



# 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

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<b>Parties</b>	<b>ARTC and Access Holder</b>	
<b>ARTC</b>	Name	<b>Australian Rail Track Corporation Limited</b>
	ABN	75 081 455 754
<b>Access Holder</b>	Name	<i>[insert]</i>
	ABN/ACN/ARBN	<i>[insert]</i>

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<b>Recitals</b>	<b>A</b>	ARTC is the manager of the Network.
	<b>B</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.
	<b>C</b>	The Access Holder may only access the Network through a nominated Operator.
	<b>D</b>	Each nominated Operator 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.
	<b>E</b>	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.
	<b>F</b>	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

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### 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 the undertaking accepted by the ACCC from time to time under Division 6 of Part IIIA of the *Trade Practices Act 1974* (Cth) that covers the Network, or, if there is no such undertaking the access protocols published by the ARTC, under which ARTC agrees to offer access to the Network from time to time;

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

**Accredited Operator** means an operator 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*);

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

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

**Additional Capacity** has the meaning given in the Access Undertaking;

**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;

**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** has the meaning given in the Access Undertaking;

**Availability Exceptions** has the meaning given in **clause 3.5(a)**;

**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;

**Capacity** has the meaning given in the Access Undertaking;

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**Capacity Entitlement** has the meaning given in the Access Undertaking;

**Charges** means the charges set out in **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** has the meaning given in the Access Undertaking;

**Coal Train** has the meaning given in the Access Undertaking;

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

**Communications or TMS Provider** means a third party responsible for:

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

**Consequential Loss** includes:

- (a) any Liability which does not flow naturally from the relevant breach of this agreement, even if that Liability may reasonably be supposed to have been in the contemplation of both parties as a probable result of the breach at the time they entered into this agreement;
- (b) loss of profits, loss of business opportunity, loss of production, loss of revenue, loss of use, loss of contract, loss of goodwill, damage to goods being transported on the Services, 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 calendar year;

**Credit Support** means either:

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

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

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

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

**Extension** has the meaning given in the Access Undertaking;

**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,

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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;

**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 such entity or authority in its capacity as an Access Holder;

**HVCCC** means the Hunter Valley Coal Chain Co-ordinator or any body having responsibility from time to time for co-ordinating the operation and capacity development of the Hunter Valley coal chain, as determined by ARTC;

**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:

- (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 provided for in the Access Undertaking (and includes the Interim Indicative Access Charges as defined in the Access Undertaking);

**Indicative Services** has the meaning given in the Access Undertaking;

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

**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 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;

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

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

**Monthly Tolerance Cap** means the limit for each Pricing Zone on the monthly tolerance available to be used by access holders in that Pricing Zone as determined from time to time by ARTC having regard to Available Capacity;

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

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

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

**Network Exit Capability** means sufficient capacity allocated to that Access Holder at the Port of Newcastle to offload the coal transported;

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**Network Management Principles** means the principles regulating Train movements on the Network, as set out in Access Undertaking from time to time;

**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;

**Non-TOP Charges** has the meaning given in **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 as 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 in substantially the form set out in the Access Undertaking;

**Passenger Priority** means reasonable priority and certainty of access for rail passenger services delivered in accordance with **clause 3.7**;

**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;

**Pricing Zone** has the meaning given in the Access Undertaking;

**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** has the meaning given in the Access Undertaking;

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

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

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**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;

**RIC** means the Rail Infrastructure Corporation ABN 21 298 300 693 of Level 3, 237 Wharf Road Newcastle NSW 2300 as renamed, reconstituted, dissolved, replaced or restructured from time to time;

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

**Safeworking Rules** means all policies and notices issued by ARTC to an Operator under the Operator Sub-Agreement or otherwise issued by ARTC for the purpose of ensuring the safe use of the Network;

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

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**Service** means a Train run by the Operator using the Network to meet the transport needs of coal producers;;

**Services Assumptions** for a Train Path, including each Path Usage, means the assumptions relating to the Services set out under **clause 4** of the relevant Train Path Schedule;

**SRA** means the State Rail Authority of New South Wales ABN 73 997 983 198 of Level 6/18 Lee Street, Chippendale, NSW as renamed, reconstituted, dissolved, replaced or restructured from time to time;

**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;

**System Assumptions** means the [System Assumptions for the Hunter Valley coal chain published by the HVCCC from time to time](#);

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**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**;

**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

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- (c) a corporation 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;

**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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**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
- (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 movement on the journey from the port or discharge point to the load point and from the load point to the port or discharge point;

**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.

## 1.2 Interpretation

In this agreement unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a party includes a person to whom any right or obligation under this agreement is transferred;
- (d) a reference to the consent of a party means the prior written consent of that party;
- (e) the words “including”, “for example” or “such as” when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (f) headings are for convenient reference only and do not affect the interpretation of this agreement;
- (g) unless otherwise indicated, a reference to a clause or a Schedule is a reference to a clause or Schedule of this agreement;
- (h) where any party comprises more than one person then all of those persons together as well as each of them individually will comply with that party’s obligations under this agreement;
- (i) notices that are required to be given in writing by the Operator to ARTC, may, if so agreed by ARTC, be provided in electronic form;

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- (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.

**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**.

**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 the above 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.

**2.3 Train Path Schedules**

Each Train Path Schedule:

- (a) sets out the Train Paths and the number of Path Usages from a particular coal mine 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 an Initial Period during which neither party can terminate the Train Path Schedule (other than in accordance with **clause 12**). [The Initial Period](#)

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will be automatically extended by one year at the end of each year of the Term, unless the Access Holder gives notice during that year that the Initial Period is not to be extended in accordance with this paragraph (c).

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## 2.4 Further extension options

Where the Access Holder has given notice in accordance with clause 2.3(c) that the Initial Period will no longer be extended in accordance with that clause, it may serve a further notice in accordance with this clause to extend the Initial Period. A notice may only be served in accordance with this clause:

Deleted: <#>may be terminated by the Access Holder giving written notice to ARTC after the expiry of the Initial Period, notifying a termination date which must not be less than the Schedule Notice Period. A notice that is given before the expiry of the Initial Period will not have effect until the expiry of the Initial Period.¶

- (a) on one occasion in relation to each Train Path Schedule;
- (b) at least 5 years prior to the expiry of the Initial Period in respect of the Train Path Schedule; and
- (c) extending the Initial Period by one, two or three years.

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## 2.5 Termination on cessation of all Train Paths

Subject to **clause 12.5**, this agreement automatically terminates on expiry or termination of all Train Path Schedules.

# 3 Access rights

*[Note: Where the Access Holder is a small producer (ie less than 5 mtpa of contracted capacity in 2010 or 2011, and less than 3 mtpa in later years), the allocation periods should be quarterly in line with the PWCS agreement.]*

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## 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 in each Month:
  - (i) **(Monthly entitlement)** the Monthly Base Path Usages for each Train Path determined in accordance with **clause 3.2**; and
  - (ii) **(Monthly tolerance)** additional Path Usages in each Pricing Zone applicable to the Train Paths which, in aggregate over all Train Paths contracted by the Access Holder in the Pricing Zone, do not exceed the Monthly Tolerance determined in accordance with **clause 3.3** (for example, if the Monthly Tolerance is 13, the Access Holder can elect to use an additional 13 Path Usages in the Month above the Monthly 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 **clause 3.7** of this agreement.

- (b) **(Annual cap)** The Access Holder's entitlement to its Monthly 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.

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- (c) **(Tolerance caps)** The Access Holder’s entitlement to use the Monthly Tolerance in relation to a Train Path in a Month 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
  - (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.

### 3.2 Determination of Monthly Base Path Usages

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

(a) ARTC must consult with the relevant port companies, and use its reasonable endeavours to ensure that, on the basis of the planned maintenance and other outages in respect of the relevant Contract Year on the Network and at the port, in each Month there will be sufficient Network Exit Capability to allow the utilisation of the Access Holder’s Monthly Base Path Usages for each Train Path for the relevant Month, and vice versa. The ARTC may consult with the relevant port companies through the HVCCC.

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(b) Following consultation with the HVCCC and/or the relevant port companies, ARTC will publish by [date to be determined once the HVCCC arrangements are known]:

- (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**”).

(c) ARTC will determine, for each Month of the following Contract Year, the Access Holder’s Monthly 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 Monthly Average Path Usages in each Maintenance Month 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 for that Month.
- (ii) ARTC will increase the Access Holder’s entitlement to Path Usages above the Monthly Average Path Usages in other Months in that Contract Year to make up for the reduction for Maintenance Losses in the Maintenance Month.
- (iii) The Monthly Base Path Usages for each Month in the Contract Year must in aggregate equal the Annual Contracted Path Usages.

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(d) By [date to be determined once the HVCCC arrangements are known], ARTC will notify the Access Holder of the Monthly Base Path Usages for the next Contract Year. If the Access Holder disputes the Monthly 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 of a dispute within this time, it is deemed to have accepted the Monthly Base Path Usages.

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### 3.3 Monthly Tolerance

(a) The Access Holder's Monthly Tolerance in each Pricing Zone will be determined in accordance with the following formula:

Monthly Tolerance = the higher of:

- (i)  $10\% \times \sum (\text{MAPU}_{\text{TP1}} \dots \text{MAPU}_{\text{TP2}})$ ; or
- (ii) 13 Path Usages;

where:

$\sum (\text{MAPU}_{\text{TP1}} \dots \text{MAPU}_{\text{TP2}})$  = the sum of the Monthly Average Path Usages for each Train Path in that Pricing Zone as set out in the Train Path Schedules. If a Train Path spans more than one Pricing Zone, then the Monthly Average Path Usages for that Train Path will count towards the Monthly Tolerance in each Pricing Zone.

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 **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.

(c) [On or before the date six months after the Commencement Date, the parties agree to review the operation of this clause and the levels of Monthly Tolerance.](#)

### 3.4 Identification of Path Usages

(a) 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 a Month will:

- (i) first, count towards the Monthly Base Path Usages until the Monthly Base Path Usages for that Train Path have been exhausted;
- (ii) second, count towards the applicable Monthly Tolerance until the Monthly Tolerance has been exhausted or until the applicable Monthly Tolerance Cap has been reached, whichever occurs first; and

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- (iii) thereafter be taken to be an ad hoc path usage (“**Ad Hoc Path Usage**”).

### 3.5 Availability Exceptions

- (a) The availability of a Train Path or a Path Usages is subject to:
    - (i) ARTC’s Passenger Priority obligations under **clause 3.7** of this agreement;
    - (ii) emergencies or genuine and material safety considerations;
    - (iii) matters outside of the reasonable control of ARTC (except for matters which arise due to ARTC’s negligence or breach of its obligations under this agreement);
    - (iv) material failure of an Operator’s Service;
    - (v) the Network Management Principles;
    - (vi) without limiting any other clause of this agreement, any lawful order, direction or requirement given to ARTC by a Governmental Authority; and
    - (vii) Third Party Works,
- (“**Availability Exceptions**”).
- (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.

### 3.6 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.

### 3.7 Passenger Priority in New South Wales

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

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

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### 3.8 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 3.8(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 3.8** 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 3.8** relates).

### 3.9 Warranty of accuracy of information

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

### 3.10 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 Services 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 3.5(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.

### 3.11 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 subsection (b) of the definition of "Train Paths".

### 3.12 Key performance indicators

- (a) Within 6 months of the Commencement Date, ARTC and the Access Holder will use their best endeavours to agree key performance indicators relating to the following areas and timeframes to meet for the review of the agreed indicators.

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ARTC	Access Holder/Operators
Track availability	Train reliability
Track quality	Train availability
Track reliability	Compliance with Daily Train Plan
Safety	
Speed restrictions	

- (b) The Access Holder acknowledges that, in agreeing key performance indicators, ARTC's objective is to have a consistent set of key performance indicators for all access holders which are in alignment with coal chain system performance indicators and, where applicable, ARTC will have regard to the key performance indicators identified in schedule D of the Access Undertaking.
- (c) 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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## 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.
- (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 refuse the nomination if:
  - (i) the Operator is in material breach of an operator sub-agreement; or
  - (ii) the Operator's Services do not comply with the Services Assumptions applicable to that Train Path.
- (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.

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- (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.

#### 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 entitled to reject a nomination if:
  - (i) the Accredited Operator does not have an unconditional Operator Sub-Agreement with ARTC endorsed by the Access Holder;
  - (ii) the Accredited Operator is in material default of an Operator Sub-Agreement in relation to another access holder or has had such agreement terminated by ARTC in the past; or
  - (iii) 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.

#### 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 is conditional or has been suspended, terminated or expired; or
  - (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.

#### 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.]*

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- (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 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.

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## 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**.

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## 5.2 Payment of TOP Charges

- (a) 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.
- (b) The Access Holder must pay the invoice by the later of:
  - (i) the 21st day of that month; or
  - (ii) seven days from the date that the invoice was received.
- (c) Except for manifest error, an Access Holder is not entitled to dispute an invoice for TOP Charges.

## 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 invoices within seven days of the date of the invoice.
- (c) If the Access Holder disputes an invoice, it must pay the greater of the undisputed amount or 50% of the invoice. **Clause 14** applies to the dispute.

## 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 in respect of 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;

ACP is the 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 monthly rebates **under Schedule 2** in respect of that Train Path in the Pricing Zone as determined in accordance with the following formulae:

- (i) if  $(ACP - APU) \times TOP \leq \sum (SMR_1, \dots, SMR_{12})$ ,

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(ACP - APU) x TOP

(ii) if (ACP - APU) x TOP >  $\sum (SMR_1 \dots SMR_{12})$ ,

$\sum (SMR_1 \dots SMR_{12})$

Where:

TOP is the TOP Price for the Train Path in the Pricing Zone multiplied by the Monthly GTK for the Train Path in the Pricing Zone (as both defined in **clause 1** of **Schedule 3**), divided by the number of Monthly Average Path Usages for that Train Path;

$\sum (SMR_1 \dots SMR_{12})$  is the sum of the system monthly rebates accrued by the Access Holder for that Train Path 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.
- (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.
- (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) 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.

## 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.

## 5.6 Variation of Charges

- (a) 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, ARTC may charge the Access Holder for access to the Extensions as a term of it agreeing to the additional infrastructure. ARTC may charge the Access Holder such amount it determines as being reasonable after taking into account:
- (i) the 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.
- (b) **Clause 14** does not apply to ARTC’s determination under this clause.

## 5.8 Interest

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

- (a) bench mark lending rate charged by the National Australia Bank or its successors (“**NAB**”), as published 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.

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

## 5.9 Goods and Services Tax

### (a) Definitions

In this clause:

**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;

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**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 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 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 in accordance with GST Legislation and will be paid by the recipient on the same terms and conditions as stated in this agreement.

(d) **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.

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## 6 Capacity

### 6.1 Capacity warranty

ARTC warrants that as at the date of this agreement, the Network has sufficient capacity to deliver all Capacity Entitlements which it has contracted to provide, assuming that the System Assumptions are met, and subject to:

(a) Availability Exceptions; and

(b) Force Majeure.

### 6.2 Shortfall in existing Capacity

If ARTC is unable to meet the unconditional Capacity Entitlements of all access holders having an access agreement with ARTC (including the Access Holder), then ARTC must allocate the Capacity shortfall in accordance with the Access Undertaking.

### 6.3 Shortfall in creation of Additional Capacity

If there is a delay in the completion of a project creating Additional Capacity for which the Access Holder has contracted for under this agreement and some, but not all, of that

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Additional Capacity becomes available, ARTC must allocate that portion of the Additional Capacity which is available in accordance with the Access Undertaking.

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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. 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.
- (f) Upon termination 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 be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.

### 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.
- (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 the 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**.
- (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

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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.

- (e) The amount of the Security will be reviewed every 12 months from the Effective Date. The results of the review are not subject to **clause 14**.
- (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.
- (g) Upon termination 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 be returned to the Access Holder less any money (disputed or undisputed) owing by the Access Holder to ARTC.

### **7.3 Exercise of Credit Support**

- (a) Subject to **clause 7.3(b)**, 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.
- (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;

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- (b) to comply with the Network Management Principles;
- (c) to have Associated Facilities in place to enable Operator's 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.

#### 8.4 Conduct of ARTC

- (a) In formulating its Indicative Access Charges, ARTC will not differentiate between access holders in circumstances where:
  - (i) the characteristics of the Indicative Services are alike; and
  - (ii) the access holders are operating within the same end market.

In determining whether the characteristics of two Indicative Services are alike ARTC may have regard to matters including location, duration and quality of the Train Path, nature of Train operating on the Train Path, characteristics of the Indicative Service, longevity of access and impact on Coal Chain Capacity.

- (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;

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- (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.
- (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.
- (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**.

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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 Services 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.

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## 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.
- (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
  - (ii) subject to the qualifications set out in **clauses 11.1(b)(iii), 11.1(e), 11.2 to 11.5, 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) [only in the case of variations which do not adversely affect the Access Holder’s entitlement to Path Usages.](#) for the purpose of maximising the use and the reliability of the Network.
- (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)** 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.

### 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

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upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.

- (b) If repairs, maintenance or upgrading of the Network, the carrying out 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 this **clause 11.2**.

### 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) 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 Usage for Under-utilisation

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

$$\text{Actual Path Usages}_{M, \dots, M-Y} / \text{Monthly Base Path Usages}_{M, \dots, M-Y} < 90\%$$

then, 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)**.

Where:

Actual Path Usages<sub>M, ... M-Y</sub> is, the aggregate number of Path Usages for that Train Path on which the Operator operated a Service for the Access Holder in

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that Month and the immediately preceding five Months as determined under **clause 11.4(d)**, plus the number of Train Paths which must be added to this number in accordance with clause 11.4(f);

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Monthly Base Path Usages<sub>M, ...M-5</sub> is the aggregate Monthly Base Path Usages for that Train Path in that Month and the immediately preceding five Months;

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

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- (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 Monthly Base Path Usages<sub>M, ...M-5</sub> - Actual Path Usages<sub>M, ...M-5</sub>.

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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 if the relevant Operator has failed:

- (i) to present a Train at the scheduled entry point onto the Network; or
- (ii) the relevant Train does not, in fact, load and transport a quantity of coal which is substantially consistent with the capacity of the Train.

- (e) If ARTC elects to delete any Path Usage under **clause 11.4(b)**, 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.

- (f) Where the Access Holder has been unable to utilise Train Paths as a result of Force Majeure or another reasonable operational reason affecting the level of production of a relevant mine (such as longwall moves or adverse geological conditions), then ARTC must take that into account in applying this **clause 11.4** by adding the relevant number of Train Paths to Actual Path Usages<sub>M, ...M-5</sub>.

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### 11.5 Cost of variation

Any losses, additional costs (excluding Charges) or other damage suffered by a party in complying with a variation under **clauses 11, 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.

### 11.6 Effect of Permanent Variations to Train Paths on the Train Path Schedule

Permanent variations pursuant to **clauses 11.1 to 11.5, or 16.3 or 21.1** of the Path Usages are deemed to be an amendment to the relevant Train Path Schedule.

### 11.7 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) 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, 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 a reasonable time;
  - (ii) does not provide a Rectification Response within the time specified in **clause 12.1(a)(iii)**;
  - (iii) does not provide a satisfactory Rectification Response meeting the requirements of **clause 12.1(a)(iii)(A)** and **(B)**; or
  - (iv) does not comply with the timetable set out in the Rectification Response subject to **clause 12.1(a)**,
- 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 as are necessary to prevent a continuation of the default by giving not less than 30 days notice.
- (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 a Train Path Schedule or this agreement (as appropriate) 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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## 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 ceases to carry on business; or
- (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 ARTC termination rights

- (a) ARTC may terminate:
  - (i) 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 Period. This is a back up right to ensure no hoarding.]*
  - (ii) this agreement on notice to the Access Holder if the NSW Lease is terminated by either party to that lease and not promptly replaced by a new lease or rights enabling ARTC to grant access rights to the Network.
- (b) If ARTC terminates a Train Path Schedule or this agreement under this **clause 12.3**, then neither party has any Liability for the failure to provide any Path Usages on the relevant Train Paths or the applicable TOP Charges following the termination.

## 12.4 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.

## 12.5 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

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agreement or a Train Path Schedule (subject to **clause 12.5(b)**) until such time as the cause giving rise to the right to terminate is remedied.

- (b) An election referred to in **clause 12.5(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.

## 12.6 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.
- (b) If ARTC elects to suspend a Train Path Schedule or this agreement, 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.

## 12.7 Early termination and TOP Charges

- (a) If ARTC terminates a Train Path Schedule or this agreement (other than under **clause 2**), the Access Holder must within one month of termination pay ARTC an amount equal to the net present value of TOP Charges applying as at the date of termination for each Train Path Schedule being terminated which would have otherwise been payable:

- (i) over the remainder of the Initial Period (if any); plus
- (ii) the Schedule Notice Period,

with the discount rate to be used to be equal to the applicable rate of return approved by the ACCC under the Access Undertaking at the time of termination.

- (b) If ARTC enters into, or varies, an access holder agreement with another party for train paths which are the same as, or substantially similar to, one or more of the Train Paths, then ARTC must rebate an amount paid under **clause 12.7(a)** which ARTC reasonably considers to be the difference between the TOP Charges it would have received from the Access Holder but for the early termination and the expected take or pay charges it receives under the new or varied agreement in relation to the Train Paths.

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- (c) The Access Holder acknowledges that the amount payable under this **clause 12.7** is a genuine pre-estimate of ARTC's loss arising from an early termination of this agreement.
- (d) This **clause 12.7** survives termination of this agreement.

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## 13 Indemnities and Liability

### 13.1 Mutual releases

- (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, in tort including negligence, or for breach of any statutory duty), relating to:
  - (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 other matter relating to this agreement, including breaches of this agreement.
- (b) ARTC releases the Access Holder from:
  - (i) any Claims ARTC may have; or
  - (ii) Liability incurred by ARTC,relating to Incidents. 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 Mutual exclusion of Consequential Loss

Other than for liability for TOP Charges under **clauses 12.7** and **16.3** or the indemnities given under **clauses 4.6 and 13.4**, 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).

### 13.3 Mutual Liability cap

Other than the liability to pay Charges (including under **clauses 12.7** and **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, in tort (including negligence), or for breach of any statutory duty) is limited to the amount of the TOP Charges payable for that Contract Year.

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### 13.4 Related Body Corporate claims

The Access Holder indemnifies ARTC for any Liability relating to Claims:

- (a) 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; and
- (b) for contribution or cross-claims made by an Operator against ARTC which relate to Claims made by the Access Holder or a Related Body Corporate against the Operator.

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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 ARTC reasonably considers that a dispute also involves the 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 notice in writing (“**Dispute Notice**”) specifying the Dispute and requiring it to be dealt with under this **clause 14**.

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- (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 about when a project is completed and/or when a Train Path becomes available in accordance with the **Train Path Schedule**:
    - (A) first, negotiation under **clause 14.2**; and
    - (B) second, if the Dispute is not resolved by negotiation, expert determination under **clause 14.4**;
  - (ii) for all other Disputes permitted under this agreement:
    - (A) first, negotiation under **clause 14.2**;
    - (B) second, if the Dispute is not resolved by negotiation, then mediation under **clause 14.3**;
    - (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 Supreme Court of New South Wales.

#### 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 14.2**, the Dispute will be referred to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within 14 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.
- (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

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- (iv) the costs of the mediator and any other incidental costs will be borne equally by the parties.
- (c) Nothing in this **clause 14.3** 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.

#### 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 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.

#### 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

Each party acknowledges, subject to **clause 15.2** and **15.3**, that all information provided by one party (“**Provider**”) to the other (“**Receiver**”) under this agreement that relates directly to:

- (a) the Access Holder’s future markets;
- (b) the Access Holder’s future market and business strategies; and
- (c) the strategies of ARTC’s or the Access Holder’s customers;

(“**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.

### 15.2 Exclusions from Confidential Information

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

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

### 15.3 Permitted disclosure

Either party may disclose Confidential Information:

- (a) necessary for the provision of advice by the Receiver’s legal advisers, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (b) to its Related Bodies Corporate (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (c) required by the HVCCC or the RCG for the purposes of co-ordinating the operation and capacity development of the Hunter Valley coal chain; or
- (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.

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## 16 Assignment, trading and novation

### 16.1 By ARTC

- (a) Other than 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,

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ARTC may not assign or novate this agreement, its interest in the subject matter of this agreement or any right under this agreement without the prior written consent of the Access Holder, which will not be unreasonably withheld.

- (b) 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.

## 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.

## 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,

- (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 incoming party wishes to vary the Train Paths following the assignment or novation and those variations involve lower take or pay charges than the TOP Charges under this agreement, then:

- (A) ARTC will calculate the difference between the net present value of TOP Charges it would have received from the Access Holder over the remaining Initial Period (if any) plus any Schedule Notice Period for the relevant Train Path but for the assignment or novation and the net 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 by the ACCC, at the time of the assignment or novation; and

- (B) where the difference calculated in accordance with clause 16.3(a)(ii)(A) is positive (because the variations of the Train Paths involve a lower take or pay charges than the TOP Charges under this agreement), either the Access Holder or the incoming party enter into arrangements satisfactory to ARTC for the payment of that amount,

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on or before such assignment or novation:

- (iii) the Access Holder or incoming party agrees to assume any liability for taxes incurred or related to the assignment or novation; and
- (iv) the incoming party does not have an Acceptable Credit Rating and it provides Credit Support satisfactory to ARTC.

- (b) Where the difference calculated in accordance with clause 16.3(a)(ii)(A) is negative (because the variations of the Train Paths involve a higher take or pay charges than the TOP Charges under this agreement), ARTC must pay that

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[amount to the Access Holder immediately following the assignment of the Train Paths.](#)

- (c) Where a path usage has been permanently assigned by the Access Holder to another access holder under this **clause 16.3**, then the Access Holder agrees that the applicable **Train Path Schedule** will be amended to reflect that assignment.

#### 16.4 Temporary trade of Path Usages

- (a) An access holder (“**Former Access Holder**”) may temporarily assign, sell, trade, or sub-license (“**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) despite the Trade, the Former Access Holder remains liable to ARTC for the TOP Charges for the traded Path Usage;
  - (ii) the New Access Holder will be liable for Non-TOP Charges relating to the traded Path Usage;
  - (iii) the Former Access Holder and New Access Holder must give ARTC at least two days notice (or such lesser period as notified by ARTC from time to time) of the Trade.
  - (iv) the New Access Holder’s load point for the traded Path Usage must be:
    - (A) closer to the Port of Newcastle; and
    - (B) within the same or a closer Pricing Zone,than the Former Access Holder’s entry point;
  - (v) 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;
  - (vi) 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; and
  - (vii) the New Access Holder’s nominated Operator must comply with the Services Assumptions relating to the Train Path.

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- (b) [Where in respect of any Trade the load point used by the New Access Holder is within the same Pricing Zone as the original loading point and is within 30 km of the original loading point then Trades may be made retrospectively. The effect of such a Trade is that the Trade is deemed to have occurred prior to the relevant Path Usage in accordance with clause 16.4\(a\). A retrospective Trade may be made in accordance with this clause 16.4\(b\) at any time before the later of:](#)

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- (i) [the end of the Month during which the relevant Path Usage occurred; and](#)

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- (ii) [5.00 pm on the date 5 Business Days after the day on which the relevant Path Usage occurred \(excluding the day on which the Path Usage occurred\).](#)

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(c) 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 and in **clause 16.5** which apply to a Former Access Holder and to a New Access Holder respectively in relation to that Trade.

(d) Subject to being given at least two days' notice (or such lesser period as notified by ARTC from time to time), ARTC will not unreasonably refuse its consent to a request by the Access Holder to Trade a Path Usage which does not meet the conditions in **clause 16.4(a)**.

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(e) 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.

(f) If ARTC reasonably considers that either the Former Access Holder or New Access Holder has breached any of the conditions in **clause 16.4(a)**, 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.

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

(h) ARTC recognises that the HVCCC may develop a capacity trading system which will allow the trading of capacity under this Agreement and other access holder agreements entered into by ARTC. ARTC must, if the terms of such arrangements acceptable to it, acting reasonably, allow the trading of Path Usages under such arrangements.

## 16.5 Treatment of traded Path Usages

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 Month in which the traded path usage was utilised by the New Access Holder; and

- (a) where the Trade resulted in the New Access Holder receiving more path usages than the Former Access Holder originally made available for the Trade ("Original Path Usages"), the path usages deemed to be used by the Former Access Holder under this **clause 16.5** will be reduced by the path usages created through the Trade being the difference between the number of path usages received by the New Access Holder and the Original Path Usages; or
- (b) where the Trade resulted in the New Access Holder receiving less path usages than the Original Path Usages, the path usages deemed to be used by the Former Access Holder under this **clause 16.5** will be increased by the path usages lost through the Trade, being the difference between the Original Path Usages and the number of path usages received by the New Access Holder;

## 16.6 HVCCC

In deciding whether consent should be given under **clauses 16.3** or **16.4**, ARTC may have regard to, and is entitled to rely on, recommendations 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.

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## 16.7 The effect of assignment

Transfers under **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 an transfer.

## 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 **clause 16.4**.

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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) 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.

### 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.

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## 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.

### 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.

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## 19 Change in Law

### 19.1 Access Undertaking

- (a) The Access Holder acknowledges that the Term may encompass new or varied Access Undertakings being approved by the ACCC.
- (b) Subject to **paragraph (c)**, the parties agree that any changes to the indicative access agreement included in an Access Undertaking and approved by the ACCC will automatically be incorporated into this agreement.
- (c) To the extent a new or varied Access Undertaking (including approved changes to the indicative access agreement) are inconsistent with changes negotiated and agreed by the parties to the indicative access agreement applying at the Commencement Date, the parties must negotiate in good faith to modify this agreement to reflect the requirements of a new or varied Access Undertaking which are necessary or desirable for ARTC to safely and efficiently manage the Network and recover its costs while retaining, to the extent reasonably possible, the commercial and economic position of both parties arising from the previously agreed changes.
- (d) If the parties cannot agree, then the dispute will be a Dispute to be resolved in accordance with **clause 14**.

### 19.2 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) 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.

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## 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 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.

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## 21 General

### 21.1 Variation

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

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## 21.2 Costs

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

## 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.

**EXECUTED** as an agreement

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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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## Schedule 2 - System Monthly True-Up

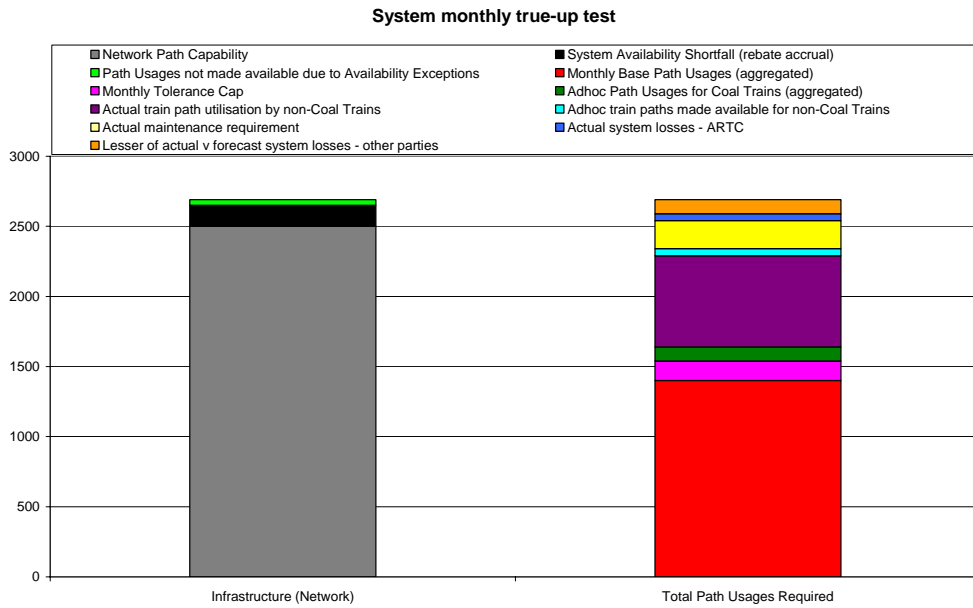
### 1 Monthly report

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

### 2 System monthly true-up test

#### 2.1 Depiction

- (a) ARTC will carry out a system monthly true-up test for each Pricing Zone at the end of each Month to determine the System Availability Shortfall.
- (b) The system monthly true-up test to be carried out by ARTC is depicted in the following diagram:



#### 2.2 Application

- (a) In this clause:

**System Availability Shortfall** means:

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

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**Network Path Capability** means the capability of the Network, specified in terms of train paths in the Month to provide services in a Pricing Zone including the provision of Additional Capacity;

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

- (i) in all agreements between ARTC and an access holder granting access rights to the Network to transport coal in the Month:
  - the aggregate monthly base path usages (in the diagram “*Monthly Path Usages (aggregated)*”);
  - the aggregate ad hoc path usages provided in the Month in respect of which a Coal Train is operated; (in the diagram “*Ad hoc Path Usages for Coal Trains (aggregated)*”);]
- (ii) the Monthly Tolerance Cap for the Month (in the diagram “*Monthly Tolerance Cap*”);
- (iii) the aggregate path usages required by ARTC in the Month to meet maintenance requirements in the Month (in the diagram “*Actual maintenance requirement*”);
- (iv) the aggregate path usages unavailable in the Month due to actual system losses arising from ARTC (in the diagram “*Actual system losses - ARTC*”)
- (v) the aggregate path usages unavailable in the Month 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 Month 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*”);
- (vi) contracted train paths utilised by Trains other than Coal Trains in the Month (in the diagram “*Actual train path utilisation by non-Coal Trains*”);
- (vii) ad hoc train paths utilised by Trains other than Coal Trains provided by ARTC (in the diagram “*Ad hoc train paths as made available for non-Coal Trains*”);

less the path usages not available due to an Availability Exception identified in **clause 3.5** not already included in (i) to (vii) above (in the diagram “*Path usages not made available due to Availability Exceptions*”).

- (b) Subject to **clause 2.2(c)**, if the monthly 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 Monthly Train Path TOP Charge (defined in **clause 1.2 of Schedule 3**) paid for each Train Path within that Pricing Zone in that Month (**System Monthly Rebate** or **SMR**) equal to:

$$ATOP(\$) \times [(TPR - NPC)/TMCC]$$

Where:

ATOP(\$) = the part of the Train Path TOP Charge for that Train Path paid by the Access Holder in the Month applicable to that Pricing Zone (which for the initial year, are those in column 12 of the table in clause 3 of the Train Path Schedule)

TPR = the Total Path Usages Required in that Pricing Zone

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NPC = the Network Path Capability in that Pricing Zone

TMCC = Total Monthly Coal Commitment, being the sum of the aggregate monthly base path usages in the applicable Pricing Zone in all agreements between ARTC and an access holder granting access rights to the Network to transport coal in that Pricing Zone and the Monthly Tolerance Cap for access rights to the Network to transport coal in that Pricing Zone less all monthly base path usages in that Pricing Zone for train paths where the access holder would not be entitled to accrue a rebate under its access holder agreement for the reasons set out in sub-clause (c) below

If  $[(TPR - NPC)/TMCC]$  is greater than 1, it will be deemed to be equal to 1.

- (c) The Access Holder will not accrue a rebate in respect of a Train Path if in that Month if:
- (i) 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 Monthly Base Path Usages for that Month; and
  - (ii) the Access Holder exceeded its Monthly Tolerance in the applicable Pricing Zone in that Month or the Monthly Tolerance Cap was reached,
- provided that any Path Usages utilised by the Access Holder which were temporarily acquired, purchased or sub-licensed by the Access Holder from another access holder under a provision consistent with **clause 16.4** of this agreement will not be counted towards the Access Holder's Monthly Base Path Usages or Monthly Tolerance.
- (d) To avoid doubt, if Network Path Capability greater than or equal to Total Path Usages Required in a Month in a Pricing Zone, then no rebate accrues to the Access Holder for that Month in respect of that Pricing Zone.
- (e) If in a Month all access holders with train paths within a Pricing Zone receive their full monthly base path usages for that Pricing Zone and ARTC makes available all path usages within the Monthly Tolerance Cap for that Pricing Zone, then ARTC will not be required to carry out the system monthly true-up test set out in this **Schedule 2** for that Month.

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# Access Holder Agreement

## Schedule 3 - Charges

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### 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 10** of **clause 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 11** of **clause 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**

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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 **column 9** of **clause 3** 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 **column 9** of **clause 3** 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 the Service from the port or discharge point to the load point determined by ARTC for that Train Path;

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**AGT<sub>E</sub>** is the actual gross tonnes for the Service empty and **AGT<sub>L</sub>** 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<sub>PZ</sub>** 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 13** 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<sub>PZ</sub> x TOP Price<sub>PZ</sub>) for each Pricing Zone spanned by the Train Path,

where:

**Actual GTK**, **AGT<sub>E</sub>** and **AGT<sub>L</sub>** have the meaning set out in **clause 2** of this **Schedule**;

**TOP Price<sub>PZ</sub>** 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<sub>E</sub>** and **Train Path Kms<sub>L</sub>** have the meaning set out in **clause 2** of **this Schedule**.

### 4 Determination of TOP Price and Non-TOP Price

#### 4.1 Price determination process

In this clause, Prices means the TOP Price and the Non-TOP Price 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 in accordance with section 4 of the Access Undertaking; and

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- (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 determined and notified to the Access Holder by ARTC in accordance with section 4.14 of 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

## Signing page

**DATED:** \_\_\_\_\_

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

..... )  
Signed )

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

..... )  
Director )

..... )  
Signed )

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

..... )  
Director/Secretary )

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

..... )  
Signed )

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

..... )  
Director )

..... )  
Signed )

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

..... )  
Director/Secretary )

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# Access Holder Agreement

## Train Path Schedule 1 – *[insert relevant mine]*

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### 1 Definitions

In this Schedule:

**Initial Period** means 10 years from the Start Date for a Train Path in this Schedule which is latest in time.

**Start Date** for a Train Path means the date set out in **column 1** of **clause 3** of this **Schedule**.

**Schedule Notice Period** means 5 years after the expiry of the Initial Period.

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### 2 Term

#### 2.1 Term of this Schedule

This Schedule commences on the Effective Date and continues until terminated under **clause 2 or 11** of the agreement.

#### 2.2 Term of Train Paths

The Access Holder's rights to a Train Path commence on the later of the Start Date for that Train Path and the Commencement Date and end on the termination of this Schedule.

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# Access Holder Agreement

## 3 Train Paths

[Drafting note – Two tables are provided:

(1) for a mine in zone 1

(2) for a mine in zone 3

The intention is that these would be in separate schedules but for ease of reference these have been included in one schedule. Insertions in table are for illustrative purposes only.]

[Table 1: For a Mine in Zone 1]

	1	2	3	4	5	6	7	8	9	10	11	12	13
Train Path	Start Date*	Load Point	Port or discharge point	Annual Contracted Path Usages**	Monthly Average Path Usages***	Nominated Operator(s) & number of Path Usages operated	Assumed gross tonnes per Service	Pricing Zone (s)	Train Path kms** (one way) per Pricing Zone	Monthly GTK per Pricing Zone (6x7x9)	Initial TOP Price per Pricing Zone** (c/GTK)	Initial monthly TOP Charge (10x11)	Initial Non-TOP Price** (c/GTK)
1	Effective Date	XXX Mine	PWCS	1080	90	Operator 1: 45 Path Usages  Operator 2: 45 Path Usages	Op 1: 9000 (loaded) 1500 (empty)  Op 2: 7200 (loaded) 1000 (empty)	1	50 (loaded) 50 (empty)	Op 1 loaded 20.25M Op 2 empty 3.375M  Op 2 loaded 16.2M Op 2 empty 2.25M  Total Monthly GTK = 42.075M	0.5	\$210,375	0.1

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[Table 2: For a Mine in Zone 3] [Drafting note: While generally there will only be one Train Path per mine, the table provides for multiple Train Paths per mine on the basis that it is possible for there to be more than one train path per mine, eg even railings for NCIG and campaign railing for PWCS and the parties may have contracted for further train paths in the future once additional capacity has been added.]

	1	2	3	4	5	6	7	8	9	10	11	12	13
Train Path	Start Date*	Load point	Port or discharge point	Annual Contracted Path Usages***	Monthly Average Path Usages****	Nominated Operator(s) & number of Path Usages operated	Assumed gross tonnes per Service	Pricing Zone(s)	Train Path kms*** (one way) per Pricing Zone	Monthly GTK per Pricing Zone (6x7x9)	Initial TOP Price per Pricing Zone** (c/GTK)	Initial monthly TOP Charge (10x11)	Initial Non-TOP Price** (c/GTK)
1	Effective Date	X Mine	PWCS	1080	90	Operator 1: 45 Path Usages  Operator 2: 45 Path Usages	Op 1: 1500 (empty) 9000 (loaded)  Op 2: 1000 (empty) 7200 (loaded)	1	30 (empty) 30 (loaded)	Op 1 empty 2.025M Op 1 loaded 12.150M  Op 2 empty 1.350M Op 2 loaded 9.720M  Total Monthly GTK for Pricing Zone: 25.245M	0.5	Op 1: \$70,875  Op 2: \$55,350  PZ1 Total: \$126, 225	0.1
								3	20 (empty) 20 (loaded)	Op 1 empty 1.35M Op 1 loaded 8.1M  Op 2 empty 0.9M Op 2 loaded 6.48M  Total Monthly GTK for Pricing Zone: 16.83	0.2	Op 1: \$18,900  Op 2: \$14,760  PZ2 Total: \$33,660	0.1

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	1	2	3	4	5	6	7	8	9	10	11	12	13
Train Path	Start Date*	Load point	Port or discharge point	Annual Contracted Path Usages***	Monthly Average Path Usages****	Nominated Operator(s) & number of Path Usages operated	Assumed gross tonnes per Service	Pricing Zone(s)	Train Path kms*** (one way) per Pricing Zone	Monthly GTK per Pricing Zone (6x7x9)	Initial TOP Price per Pricing Zone** (c/GTK)	Initial monthly TOP Charge (10x11)	Initial Non-TOP Price** (c/GTK)
2	30/06/2013	X Mine	PWCS	120	10	To be nominated under clause 4 of this agreement	To be confirmed with nominated operator	1	30 (empty) 30 (loaded)	Operator / empty [ ] Operator loaded [ ]	0.5	[ ]	[ ]
								3	20 (empty) 20 (loaded)	Operator empty [ ] Operator loaded [ ]	0.2	[ ]	

\* If the Effective Date is not the start of a Month or a Contract Year or the agreement does not expire on the end of a Month or a Contract Year, then the number of Path Usages in **column 4 and 5** (as applicable) for each Train Path will be pro rated by reference to that part of the Month or Contract Year over a full Month or Contract Year and the resulting Path Usages for that Month or Contract Year will be rounded down.

\*\* All prices are exclusive of GST.

\*\*\* 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.

\*\*\*\* Average Monthly Path Usages will be one twelfth of the Annual Contracted Path Usage.

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#### 4 Services Assumptions

The following Services Assumptions apply to each Path Usage operated by Operator 1.

*[Drafting note - insertions in table are for illustrative purposes only.]*

Train Path	Train axle load (tonnes)	Train length (metres)	Maximum speed (km/hr)	Section run times (minutes)
1	30	1500	80	xx
2	30	1500	80	xx

The HVCCC will publish assumptions for other service providers which align with these entitlements. ARTC is not responsible for the adequacy or delivery of assumptions relating to other service providers.

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#### 5 Track assumptions - Train Path 1

- (a) ARTC’s obligation to make available the Path Usage in **row 1 of clause 3 of this Schedule** is conditional upon the Access Holder providing sufficient evidence to the reasonable satisfaction of ARTC that it has the contracted capacity for at least the Initial Period to offload the anticipated coal at the port or Network exit specified in row 1.
- (b) 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 a condition precedent.

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#### 6 Track assumptions - Train Path 2

- (a) ARTC’s obligation to make available the Path Usages in **row 2 in clause 3 of this Schedule**, is conditional on:
  - (i) the Access Holder providing sufficient evidence to the reasonable satisfaction of ARTC that it has the contracted capacity for at least the Initial Period to offload the anticipated coal at the port or discharge point specified in **row 2 in clause 3 of this Schedule**; and
  - (ii) completion of the following projects (“listed projects”):

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Train Path	Listed projects	Equivalent capacity (in Train Paths)
2	<i>Third road project as described in section # of the Hunter Valley Corridor Capacity Strategy dated #</i>	
	<i>Crossing loops at xxx</i>	
	<i>Track duplication between X and X</i>	

- (iii) completion of any additional projects or replacements of listed projects (“new projects”):
  - (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
- (iv) in ARTC’s reasonable opinion, the listed and 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 by the ACCC under the Access Undertaking.

ARTC must promptly notify the Access Holder if it considers that a listed and 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 project.

*[Drafting note - drafting in italics is illustrative only.]*

- (b) 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

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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.]*

- (c) ARTC must promptly notify the Access Holder if it believes that **clause 5(a)(iii)** is unlikely to be satisfied and provide reasons for the basis of ARTC's belief.
- (d) These conditions precedent are 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 a condition precedent.
- (e) Other than a dispute in relation to **clause 5(a)(iii)**, a dispute under this clause 5 of Schedule **3** will be resolved by expert determination under **clause 14.4**.

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# Access Holder Agreement

## Annexure A - Operator Sub-Agreements

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