent (acting reasonably).

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(c) If the Access Holder has received a warning notice under clause 11.5(a) (which has not been withdrawn) and if, after 7 days from the receipt of the warning notice, the Access Holder continues to use a Non-Compliant Service then ARTC must, on 7 days' notice to the Access Holder, do one or more of the following:

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(i) review and adjust the Service Assumptions in the applicable Train Path Schedule to reflect the characteristics of the Non-Compliant Service;

- (ii) review and adjust the Annual Contracted Path Usages in the applicable Train Path Schedule including deleting the number of Path Usages from the relevant Train Path Schedule which ARTC reasonably considers equivalent to the difference in Capacity consumed by the Non-Compliant Service and the Capacity that would have been consumed had the Access Holder used a Service which complied with the applicable Service Assumptions; or
- (iii) adjust the TOP Charges to be paid by the Access Holder having regard to:
 - (A) the characteristics of the Non-Compliant Service when compared with the Service Assumptions set out in the applicable Train Path Schedule; and
 - (B) the factors which impact on ARTC's business and Coal Chain Capacity which ARTC is able to have regard to in formulating its Charges.

(d) To avoid doubt, the Access Holder's obligation to pay TOP Charges will be updated to reflect the revisions to the Service Assumptions made under **clause 11.5(d)(i)**.

~~(e) The objective of any adjustment under clause 11.5(c) is to ensure that, as far as is reasonably practicable, it is not necessary for the base path usages of other access holders to be reduced under clauses 6.2 or 6.3.~~

(f) To avoid doubt, where a Path Usage is deleted from a Train Path Schedule under this **clause 11.5**,

the Access Holder's obligation to pay TOP Charges in respect of that deleted Path Usage is unaffected. **[Note: It is unreasonable to both continue TOP Charges and adjust Tolerance]**

(g) ARTC is not entitled to take any of the steps set out in **clause 11.5(c)**, once the Access Holder ceases to use a Non-Compliant Service. However, if the Access Holder uses a Non-Compliant Service again within one year from the date of the warning notice, ARTC may take any of the steps set out in **clause 11.5(c)** on 14 days notice to the Access Holder (and for the avoidance of doubt, is not required to comply with the notice requirements contained in **clause 11.5(c)**).

(h) In exercising its rights under **this clause 11.5**, ARTC will have regard to, and is entitled to rely on, **advice and** recommendations **provided** by the HVCCC on the impact of Non-Compliant Services on Coal Chain Capacity.

11.6 Cancelled Services

(a) If ARTC reasonably considers that the Cancellation of any Service Scheduled for the Access Holder on a Train Path, other than at the fault of ARTC, has had a material adverse impact on Capacity, Coal Chain Capacity or the Capacity entitlement of another access holder, then ARTC must issue a warning notice to the Access Holder who Cancelled or caused the Cancellation of the Service informing the Access Holder that ARTC may adjust the Access Holder's Base Path Usages on that Train Path. ARTC's assessment of whether a Cancelled Service has had a material

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adverse impact on Capacity or Coal Chain Capacity will take into account relevant System Assumptions. The parties acknowledge that ARTC will not be in a position to apply this **clause 11.6(a)** in circumstances where it is not possible for ARTC (acting reasonably) to promptly and reasonably attribute the cause of the Cancellation.

(b) ARTC will withdraw a warning notice provided under **clause 11.6(a)** if ARTC is reasonably satisfied that:

(i) the Access Holder had grounds for the Cancellation; or

(ii) the Access Holder will not continue to Cancel Scheduled Services without ARTC's consent (acting reasonably).

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(c) If the Access Holder has received a warning notice under **clause 11.6(a)** (which has not been withdrawn under **clause 11.6(b)**) then ARTC must, on 30 days' notice to the Access Holder, review and temporarily adjust the Access Holder's Base Path Usages on the Train Path including deleting a number of Path Usages from the Access Holder's Base Path Usages in one or more Periods, which ARTC reasonably considers equivalent to the Cancelled Path Usages. To avoid doubt, where a Path Usage is removed from the Base Path Usages, a corresponding Path Usage will be deleted from the Access Holder's Annual Contracted Path Usages in the relevant Train Path Schedule for the relevant Contract Year.

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(d) The objective of the adjustment in **clause 11.6(c)** is to ensure that, as far as is reasonably practicable, it is not necessary for the Base Path Usages of other access holders to be reduced under **clauses 6.2 or 6.3**.

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(e) In exercising its rights under this **clause 11.6** ARTC will have regard to, and is entitled to rely on, the HVCCC's attribution of fault for the Cancellation of a Service.

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11.7 Cost of variation

Any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under **clauses 11** (other than **clauses 11.4 and 11.5**), **16** and **21.1** 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, by the party which incurs such losses, additional costs or other damages.

11.8 Effect of Permanent Variations to Train Paths on the Train Path Schedule

Permanent variations pursuant to **clauses 11.1 to 11.4**, or **16.3** or **21.1** of a Train Path or Path Usages are deemed to be an amendment to the relevant Train Path Schedule.

11.9 Temporary variations and Cancellations of Train Paths

The Access Holder acknowledges that an Operator may agree to temporary variations to, and Cancellations of, a Path Usage in accordance with the Operator Sub-Agreement without the ARTC or Operator notifying the Access Holder.

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12 Suspension and termination

12.1 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 calculated in accordance with **clause 5.8**) within 14 days;
 - (ii) in the case of a failure to provide Credit Support in accordance with a request under **clause 7.1** or **7.2**, provide the Credit Support within 14 days;
 - (iii) for any other default of a material obligation, rectify the default within a reasonable time and respond in writing to the aggrieved party, within 30 days 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 the applicable time specified in **clause 12.1(a)** or to the extent that **clause 12.1(a)(iii)** is applicable, does not comply with the timetable set out in the Rectification Response;
 - (ii) to the extent that **clause 12.1(a)(iii)** is applicable, does not provide a Rectification Response within the time specified in **clause 12.1(a)(iii)**;
 - (iii) to the extent that **clause 12.1(a)(iii)** is applicable, does not provide a reasonably satisfactory Rectification Response meeting the requirements of **clause 12.1(a)(iii)(A)** and **(B)**,

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then the aggrieved party may at any time thereafter suspend such rights of the defaulting party under the relevant Train Path Schedules or this agreement but only to the extent such rights correspond to the performance of the obligation in default or as are necessary to prevent a continuation of the default, by giving not less than 30 days notice.

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- (c) If the defaulting party does not within a reasonable time after the suspension of this agreement under **paragraph (b)** rectify the default, the aggrieved party may terminate the obligations of both parties under a Train Path Schedule or this agreement (as appropriate) but only to the extent such obligations relate to the cause giving rise to the right to terminate, by giving not less than 30 days notice.
- (d) Notwithstanding that ARTC may be the defaulting party, nothing in **clause 12.1(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 access holder agreement with any other access holder.

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~~(e) This clause 12.1 shall not apply to a breach resulting from an Access Holder using a Non-Compliant Service or Cancelling a Service until such time as ARTC has first complied with the provisions of clause 11.5.~~

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12.2 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 16**;
- (b) the other party **permanently** ceases to carry on business; or **[Note: ARTC should not be entitled to terminate the agreement in circumstances where a mine is subject to a temporary shut down and the Access Holder continues to pay TOP Charges.]**
- (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)*.

12.3 Further termination rights

- (a) ~~ARTC may terminate~~ a Train Path Schedule by giving the Access Holder no less than three months' written notice if the mine to which the Train Path Schedule relates has permanently ceased operation; or *[Drafting note – access rights are evergreen and it is expected that Access Holder's will terminate in line with mine closures following the Initial Term. This is a back up right to ensure no hoarding.]*
- (b) ~~ARTC or the Access Holder may terminate~~ this agreement on notice to the ~~other party~~ if the NSW Lease is terminated by either party to that lease and

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not promptly replaced by a new lease or rights enabling ARTC to grant access rights to the Network.

(c) If either party terminates a Train Path Schedule or this agreement under this clause 12.3, then all obligations to provide any Path Usages on the relevant Train Paths or to pay the applicable TOP Charges on and from the date of termination will cease.

[Note: Clause 12.3(a)(ii) (now clause 12.3(b) only allows termination if the NSW Lease is "not promptly replaced by a new lease or rights" allowing ARTC to continue its obligations. There is no reason why the Access Holder should not be entitled to terminate in these circumstances.]

12.4 No other termination

To the maximum extent permitted by law:

- (a) neither party may terminate or has any right to terminate or obtain any order with the effect of terminating this agreement; and
- (b) this agreement will not terminate, be frustrated (whether at common law or by statute), be repudiated or taken to have been repudiated for any reason,

except in accordance with **clauses 12.1, 12.2 and 12.3** of this agreement. *[Note: The amendment is required otherwise this clause does not make sense, given that there are laws which the parties cannot overrule.]*

12.5 Suspension for lack of ARTC Accreditation

If ARTC's Accreditation is suspended or cancelled for a continuous period of longer than one month, the Access Holder has the right to suspend its payment of the TOP Charges for the period commencing from the date of suspension or cancellation of Accreditation until ARTC's Accreditation is restored.

12.6 Suspension

- (a) Without in any way limiting the rights of a party under **clause 12.1, 12.2 or 12.3**, 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 or a Train Path Schedule (subject to **clause 12.6(b)**) but only to the extent such obligations relate to the cause giving rise to the right to terminate and only until such time as the cause giving rise to the right to terminate is remedied.
- (b) An election referred to in **clause 12.6(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.

(c) For the avoidance of doubt, in the event that all Train Path Schedules expire during the course of a suspension under this clause 12.6, clause 2.4 shall apply. [Note: NSWMC considers that these words provide useful clarification. ARTC should not consider this to be controversial]

(d) If ARTC suspends the obligations of both parties under paragraph (a) where it is entitled to terminate this agreement under clause 12.3 then, if the suspension continues for more than 3 months, the Access Holder does have any Liability for the applicable TOP Charges for the period of the

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suspension. *[Note: ARTC has agreed that Liability for TOP Charges ceases on termination of the agreement where the termination arises out of clause 12.3. It is unreasonable for ARTC to refuse to suspend TOP Charges where it opts to suspend obligations and that suspension arises out of clause 12.3.]*

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12.7 Effect of termination or suspension

- (a) Upon termination or suspension of a Train Path Schedule or this agreement (including under **clause 2**) all rights of the Access Holder to use the Network (to the extent of the termination or suspension) will cease immediately (but in the case of a suspension, only for the term of the suspension).
- (b) If ARTC elects to suspend a Train Path Schedule or this agreement, subject to clauses 12.6(c), the Access Holder is still obliged to pay the TOP Charges during the period of suspension. If the Access Holder elects to suspend a Train Path Schedule or this agreement, then the Access Holder has no obligation to pay the TOP Charges for the period of suspension.
- (c) Termination or suspension of a Train Path Schedule or 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 the Train Path Schedule or this agreement including any such debt, obligation or liability which was the cause of termination or suspension or arose out of such cause.
- (d) Upon termination or suspension of a Train Path Schedule or this agreement under any circumstances, all covenants and agreements of ARTC and the Access Holder which by their terms or reasonable implication are to be performed in whole or in part after the termination or suspension of the Train Path Schedule or this agreement will survive such termination or suspension.
- (e) The suspension or termination of a Train Path Schedule does not affect the operation of another Train Path Schedule.

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12.8 Early termination and TOP Charges

- (a) If ARTC terminates a Train Path Schedule or this agreement (other than under **clause 2** or 12.3 of this agreement), the Access Holder must within one month of termination pay ARTC an amount equal to the present value of the TOP Charges which would have otherwise been payable over the remaining term of each terminated Train Path Schedule as calculated by ARTC. In calculating the present value, ARTC will:
 - (i) assume the TOP Charges which would apply over the remaining term of each terminated Train Path Schedule are those applying at the date of termination;
 - (ii) subject to **paragraph (b)**, if the Project Completion Condition Precedent for a tranche of Path Usages under a terminated Train Path Schedule is not satisfied, assume that it will be satisfied on the relevant Start Date (as last notified by ARTC); and
 - (iii) use a discount rate equal to the applicable rate of return approved under the Access Undertaking at the time of termination.

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(b) If an uncompleted project in the Train Path Schedule is for the sole benefit of the Access Holder, ARTC must negotiate in good faith with the Access Holder to mitigate the future costs incurred in relation to that project and ARTC must, acting reasonably, take into account any such agreed reduction in calculating the amount payable under **paragraph (a)**.

(c) If:

- (i) ARTC enters into, or varies, an access holder agreement with another party for a train path which is the same as, or substantially similar to, a Train Path under a terminated Train Path Schedule; and
- (ii) in ARTC's reasonable opinion the Capacity contracted under the new or varied access holder agreement relates to the same Capacity contracted by the Access Holder under the terminated Train Path Schedule,

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ARTC must rebate an amount paid under **clause 12.8(a)** which ARTC reasonably considers to be the present value of the expected take or pay charges it will receive under the relevant train path schedule of the new or varied agreement.

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(d) ARTC will:

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(i) ARTC must use best endeavours to enter into one or more new access holder agreements in relation to the Train Paths or substantially similar train paths as soon as reasonably practicable; and

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(ii) use its reasonable endeavours to ensure that Capacity which becomes available as a result of early termination is made available to other access holders (including applicants for Capacity) prior to the construction of Additional Capacity.

(e) In calculating the present value of the take or pay charges it will receive under the relevant train path schedule of the new or varied access holder agreement:

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- (i) ARTC must use a discount rate equal to the applicable rate of return approved under the Access Undertaking at the time of the termination; and
- (ii) the expected take or pay charges under the new or varied agreement will be for the lesser of the minimum term of that agreement and the remaining term (at the time of the rebate) of the terminated Train Path Schedule but for the termination.

(f) ARTC is not required to pay a rebate under **paragraph (c)** to the extent it exceeds the amount paid under **paragraph (a)**.

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(g) To avoid doubt, if ARTC enters into more than one new access holder agreement in accordance with this **clause 12.8**, **clauses 12.8(c)** and **12.8(e)**, will apply to each new access holder agreement entered into by ARTC.

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(h) The Access Holder acknowledges that the amount payable under this clause 12.8 is a genuine pre-estimate of ARTC's loss arising from an early termination of a Train Path Schedule or this agreement.

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(i) This clause 12.8 survives termination of this agreement.

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13 Indemnities and Liability

[Note: NSWMC is still considering whether ARTC's liability is acceptable.]

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13.1 Mutual releases

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(a) Except for an entitlement to a Rebate under clause 5.4, the Access Holder releases ARTC from any Claims it may have, or Liability incurred by the Access Holder, however arising (including under this agreement, or for breach of any statutory duty), relating to:

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(i) Incidents;

(ii) a Path Usage or any part of a Train Path not being made available or an Operator's Train is not delivered on time to its ultimate or intermediate destination in accordance with the Daily Train Plan;

(iii) the use of, or failure to use, Path Usages by the Operator under the Operator Sub-Agreement;

(iv) an Operator complying with the terms of its Operator Sub-Agreement, including complying with Instructions and directions from ARTC;

(v) any breach by an Operator of the Operator Sub-Agreement as endorsed by the Access Holder; or

(vi) any breach of this agreement which directly or indirectly causes ARTC to fail to make a Path Usage or Train Path available to the Access Holder (including clauses 4, 8 and 9),

unless:

(vii) the event giving rise to the Liability is caused by a negligent act or omission or the fraud, or Wilful Misconduct of ARTC; or

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(viii) the particular Claim is not able to be excluded or limited pursuant to the provisions of any legislation.

(b) ARTC releases the Access Holder from:

(i) any Claims ARTC may have; or

(ii) Liability incurred by ARTC,

however arising (including under this agreement or for breach of any statutory duty), relating to Incidents unless: *[Note: this wording is consistent with clause 13.1(a)]*

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- (iii) the event giving rise to the Liability is caused by a negligent act or omission or the fraud or Wilful Misconduct of the Access Holder; or
- (iv) the particular Claim is not able to be excluded or limited pursuant to the provisions of any legislation.

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To avoid doubt, this release does not apply to an Operator (whether or not it is acting as agent of the Access Holder) or any guarantor of an Operator.

13.2 Conditions and warranties

Subject to any rights imposed by law that cannot be limited or excluded:

- (a) all conditions or warranties implied by law are excluded; and
- (b) if an implied warranty or condition cannot be excluded, but limitation is permitted, ARTC's liability for breach of that implied warranty or condition is limited to, at ARTC's absolute discretion, the resupply of the relevant services or the payment of the cost of having the relevant service supplied again.

13.3 Mutual exclusion of Consequential Loss

Other than for liability for TOP Charges under **clauses 12.8 and 16.3** or the indemnities given under **clauses 4.6 and 13.5**, 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).

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13.4 Mutual Liability cap

If a Claim or Liability arises that is not covered by **clause 13.1** or **13.2**, and other than the liability to pay Charges (including under **clause 16.3**), a party's maximum aggregate Liability to the other party for all Claims arising in or made during a Contract Year relating to this agreement however arising (including under this agreement, or for breach of any statutory duty) but excluding Liability caused or to the extent contributed to by a negligent act or omission, fraud or Wilful Misconduct is limited to the amount of the TOP Charges payable for that Contract Year.

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13.5 Related Body Corporate claims

The Access Holder indemnifies ARTC for any Liability relating to Claims made by a Related Body Corporate against ARTC relating to the matters set out in **clauses 13.1(a)(i) to 13.1(a)(vi)**, except to the extent such Claims are made under written agreements which ARTC has with that Related Body Corporate.

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13.6 Survival

This **clause 13** survives termination of this agreement.

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14 Resolution of disputes

14.1 Procedure to settle disputes

- (a) If there is a dispute between the parties relating to or arising out of this agreement (“a **Dispute**”), then, unless otherwise expressly agreed to the contrary by the parties, such Dispute will be resolved in accordance with this **clause 14**.
- (b) If either party reasonably considers that a dispute also involves an Operator, then:
- (i) for a Dispute raised under this agreement, ARTC and the Access Holder consent to, and will not in any way prevent, the Operator from being joined to the procedure detailed in this **clause 14**; and
- (ii) for a dispute (as defined in clause 17 of an Operator Sub-Agreement) raised under an Operator Sub-Agreement) the Access Holder agrees that where a notice of joinder is given by ARTC joining the Access Holder to the dispute, then the dispute under the Operator Sub-Agreement will also constitute a Dispute under this agreement. The dispute resolution procedure under this agreement and the Operator Sub-Agreement will be run as a joint procedure and all references to “parties” and “each party” will include a reference to the Operator. For the purposes of this **clause 14.1(b)(ii)**, to the extent of any inconsistency between the dispute resolution procedures in this **clause 14** and clause 17 of the Operator Sub-Agreement, the terms of the Operator Sub-Agreement will prevail.
- (iii) The Access Holder agrees that where it is joined to a dispute raised under an Operator Sub-Agreement:
- (A) the Access Holder is bound by the dispute resolution process under clause 17 of the Operator Sub-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 Operator Sub-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 a notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with under this **clause 14**.
- (d) Upon provision of a Dispute Notice under **clause 14.1(c)**, the procedure that is to be followed to settle a Dispute arising under this agreement is as follows:
- (i) for a Dispute over a rebate paid under **clause 5.4** of this agreement or a Dispute referable to this clause under the Train Path Schedule:
- (A) first, negotiation under **clause 14.1(d)(ii)(C)**; and

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- (B) second, if the Dispute is not resolved by negotiation, expert determination under **clause 14.4**;
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- (ii) for all other Disputes permitted under this agreement:
 - (A) first, negotiation under **clause 14.1(d)(ii)(C)**;
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 - (B) second, if the Dispute is not resolved by negotiation, then mediation under **clause 14.3**;
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 - (C) 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 Courts of New South Wales. **[Note: The Supreme Court of New South Wales may not be the appropriate court or may not have jurisdiction. This is also consistent with clause 18.2]**
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14.2 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 fourteen 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.

14.3 Mediation

- (a) If the Dispute is not resolved within 14 days after being referred to the chief executive officers under **clause 14.1(d)(ii)(C)**, 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 Business 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.
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- (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 shall 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.
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- (c) Nothing in this **clause 14.3** or **clause 14.1(d)** prohibits a party from seeking appropriate injunctive relief.
- (d) Subject to **clauses 14.3(c)** and **14.3(e)**, a party cannot commence legal proceedings until completion of the procedures set out in this **clause 14.3**. If legal proceedings are initiated or continued in breach of this **clause 14.3(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 14**.
- (e) This **clause 14** 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 the subject of a dispute;
 - (iii) terminate the agreement where the basis for doing so is not in dispute.
- (f) If the Dispute is not resolved within one month of the appointment of the mediator under **clause 14.3(b)**, either party may by notice in writing to the other terminate the mediation proceedings.

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14.4 Expert determination

If a Dispute is referred under this agreement to proceed to expert determination, then the following provisions apply;

- (a) the parties may agree upon the appointment of an expert in relation to that Dispute and, failing such agreement within 10 Business Days of the Dispute being referred to expert determination, such person as appointed by the President of IAMA will act as an expert in relation to the Dispute (“Expert”);
- (b) the Expert may initiate such enquiries and investigations as it considers necessary or desirable for the purpose of performing its functions and the parties must co-operate with any such enquiries and investigations;
- (c) unless the parties agree otherwise, the Expert must use reasonable endeavours to make its determination or finding in respect of the Dispute within 30 Business Days of their appointment and the parties must co-operate with the expert for this purpose;
- (d) any determination made by the expert is binding on the parties (other than for manifest error);
- (e) the parties agree that the expert determination will be conducted in **New South Wales at a venue to be agreed between the parties in** accordance with the Expert Determination Rules of IAMA, except that to the extent of any inconsistency between those rules and this agreement, the terms of this agreement shall prevail.

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14.5 Extension of time periods

Any time periods set out in this **clause 14** may be extended by the written agreement of the parties.

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15 Confidentiality

15.1 Acknowledgment of confidentiality

- (a) Each party acknowledges, subject to **clause 15.2** and **15.3**, that all information provided by one party (“**Provider**”) to the other (“**Receiver**”) under **the terms of** this agreement that is designated or indicated, either orally or in writing, as being the confidential information of the Provider or any of its related body corporates (“**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 and not use that Confidential Information for any purpose other than the purposes that the provisions of this agreement allow. **[Note NSWMC is still considering whether it is operationally practical to continually designate information as confidential.]**
- (b) To avoid doubt, information provided by the Access Holder to ARTC on the forecast and actual volume of coal to be transported on the Network by the Access Holder is Confidential Information.

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15.2 Exclusions from Confidential Information

For the purposes of this **clause 15.2**, Confidential Information does not include information which is:

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- (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 information required by any stock exchange, rail safety or economic regulator; **or**
- (d) derived or produced from Confidential Information but disclosed in an aggregated form, on at least a Pricing Zone basis.

15.3 Permitted disclosure

Either party may disclose Confidential Information:

- (a) necessary for the provision of advice by the Receiver’s legal advisers, financiers (and their advisers), 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);

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- (c) to the HVCCC or the RCG to the extent necessary to enable the HVCCC or the RCG to co-ordinate the operation and capacity development of the Hunter Valley Coal Chain;
- (d) to an Operator to the extent that it is necessary or desirable for the parties to do so for the purpose of complying with this agreement;
- (e) to the ACCC where required under the Access Undertaking; or
- (f) to the lessor of the Network (subject to the lessor of the Network being under an obligation of confidentiality which is no less onerous than the obligation of confidentiality contained in this agreement), if required under the terms of the NSW Lease.

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16 Assignment, trading and novation

16.1 By ARTC

- (a) Subject to clause 16.1(b), ARTC may not assign, novate, sell, trade, sub-licence or otherwise dispose of this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Access Holder, which will not be unreasonably withheld.
- (b) Subject to it first rectifying any pre-existing breach of this agreement, ARTC may assign, novate, sell, trade, sub-licence or otherwise dispose of this agreement 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 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 without the Access Holder's consent.
- (c) Nothing in clause 16.1(a) prevents ARTC from entering into any sub-contracting or agency agreements or arrangements in relation to any of its functions provided that ARTC remains liable for any act or omission of a person acting under such an arrangement. [Note: It not unreasonable that ARTC remain liable for sub-contractors and agents actions. ARTC is in a position to negotiate indemnities in its favour in its sub-contracting and agency arrangements and, in any case, its Liability would still be limited under clause 13]

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16.2 By the Access Holder

Except as set out in clause 16.3 and clause 16.4, the Access Holder may not license, assign, novate, sell, trade, sub-licence or otherwise dispose (“transfer”) of this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of ARTC.

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16.3 Permanent assignment and trades

- (a) ARTC must not unreasonably withhold its consent to the permanent assignment or novation of this entire agreement or some or all of the Path Usages for a Train Path (for a period of 12 months or more) under this agreement, if:

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(i) the incoming party enters into an access holder agreement, or varies its existing access holder agreement, with ARTC on such terms not inconsistent with this agreement as ARTC may reasonably determine;

~~(ii) the Access Holder or incoming party agrees to assume any liability for taxes incurred or related to the assignment or novation; and~~

~~(iii) the incoming party does not have an Acceptable Credit Rating and it provides Credit Support satisfactory to ARTC.~~

(b) Where a path usage has been permanently assigned by or to the Access Holder to another access holder under this **clause 16.3**, then the Access Holder **and ARTC** agree that the applicable Train Path Schedule will be amended to reflect that assignment. **[Note: ARTC indicated in its table of comments dated 7 December 2009 that this amendment was agreed]**

16.4 Temporary trade of Path Usages

(a) ~~All participants in the Hunter Valley Coal Chain have developed~~ a system for the temporary trade of capacity on the Network between access holders. In ~~implementing the~~ temporary trading system, ARTC will consult with the HVCCC and the Terminal Operators with the objective of aligning the temporary trade of Path Usages on the Network with the trading of capacity at the coal terminals at the Port of Newcastle. The parties agree that:

~~(i) the HVCCC will be administrator of the capacity trading system;~~

~~(ii) the HVCCC will facilitate the transfer of capacity by providing advice as to potential Capacity impacts to the transferor and transferee of the Path Usages and to ARTC;~~

~~(iii) in relation to short-term transfers, where loss to Capacity occurs, the HVCCC will provide reports as to the cause of that loss to all relevant participants in the Hunter Valley Coal Chain;~~

~~(iv) the HVCCC will retain records regarding transfers, including information relevant to preventing hoarding, which information may be provided to ARTC and the Terminal Operators to the extent required in order for ARTC and the Terminal Operators to prevent hoarding; and~~

~~(v) the system for the temporary trade of capacity on the Network, and any accompanying rules regarding the treatment of traded Path Usages for the purpose of the true-up test to be carried out in accordance with **Schedule 2** will be binding on the parties.~~

~~(b) ARTC and the Access Holder agree that the HVCCC's advice under clause 16.4(a)(ii) as to the amount of Capacity which will be lost will be binding in the absence of manifest error.~~

~~(c) ARTC will notify the Access Holder in writing when the system for the temporary trade of capacity on the Network is finalised and available for use by the Access Holder. Until the Access Holder is so notified, a temporary trade must take place in accordance with **clause 16.4(d)**, to **clause 16.4(j)**.~~

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<#>ARTC will calculate the difference between the present value of TOP Charges it would have received from the Access Holder over the remaining term of the relevant Train Path Schedule but for the assignment or novation and the present value of the expected take or pay charges it will receive following assignment and novation where the TOP Charges will be assumed over the relevant period to be equal to those applying, and the discount rate to be used will be the rate of return approved under the Access Undertaking, at the time of the assignment or novation; and ¶
<#>if the difference calculated in accordance with **clause 16.3(a)(ii)(A)** is greater than zero, then either the Access Holder or the incoming party must enter into arrangements satisfactory to ARTC for the payment of that amount, ¶
on or before such assignment or novation.¶

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(d) An access holder (“**Former Access Holder**”) may trade (“**Trade**”) a Path Usage (for a period of less than 12 months) to a person who has an access holder agreement with ARTC (“**New Access Holder**”) without ARTC’s consent subject to the following conditions:

- (i) the Former Access Holder, and New Access Holder must give ARTC at least three days notice of the Trade;
- (ii) the New Access Holder’s load point for the traded Path Usage must be:

(A) [closer to the Port of Newcastle]; and **[Note: NSWMC is confirming with the HVCCC whether this is a requirement]**

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(B) within the same or a closer Pricing Zone,

than the Former Access Holder’s load point;

- (iii) the destination of the traded Path Usage when utilised by the New Access Holder will be the same destination had the traded Path Usage been utilised by the Former Access Holder. To avoid doubt, a discharge point of Kooragang Coal Terminal, Carrington Coal Terminal, the Newcastle Coal Infrastructure Group Terminal at Newcastle or any other export coal terminal at Newcastle will be considered the same destination;

[Note; neither the Former nor the New Access Holder would necessarily have sufficient information to be able to provide this warranty]

Deleted: the Former Access Holder and New Access Holder each warrant that the Trade will not adversely impact Coal Chain Capacity and agree that ARTC is entitled to rely, and is under no obligation to review the accuracy of, this warranty;

(iv) the New Access Holder must only use an Operator for a traded Path Usage who has an unconditional Operator Sub-Agreement with ARTC and endorsed by the New Access Holder;

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(v) the New Access Holder’s nominated Operator must comply with the Service Assumptions relating to the Train Path;

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(vi) the Former Access Holder and the New Access Holder have the same Allocation Period in the Contract Year the Trade takes place; and

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(vii) the New Access Holder must only use the Path Usage in the same Period the Path Usage was available for use by the Former Access Holder.

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(e) For each Trade carried out in accordance with **clause 16.4**:

(i) the Former Access Holder remains liable to ARTC for the TOP Charges for the traded Path Usage; **[Note: NSWMC is confirming that any lost paths are accounted for by deducting them from the Former Access Holder's Monthly Base Path Usages]**

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(ii) the New Access Holder will be liable for Non-TOP Charges relating to the traded Path Usage (but only to the extent of actual usage); and

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(iii) to avoid doubt, the New Access Holder will not be liable for any Ad Hoc Charge when using the traded Path Usage.

(f) If the Access Holder is a Former Access Holder or a New Access Holder for a Trade, it agrees to be bound by the obligations listed above which apply to a Former Access Holder and to a New Access Holder respectively in relation to that Trade.

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(g) Subject to being given at least two weeks' notice (or such lesser period as notified by ARTC from time to time) and satisfying **clause 16.4(d)(vii)**, ARTC will not unreasonably refuse its consent to a request by the Access Holder to Trade a Path Usage which does not otherwise meet the conditions in **clause 16.4(d)**, provided ARTC is able to ascertain the impact of the Trade on Coal Chain Capacity and the Capacity entitlements of other access holders, and subject to any conditions that ARTC may require as to the Period in which the Path Usage may be used. **[Note: NSWMC, is liaising with the HVCCC as to whether the time for a response can be reduced.]**

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(h) The entering into a Trade by the Access Holder will not abrogate, impair, release or extinguish any debt, obligation or liability of the Access Holder to ARTC under this agreement which may have accrued before entering into such Trade or which may accrue thereafter.

(i) If ARTC reasonably considers that either the Former Access Holder or New Access Holder has breached any of the conditions in **clause 16.4(d)**, then it may immediately terminate the Trade and the rights and obligations for the relevant Path Usages will from termination revert to the Former Access Holder.

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(j) ARTC will not be considered to have agreed that a Trade does not breach **clause 16.4(d)**, because it does not object to a Trade at the time of being notified or any delay in terminating a Trade.

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16.5 Treatment of traded Path Usages

(a) For the purposes of this agreement where a path usage has been the subject of a Trade under **clause 16.4** of this agreement, the Former Access Holder will be deemed to have utilised the path usage traded to the New Access Holder in the Period in which it was available for use by the Former Access Holder, and the path usage the subject of the Trade will be treated as part of the Former Access Holder's base path usages.

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(b) To avoid doubt, where a path usage is the subject of more than one Trade, the path usage will continue to be treated as part of the original Former Access Holder's base path usages and will not form part of the base path usages of any New Access Holder to who receives the traded path usage.

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16.6 HVCCC

In deciding whether consent should be given under **clauses 16.3 or 16.4**, ARTC will have regard to, and is entitled to rely on, **advice and recommendations provided** by the HVCCC and it will not be taken to be unreasonably withholding its consent or terminating a Trade where the HVCCC raises material objections to the assignment, novation or trade. **[Note: HVCCC should be consulted to confirm that it will always be able to provide advice/recommendations. If it is not able to do so,**

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consideration should be given to refusing consent to a trade in the absence of a recommendation

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16.7 The effect of assignment

Transfers under ~~clause 16.1~~, ~~clause 16.3~~ or ~~clause 16.4~~ 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 a transfer.

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16.8 Reduction in notice periods

ARTC will use reasonable endeavours to develop processes and mechanisms in conjunction with the HVCCC which will enable it to specify shorter notice periods for trading under ~~clauses 16.4(d) and 16.4(g)~~.

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17 Force Majeure

17.1 Suspension of obligations

The obligations of a party (other than an obligation to pay money, including a TOP Charge ~~or a Rebate~~) 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.~~

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17.2 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.

18 Governing Law

18.1 Law of the agreement

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

18.2 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.

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18.3 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.

19 Change in Law

19.1 ACCC acceptance of Access Undertaking

- (a) The parties acknowledge that as at the Commencement Date:
- (i) ARTC is seeking ACCC acceptance of a voluntary access undertaking submitted under Part IIIA of the TPA covering the Network; and
 - (ii) the ACCC is expected to make a decision whether to accept the access undertaking in 2010.
- (b) The parties agree that all of the provisions of the agreement should be consistent with the provisions of the Indicative Access Agreement included in the Access Undertaking accepted by the ACCC, and that all provisions will be automatically varied to reflect the equivalent provisions in the indicative access agreement included in the Access Undertaking accepted by the ACCC, on the date that Access Undertaking comes into effect. Any changes required to this agreement which are required as a result of the automatic variation will be incorporated with effect on and from the date of acceptance as follows:
- (i) if there is any inconsistency between this agreement and the Indicative Access Agreement, this agreement will be automatically varied to the extent of the inconsistency in order to reflect the equivalent provisions in the Indicative Access Agreement;
 - (ii) if this agreement contains a provision which is not contained in the Indicative Access Agreement and is not inconsistent with any provision of the Indicative Access Agreement, that provision will be retained unless the parties agree otherwise; and
 - (iii) if the Indicative Access Agreement contains a provision which is not contained in this agreement, that provision will be automatically incorporated into this agreement.
- (c) For the avoidance of doubt, if the take or pay component or non take or pay component of an Interim Indicative Access Charge for a Pricing Zone contained in the Access Undertaking accepted by the ACCC, is not the same as the take or pay component or non take or pay component (as applicable) of the equivalent Interim Indicative Access Charge for that Pricing Zone put forward by ARTC to the ACCC on 13 October 2009 as part of its access undertaking application, then:
- (i) if the Access Holder has contracted for the Interim Indicative Service, the relevant TOP Price or Non TOP Price (as applicable) will be automatically varied so that it is the same as the

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<#>the mechanisms to agree key performance indicators in **clause 3.12** of this agreement; ¶
<#>the Network Exit Capability principle in **clause 3.14**; ¶
<#>the nomination of Operators and the limited agency provisions, as contained in **clauses 4.1 to 4.5**; ¶
<#>the provisions contained in **clause 5** relating to charges and payment, and the true-up test contained in **Schedule 2**; ¶
<#>capacity shortfall principles, as contained in **clause 6**; ¶
<#>the principles governing the differentiation between access holders in formulating Indicative Access Charges, as contained in **clause 8.4**; ¶
<#>the principles governing the removal of path usages for under-utilisation in **clause 11.4**; ¶
<#>the processes and rules covering Non-Compliant Services in **clause 11.5**; ¶
<#>the dispute resolution provisions in **clause 14**; ¶
<#>the processes and rules governing assignment and trading in **clauses 16**; ¶
<#>the provisions governing the uplift of any changes to a new Indicative Access Agreement included in a new or varied Access Undertaking under **clause 19.2**; and ¶
<#>the price determination process, as contained in **clause 4 of Schedule 3**. ¶

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components of the Interim Indicative Access Charge accepted by the ACCC for that Pricing Zone; or

- (ii) if the Access Holder has not contracted for the Interim Indicative Service, ARTC will promptly update the relevant TOP Price or Non TOP Price (as applicable) ~~so that it is the same as~~ the difference between the components of the Interim Indicative Access Charge accepted by ACCC for that Pricing Zone and the components of the Interim Indicative Access Charge proposed by ARTC. If the Access Holder does not agree with the variation to the TOP Price or Non TOP Price (as applicable) put forward by ARTC, then the dispute will be a Dispute to be resolved in accordance with **clause 14**.

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- (d) ~~ARTC agrees to use its best endeavours to obtain the ACCC's acceptance of the Access Undertaking referred to in **paragraph (a)**, including:~~

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- ~~(i) taking into consideration all reasonable suggestions of the Access Holder and other participants in the Hunter Valle Coal Chain in relation to the provisions of that Access Undertaking (including provisions agreed between the parties under this agreement where such provisions are inconsistent with the Access Undertaking before the ACCC at the date of this agreement);~~

- ~~(ii) submitting a revised version of that Access Undertaking in the form attached to the Deed Poll;~~

- ~~(iii) liaising with the ACCC in relation to obtaining its acceptance of that Access Undertaking; and~~

- ~~(iv) updating and resubmitting to the ACCC the Access undertaking, the indicative Access Holder Agreement and the Operator Sub-Agreement as required by the ACCC in order to obtain acceptance by the ACCC of the Access Undertaking (as those terms are defined in the Access Undertaking);~~

- ~~(e) If the parties cannot agree, then the dispute will be a Dispute to be resolved in accordance with **clause 14**.~~

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- ~~(f) The Access Holder may terminate this agreement by notice to ARTC at any time if the Access Undertaking referred to in **paragraph (a)** is not accepted by the ACCC by 30 June 2010.~~

19.2 New or varied Access Undertaking

- (a) The Access Holder acknowledges that the Term may encompass new or varied Access Undertakings being accepted by the ACCC, subsequent to the Access Undertaking contemplated under **clause 19.1** of this agreement being accepted by the ACCC.

- (b) Any changes to the indicative access agreement included in an Access Undertaking accepted by the ACCC as contemplated by **paragraph (a)** will automatically be incorporated into this agreement on the date the new or varied Access Undertaking comes into effect as follows:

- (i) if there is any inconsistency between this agreement and the indicative access agreement, this agreement will be automatically

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varied to the extent of the inconsistency in order to reflect the equivalent provisions in the indicative access agreement;

- (ii) if this agreement contains a provision which is not contained in the indicative access agreement and is not inconsistent with any provision of the indicative access agreement, that provision will be retained unless the parties agree otherwise; and
- (iii) if the indicative access agreement contains a provision which is not contained in this agreement, that provision will be automatically incorporated into this agreement. [Note: these words are inconsistent with the intention of the automatic uplift.]

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19.3 Other changes in law

- (a) Any present or future legislation which operates to vary the obligations of ARTC or the Access Holder in connection with this agreement resulting in ARTC or the Access Holder'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) Subject to clause 5.6, 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 on 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 resolved in accordance with clause 14.

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20 Notices

20.1 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.

20.2 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

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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.

20.3 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 Access Holder

Name: [insert]
Address: [insert]
Attention: [insert]
Facsimile: [insert]

20.4 Change of Address

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

20.5 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.

21 General

21.1 Variation

Subject to any variation of this agreement made in accordance with **clauses 3.3(i) and/or 19**, 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.

21.2 Costs

Each party will bear its own costs in relation to the negotiation, execution and performance of this agreement except that the Access Holder will be liable for any stamp duty and associated fees, fines and penalties associated with the execution of this agreement.

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21.3 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.

21.4 Risk and cost of performing obligations

Subject to this agreement:

- (a) whenever the Access Holder is obliged or required hereunder 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 Access Holder;
- (b) whenever ARTC is obliged or required hereunder 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.

21.5 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 Access Holder as agent of ARTC for any purpose whatsoever and the Access Holder 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.

21.6 Other agreements

This document and the Operator Sub-Agreements comprise 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.

21.7 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.

21.8 Approvals and consents

By giving its approval or consent a party does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval.

21.9 Discretion in exercising rights

- (a) A party may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by imposing conditions), unless this agreement expressly states otherwise.

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- (b) A party is not liable for a Liability caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising a right or remedy under this agreement.

21.10 Partial exercising of rights

Except as otherwise expressly provided by this agreement, if a party does not exercise a right or remedy fully or at a given time, the party may still exercise it later.

21.11 Schedule 4 (NSW RAU)

The parties agree to comply with **Schedule 4**.

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Access Holder Agreement

Schedule 1 - Network

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

1. Newcastle (Islington Junction) 164.400 km to Port Waratah
2. Scholey Street Junction (Via Coal) 164.900 to Muswellbrook 288.900 km
3. Hanbury Junction 168.800 to Kooragang Island
4. Kooragang East Junction 169.3 km to Sandgate 170.500 km*
5. Muswellbrook 288.900 km to Ulan 435.300 km
6. Muswellbrook 288.900 km to Gap** 416.000 km

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

** To the extent where the railway line joins the rail network owned by Rail Infrastructure Corporation.

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Access Holder Agreement

Schedule 2 - System True-Up

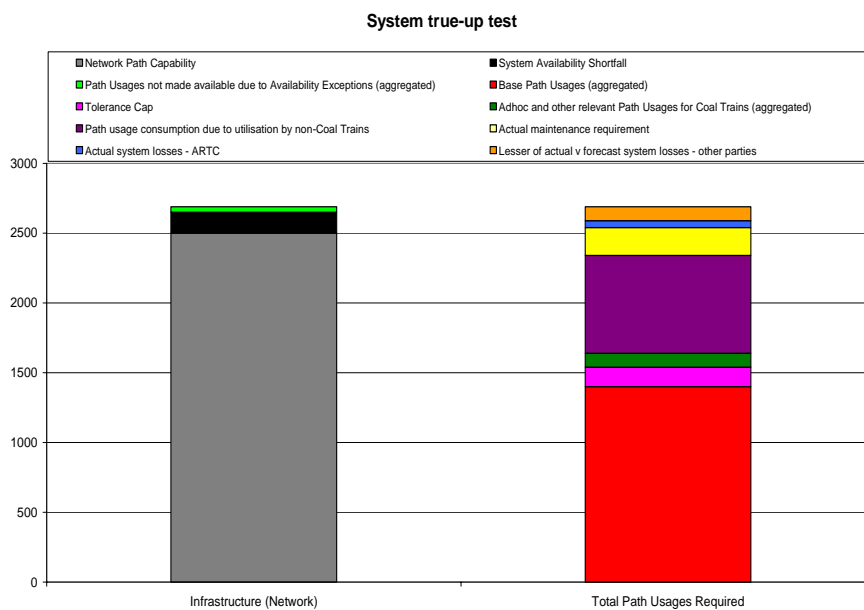
1 Periodic report

Within 10 Business Days of the end of each Period, ARTC will publish a report setting out the results of the system true-up test for each Pricing Zone.

2 System true-up tests

2.1 Depiction

- (a) ARTC will carry out:
 - (i) a system true-up test for each Pricing Zone at the end of each Month to determine the System Availability Shortfall in that Month for all access holders with an allocation period of a Month; and
 - (ii) a system true-up test for each Pricing Zone at the end of each Quarter to determine the System Availability Shortfall in that Quarter for all access holders with an allocation period of a Quarter.
- (b) The system true-up test to be carried out by ARTC is depicted in the following diagram:



2.2 Application

In this Schedule:

System Availability Shortfall or **SAS** (in the diagram “*System Availability Shortfall*”) means:

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- (a) where the Network Path Capability is less than the Total Path Usages Required
 = Total Path Usages Required - Network Path Capability
- (b) where the Network Path Capability is greater than or equal to the Total Path Usages Required
 = zero.

Network Path Capability or **NPC** (in the diagram “*Network Path Capability*”) means the capability of the Network, specified in terms of path usages in the Period to provide services in a Pricing Zone including any Additional Capacity made available at the date the true-up test is carried out;

Total Path Usages Required or **TPR** means, for a Pricing Zone, the sum of:

- (a) in all agreements between ARTC and an access holder granting access rights to the Network to transport coal in the Period:
- (i) the aggregate base path usages which, if the relevant Period is a Month, will be the aggregate monthly base path usages and, if the relevant Period is a Quarter, will be the aggregate quarterly base path usages (in the diagram “*Base Path Usages (aggregated)*”);
 - (ii) the aggregate ad hoc path usages provided in the Period in respect of which a Coal Train is operated and,
 - (A) if the relevant Period is a Month, the aggregate quarterly base path usages in respect of which a Coal Train was actually operated in that Month, or
 - (B) if the relevant Period is a Quarter, the aggregate monthly base path usages in respect of which a Coal Train was actually operated in that Quarter
 (in the diagram “*Ad hoc and other relevant Path Usages for Coal Trains (aggregated)*”);
- (b) if the relevant period is a Month, the Monthly Tolerance Cap for the Month, or if the relevant Period is a Quarter, the aggregate Monthly Tolerance Cap in the three months making up the Quarter (in the diagram “*Tolerance Cap*”);
- (c) the aggregate path usages required by ARTC in the Period to meet maintenance requirements in the Period (in the diagram “*Actual maintenance requirement*”);
- (d) the aggregate path usages unavailable in the Period due to actual system losses arising from ARTC (in the diagram “*Actual system losses - ARTC*”)
- (e) the aggregate path usages unavailable in the Period due to either actual system losses arising from parties other than ARTC, or the aggregate path usages forecast by ARTC to be unavailable in the Period due to system losses arising from parties other than ARTC, whichever is the lesser (in the diagram, “*Lesser of actual v forecast system losses - other parties*”);
- (f) the aggregate path usages not made available to Coal Trains due to Capacity being utilised by Trains other than Coal Trains in the Period, where both a forward and related return journey of a Train other than a Coal Train is treated as a single contracted path usage (in the diagram “*Path usage consumption due to utilisation by non-Coal Trains*”)

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less the path usages not available due to an Availability Exception identified in **clause 3.6** for all users of the Network not already included in (a) to (f) above (in the diagram “*Path usages not made available due to Availability Exceptions*”).

2.3 Entitlement to TOP rebate accrual in a Period

- (a) Subject to **clause 2.4(a)** of this **Schedule** if the applicable true-up test shows that for a Pricing Zone spanned by a Train Path of the Access Holder under this agreement:

System Availability Shortfall is greater than zero

then the Access Holder will accrue a rebate of the Train Path TOP Charge (defined in **clause 1.2 of Schedule 3**) paid for each Train Path within that Pricing Zone in that Period (**System Period Rebate** or **SPR**) equal to:

$$AH\ TOP_{PU}(\$) \times AH\ IS \times [SAS / \sum(AH_1\ IS \dots AH_N\ IS)]$$

where:

AH TOP_{PU}(\$) is the Train Path TOP Charge associated with a Path Usage for that Train Path within that Pricing Zone which will be calculated by dividing the Train Path TOP Charge for that Pricing Zone (the Train Path TOP Charge for each Month for the initial year are set out in column 10 of the table in **clause 3.2** and **3.3** of the **Train Path Schedule**) by the Average Path Usages for the Train Path (which are set out in column 4 of the table in **clause 3.2** and **3.3** of the **Train Path Schedule**);

AH IS means the Access Holder’s individual shortfall for that Train Path in the Pricing Zone in that Period which will equal:

$$BPU - APUBP$$

where:

BPU means Base Path Usages which has the meaning given in **clause 1** of the agreement;

APUBP means actual path usages used by the Access Holder in the Period counted towards Base Path Usages in accordance with **clause 3.4** of this agreement, provided that any path usages utilised by the Access Holder which were temporarily traded to the Access Holder from another access holder under a provision consistent with **clause 16.4** of this agreement will not be counted towards the number of path usages actually used by the Access Holder;

SAS has the meaning given in **clause 2.2** of this **Schedule**;

$\sum(AH_1\ IS \dots AH_N\ IS)$ means:

- (i) if the true-up test is being carried out over a Month, the sum of the individual shortfalls in that Pricing Zone in that Month of each access holder with an Allocation Period of a Month in the relevant Contract Year; or
- (ii) if the true up test is being carried out over a Quarter, the sum of the individual shortfalls in that Pricing Zone in that Quarter of each access holder with an Allocation Period of a Quarter in the relevant Contract Year;

and the individual shortfall of each access holder in the Period will be calculated in accordance with the formula set out in the definition of **AH IS** but the definitions of **BPU** and **APUBP** will be read as referring to the entitlement or use (as applicable) of the relevant access holder.

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- (b) If $[SAS / \sum(AH_1 IS \dots AH_N IS)]$ is greater than one, $[SAS / \sum(AH_1 IS \dots AH_N IS)]$ will be deemed equal to one.
- (c) To avoid doubt, if the Access Holder's Allocation Period during the relevant Contract Year is a Month, the Access Holder will only accrue a rebate under the application of a monthly true-up test and if the Access Holder's Allocation Period during the relevant Contract Year is a Quarter, the Access Holder will only accrue a rebate under the application of a quarterly true-up test..

2.4 Exceptions and limitations

- (a) To avoid doubt, the Access Holder will not accrue a rebate in respect of a Train Path if in that Period the number of Path Usages for which an Operator actually operated a Service for the Access Holder on that Train Path to transport coal, is equal to or exceeds the Access Holder's Base Path Usages for that Period less any Path Usages not made available under **clause 3.14**, or **clause 4.5** of this agreement, provided that any Path Usages utilised by the Access Holder which were temporarily traded to the Access Holder from another access holder under a provision consistent with **clause 16.4** of this agreement will not be counted towards the number of path usages actually used by the Access Holder.
- (b) To avoid doubt, if Network Path Capability is greater than or equal to Total Path Usages Required for a Period in a Pricing Zone, then no rebate accrues to the Access Holder for that Period in respect of that Pricing Zone.
- (c) If in a Period all access holders with train paths within a Pricing Zone receive their full base path usages for that Pricing Zone in that Period, then ARTC will not be required to carry out the system true-up test set out in this **Schedule 2** for that Period.

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Access Holder Agreement

Schedule 3 - Charges

1 TOP Charges

1.1 TOP Charges

TOP Charges (payable each month) = Sum of each Train Path TOP Charge

1.2 Train Path TOP Charge

Train Path TOP Charge is:

\sum (Monthly GTK_{PZ} x $TOP\ Price_{PZ}$) for each Pricing Zone spanned by the Train Path,

where:

Monthly GTK_{PZ} is the “Total Monthly GTK” for the each Pricing Zone as set out in **column 8 of clause 3.2 and clause 3.3 of the Train Path Schedule** for each Train Path;

TOP $Price_{PZ}$ is the take or pay price for the Train Path in each Pricing Zone (in c/GTK):

- (a) for the first Contract Year of this agreement - the amount set out in **column 9 of clause 3.2 and clause 3.3 of the Train Path Schedule** for each Pricing Zone spanned by the Train Path; and
- (b) for each following Contract Year - determined in accordance with **clause 4 of Schedule 3**.

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2 Non-TOP Charges

2.1 Non-TOP Charge for each Service

The Non-TOP Charge for each Service using a Path Usage including an Ad Hoc Path Usage is:

\sum (Actual GTK_{PZ} x NTP_{PZ}) for each Pricing Zone spanned by the Train Path,

where:

Actual GTK_{PZ} is the sum of ($Train\ Path\ Kms_E$ x AGT_E) and ($Train\ Path\ Kms_L$ x AGT_L) in a Pricing Zone;

Train Path Kms_E is the kilometres travelled by the Service on the outward empty journey from the port or discharge point to the load point, in each Pricing Zone as set out in **clause 3.1 of the relevant Train Path Schedule** unless the Train Path is not included in a **Train Path Schedule** in which case it is the kilometres measured for the outward empty journey by the Service from the port or discharge point to the load point determined by ARTC for that Train Path;

Train Path Kms_L is the kilometres travelled by the Service on the inward loaded journey from the load point to the port or discharge point, in each Pricing Zone as set out in **clause 3.1 of the relevant Train Path Schedule** unless the Train Path is not included in a **Train Path Schedule** in which case it is the kilometres measured for the inward loaded journey by

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the Service from the port or discharge point to the load point determined by ARTC for that Train Path;

AGT_E is the actual gross tonnes for the Service empty and **AGT_L** is the actual gross tonnes for the Service loaded using that Path Usage as notified by the Operator for that Service and verified by ARTC;

and

NTP_{PZ} is the Non-TOP Price for each Pricing Zone (in c/GTK):

- (a) for a Train Path included in a Train Path Schedule:
 - (i) for the first Contract Year of this agreement - the amount set out in **column 11 of clause 3.2 and clause 3.3** of the relevant **Train Path Schedule** for each Pricing Zone spanned by the Train Path; and
 - (ii) for each following Contract Year - determined in accordance with **clause 4 of Schedule 3**; or
- (b) for a Train Path which is not included in a Train Path Schedule, the price notified to the Access Holder from time to time.

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3 Ad Hoc Charges

3.1 Ad Hoc Charges

For each Ad Hoc Path Usage, and each Path Usage which is agreed by ARTC and the Access Holder to be provided on an ad-hoc basis, the Access Holder must pay an Ad Hoc Charge (in addition to the Non-TOP Charge) as follows:

\sum (Actual GTK_{PZ} x TOP Price PZ) for each Pricing Zone spanned by the Train Path,

where:

Actual GTK, **AGT_E** and **AGT_L** have the meaning set out in **clause 2** of this **Schedule**;

TOP Price PZ has the meaning set out in **clause 1** of **this Schedule** unless the Train Path is not included in a Train Path Schedule, in which case it is the price notified by ARTC to the Access Holder from time to time;

Train Path Kms_E and **Train Path Kms_L** have the meaning set out in **clause 2** of **this Schedule**.

3.2 No Ad Hoc Charge accrues if Access Holder is already paying a TOP Charge for the Path Usage

If:

- (a) the Access Holder must pay a TOP Charge in relation to a tranche of Path Usages under a Train Path Schedule; and
- (b) the Access Holder has no right to use that tranche of Path Usages under the Train Path Schedule due to the Access Holder not having satisfied the Network Exit Capability Condition Precedent in relation to those Path Usages; and

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- (c) the Access Holder has an Ad Hoc Path Usage for that Train Path (ie a Service is operated on its behalf on the Train Path in excess of its Base Path Usages and available Tolerance for that Train Path),

the Access Holder is not required to pay an Ad Hoc Charge for that Ad Hoc Path Usage.

4 Determination of TOP Price_{PZ} and Non-TOP Price_{PZ}

4.1 Price determination process

In this clause, Prices means the TOP Price_{PZ} and the Non-TOP Price_{PZ} specified in each Train Path Schedule which is in force for a Contract Year.

- (a) For the Contract Year in which the Commencement Date occurs, the Prices are set out in the relevant Train Path Schedule.
- (b) The Prices that apply under **Schedule 3** for each following Contract Year are:
 - (i) to the extent that ARTC is providing the Access Holder with Indicative Services under this agreement, the Prices for those services are the final Indicative Access Charges published by ARTC and determined in accordance with the Access Undertaking; and
 - (ii) to the extent that ARTC is providing the Access Holder with non-Indicative Services under this agreement, the Prices for those services are the Charges notified to the Access Holder by ARTC , and determined, in accordance with the Access Undertaking.
- (c) The parties agree:
 - (i) that the dispute resolution procedures under the Access Undertaking will apply to any dispute it has relating to the Prices (including any time limits or thresholds for raising disputes);
 - (ii) any determination of the arbitrator pursuant to the Access Undertaking are final and binding and that **clause 14** of this agreement does not apply to such disputes; and
 - (iii) if there is an arbitration in respect of Indicative Access Charges, then any arbitration between ARTC and the Access Holder in relation to the Prices for non-Indicative Services pursuant to the Access Undertaking will be stayed pending the arbitrator's determination of the dispute relating to the Indicative Access Charges.
- (d) Before the start of each Contract Year, the Access Holder must provide forecast coal volumes and likely distribution of volumes across its Operators in a timely manner following a request by ARTC for the purpose of assisting ARTC to determine the Prices.
- (e) If the Prices are subject to arbitration pursuant to the Access Undertaking and the arbitrator has not made its determination before the time the Prices are to take effect, the Prices as notified by ARTC will apply until such Prices are agreed or finally determined following which the parties will make the necessary adjustments in accordance with **clause 5.5** of this agreement.

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5 Variation

The Charges are subject to variation in accordance with **clause 5.6** of this agreement.

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Access Holder Agreement

Schedule 4 - NSW Rail Access Undertaking - Amended Terms

1 Background

- (a) As at the Commencement Date, the Network is regulated under the NSW Rail Access Undertaking administered by IPART.
- (b) The NSW Rail Access Undertaking will continue in force until a voluntary access undertaking covering the Network is accepted by the ACCC under Division 6 of Part IIIA of the TPA, comes into effect.
- (c) This **Schedule** amends and supplements the term of the agreement to ensure compliance with the NSW Rail Access Undertaking, until an access undertaking covering the Network is accepted by the ACCC and comes into effect.

2 Definitions

The parties agree for the purposes of this **Schedule**:

- (a) **IPART** means the Independent Pricing and Regulatory Tribunal;
- (b) **IPART Act** means the *Independent Pricing and Regulatory Tribunal Act 1992 (NSW)*;
- (c) **NSW Rail Network** has the same meaning as “NSW Rail Network” in the *Transport Administration Act 1988 (NSW)*; and
- (d) **Schedule Term** has the meaning given in **clause 3.1** of this **Schedule**.

3 Application

3.1 Schedule Term

This **Schedule** commences on the Commencement Date and expires on the date when an access undertaking accepted by the ACCC under Division 6 of Part IIIA of the TPA covering the Network comes into effect.

3.2 Application

During the Schedule Term, the terms of this **Schedule** apply to the extent of any inconsistency with other provisions of this agreement.

4 Charges

4.1 Determination of Prices in accordance with NSW RAU

The TOP Price_{PZ} and Non-TOP Price_{PZ} will be determined in accordance with the pricing principles set out in Schedule 3 to the NSW RAU and **clause 4.2** of this **Schedule**.

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4.2 Annual Determination

- (a) For the Contract Year in which the Commencement Date occurs, the TOP Price_{PZ} and Non-TOP Price_{PZ} are set out in the relevant Train Path Schedule to the agreement.
- (b) For each subsequent Contract Year, the following process will be followed:
- (i) Before the start of each Contract Year:
 - (A) ARTC will seek forecast coal volumes and likely distribution of volumes across operators from each access holder seeking to transport coal on the Network and will specify a date at least 20 Business Days from the date of the request by which this information should be provided. ARTC will have regard to this information (to the extent provided) to forecast actual gross tonnes for Coal Trains in the next Contract Year for each Pricing Zone; and
 - (B) ARTC will determine its annual forecast of costs for the Network in each Pricing Zone which are to be recovered by ARTC in the next Contract Year;
 - (ii) ARTC will notify these forecasts under **paragraph (i)** and the take or pay charges to those access holders seeking to transport coal on the Network at least 20 Business Days before the Charges are due to take effect.
 - (iii) If access holders holding two thirds or more of the contracted GTK for Coal Trains in the relevant Pricing Zone for the next Contract Year give ARTC a dispute notice within 20 Business Days of being notified of the take or pay charges setting out that they disagree with the take or pay charges for that Pricing Zone, then the dispute will be resolved by arbitration under **clause 6.2** of this **Schedule**.
 - (iv) If less than two thirds of those access holders give a dispute notice within the required time for a Pricing Zone, the take or pay charges as notified for that Pricing Zone are final and not subject to arbitration under **clause 6.2**.
 - (v) Additional Capacity in the Pricing Zone which has been contracted on a conditional basis and which will not be commissioned in the next Contract Year will not count towards the two thirds test.
 - (vi) ARTC will promptly publish the final take or pay charges on its website:
 - (A) if there is no arbitration - following the end of the 30 Business Day dispute period; or
 - (B) if there is an arbitration - following the determination by the arbitrator.

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4.3 Treatment of rebate

Any revenue rebated by ARTC under **clause 5.4** of the agreement will be deemed access revenue received by ARTC for the purpose of annual compliance with the pricing principles in the NSW RAU.

5 Rate of return

The rate of return referred to in **clause 12.8(e)** of the agreement and **clause 4.3(a)(iii)** of each **Train Path Schedule** will be the applicable rate of return approved by IPART under the NSW RAU.

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6 Dispute resolution

6.1 Dispute resolution process

Upon provision of a Dispute Notice under **clause 14.1(c)** of this agreement, the procedure that is to be followed to settle a Dispute arising under this agreement is as follows:

- (a) for a Dispute in relation to the take or pay charges notified under **clause 4.2(b)(ii)** of this **Schedule**, resolution in accordance with **clause 4.2(b)(iii) - (v)** of this **Schedule** (including any time limits or thresholds for raising disputes); and
- (b) for all other Disputes permitted under this agreement:
 - (i) first, negotiation under **clause 14.2** of the agreement;
 - (ii) second, if the Dispute is not resolved by negotiation, then mediation under **clause 14.3** of the agreement;
 - (iii) third, if the Dispute is not resolved by mediation within one month of the appointment of the mediator, then arbitration under **clause 6.2** of this **Schedule**.

6.2 Arbitration

If a Dispute is referred under this Schedule to proceed to arbitration, the following provisions apply.

- (a) The arbitrator will be IPART or an alternative arbitrator appointed by IPART in accordance with section 24B of the IPART Act.
- (b) Part 4A of the IPART Act will apply to govern the arbitration.
- (c) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.

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7 Other mandatory terms

7.1 No hindering access

Neither the Access Holder nor ARTC will engage in conduct aimed at hindering the rights of any other person to enter onto the NSW Rail Network to operate or move rolling stock.

7.2 Disclosure

The Access Holder agrees that nothing in the agreement prevents ARTC from:

- (a) creating, maintaining and disclosing information packages; and
- (b) providing information to IPART or the New South Wales Minister with responsibility for transport,

in accordance with the NSW RAU.

7.3 Compliance with all relevant laws

- (a) The Access Holder agrees at all times to comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to their access to the Network.
- (b) ARTC agrees to at all times to 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.

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Access Holder Agreement

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)	Signed
.....))
Full Name (Print))	Full Name (Print)
.....))
Director)	Director/Secretary

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SIGNED for and on behalf of))
.....))
by authority of its Directors in))
accordance with section 127 of the))
Corporations Act 2001:))
.....))
Signed)	Signed
.....))
Full Name (Print))	Full Name (Print)
.....))
Director)	Director/Secretary

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Access Holder Agreement

1 Train Path Schedule 1 – ~~[insert relevant mine]~~Definitions

In this Schedule:

Effective Date is the Start Date set out in **column 1** of **clause 3.2** of this **Schedule** and where there is more than one tranche of Path Usages for the Train Path, the Start Date in **column 1** which is earliest in time;

Expiry Date means the later of the date the Initial Term expires or, if the Access Holder has submitted a Renewal Notice in accordance with **clause 2.4** of this **Schedule**, 10 years from the end of the Contract Year in which the Access Holder last submitted a Renewal Notice;

Extension Notice means a written request given to ARTC in accordance with **clause 2.5** of this **Schedule**;

Extension Period means the period of between one to three years by which the term of this **Schedule** is extended as specified in an **Extension Notice**;

Initial Term means 10 years ~~from the Start Date or such shorter period as agreed where clause 2.5 of the agreement applies;~~

Network Exit Capability Condition Precedent means the condition precedent set out in **clause 4.1** of this **Schedule**;

Project Completion Conditions Precedent means the conditions precedent set out in **columns 12-14** of **clause 3.2** and **clause 3.3** of this **Schedule**, the requirements for which are detailed in **clause 4.3** of this **Schedule**;

Renewal Notice means a written notice given to ARTC in accordance with **clause 2.4** of this **Schedule**;

Renewal Year means the year which is 10 years in advance of the Contract Year in which the Renewal Notice as submitted to ARTC; and

Start Date means for a tranche of Path Usages, the date set out in **column 1** of **clause 3.2** or **clause 3.3** of this **Schedule** for those Path Usages.

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2 Term

2.1 Term of this Schedule

This **Schedule** commences on the Effective Date and continues until the earlier of termination in accordance with **clause 12** of this agreement and the Expiry Date.

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2.2 Commencement of right to use Path Usages

The Access Holder's right to use Path Usages in **clause 3** of this **Schedule** commences on the last of the following to occur:

- (a) the applicable Start Date;
- (b) satisfaction of the Network Exit Capability Condition Precedent; or
- (c) satisfaction of the Project Completion Conditions Precedent (if any) for those Path Usages.

2.3 Commencement of obligation to pay TOP Charges for Path Usages

- (a) The Access Holder's obligation to pay TOP Charges for Path Usages commences on the later of:
 - (i) the applicable Start Date; or
 - (ii) satisfaction of the Project Completion Conditions Precedent (if any) for those Path Usages.
- (b) To avoid doubt, the Access Holder's obligation to pay TOP Charges for the Path Usages is not conditional upon the Access Holder satisfying the Network Exit Capability Condition Precedent. When the Network Exit Capability Condition is not met but all other Condition Precedents are met, the applicable Path Usages will be treated as the Access Holder's Path Usages for the purposes of **clause 5** and **Schedule 3** of this agreement only.

2.4 Annual Renewal of Schedule

- (a) Before the end of each Contract Year, the Access Holder (not being an Access Holder to whom clause 2.5 of the agreement applies) may renew the term of this **Schedule** by giving written notice to ARTC that the term of the **Schedule** will be extended for the year which is 10 years in advance of the year in which the renewal is submitted (**Renewal Year**). The Access Holder may only give one Renewal Notice under this **Schedule** in a Contract Year.
- (b) The Access Holder must identify in the Renewal Notice the number of Path Usages to be contracted for in the Renewal Year and that number must be less than or equal to the number of Path Usages contracted for in the year immediately preceding the Renewal Year.
- (c) If the Access Holder has not provided a Renewal Notice to ARTC in accordance with **clause 2.4(a)** of this **Schedule** in a Contract Year, the Access Holder will be unable to renew the term of the Schedule in any subsequent Contract Year.
- (d) Where clause 2.5 of the agreement applies, the Access Holder shall be entitled to extend the "Initial Term" on one (1) occasion for a period of one (1) year provided it gives written notice of the extension to ARTC at least 2 years prior to the expiry of the Train Path Schedule and clause 2.5 of this Schedule shall not apply.

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[Drafting note: This is intended to align with the annual renewal process in the PWCS Terminal Access Protocol. For example, in 2011, an Access Holder may submit a renewal of the Train Path Schedule for the year 2021 for an amount up to the Annual Contracted Path Usages for 2020]

2.5 Extension of Schedule

- (a) This **clause 2.5** applies if the Access Holder has not provided a Renewal Notice under **clause 2.4** of this **Schedule**.
- (b) If ARTC receives an access application from another access holder for path usages:
 - (i) which are mutually exclusive with the Access Holder using the Path Usages under this Schedule in any of the three years following the Expiry Date (where Path Usages under this Schedule means the Path Usages which the Access Holder has contracted for under this Schedule in the year preceding the Expiry Date); and
 - (ii) with a network entry point in the same Pricing Zone as the Train Path,then, ARTC will notify the Access Holder in writing that an access application meeting the requirements of (i) and (ii) has been received by ARTC and the Access Holder may, within thirty days from receipt of the notice from ARTC, extend the term of this Schedule by providing ARTC with a written notice complying with **clause 2.5(c)** of this **Schedule** (**Extension Notice**).
- (c) The Access Holder must identify in the Extension Notice:
 - (i) the period for which the Path Usages are sought which must be for not less than one year and not more than three years from the date the Schedule was due to expire as a result of the failure to provide a Renewal Notice (**Extension Period**); and
 - (ii) the number of Path Usages sought for each year of the Extension Period which must be less than or equal to the number of Path Usages contracted for under this Schedule in the year immediately preceding the Expiry Date.
- (d) ARTC's obligation to inform the Access Holder of the receipt of an access application meeting the requirements of **clause 2.5(b)** of this **Schedule** will continue until the earlier to occur of:
 - (i) the Access Holder being granted an extension by ARTC following receipt of an Extension Notice; and
 - (ii) the date which is five years before the date when the **Schedule** is due to expire as a result of the failure to provide a Renewal Notice under **clause 2.4(a)** of this **Schedule**.
- (e) If, on receipt of an access application satisfying **clause 2.5(b)**, ARTC is required to provide two or more access holders with an opportunity to extend their train path schedule and ARTC receives a valid extension notice from two or more access holders, ARTC will:
 - (i) if there is sufficient Available Capacity, provide the path usages sought under each extension notice received; and

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- (ii) if there is insufficient Available Capacity to provide the path usages sought under each extension notice, allocate the path usages sought to the access holder whose extension is, in ARTC's opinion, most favourable to it. Ordinarily, but without limiting ARTC's discretion in this regard, ARTC would make a decision based on the extension that represented the highest present value of future returns to ARTC after considering all risks associated with the extension.

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Access Holder Agreement

3 Train Path: [Mine XY]

3.1 Train Path Description and Service Assumptions

Train Path Description		
Load point	[]	
Discharge point	CCT	
Pricing Zones	1	3
Kilometres (one way) per PZ	30	20

Service Assumptions	Operator 1	Operator 2 <i>[If applicable]</i>
Train axle load	xx	xx
Train length (metres)	xx	xx
Maximum speed (km/hr)	xx	xx
Section run times (minutes)	xx	xx

3.2 Tranche 1 of Path Usages (existing)

Input Information							Initial Price/Charge				Project Completion Conditions Precedent		
1	2	3	4	5	6	7	8	9	10	11	12	13	14
Start Date ¹	Annual Contracted Path Usages ²	Allocation Period ³ (Monthly or Quarterly)	Average Path Usages ⁵ (2/12)	Nominated operator and number of path usages	Assumed GT per service	Pricing Zone	Assumed Monthly GTK per PZ	Initial TOP Price per Pricing Zone (c/GTK) ⁴	Initial Train Path TOP Charge per Pricing Zone ⁶	Initial Non-TOP Price per Pricing Zone (c/GTK)	Pricing Zone	Project 1	Project 2
01/01/2010	1080	Month	90	Op 1:90	1500 (unloaded) 9000 (loaded)	1 3	4.05m (unloaded) 24.3m (loaded) 2.7m (unloaded) 16.2m (loaded)	Zone 1 0.5 Zone 3 0.2	\$141,750 \$37,800		1 3	Nil Nil	Nil Nil

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3.3 Tranche 2 of Path Usages (new)

Input information							Initial Price/Charge			
1	2	3	4	5	6	7	8	9	10	11
Start Date ¹	Annual Contracted Path Usages ²	Allocation Period ³ (Month or Quarter)	Average Path Usages ⁵ (2/12)	Nominated operator and number of path usages	Assumed GT per service	Pricing Zone	Assumed Monthly GTK per PZ	Initial TOP Price per Pricing Zone (c/GTK) ⁴	Initial Train Path TOP Charge per Pricing Zone ⁵	Initial Non-TOP Price per Pricing Zone (c/GTK)
Q4 2010	180	Month	15	Op 1:15	1500 (unloaded) 9000 (loaded)	1 3	675,000 (unloaded) 4.05m (loaded) 0.45m (unloaded) 2.71m (loaded)	Zone 1 0.5 Zone 3 0.2	\$23,265 \$6,300	

Project Completion Conditions Precedent		
12	13	14
Pricing Zone	Project 1	Project 2
1	Minimbah	Newdell Junction Upgrade
3	Nil	Braefield Loop

- 1 If the Effective Date is not the start of a Month or a calendar year or the agreement does not expire on the end of a Month or a calendar year, then the number of Path Usages in **column 4** and **column 5** (as applicable) will be pro rated by reference to that part of the Month or calendar year over a full Month or calendar year and the resulting Path Usages will be rounded down.
- 2 An outward journey from the Port or discharge point to the load point with a return inward journey from the load point to the Port or discharge point will be considered a single Path Usage.
- 3 An Allocation Period will be a Month unless the criteria in **clause 3.5(a)** of this agreement are satisfied and ARTC receives an election notice from the Access Holder in accordance with **clause 3.5(b)** of the agreement.
- 4 All prices are exclusive of GST.
- 5 All TOP Charges will be calculated, and payable, on a monthly basis regardless of the Access Holder's Allocation Period in any Contract Year.

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4 Conditions Precedent

4.1 Network Exit Capability Condition Precedent

- (a) ARTC's obligation to first make available the Path Usages in **clause 3** of this **Schedule** and the Access Holder's entitlement to have access to the Path Usages in **clause 3** is conditional upon the Access Holder providing evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability, based on the applicable Service Assumptions, to offload the anticipated coal associated with those Path Usages at the discharge point specified in **clause 3** of this **Schedule** for a period of at least ~~the term of this Train Path Schedule,~~
- ~~(b) To the extent reasonably practicable (and subject to Available Capacity), if an Access Holder has been granted port capacity and is seeking Path Usages, ARTC will grant Path Usages to enable the Access Holder to fully utilise that port capacity.~~
- ~~(c) Where the Path Usages are for the purpose of transporting coal to a coal terminal at the Port of Newcastle, ARTC will be satisfied that the Access Holder has sufficient Network Exit Capability if the Access Holder provides ARTC with a copy of an executed contract with a Terminal Operator which provides for sufficient terminal allocations to offload the anticipated coal for a period of the term of this Train Path Schedule,~~
- ~~(d) If the Access Holder is able to provide evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability to offload some but not all of the anticipated coal associated with the Path Usages at the discharge point specified in clause 3 of this Schedule, based on the applicable Service Assumptions, for a period of at least the term of this Train Path Schedule, the Network Exit Capability condition will be considered satisfied in respect of those number of Path Usages identified in clause 3 of this Schedule which ARTC considers equivalent to the Access Holder's Network Exit Capability.~~
- ~~(e) In determining the number of Path Usages which are equivalent to the Access Holder's Network Exit Capability, under clause 4.1 and clause 4.2 of this Schedule, ARTC will have regard to, and is entitled to rely on, advice and recommendations provided by the HVCCC.~~
- ~~(f) This condition precedent is for the benefit of ARTC and may only be waived by ARTC. ARTC must promptly notify the Access Holder of the satisfaction or waiver of this condition precedent.~~

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4.2 Removal of path usages for failure to satisfy Network Exit Capability Condition Precedent

- (a) If:
- (i) the Access Holder has been unable to satisfy the Network Exit Capability Condition Precedent in **clause 4.1(a)** on the later of the applicable Start Date, and if there are Project Completion Conditions Precedent for those Path Usages, satisfaction of those Project Completion Conditions Precedent; and

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- (ii) the Access Holder cannot demonstrate to ARTC’s reasonable satisfaction that it will be able to satisfy that condition precedent within three months from receipt of a notice by ARTC to do so,

then ARTC has the right to elect by notice in writing to the Access Holder (of not less than 60 days) to delete the Path Usages for which the Access Holder does not have Network Exit Capability from **clause 3.2 or 3.3** of this **Schedule**.

- (b) If the Access Holder was able to provide evidence to the reasonable satisfaction of ARTC that it has sufficient Network Exit Capability to offload some but not all of the anticipated coal associated with the Path Usages in accordance with **clause 4.1(b)** of this **Schedule**, then ARTC will not delete those number of Path Usages which ARTC considers equivalent to the Access Holder’s Network Exit Capability.
- (c) If ARTC elects to delete any Path Usage under **clause 4.2(a)**, the Access Holder’s obligations to pay TOP Charges for those Path Usages will be reduced from the date of deletion to reflect the removal of the Path Usages.
- (d) To avoid doubt, if the Access Holder has been unable to satisfy the Network Exit Capability Condition Precedent and ARTC does not elect to delete Path Usages under **clause 4.2(a)**, then the Access Holder will remain liable for the TOP Charges associated with those Path Usages from the later of the applicable Start Date, and if there are Project Completion Conditions Precedent for those Path Usages, satisfaction of those Project Completion Conditions Precedent.

(e) For the avoidance of doubt, **clauses 4.1 and 4.2** of this **Schedule** do not limit the operation of **clause 3.13** of the agreement during the Term.

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4.3 Project Completion Condition Precedent [where applicable]

- (a) ARTC’s obligation to first make available the Path Usages in **clause 3.3** of this **Schedule** and the Access Holder’s entitlement to have access to those Path Usages is conditional upon:

- (i) Completion of the following projects (“listed projects”):

- (A) Minimbah Track Stage 1;
- (B) Newdell Junction Upgrade; and the
- (C) Braefield loop.

[Drafting note: this projects are include for illustrative purposes only]

- (ii) Completion of any additional projects or replacements of listed projects (“new projects”):

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- (A) agreed between ARTC and the Access Holder; or
- (B) endorsed by the RCG or the ACCC as prudent, to provide the equivalent capacity for a listed project; and
- (iii) In ARTC's reasonable opinion, the new projects being commercially viable to ARTC including having regard to:
 - (A) ARTC's total investment program; and
 - (B) the availability and cost of capital to ARTC when compared to the rate of return approved under the Access Undertaking.

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(b) ARTC must promptly notify the Access Holder if it considers that a New Project is, or is likely to be, not commercially viable and ARTC will enter into good faith negotiations with the Access Holder with the aim of securing alternative funding arrangements to deliver that New Project.

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(c) The parties agree that once a New Project has been endorsed by the RCG under the Access Undertaking, it will be deemed to be a listed project and [clause • (liquidated damages)] will apply. [Note: See comment in subclause (d)]

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(d) ARTC must promptly notify the Access Holder if it believes that this condition unlikely to be satisfied and provide reasons for the basis of ARTC's belief. [Note: An Access Holder will enter into this AHA on the basis that Additional Capacity is to be provided at a specified future time. The Access Holder relies on ARTC's agreement to provide Additional capacity, in order to make decisions as to funding and development of projects, such as new mines and mine expansions. Significant financial and other resources are likely to be committed on the basis that ARTC has agreed to provide Additional Capacity in accordance with the AHA. ARTC should not be entitled to later determine that it will not provide that Additional Capacity at all or on time/budget. If the Additional Capacity is delayed beyond, for example, 6 months from the proposed completion date, the Access Holder should be entitled to receive liquidated damages. A reasonable amount of damages would be twice the TOP Charge which ARTC would have received had the Additional Capacity been made available on the date set out in this schedule. It is within ARTC's control not to execute an AHA if it cannot delivery the Capacity to be provided under that AHA.]

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(e) Subject to the RCG endorsing each listed project in accordance with the timelines submitted and outlined in the RCG submissions, ARTC must use its best endeavours to complete the listed and new projects by the Start Date. If a new project is required, ARTC must provide an updated Start Date and use best endeavours to complete the new project by the updated Start Date.

[Drafting note – the Access Holder will be kept informed of project development through RCG so it is not proposed to include progress reporting obligations.]

(f) This condition precedent is for the benefit of ARTC and may only be waived by ARTC. ARTC must promptly notify the Access Holder of the satisfaction or waiver of this condition precedent

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(g) In clause 4.3 of this Schedule, a reference to "commercially viable" must be interpreted with reference to the provisions of the Access Undertaking.

4.4 Dispute resolution

A dispute under this clause 4 will be resolved by expert determination under clause 14.4 of this agreement.

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Access Holder Agreement (for negotiation pre HVAU)

Annexure A - Operator Sub-Agreements

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ARTC	Access Holder/Operators
Track availability (including Capacity reductions due to planned and unplanned maintenance)	Train reliability Train availability
Track quality	Compliance with Daily Train Plan
Track reliability	
Safety	
Speed restrictions	

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the Tolerance available to the Access Holder, calculated in accordance with **clause 3.3** will be reviewed and adjusted to reflect the Access Holder's reduced entitlement to Path Usages in the affected Periods.

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but this does not invalidate any steps taken before this time

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and on the HVCCC's attribution of fault for the cancellation of a Service

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Nothing in this **clause 11.5** affects ARTC's entitlement to suspend or terminate a Train Path Schedule in accordance with **clause 12** of this agreement.

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