



02 October 2009

Mr. Anthony Wing & Dr. Richard Chadwick  
Australian Competition and Consumer Commission  
GPO Box 520  
MELBOURNE, Victoria, 3001

Copy to: Mr. David Hatfield, Director, Adjudication Branch, ACCC  
Mr. Simon Ormsby, General Manager Commercial, ARTC

Dear Gentlemen

**Re: Draft Hunter Valley Track Access Undertaking and Agreements**

This letter is submitted in response to a request for further information on the issues of Contract Alignment in the Hunter Valley Coal Chain.

Xstrata Coal is supportive of the direction being taken by both the port and track providers in developing the new form of long-term contracts, and the steps taken to ensure alignment is achieved. The attached paper sets out some further areas where we believe that amendments are required to the ARTC Access Undertaking and Access Holder Agreement in order to achieve a practical and workable level of contractual alignment to provide coal producers with the commercial certainty that they require to undertake on-going investment in mining activities in the Hunter Valley.

We have prepared a mark-up of the draft Hunter Valley Access Undertaking, and the Access Holder Agreement with some suggestions as to how the issues of capacity alignment may be achieved. These mark-ups are provided as draft only for the purposes of encouraging on-going refinement of the contractual terms to ensure these outstanding issues can be resolved, and should not be taken as a comprehensive position on these documents. We believe that further work is required jointly between the terminal operators, ARTC and producers in finalising these terms, and look forward to continuing the constructive work with ARTC.

The issue of contractual alignment is critical. The current situation in the Dalrymple Bay Coal Chain highlights the risks of entering into long-term take-or-pay agreements which are not aligned. There are two material risks which have been highlighted in recent times:

1. **Capacity needs to be calculated by reference to a common set of System Assumptions.** At DBCC there are material differences in the underlying assumptions that the train, track and port operators use when determining the investment required to deliver coal chain capacity. For example one party assumes the system operates on an even-

railing basis, while the other assumes cargo assembly. Other examples include clear difference in the amount of maintenance that takes place on the track, the level of unplanned losses across the system, and the headways between trains when running on the network. These fundamental differences mean that even though a producer may hold a contract for the same volume with each of the train, track and port providers, the reality is that the system as a whole will not be capable of transporting the capacity which has been contracted. This is the source of much of the substantial underperformance of the DBCC system compared to the level of contracts which have been entered into.

2. **There needs to be coordination / alignment in the delivery of new infrastructure.** Recent port expansions in the DBCC system have occurred up to two years in advance of the expansion of the track capacity. This results in misalignment in contracts and substantial take-or-pay charges being levied on producers for capacity which is unusable. There is no obligation between the track and port providers to coordinate investment planning, and the result is that additional costs are imposed on industry unnecessarily.

There are numerous other examples from other supply chains, however these two key risks highlight why contractual alignment and transparency in coordination must be achieved. The difficulty is that once contracts have been entered into, there is little that can be done to un-do the situation. In the DBCC example, this has resulted in all parties acknowledging the issues, but everyone holding the other elements of the supply chain accountable for addressing the problem. We must not allow a similar model to propagate into the Hunter Valley Coal Chain.

The attached paper and proposed mark-ups to the draft agreements are therefore provided to encourage further work and debate in refining the agreements to avoid repeating the mistakes of the past in other supply chains. The issues can be addressed with minimal drafting amendments. We urge the ACCC, ARTC, terminal operators and producers to continue to address these issues in the next month so that contracts can be finalised during Q4 2009. Particularly, we encourage ARTC and the terminal operators to take a leadership approach in this final coordination, as it is ultimately their contracts which must be aligned. Whilst the previous Contractual Alignment Group provides a ready reference for broader consultation with producers and haulage operators, we recommend that the primary responsibility for finalizing this task vests in ARTC and the terminal operators, and not with any broader industry group such as the HVCCC.

We acknowledge the constructive work undertaken by all parties and this submission is likewise provided in the context of seeking to be constructive. It must be emphasized that this alignment needs to be completed during Q4 2009; whilst contractual alignment has been somewhat stalled due to the 2008/09 focus on the terminal solution, there is an urgent need to now prioritise and resource this task.

Please do not hesitate to contact me on 02 9253 6752 should you have any queries or require any further information in relation to this submission.

Yours sincerely,



**Stephen Bridger**  
**Executive General Manager - Logistics**  
**Xstrata Coal**

#### Attachments

1. Paper: Achieving Contractual Alignment across the Hunter Valley Coal Chain (5 pages)
2. Partial mark-up to draft Hunter Valley Access Undertaking pertaining to contractual alignment (1 document)
3. Partial mark-up to draft Access Holder Agreement pertaining to contractual alignment (1 document)



## **Attachment I: Achieving Contractual Alignment across the Hunter Valley Coal Chain.**

Contractual Alignment means that coal producers are able to enter into contracts for capacity with track, port and train providers such that they are able to rely, with a high degree of confidence, on the capacity being available to transport coal through the system. There are four key requirements to ensure alignment and provide certainty:

1. A contract for xMt of capacity on both track and port is based on a common understanding of capacity which reflects a realistic set of operating arrangements such that xMt of coal can be hauled through the system and loaded onto vessels over the life of the contract.
2. Producers are able to vary, swap or trade their entitlement via a mechanism which enables track and port capacity to be re-allocated (taking into account the physical constraints of the coal chain and preserving the commercial position of the infrastructure providers). This mechanism must ensure capacity is not lost as a result of the trade, and that entities who are not a party to the trade do not have their capacity rights impacted.
3. The operation of contracts and consumption of capacity over time is monitored such that contractual rights are enforced and parties are held accountable for their consumption of system capacity without infringing on the contractual rights of others. This means that capacity which has been contracted on track, port and train takes priority over un-contracted throughput.
4. Producers wishing to gain access to future coal chain capacity have a clearly defined process through which they may trigger capacity expansions (if required) and obtain access, such that they can coordinate their start-up of new mining operations with coordinated delivery of coal chain capacity (track, train and port).

Substantial progress has been made towards the achievement of these goals with the progress towards long-term take-or-pay contracts for track and port capacity. Many producers have also sought to renegotiate and enter into new rail haulage arrangements in the knowledge that track and port capacity will be contracted on a different basis to the historical arrangements in the Hunter Valley. Notably, progress has been made towards alignment by:

- Creating a contractual framework which provides for producers to hold long-term access agreements to track and port capacity
- Referencing the establishment of a new Hunter Valley Coal Chain Coordinator as an organisation to model and determine capacity.
- Requiring producers to hold port contracts and track contracts in alignment

It is the intent of each of PWCS and ARTC to create contracts which provide for alignment, and there has been some work to date by each of the parties to address the alignment challenge. However there are still significant risks remaining that the contracts being proposed will not achieve the outcomes outlined above, and impose significant costs and inefficiency on the industry. These risks are identified and explained below, together with suggested amendments to resolve the issue.

Attached to this document is a mark-up the ARTC HVAU and Access Holder Agreement with some suggested amendments to address these issues. This mark-up is provided as a draft for further discussion with ARTC, and is subject to further refinement and development.

1. **There is no commitment to ensure capacity is calculated based on a common set of realistic system assumptions:**

*Why is this a risk?*

If port and track providers, and train operators, do not sell capacity based on the same set of realistic assumptions as to how the coal chain operates, then the capacity commitments will not be deliverable by the coal chain as a whole. For example, if the port providers assumes the coal chain will incur 10 days of losses due to maintenance in a year, and the track provider assumes 20 days, then it is likely that the port will be unable to deliver its committed capacity obligation if in fact it turns out that there were 20 days of losses due to maintenance.

There is currently no obligation on ARTC or the port providers to ensure they are operating from a common set of realistic system assumptions when entering into contracts. Both entities refer to the HVCCC having some role in the process of calculating capacity but the exact nature of this role is vague, providing considerable uncertainty as to how alignment will be maintained across the system. There should be an over-arching obligation to ensure alignment at this most fundamental level is achieved, and it should be clearly stated that the role of the HVCCC is to set, monitor and administer system capacity.

*Proposed solution:*

Introduce into the HVAU an obligation to ensure System Assumptions are common and agreed between the port and the track providers. This should be part of an overall set of principles introduced into both the ARTC and terminal contracts to ensure coal chain alignment. The role of the HVCCC should be clearly described.

**2. There continues to be some risk that allocation of capacity to time periods may not align between port and track**

*Why is this a risk?*

If parties do not achieve aligned capacity each month or quarter, then they are forced to rely on trading and/or flexibility provisions to ensure their basic contractual rights can be utilised. It is preferable to ensure that the capacity entitlements across port and track in each time period are in perfect alignment when they are first issued.

ARTC and PWCS each refer to a process by which the HVCCC is consulted and maintenance is considered in determining how annual capacity entitlements are allocated across months. This process is insufficient as it does not oblige ARTC and the terminal providers to allocate capacity such that the aligned annual entitlements translate into aligned monthly entitlements.

*Proposed solution:*

Introduce into the HVAU an obligation to ensure capacity is allocated across time periods such that producers receive aligned capacity in each month/quarter. Given that the capacity calculations are to be based on a common set of system assumptions, then it is straightforward to ensure that the monthly allocation process will also result in alignment.

The Access Holder Agreement should also allow for different capacity periods depending on whether the customer is a Small or Large Producer consistent with the terminal agreement.

**3. The mechanism to trade capacity needs further work to be aligned with a port mechanism.**

*Why is this a risk?*

The ability to trade, swap or reallocate capacity is important to ensure capacity of the coal chain can be used efficiently. There is a reasonable amount of unpredictable variation in coal chain operations arising as a result of market driven events, infrastructure issues, geological issues and other factors such as weather. Managing change on a short and



long-term basis is therefore critical, and it is essential that port and track capacity can be jointly or separately traded and swapped between loadpoints and between producers.

Currently the process for trading at the port is yet to be defined. The mechanism for trading track capacity is cumbersome with specified notice periods of two weeks, which is considered unrealistic for managing short term variation. Both parties are committed to the HVCCC playing a role in the trading process. There is currently no commitment to ensure a common system is developed or to ensure that trading of port and track capacity will be enabled via a coordinated process

*Proposed solution:*

ARTC and PWCS are intending to work, via a Capacity Transfer System Working Group, on developing a mechanism for trading terminal capacity. This should be expanded to include the development of a coordinated system for trading terminal and track capacity, and the commitment to develop a coordinated and aligned mechanism needs to be an obligation in the contracts.

#### **4. Flexibility provisions are not aligned between port and track agreements.**

*Why is this a risk?*

If flexibility and tolerance limits are not aligned, then this will reduce the ability of the producers to manage their entitlements across the whole of the coal chain. Workability of the proposed flexibility arrangements is unclear

*Proposed solution:*

Proposed to review flexibility arrangements following an initial trial period to ensure port and track working in sympathy with one another.

#### **5. Adjustments for unplanned capacity losses may create misalignment**

*Why is this a risk?*

ARTC have made allowances for a level of unplanned capacity losses in determining the capacity available for sale. This helps to ensure that producers will hold sufficient capacity rights to move their contracted capacity after allowing for a reasonable level of losses which are inevitable in the day to day operation of the coal chain.

A key principle of the new commercial framework is that coal producers should be held accountable for capacity losses which they cause, or similarly to obtain the benefit of increases in capacity as a result of changes in behaviour or infrastructure. The PWCS contract provides for capacity adjustments to be allocated to the causing party, and the ARTC agreement needs to be brought into alignment with this approach. The current drafting provides ARTC will flexibility to allocate capacity adjustments as it sees fit. Principles should be introduced to ensure the allocation of capacity adjustments provides incentive for parties to consume coal chain entitlements efficiently

*Proposed solution:*

Amend the adjustment mechanism with an over-arching obligation to allocate capacity adjustments, to the extent possible, to the causing party.

#### **6. There is no obligation to maintain and develop the coordinated approach to coal chain planning, and to ensure that a producer holds aligned train, track and port contracts for every train planned through the system.**

*Why is this a risk?*

With new infrastructure coming on-line to support the growing demand for coal chain throughput, it is increasingly important that the daily planning activities be undertaken on a coordinated basis. PWCS refers to the HVCCC as the planning body, and ARTC may have regard to any planning input provided by the HVCCC. There is no obligation on ARTC and the terminal to maintain and develop a coordinated approach to planning.

Similarly, it is unclear how planning will be coordinated between the track and port operators to ensure that before coal is moved through the coal chain that there is an aligned contractual obligation in place i.e. the producer must demonstrate aligned train, track and port capacity is in place before being able to assemble a stockpile or run a train through the system. This requirement is the most fundamental mechanism to ensure contractual alignment exists and is maintained in the day to day running of the coal chain, but is not captured in any of the contracts.

*Proposed solution:*

A contractual obligation is required on each of the terminal and port providers to implement a planning system which seeks to ensure a coordinated approach to coal chain planning consistent with the System Assumptions and consistent with the contracted obligations of the parties. There must also be an obligation in place that before coal is allowed to pass through the system, that the producer must provide evidence of its aligned contracts for the volume of coal being transported (for example on a stockpile by stockpile basis at the port)

**7. Contractual Terms are not aligned, requiring producers to hold non-aligned capacity obligation in the long-term**

*Why is this a risk?*

Currently the terminal agreement provides for a rolling 10 year contract on an evergreen basis, where as the ARTC agreement is effectively a 15 year commitments (10 years plus a 5 year notice period). For mines reaching the end of their life, the PWCS agreement allows for short term contractual extensions to cover the uncertainty in the exact remaining reserves while the ARTC agreement has no such allowance. These differences create immediate misalignment and financial exposure for every producer.

*Proposed solution:*

Modify the ARTC agreement to align with PWCS and NCIG rolling 10 year agreement and incorporate a short term option to extend the [AHA] at the end of a mine's life. *[Does this need to be described?]*

**8. There is no obligation on ARTC to coordinate its investment planning and time the delivery of new capacity, to the extent possible, with the port operators**

*Why is this a risk?*

Misalignment in the delivery of new infrastructure imposes significant costs onto industry which are otherwise avoidable. Each of ARTC and PWCS intend that they will use the HVCCC to assist in planning new infrastructure requirements, however there is no explicit obligation requiring coordination. It is recognised that perfect alignment is not always possible.

*Proposed solution:*

Introduce an explicit obligation to coordinate investment planning between port and terminal to ensure cost, risk and timing are taken into account when planning capacity expansions.

## 9. ARTC are selling rail paths, but charging on the basis of tonnes throughput

### *Why is this a risk?*

ARTC determine the number of paths required by each producer and this is the basis of the access right to the track, however producers are then only charged on a \$-per-tonne model, meaning there is no incentive on producers to consume their rail paths efficiently. The proposed arrangements appear subject to gaming, for example by nominating a smaller train size to secure a large number of rail paths, but then running larger trains to haul the coal. This does not encourage investment in efficient train sizes, nor does it align the sale of track capacity with the underlying System Assumptions.

Current pricing proposals do not provide incentives for improved productivity.

### *Proposed solution:*

ARTC should adopt a model whereby train paths are calculated based on an efficient train size, and then charge per train path utilised. If a producer wishes to run less efficient trains, then this will require them to purchase more rail paths, thereby sending the appropriate investment signal to both ARTC and to the producer in relation to train procurement. This model ensures a more efficient allocation of capacity across the coal chain.

It is reasonable to provide for some 'grandfathering' of existing rolling stock in the system, such that capital which has already been sunk into the coal chain is not penalised. This can be in the form of some form of price adjustment for producers utilising existing rolling stock, where that rolling stock does not comply with the efficient train as defined by the System Assumptions.



# Hunter Valley Coal Network Access Undertaking

**Dated**

**BY**

**AUSTRALIAN RAIL TRACK CORPORATION LIMITED** (ABN 75 081 455 754) of  
Ground Floor, ARTC Building, Off Sir Donald Bradman Drive, Passenger Terminal Road,  
Mile End South Australia 5031 ("**ARTC**")

**IN FAVOUR OF**

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** being a body corporate  
established under **section 6A** of the TPA ("**ACCC**")



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# 1 Preamble

## 1.1 Introduction

Australian Rail Track Corporation Limited (“ARTC”) gives this undertaking to the Australian Competition and Consumer Commission (“ACCC”) pursuant to the Part IIIA *Trade Practices Act* (Cth) 1995 (“TPA”). This undertaking reflects the following characteristics of ARTC’s commercial environment specific to the Hunter Valley Rail Network:

- (a) ARTC was established on 24 February 1998 as a company under the *Corporations Act 2001* (Cth). ARTC’s shares are fully owned by the Australian Government.
- (b) On 5 September 2004, ARTC commenced a 60 year lease of certain parts of the rail network in NSW including the Hunter Valley network forming the Network. ARTC is responsible for managing the Network and for the granting of access to the Network.
- (c) ARTC is a vertically separated provider of access.
- (d) The predominant usage of the Network is for rail services to the Hunter Valley coal markets. Subject to legislative requirements in relation to other traffic, such as passenger, ARTC recognises that the operation of, and investment in the development of, the Network is primarily to improve utilisation and performance of such rail services and to optimise coal export throughput in the Hunter Valley.
- (e) ARTC recognises that the Network facilitates provision of rail services to the coal supply chain primarily serving the export coal market through the Port of Newcastle, and also the NSW domestic coal market. ARTC recognises its role as an active participant in the HVCCC, and the role that the HVCCC plays with Hunter Valley Coal Chain Service Providers and Coal Customers in the integrated and coordinated planning of the coal supply chain serving the export coal market through the port of Newcastle, as well as the NSW domestic coal market. ARTC also recognises the role that the HVCCC plays in identifying, and in facilitating expansion of, Coal Chain Capacity.
- (f) ARTC recognises that Hunter Valley export coal producers are seeking to align capacity contracted across contracts with infrastructure service providers, including above rail, below rail and port terminal capacity.
- (g) In relation to traffic utilising the Network other than for the purpose of hauling coal, ARTC operates in a competitive environment where competition from other modes of transport (particularly road) places constraint on rail transport and Access pricing. Access pricing for this traffic is such that it only meets their Direct Cost of Access to the Constrained Network.
- (h) ARTC has adopted the concepts of equity and transparency as key elements of its pricing policies. ARTC will not discriminate price on the basis of the identity of the Applicant. By so doing, ARTC seeks to encourage customer confidence, competition and market growth in the rail and Hunter Valley export coal industries in an evolving environment.



- (i) As an access provider, maintenance of, and investment in, the Network and Associated Facilities is a large component of ARTC's current cost structure. These services are either outsourced, and managed under contracts entered into on commercial terms as a result of a competitive tender process, or, in ARTC's view, otherwise managed on an efficient basis. ARTC has adopted this practice with a view to ensuring that ARTC's cost structure will reflect efficient infrastructure practice in the context of the Hunter Valley Coal Chain where a key objective in maintenance planning is to maximise coal chain throughput and reliability.
- (j) ARTC has prepared this Undertaking voluntarily in pursuance of its charter objectives.
- (k) This Undertaking will be applied consistently to applications for Access Rights where such applications are within the scope of this Undertaking.

## 1.2 Objectives

This Undertaking is a voluntary undertaking submitted by ARTC under Part IIIA of the TPA. The intent of the Undertaking is to:

- (a) provide a framework to manage negotiations with Applicants for Access Rights to the Network;
- (b) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing applications for Access Rights;
- (c) use transparent and detailed methodologies, principles and processes for determining Access revenue limits, terms and conditions;
- (d) reach an appropriate balance between:
  - (i) the legitimate business interests of ARTC, including:
    - (A) recovery of all reasonable costs associated with the granting of Access to the Network;
    - (B) a fair and reasonable return on ARTC's investment in the Network and Associated Facilities commensurate with its commercial risk; and
    - (C) encouraging customer confidence and market growth in the rail industry and also, in particular, the Hunter Valley coal industry;
  - (ii) the interest of the public, including:
    - (A) increasing competition and ensuring efficient use of resources; and
    - (B) the promotion of economically efficient investment, use and operation of the Network, being an element of the Hunter Valley Coal Chain;
  - (iii) the interests of Applicants seeking Access Rights to the Network, including:

- (A) providing Access to the Network on fair and reasonable terms; and
  - (B) providing Access in a transparent, efficient and non-discriminatory manner; and
  - (C) providing reliability in rail infrastructure's contribution to the Hunter Valley Coal Chain;
- (e) provide an efficient and effective dispute resolution process in the event that ARTC and the Applicant are unable to negotiate mutually acceptable Access Agreements; and
- (f) operate consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement.

### 1.3 Coal chain principles

ARTC recognises the desirability of achieving the following coal chain principles, and will seek to give effect to them through this Access Undertaking and the Access Agreements it enters into:

- (a) existing coal producers should have certainty of access to the existing coal chain capacity which is utilised by them in accordance with their existing contractual rights;
- (b) new and expanding producers have access to a process by which they can reliably negotiate access to coal chain capacity, whether existing or new;
- (c) coal chain capacity should be contracted for on the basis of a single set of System Assumptions, such that if those System Assumptions are achieved the port and track capacity contracted for on the basis of those System Assumptions can be provided; and
- (d) the allocation of coal chain capacity should be on the basis of contracts which are consistent with each other and workable together having regard to the totality of the arrangements, including with respect to:
  - (i) allocation periods;
  - (ii) flexibility provisions;
  - (iii) trading mechanisms; and
  - (iv) adjustments to the coal chain capacity provided.

### 1.4 Contract structure

- (a) In recognition of interests pertaining to coal traffic, identified in **section 1.1(e)** and **(f)**, ARTC will, on request, enter into a direct agreement with a Coal Customer for Coal Access Rights to the Network (an Access Holder Agreement) subject to the following terms:

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- (i) the Coal Customer may only utilise those Access Rights through an Accredited Operator who has been nominated by the Access Holder for that purpose; and
  - (ii) that Operator must have an Operator Sub-Agreement with ARTC which has been endorsed by the Access Holder.
- (b) An Accredited Operator may also enter into an Access Holder Agreement with ARTC under which it will hold Coal Access Rights. The Accredited Operator will also need an Operator Sub-Agreement with ARTC to utilise those Coal Access Rights.
- (c) For non-coal traffic, ARTC will enter into a single Access Agreement for Non-Coal Access Rights with an Accredited Operator which will provide for both an entitlement to Train Paths and a right to operate Non-Coal Trains on those Train Paths, or with an Applicant who is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the Trains on those Train Paths provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.

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## 2 SCOPE AND ADMINISTRATION OF THE UNDERTAKING

### 2.1 Scope

- (a) This Undertaking provides for the negotiation of Access Rights to the Network, with details of the specified services and sections of the Network defined during Access negotiations. Access will include, in addition to the track, the benefit of Associated Facilities required to facilitate such Access.
- (b) This Undertaking does not extend to any Extension to the Network nor to the track and infrastructure not part of the Network that may connect to the Network.

### 2.2 Grant and Duration of Undertaking

- (a) ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking in relation to the grant of Access Rights to the Network. This Undertaking takes effect twenty one (21) days after it is accepted by the ACCC under **section 44ZZA(3)** of the TPA (“**Commencement Date**”) and will continue until the earlier to occur of:
  - (i) the of the Term; or
  - (ii) withdrawal of this Undertaking in accordance with its terms or the TPA.
- (b) Not later than three (3) months prior to the expiry of the Term of the Undertaking ARTC will submit to the ACCC a written statement outlining whether or not it intends to submit a new voluntary undertaking to the ACCC for its consideration.
- (c) If ARTC intends to submit a new voluntary undertaking to the ACCC for its consideration, ARTC will also apply to the ACCC for an extension of the expiring Undertaking.



- (d) The application for extension would include a proposed extension period which, in ARTC's view, reasonably estimates the time it would take for ARTC to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.
- (e) If ARTC does not propose to submit to the ACCC a new voluntary undertaking then **section 2.2(b) to (d)** would not be applicable. Nothing in this section would prevent ARTC from submitting a voluntary undertaking to the ACCC at any time during the Term of this Undertaking.

### 2.3 Term

This Undertaking will continue to be binding upon ARTC until the earlier of:

- (a) the tenth (10th) anniversary of the Commencement Date; or
- (b) the date upon which the ACCC consents to the withdrawal of the Undertaking by ARTC.

### 2.4 Review of Undertaking

- (a) If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC or becomes inconsistent with the objectives prescribed at **section 1.2**, ARTC may seek the approval of the ACCC to vary this Undertaking.
- (b) Prior to seeking the approval of the ACCC under **section 2.4(a)**, ARTC will first consult with Access Holders and Operators regarding the proposed variation.
- (c) ARTC may only vary the Undertaking with the consent of the ACCC under **section 44ZZA(7)** of the TPA.
- (d) As soon as practicable after the fifth (5th) anniversary of the Commencement Date, ARTC will undertake a review of the Undertaking, in consultation with Access Holders and other stakeholders. The review will consider any material impact that changes to industry circumstances or Government legislation, rules or regulations may have on the extent to which the Undertaking reasonably meets its intent as prescribed at **section 1.2**.

### 2.5 Existing agreements and rights

- (a) This Undertaking applies only to the negotiation of new Access Agreements and the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.
- (b) ARTC will reserve, at no charge, existing train paths used for non-coal traffic under agreements existing immediately before the Commencement Date. ARTC will reserve the existing train paths for the purpose of making them available to Applicants who submit an Access Application for Non-Coal Access Rights, to be used for substantially the same purpose and in respect of the same end-market as the existing train paths, within 30 Business Days from the Commencement Date. To avoid doubt, the reserved train paths will be contracted on the terms and conditions, applicable at the time of the Access Application.

## 2.6 Insurance

ARTC will take out and maintain a liability insurance policy with a limit of not less than \$250,000,000 for any one occurrence which provides an indemnity in respect of:

- (a) loss of, loss of use of, and destruction or damage to, real or personal property;
- (b) injury to, or disease or death of, persons; and
- (c) ARTC's liability prescribed in Access Agreements and the Operator Sub-Agreements to the extent coverable by insurance.

## 2.7 Contact details

- (a) Persons wishing to contact ARTC for further information or to apply for Access to the Network should contact ARTC at any of the following addresses:

- (i) Australian Rail Track Corporation Limited

Ground Floor  
Off Sir Donald Bradman Drive  
Passenger Rail Terminal Road  
MILE END SA 5031

Attention: Chief Executive Officer  
Telephone: (08) 8217 4366  
Facsimile: (08) 8217 4578

- (ii) Australian Rail Track Corporation Limited

PO Box 10343  
Gouger Street  
ADELAIDE SA 5000

secretary@artc.com.au

- (b) Applicants are also encouraged to search ARTC's internet web site at [www.artc.com.au](http://www.artc.com.au) on which will be published various information regarding ARTC and this Undertaking including:
  - (i) illustrative maps showing a geographical description of the Network in the form of Annexure 1 of Schedule B as amended by ARTC from time to time during the Term;
  - (ii) a narrative description of the Network;
  - (iii) Indicative Access Charges for Indicative Services;
  - (iv) prices for which Access has been granted to Services other than Indicative Services, together with a general description of the Services to which such prices relate;
  - (v) the Network Management Principles;

- (vi) the Indicative Access Holder Agreement including the Standard Operator Sub-Agreement;
- (vii) current available market terms and conditions;
- (viii) a copy of ARTC's annual report;
- (ix) details of Committed Capacity and other Capacity on the Network;
- (x) indicative section running times for Indicative Services;
- (xi) route standards by corridor;
- (xii) the Performance Indicators;
- (xiii) RAB for each Segment;
- (xiv) Ceiling Limit for the Constrained Network determined in the most recent annual compliance assessment; and
- (xv) Hunter Valley corridor capacity strategy.

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### 3 NEGOTIATING FOR ACCESS

#### 3.1 Introduction

- (a) ARTC will negotiate with an Applicant in good faith. This section of the Undertaking will form the framework for ARTC's negotiations with an Applicant for Access Rights. However, ARTC recognises that the process needs to be flexible and ARTC will be willing to tailor the process in consultation with the Applicant.
- (b) For Coal Access Rights, ARTC recognises the importance of the role performed by the HVCCC in providing advice on the operating requirements needed to deliver Coal Chain Capacity, as well as the role of the other Hunter Valley Coal Chain Service Providers. In particular, ARTC recognises the importance of the Applicant and ARTC consulting with the HVCCC and the Hunter Valley Coal Chain Service Providers to determine the impact on Coal Chain Capacity of the Access Rights sought by the Applicant. This consultation may occur before the submission of an Access Application as provided under **section 3.6**.

#### 3.2 Framework

This Section of the Undertaking seeks to outline the process which will be followed to enable an Applicant to gain Access Rights to the Network. It provides for:

- (a) preliminary meetings and exchanges of information, including, in relation to Coal Access Rights, consultation with the HVCCC and other Hunter Valley Coal Chain Service Providers;
- (b) submission of an Access Application by the Applicant;
- (c) preparation of an Indicative Access Proposal by ARTC;



- (d) negotiations to develop an Access Agreement for execution;
- (e) dispute resolution procedures; and
- (f) both ARTC and the Applicant to negotiate in good faith.

### 3.3 Information Provision

- (a) Subject to **section 3.3(b)**, ARTC will, if requested by an Applicant, provide the following information to the Applicant to assist with negotiations:
  - (i) path length availability;
  - (ii) for Coal Access Rights, referral to the Coal Chain Master Plan and Assumptions;
  - (iii) axle load limitations;
  - (iv) maximum allowable speeds;
  - (v) infrastructure characteristics;
  - (vi) applicable safe working requirements;
  - (vii) section run times;
  - (viii) the Incremental Cost and Economic Cost determined in accordance with the Undertaking for the Pricing Zones for which Access Rights are being sought;
  - (ix) subject to section 3.3(b), other information relating to Capacity or Train operations reasonably required by the Applicant in relation to the Access Rights sought.
- (b) ARTC's obligation under **section 3.3(a)** is subject to:
  - (i) ARTC not disclosing any information which would breach a confidentiality obligation binding on it; and
  - (ii) the Applicant agreeing to pay the reasonable costs incurred by ARTC in obtaining information that is not ordinarily and freely available to ARTC.

### 3.4 Parties to Negotiation

- (a) ARTC reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and ARTC considers that such non-compliance is material, ARTC will not be obliged to continue negotiations regarding the provision of Access Rights for that Applicant.
- (b) Where an Applicant seeks Coal Access Rights, ARTC will negotiate an Access Holder Agreement with an Applicant who is not an Accredited Operator on the following basis:

- (i) the Applicant will nominate an Accredited Operator prior to utilising the Coal Access Rights sought;
- (ii) that Operator will enter into an Operator Sub-Agreement agreed to by ARTC and the Access Holder and included as an annexure to the Access Holder Agreement; and
- (iii) the Applicant will endorse the signed Operator Sub-Agreement.

ARTC will negotiate the terms of the Operator Sub-Agreement forming part of the Access Holder Agreement with the Access Holder or the relevant Operator where it has been appointed as the Access Holder's agent for that purpose.

- (c) Where an Applicant seeks Non-Coal Access Rights, ARTC will negotiate an Access Agreement with an Applicant who is not an Accredited Operator where the Applicant will procure the services of an Accredited Operator to operate the Trains on the contracted Train Paths provided that all of the terms and conditions of the Access Agreement are met by the Applicant or the Operator.
- (d) Where an Applicant intends to seek Coal Access Rights, ARTC may require the Applicant to provide sufficient evidence to the reasonable satisfaction of ARTC that it will have sufficient Network Exit Capability, for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may require the Applicant to provide a copy of its contract with the relevant port company establishing the Applicant's ability to offload the anticipated coal at the Port of Newcastle.
- (e) At any time, before or during the negotiation process, ARTC may require the Applicant to demonstrate to ARTC that it is able to meet the following prudential requirements:
  - (i) the Applicant must be Solvent;
  - (ii) the Applicant, or a Related Party of the Applicant, must not be currently, or have been in the previous (2) years, in Material Default of any agreement with ARTC, or any agreement in accordance with which access to rail infrastructure not managed by ARTC has been provided to the Applicant or a Related Party of the Applicant;
  - (iii) the Applicant has an Acceptable Credit Rating or will agree to provide credit support in the form of a Security or a Parent Guarantee before the Access Agreement becomes effective; and
  - (iv) the Applicant must be able to demonstrate to ARTC that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance.

- (f) If ARTC refuses to negotiate for any reasons as described in **section 3.4(a), 3.4(b), 3.4(c) or 3.4(d)**, it will, within ten (10) Business Days of the decision to refuse to negotiate, explain in writing to the Applicant the reasons for such refusal.
- (g) If the Applicant considers that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations in accordance with **section 3.4, 3.15(c)**. If the arbitrator determines that ARTC has unreasonably refused to commence or subsequently unreasonably ceased negotiations, ARTC will recommence negotiations immediately.
- (h) If at any time, ARTC is of the view that an Applicant's request for Access Rights is frivolous in nature, ARTC may refer the request to the arbitrator in accordance with **section 3.15(c)** for determination. If the arbitrator determines that the request is in fact frivolous, then ARTC will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

### 3.5 Confidentiality

- (a) Each party acknowledges, subject to **section 3.5(b) and (c)**, that all information provided by one party ("**Provider**") to the other ("**Receiver**") as part of the negotiation process for Access Rights under this Undertaking that relates directly to:
  - (i) the Applicant's future markets;
  - (ii) the Applicant's future market strategies and business strategies; and
  - (iii) the strategies of ARTC's or the Applicant'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 provisions of this Undertaking allow.
- (b) For the purposes of this **section 3.5**, Confidential Information does not include information which is:
  - (i) 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;
  - (ii) obtained lawfully from a third party without restriction on use or disclosure; or
  - (iii) required to be made public by operation of law (subject to the Receiver claiming any immunity, privilege or restriction on or from disclosure that it can reasonably claim), including without limitation information required by any stock exchange, rail safety or economic regulator;
- (c) Either party may disclose Confidential Information:
  - (i) 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);

- (ii) to a Related Party (provided they are under a legal obligation not to disclose the Confidential Information to any third party);
- (iii) subject to entering into appropriate confidentiality arrangements with the HVCCC and the RCG, to the HVCCC for the purpose of assisting the HVCCC in determining the impact of the Access Rights sought on Coal Chain Capacity and on the operating requirements needed to deliver Coal Chain Capacity under **section 3.9**, scheduling and planning the Hunter Valley Coal Chain, including as required under **section 5.2**, and to the RCG, in relation to the consultation process set out under **sections 6.2, 6.3 and 6.4**; and
- (iv) to an Operator to the extent that it is necessary or desirable for the parties to do so for the purposes of complying with contractual obligations under an Access Agreement or Operator Sub-Agreement.

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### 3.6 Initial review where Coal Access Rights are sought

- (a) Where an Applicant intends to seek Coal Access Rights and the Applicant has requested that ARTC take part in an initial review of Capacity requirements, ARTC will effectively and reasonably participate in that initial review subject to **section 3.6(c)**.
- (b) The purpose of the initial review is to assist the Applicant to provide sufficient information to the HVCCC to enable the HVCCC to determine the impact on Coal Chain Capacity of the Access Rights sought, and to provide advice to the Applicant on that impact and on the operating requirements needed to deliver Coal Chain Capacity and for the Applicant to determine how many Train Paths may be required.
- (c) If the other Hunter Valley Coal Chain Participants do not participate reasonably and effectively in the initial review of Capacity, ARTC will not consider itself bound to participate in the review.

### 3.7 Access Application

- (a) Requests for Access Rights are to be submitted to ARTC prepared in written form and clearly state that the Access Application is made in accordance with this Undertaking and is accompanied by the following information:
  - (i) Applicant details, including business name, ABN, ACN, business address and contact details;
  - (ii) Capacity requirements such as mode of operation, locations and time of entry and exit to the Network, or combination of load and discharge points for which Access Rights are required. For cyclic traffic, the number of monthly and annual train services required;
  - (iii) any requirements for Additional Capacity (subject to **section 5**);
  - (iv) additional above rail requirements;

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- (v) duration of the Access Rights sought;
- (vi) the type of Service intended to utilise the Access Rights sought, contract requirements including (where applicable) Train speed, axle load and length, annual tonnages between load and discharge points, and task variability;
- (vii) where applicable and available, details of the Operator or Operators likely to be nominated for each Train Path sought;
- (viii) indication of Rolling Stock to be used; and
- (ix) where an Applicant is seeking Coal Access Rights:
  - (A) subject to **section 3.7(b)**, confirmation that the Applicant will have sufficient Network Exit Capability, for the lesser of the proposed contracted period for the Train Paths or ten years from the time when the Coal Access Rights will be available for use. Where the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may require the Applicant to provide a copy of its contract with the relevant port company establishing the Applicant's ability to offload the anticipated coal at the Port of Newcastle. In order to satisfy the requirements of this section, the Applicant must show that its Network Exit Capability is sufficient to offload the anticipated coal based on the operation of the Train services using the Train Paths and the port facilities in accordance with the System Assumptions; and
  - (B) advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, and on the operating requirements needed to deliver Coal Chain Capacity, and on whether the Applicant's Network Exit Capability is sufficient.
- (b) If the Coal Access Rights sought are for the purpose of transporting coal to the Port of Newcastle, ARTC may accept an Access Application which does not meet the requirements of **section 3.7(a)(ix)(A)** provided the Applicant is able to establish to ARTC's reasonable satisfaction that it is negotiating with the relevant port company to obtain sufficient Network Exit Capability to offload the anticipated coal volumes at the Port of Newcastle and satisfy the requirements of section 3.7(a)(ix).
- (c) Prior to submitting an Access Application, an Applicant may, in addition to the initial review where an Applicant is seeking Coal Access Rights, seek initial meetings with ARTC to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and, in particular, the information to be included as part of an Access Application.

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### 3.8 Acknowledgment

- (a) Upon receiving an Access Application from an Applicant, ARTC will acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within ten (10) Business Days of its receipt, or such longer period as specified in accordance with **section 3.8(c)**.

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- (b) Prior to acknowledging the Access Application ARTC may seek:
  - (i) additional information where ARTC can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal; or
  - (ii) clarification of the information that has been provided in the Access Application.
- (c) If ARTC seeks additional information or clarification in accordance with **section 3.8(b)**, it will advise the Applicant of the additional information or the clarification required within ten (10) Business Days of receipt of the Access Application. Upon receiving the required information or clarification from the Applicant, ARTC will provide written acknowledgement of the receipt of the completed Access Application within ten (10) Business Days.

### 3.9 Determination of Capacity

- (a) Subject to **section 3.9(b)**, ARTC will use reasonable efforts to provide the Indicative Access Proposal to the Applicant within sixty (60) Business Days of the acknowledgment given under **section 3.8**.
- (b) In assessing an Access Application, ARTC may consider that due to the complexity of the Access Application, a delay in the time taken to obtain information from the HVCCC or the Applicant relevant to the assessment of the Access Application, or other extenuating circumstances it is not reasonable to provide an Indicative Access Proposal within sixty (60) Business Days. In these circumstances, ARTC will inform the Applicant in its acknowledgment of the Access Application that ARTC does not expect to provide an Indicative Access Proposal within sixty (60) Business Days and within a further ten (10) Business Days will advise the Applicant of its estimate of the time required to deliver the Indicative Access Proposal. Where the Applicant is of the view that the time estimated for preparation of the Indicative Access Proposal under this **section 3.9(b)** is excessive, then the Applicant may refer the matter to the arbitrator in accordance with **section 3.15(c)**.
- (c) Where an Applicant seeks Coal Access Rights, ARTC will have regard to any advice provided by the HVCCC on the impact of the Access Rights sought on Coal Chain Capacity, and on the operating requirements needed to deliver Coal Chain Capacity.
- (d) ARTC will determine whether there is sufficient Available Capacity to accommodate the Access Rights sought by the Applicant on the basis of a Capacity Analysis carried out in accordance with **section 5.2**. Where ARTC disagrees with the advice provided by the HVCCC to the Applicant, ARTC may request the Applicant to seek a further review from the HVCCC of the impact of the Access Rights sought on Coal Chain Capacity and on the operating requirements needed to deliver Coal Chain Capacity. While ARTC will have regard to the further advice provided by the HVCCC, ARTC will have the sole right to determine whether there is sufficient Available Capacity to grant the Access Rights sought by the Applicant.

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- (e) If ARTC considers that there is not sufficient Available Capacity on the Network to provide the Applicant with the Access Rights sought, ARTC will, if requested by the Applicant, inform the Applicant of the reasons for its view and the Applicant may request Additional Capacity. ARTC will consider the Applicant's request for Additional Capacity in accordance with **section 6.2**.

### 3.10 Indicative Access Proposal

- (a) The Indicative Access Proposal will set out, amongst other things:
  - (i) the results of a Capacity Analysis determining whether there is sufficient Available Capacity to accommodate the requested Access Rights;
  - (ii) in the event the Access Application requires the Applicant to have recourse to Additional Capacity, an outline of the works and an indicative estimate of the cost of such works required to provide the Additional Capacity or an outline of the requirements for an investigation into the provision of Additional Capacity for the requested Access Rights;
  - (iii) advice in respect of the existence of other Applicants who have submitted an Access Application (where negotiations are continuing in accordance with this Undertaking) in respect of Access Rights which, if they were to be provided, would limit the ability of ARTC to provide Access Rights in accordance with the Indicative Access Proposal;
  - (iv) where the application is for Coal Access Rights, refer the Applicant to the HVCCC for any additional information in relation to Coal Chain Capacity;
  - (v) a reference to the Indicative Access Holder Agreement and a reference to the current available market terms and conditions as published on ARTC's website;
  - (vi) an initial estimate of the Charges for the Access Rights, based on the pricing principles set out in **section 4**; and
  - (vii) details of the additional information required for ARTC to progress the proposal and further develop the Charges and terms and conditions for acceptance.
- (b) The Indicative Access Proposal will, unless it contains specific provisions to the contrary, contain indicative arrangements only and does not oblige ARTC to provide Access Rights in accordance with specific terms and conditions, including Charges, contained within it.
- (c) If, after sixty (60) Business Days following ARTC's acknowledgment of the Access Application, or if applicable, after expiration of the time estimated by ARTC or determined by the arbitrator in accordance with **section 3.9(b)**, the Applicant believes that ARTC is not making reasonable progress in the preparation of the proposal, then the Applicant may refer the matter to the arbitrator for a determination in relation to the progress of the Indicative Access Proposal in accordance with **section 3.15(c)**.

- (d) In the event that ARTC is unable to provide an Indicative Access Proposal based on the Access Application, ARTC will, if possible, submit to the Applicant an Indicative Access Proposal offering alternative Access Rights which it reasonably believes may meet the Applicant's requirements.
- (e) Disputes arising from the process described in this **section 3.10** will be resolved in accordance with **section 3.15(c)**.

### 3.11 Negotiation

- (a) If the Applicant intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the Indicative Access Proposal, the Applicant will notify ARTC of its intention to do so within thirty (30) Business Days of the date it receives the Indicative Access Proposal (or such other period of time that the parties agree). In the event that a notification is given after this period of time, ARTC will review the Indicative Access Proposal and, if considered necessary by ARTC, prepare a revised Indicative Access Proposal in accordance with **section 3.10** and the negotiation process outlined in this **section 3** will recommence from that point.
- (b) If the Applicant is of the view that the Indicative Access Proposal has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, then the Applicant will notify ARTC of its concerns within thirty (30) Business Days of the date of receipt of the Indicative Access Proposal.
- (c) ARTC will take all reasonable steps to respond to the concerns raised by the Applicant in relation to the Indicative Access Proposal under **section 3.11(b)** within thirty (30) Business Days of receipt of notification of the concerns. If ARTC is unable to address the concerns of the Applicant within such time frame, ARTC will notify the Applicant in writing as to the reasons why and advise an intended course of action, with indicative time frames, of how the concern is being addressed. If the Applicant is satisfied with the response received from ARTC, including any revision to the Indicative Access Proposal, it will notify ARTC of its intention to proceed with negotiations within thirty (30) Business Days of receiving ARTC's response.
- (d) If the Applicant is not satisfied with the response from ARTC, including any revision to the Indicative Access Proposal, the Applicant may seek to resolve the dispute in accordance with the dispute resolution process outlined in **section 3.15**. The Applicant will commence this dispute resolution process within thirty (30) Business Days of receiving ARTC's response.

### 3.12 Negotiation Process

- (a) If the Access Applicant indicates its willingness to progress negotiations under this **section 3.12**, then both parties will commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The negotiation period will commence upon the Applicant providing a notification to ARTC of its intention to proceed pursuant to **section 3.12(a)** and will cease upon the earlier of:



- (i) execution of an Access Agreement in respect of the Access Rights sought by the Applicant;
  - (ii) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
  - (iii) the expiration of three (3) months from the commencement of the negotiation period, or if both parties agree to extend the negotiation period, the expiration of the agreed extended period;
  - (iv) if ARTC believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period, issue of a notice by ARTC informing the Applicant that it does not believe the negotiations are progressing in good faith towards the development of an Access Agreement within a reasonable time period and that ARTC intends to end the negotiation period;
  - (v) if **sub-section (iv)** applies and ARTC refers the matter to the arbitrator under **section 3.15(c)** for a determination on this issue and such determination is found in ARTC's favour, the date of issue of the determination;
  - (vi) where an Applicant is seeking Coal Access Rights, ARTC receives evidence confirming that the Applicant no longer satisfies the Network Exit Capability requirement in **section 3.7(a)(ix)**, ARTC may issue a notice of intent to end the negotiation period, to become effective ten (10) Business Days after the issue of the notice. Where ARTC issues a notice of intent, ARTC will provide to the Applicant written reasons for its decision to end the negotiation period; or
  - (vii) if ARTC receives evidence confirming that the Applicant no longer satisfies the prudential requirements of **section 3.4(e)**, on receiving such evidence ARTC will advise the Applicant of such evidence and if the Applicant is not willing to provide Security or a Parent Guarantee, ARTC may issue a notice of intent to end the negotiation period, to become effective ten (10) Business Days after the issue of the notice. Where ARTC issues a notice of intent, ARTC will provide to the Applicant written reasons for its decision to end the negotiation period.
- (c) Upon cessation of the negotiation period, ARTC will be entitled to cease negotiations with the Applicant.

### 3.13 Application for mutually exclusive Access Rights

- (a) Where two or more Applicants have submitted an Access Application for mutually exclusive Access Rights each Applicant will be notified as soon as practicable after ARTC has identified that the Access Rights sought are mutually exclusive Access Rights.
- (b) Subject to **section 3.13(c)**, where two or more Applicants have submitted an Access Application for mutually exclusive Access Rights, ARTC will allocate Access Rights to the Applicant who accepts an Access Agreement with ARTC which, in the opinion of ARTC, is most favourable to it. Ordinarily, but without

limiting ARTC's discretion in this regard, ARTC would make such a decision based on the Access Agreement that represented the highest present value of future returns to ARTC after considering all risks associated with the Access Agreement.

- (c) An Applicant will not be allocated Coal Access Rights unless it is able to satisfy the Network Exit Capability Requirement in **section 3.7(a)(ix)**.
- (d) If, at any time during the negotiation period, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in **section 3.15**.

### 3.14 Access Agreement

- (a) The granting of Access Rights will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be ARTC and the Applicant.
- (b) Subject to **section 3.14(c)**, ARTC may offer any of the following as an Access Agreement:
  - (i) for Applicants seeking Coal Access Rights :
    - (A) the Indicative Access Holder Agreement subject to the Applicant satisfying the Network Exit Capability requirement in **section 3.7(a)(ix)**, the prudential requirements in **section 3.4(e)** and seeking Access Rights intended for the operation of Indicative Services;
    - (B) the current available market terms and conditions in the form of an Access Holder Agreement as published on ARTC's website, as applicable; or
    - (C) an updated Access Holder Agreement to reflect agreed amendments to the Indicative Access Holder Agreement. A negotiated Access Holder Agreement will, (unless otherwise agreed between ARTC and the Applicant) must at least address certain essential elements set out in Schedule A. The details of Schedule A do not provide an exhaustive list of the issues that may be included in an Access Holder Agreement.
  - (ii) for Applicants seeking Non-Coal Access Rights:
    - (A) the current available market terms and conditions in some other form as published on ARTC's website, as applicable; or
    - (B) an updated Access Agreement to reflect agreed amendments to the applicable Access Agreement. A negotiated Access Agreement will, unless otherwise agreed between ARTC and the Applicant, at least address certain essential elements set out in Schedule A as applicable. The details of Schedule A do not provide an exhaustive list of the issues that may be included in an Access Agreement.

- (c) ARTC must offer the Indicative Access Holder Agreement to an Applicant for Coal Access Rights if the Applicant:
- (i) seeks Access Rights for the operation of Indicative Services;
  - (ii) meets the Network Exit Capability requirement in **section 3.7(a)(ix)** and the prudential requirements in **section 3.4(e)**; Deleted: 3.4(d)
  - (iii) either:
    - (A) the Network has sufficient Available Capacity to meet the Applicant's needs; or
    - (B) ARTC consents to provide Additional Capacity to meet the Applicant's needs in accordance with **section 6.2** or **section 6.3**; and
- (d) Once the Applicant has notified ARTC that it is satisfied with the terms and conditions of the Access Holder Agreement as drafted, ARTC will, as soon as reasonably practicable, provide a final Access Holder Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.
- (e) Where ARTC offers an Access Holder Agreement and the Applicant accepts the terms and conditions offered in that Access Holder Agreement, both ARTC and the Applicant will execute the Access Holder Agreement. The parties will use reasonable endeavours to comply with this **subsection 3.14(e)** as soon as practicable.

### 3.15 Dispute resolution

If any dispute arises under this Undertaking or in relation to the negotiation of Access Rights between an Applicant and ARTC ("**Dispute**") then, unless otherwise expressly agreed to the contrary by both parties, such Dispute will be resolved in accordance with this **section 3.15** and 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 in the manner set out in this **section 3.15**. The parties will use reasonable endeavours acting in good faith to settle the Dispute as soon as is practicable.

Disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking. To avoid doubt, disputes raised in accordance with **sections 4.14(c)** and **4.17** will be dealt with in accordance with the **section 3.15(c)** of the Undertaking.

(a) **Negotiation**

Within five (5) Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and use reasonable endeavours, acting in good faith, to resolve the dispute by joint discussions.

(b) **Mediation**

- (i) If the Dispute is not resolved under **section 3.15(a)** within ten (10) Business Days after the date of the Dispute Notice then:

- (A) if the parties agree, they will attempt to resolve the Dispute by mediation pursuant to this **section 3.15(b)**; or
  - (B) if the parties do not wish to resolve the Dispute by mediation under **section 3.15(b)**, either party may by notice in writing to the other and the arbitrator, refer the Dispute to be determined by arbitration under **section 3.15(c)**.
- (ii) If the parties agree to attempt to resolve the Dispute by mediation the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.
  - (iii) If the Dispute is not resolved within a further ten (10) Business Days after being referred to the chief executive officers under **section 3.15(b)(ii)**, the Dispute will be referred to formal mediation in New South Wales by a single mediator appointed by agreement of the parties, or if they fail to agree within ten (10) Business Days, appointed by the President of the Law Society of New South Wales acting on the request of either party.
  - (iv) Unless the parties agree otherwise:
    - (A) the mediation will be conducted by a mediator under the “The Law Society Guidelines for those involved in Mediations of the Law Society of New South Wales”;
    - (B) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
    - (C) each party will bear own costs relating to the preparation for and attendance at the mediation; and
    - (D) the costs of a mediator will be borne equally by the parties.
- (c) **Arbitration**
- (i) If the Dispute is not resolved under **section 3.15(a)**, or at any time after the appointment of the mediator (if any) under **section 3.15(b)**, either party may by notice in writing to the other and the arbitrator terminate the mediation proceedings and notify the arbitrator of a Dispute to be determined by arbitration under this **section 3.15(c)**. If the Applicant serves notice on the arbitrator under this **section 3.15(c)**, that notice will also include an agreement by that Applicant to:
    - (A) pay the amounts and rates described in **section 3.15(c)(ii)(M)**; and
    - (B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under **section 3.15(c)**, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.
  - (ii) Where a Dispute is referred to arbitration in accordance with this **section 3.15(c)**, the following will apply:



- (A) The arbitrator will be the ACCC. For the purposes of a particular arbitration, the arbitrator is to be constituted by two (2) or more members of the ACCC nominated in writing by the chairperson of the ACCC.
- (B) The arbitrator will not proceed with the arbitration unless and until the Applicant has agreed to pay costs in accordance with the amounts or rates described in **section 3.15(c)(ii)(M)** as determined by the arbitrator under that section.
- (C) ARTC and the Applicant agree to adopt the arbitration procedures in Division 3 Subdivision D of Part IIIA of the TPA, except that:
  - (i) the arbitrator will observe the rules of natural justice but is not required to observe the rules of evidence;
  - (ii) a party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration; and
  - (iii) the arbitrator will include in the determination findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
- (D) The arbitrator will when conducting the arbitration:
  - (i) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (ii) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
  - (iii) call on any party the arbitrator believes necessary to give evidence;
  - (iv) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (v) present their determination in a draft form to the parties and hear argument from the parties before making a final determination; and
  - (vi) hand down a final determination in writing which includes all their reasons for making the determination.
- (E) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
  - (i) the notification of the dispute is vexatious;
  - (ii) the subject matter of the dispute is trivial, misconceived or lacking in substance; or

- (iii) the party who notified the dispute has not engaged in negotiations in good faith.
- (F) In deciding a dispute, the arbitrator will take into account:
- (i) the principles, methodologies and provisions set out in this Undertaking;
  - (ii) the objectives and principles enunciated in Part IIIA of the TPA and the Competition Principles Agreement;
  - (iii) ARTC's legitimate business interests and investment in the Network;
  - (iv) all costs that ARTC incurs in providing Access Rights, including any costs of extending the Network, but not costs associated with losses arising from increased competition in upstream or downstream markets;
  - (v) the economic value to ARTC of any additional investment that the Applicant or ARTC has agreed to undertake;
  - (vi) the interests of all persons who have rights to use the Network;
  - (vii) the operational and technical requirements necessary for the safe and reliable operation of the Network;
  - (viii) the economically efficient operation of the Network;
  - (ix) the benefit to the public from having competitive markets; and
  - (x) any other matters that the arbitrator thinks are appropriate to have regard to.
- (G) In making its determination, the arbitrator:
- (i) may deal with any matters referred to in section 44V of the TPA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the TPA;
  - (iii) will take into account the matters referred to in section 44X of the TPA; and
  - (iv) otherwise comply with **section 3.15(c)(ii)(C)**.
- (H) The arbitrator may publish its determination at its discretion subject to consideration of submissions by either party to the arbitration which are commercially sensitive or contain confidential information. At any time prior to the making of the determination, either party may give notice to the arbitrator of the

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information supplied by it which is either commercially sensitive to it or subject to confidentiality obligations, including the reasons why such information is commercially sensitive or confidential. After considering such submissions, the arbitrator may decide not to publish as part of its determination the information that is commercially sensitive or confidential to either party to the arbitration.

- (I) The arbitrator may join the conduct of separate arbitrations if the arbitrator considers that:
  - (i) there are one or more issues common to the arbitrations; and
  - (ii) the joining of the arbitrations will not unreasonably delay the process, or unreasonably increase the costs, of the arbitrations.
- (J) The arbitrator may join one or more additional persons as a party to an arbitration if:
  - (i) the person applies in writing to be made a party and can demonstrate to the arbitrator an interest which is significant enough to reasonably warrant being made a party; and
  - (ii) the arbitrator considers that making the additional person a party to the arbitration will not unreasonably delay the process, or unreasonably increase the costs, of the arbitration.
- (K) If the arbitrator joins the conduct of separate arbitrations or joins an additional person as a party to the arbitration, the arbitrator will have regard to the wishes of the parties and the need for commercial confidentiality in determining how it will conduct the arbitration.
- (L) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
- (M) The arbitrator may charge for its costs of conducting an arbitration of a dispute the amounts and rates (if any) prescribed by the *Trade Practices Regulations 1974 (Cth)*. If the *Trade Practices Regulation 1974 (Cth)* do not prescribe such amounts or rates, the arbitrator may charge the amounts and rates mentioned in regulation 6F of those regulations as amended from time to time.
- (N) The costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.
- (O) Except where the determination or direction is subject to a review by a court of law, if an Applicant does not comply with a

determination or direction of the arbitrator, then ARTC will no longer be obliged to continue negotiations regarding the provision of Access Rights to that Applicant.

- (P) Except where the determination or direction is subject to a review by a court of law, ARTC will comply with the lawful directions or determinations of the arbitrator.
- (Q) ARTC will indemnify the arbitrator from any claims made against it arising in connection with the performance by the arbitrator of its duties under this section, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.

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## 4 ACCESS PRICING PRINCIPLES

### 4.1 Price

The Charge to an Access Holder will include a price negotiated in accordance with the principles set out in this Undertaking.

### 4.2 Floor and Ceiling Price and Revenue Limits

- (a) Access revenue from every Access Holder must at least meet the Direct Cost imposed by that Access Holder.
- (b) For each Segment or group of Segments, Access revenue from Access Holders should, as an objective, meet the Incremental Cost of those Segments ("**Floor Limit**").
- (c) For any Access Holder, or group of Access Holders, Access revenue must not exceed the Economic Cost of the Segments which are required on a stand alone basis for the Access Holder or group of Access Holders ("**Ceiling Limit**") where the RAB for those Segments is equal to, or falls below, the RAB Floor Limit for those Segments at the end of the relevant calendar year.

### 4.3 Regulatory Asset Base

#### (a) RAB in relation to assets existing as at the Commencement Date

To determine the Regulatory Asset Base ("**RAB**") in relation to assets existing as at the Commencement Date (Existing Regulatory Asset Base ("**ERAB**")) for a Segment or group of Segments, the Network and Associated Facilities ("**Initial Existing Regulatory Asset Base (Initial ERAB)**") will be:

- (i) in relation to those Segments that have been ascribed a regulatory asset value in accordance with the NSW Rail Access Undertaking in force at the time immediately preceding the Commencement Date will be set at the value of those Segments determined in accordance with the NSW Rail Access Undertaking as at the Commencement Date. This part of the Initial ERAB will be rolled forward in accordance with the formula below to determine an opening Initial ERAB;



- (ii) in relation to other Segments, initially valued using the depreciated optimised replacement cost method of valuing assets. The optimised replacement cost means the cost of replacement by commercially efficient application of best known currently available technology based on existing capacity and performance characteristics of the asset.

ERAB will be rolled forward annually according to the following methodology

$$ERAB_{t \text{ start}} = ERAB_{t-1 \text{ end}} =$$

$$(1 + WACC_E) * ERAB_{t-1 \text{ start}} - \text{Out-turn Revenue}_{t-1} + \text{Out-turn Opex}_{t-1} - \text{Disposals}_{t-1}$$

where

$ERAB_{t \text{ start}}$  is ERAB at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date, would be the Initial ERAB).

$ERAB_{t-1 \text{ end}}$  is the ERAB at the end of the preceding calendar year (t-1).

$ERAB_{t-1 \text{ start}}$  is the ERAB at the start of the preceding calendar year (t-1).

$WACC_E$  is the approved nominal Rate of Return for assets existing as at the Commencement Date or as revised from time to time in accordance with **section 4.7**.

$\text{Out-turn Revenue}_{t-1}$  is the total revenue earned by ARTC in the preceding calendar year (t-1) attributed to assets existing as at the Commencement Date.

$\text{Out-turn Opex}_{t-1}$  is the total operating expenditure incurred by ARTC in the preceding calendar year (t-1), attributed to assets existing as at the Commencement Date, on an industry efficient basis.

$\text{Disposals}_{t-1}$  is the written down value of any disposals during the preceding calendar year (t-1), in relation to assets existing as at the Commencement Date.

(b) **RAB in relation to assets commissioned during the Term**

To determine the RAB in relation to assets commissioned during the Term (Investment Regulatory Asset Base (“**IRAB**”)) for a Segment or group of Segments, the Network and Associated Facilities will be initially valued at zero (“**Initial Investment Regulatory Asset Base (Initial IRAB)**”).

IRAB will be rolled forward annually according to the following methodology.

$$IRAB_{t \text{ start}} = IRAB_{t-1 \text{ end}} =$$

$$(1 + WACC_I) * IRAB_{t-1 \text{ start}} - \text{Out-turn Revenue}_{t-1} + \text{Out-turn Opex}_{t-1} + \text{Net Capex}_{t-1}$$

where

$IRAB_{t \text{ start}}$  is the IRAB at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date, would be the Initial IRAB).

$IRAB_{t-1 \text{ end}}$  is the IRAB at the end of the preceding calendar year (t-1).

$IRAB_{t-1 \text{ start}}$  is the IRAB at the start of the preceding calendar year (t-1).

$WACC_t$  is the approved nominal Rate of Return for assets commissioned during the Term or as revised from time to time in accordance with **section 4.7**.

Out-turn Revenue $_{t-1}$  is the total revenue earned by ARTC in the preceding calendar year (t-1) attributed to assets commissioned during the Term.

Out-turn Opex $_{t-1}$  is the total operating expenditure incurred by ARTC in the preceding calendar year (t-1), attributed to assets commissioned during the Term, on an industry efficient basis.

Net Capex $_{t-1}$  is the net additions to the RAB in the preceding calendar year (t-1) (that is out-turn Capital Expenditure by ARTC less any disposals during the preceding calendar year (t-1) on a Prudent basis in relation to assets commissioned during the Term.

(c) **RAB for Segments**

The RAB for all assets in a Segment or group of Segments, at the start of any calendar year (t), will be the sum of  $ERAB_{t \text{ start}}$  and  $IRAB_{t \text{ start}}$ .

(d) **RAB Floor Limit**

The RAB Floor Limit for a Segment or group of Segments will be:

- (i) as at the Commencement Date, the sum of the Initial ERAB and the Initial IRAB;
- (ii) rolled forward annually according to the following methodology

$$RAB \text{ Floor Limit}_{t \text{ start}} = RAB \text{ Floor Limit}_{t-1 \text{ end}} =$$

$$(1 + CPI_{t-1}) * RAB \text{ Floor Limit}_{t-1 \text{ start}} + Net \text{ Capex}_{t-1} - Depreciation_{t-1}$$

where

$RAB \text{ Floor Limit}_{t \text{ start}}$  is the RAB Floor Limit at the start of the relevant calendar year (t) (which, for the first year following the Commencement Date, would be the sum of the Initial ERAB and the Initial IRAB).

$RAB \text{ Floor Limit}_{t-1 \text{ end}}$  is the RAB Floor Limit at the end of the preceding calendar year (t-1).

$RAB \text{ Floor Limit}_{t-1 \text{ start}}$  is the RAB Floor Limit at the start of the preceding calendar year (t-1).

$CPI_{t-1}$  is the inflation rate for the preceding calendar year (t-1), determined by reference to the All Groups Consumer Price Index Statistics published for the September quarter of that year.

Net Capex $_{t-1}$  is the net additions to the RAB Floor Limit in the preceding calendar year (t-1) (that is out-turn Capital Expenditure by ARTC less any disposals during the preceding calendar year (t-1) on a Prudent basis.

Depreciation<sub>t-1</sub> is Depreciation applicable to the RAB Floor Limit in the preceding calendar year (t-1).

#### 4.4 Economic cost

For the purposes of this **section 4**, Economic Cost of a Segment means:

- (a) Segment Specific Costs;
- (b) Depreciation of Segment Specific Assets;
- (c) a return on Segment Specific Assets, being determined by applying a real Rate of Return to the value of Segment Specific Assets;
- (d) an allocation of Non-Segment Specific Costs;
- (e) an allocation of Depreciation of Non-Segment Specific Assets;
- (f) an allocation of return of Non-Segment Specific Assets, being determined by applying a real Rate of Return to the value of Non-Segment Specific Assets; and
- (g) the costs described in sub-sections (a) to (f) as applicable to Additional Capacity, including interest reasonably incurred during construction of Additional Capacity.

All costs are to be assessed on a stand alone basis.

#### 4.5 Cost allocation

- (a) For the purposes of **section 4.4**, Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets will be allocated to Segments in accordance with the following principles:
  - (i) where possible, costs will be directly attributed to a Segment;
  - (ii) where possible, Non-Segment Specific Costs and Non-Segment Specific Assets will be identified with the Hunter Valley corridor, other ARTC corridors or identified as system-wide;
  - (iii) Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets identified with the Hunter Valley corridor or other ARTC corridors, or identified as system-wide, will be allocated to those parts of Segments in the Hunter Valley corridor or in other ARTC corridors, or, where identified as system wide, to Segments owned, leased or licensed by ARTC respectively, in proportion to:
    - (A) gtkm with respect to Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets associated with track maintenance; and
    - (B) Train kilometres with respect to Non-Segment Specific Costs and Depreciation of, and return on, Non-Segment Specific Assets not associated with track maintenance.

- (b) All costs will comprise ARTC's reasonably anticipated costs over a reasonable future timeframe.

#### 4.6 Depreciation

For the purposes of calculating the Depreciation allowance in any calendar year:

- (a) Depreciation is to be calculated at the beginning of each calendar year, using a straight line methodology (unless otherwise agreed with an Access Holder or accepted by the ACCC) with respect to specific assets and the estimate of the remaining useful life of the assets.
- (b) The useful life of a Segment or group of Segments is to be determined having regard to:
  - (i) the average remaining mine life of Hunter Valley coal mines utilising the Pricing Zone of which that Segment or group of Segments forms part and existing at the time of the determination or expected to commence during the 5 year period following the time of the determination;
  - (ii) average mine production levels anticipated during the Term having regard to Coal Chain Capacity at any time; and
  - (iii) marketable coal reserves estimated for each mine existing at the time of the determination or expected to commence during the 5 year period following the time of the determination.

The average remaining mine life of Hunter Valley coal mines utilising a Pricing Zone may vary between Pricing Zones as approved by the ACCC.

- (c) The estimate of remaining mine life will be reviewed by ARTC five years from the Commencement Date and if necessary revised estimates will be proposed for ACCC approval.
- (d) Depreciation is to be charged each year on the opening balance of the Regulatory Asset Base and on 100% of the Prudent Capital Expenditure of assets commissioned for a period of half the year.

#### 4.7 Rate of return

- (a) The Rate of Return will be equivalent to ARTC's weighted average cost of capital ("WACC") as accepted by the ACCC after consideration of all risks with the commercial environment in which ARTC operates on the Network, the elements of which will comprise:
  - (i) a capital asset pricing model ("CAPM") method of determining the cost of equity;
  - (ii) a debt to equity ratio which would be considered prudent for ARTC's business in relation to the Network by reputable lenders; and
  - (iii) an appropriate adjustment (beta) factor to the equity risk margin appropriate for investment in railway infrastructure forming part of the Network.

- (b) The Rate of Return may vary between assets existing as at the Commencement Date and assets provided by Capital Expenditure during the Term reflecting differences in the elements at **sections 4.7(a)(i), (ii) and (iii)** arising from consideration of the risks with the commercial environment in which ARTC operates in relation to those respective assets.
- (c) The Rate of Return will be reviewed by ARTC five years from the Commencement Date and if necessary a revised Rate of Return will be proposed for ACCC approval.
- (d) The Rate of Return will be revised on 1 January in each other year of the Term to reflect changes in the following elements:
  - (i) risk free rate; and
  - (ii) debt margin.
- (e) The basis of the determination of the risk free rate and debt margin will be:
  - (i) consistent with the basis of determination approved by the ACCC as at the Commencement Date or, where applicable, as approved by the ACCC under **subsection (c)** above; and
  - (ii) relevant to a time frame for measurement immediately preceding 1 January of the relevant year.

#### 4.8 Unders and overs accounting

- (a) Unders or overs accounting is the outcome of the reconciliation of Access revenue with applicable Ceiling Limits undertaken by ARTC as part of the annual ACCC compliance assessment under **section 4.9**. ARTC will calculate the total unders or overs amount as part of its submission to the ACCC (**section 4.9(a)(ii)**). The amount may need to be adjusted in accordance with a determination by the ACCC.
- (b) For each Constrained Coal Customer, ARTC will:
  - (i) establish a Constrained Coal Customer Account;
  - (ii) determine the annual allocation of the total unders or overs amount to each Constrained Coal Customer in accordance with the methodology specified at (iii);
  - (iii) for the allocation of the total unders or overs amount, have regard to the proportion of revenue paid for Access Rights over the Constrained Network by each Constrained Coal Customer;
  - (iv) add or subtract the annual allocation for the calendar year from the opening balance in each applicable Constrained Coal Customer Account in determining the closing balance of the applicable Constrained Coal Customer Account for that calendar year;
  - (v) advise each Constrained Coal Customer of the details of its Constrained Coal Customer Account; and



- (vi) reconcile the Constrained Coal Customer Accounts by one of two methods, being:
  - (A) ARTC bringing the closing balance of each Constrained Coal Customer Account back to zero by refunding or collecting the applicable amount to or from, respectively, each Constrained Coal Customer; or
  - (B) mutual agreement between the parties, which must result in an outcome that is equitable for all Constrained Coal Customers.

#### 4.9 Annual ACCC compliance assessment

- (a) ARTC will submit to the ACCC by 30 April each year in respect of the previous calendar year:
  - (i) documentation detailing roll-forward of the RAB and the RAB Floor Limit, and comparisons between RAB and RAB Floor Limit; and
  - (ii) where documentation in (i) above demonstrates that RAB is at or below RAB Floor Limit, documentation detailing calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any allocation of the total unders and overs amount.
- (b) The ACCC will determine whether ARTC has undertaken:
  - (i) roll-forward of the RAB and RAB Floor Limit in accordance with the Undertaking and, where the roll forward is not in accordance with the Undertaking, determine what closing RAB or RAB Floor Limit would be in accordance with the Undertaking;
  - (ii) when required, the calculations relevant to reconciliation of Access revenue with the applicable Ceiling Limit and calculation of any allocation of the total unders and overs amount in accordance with the Undertaking, and where the calculations are not in accordance with the Undertaking, determine what total unders and overs amount or allocation would be in accordance with the Undertaking having regard to the operation of its unders and overs account;
  - (iii) in determining whether ARTC has complied with the provisions of **section 4.3** in rolling forward IRAB, ERAB, RAB or the RAB Floor Limit, the ACCC may have regard to the submissions of relevant industry participants to the consultation process in **section 6.4** in relation to any Capital Expenditure not endorsed by the RCG in accordance with **section 6.4(g)**, but not otherwise have regard to the submissions of relevant industry participants;
  - (iv) the ACCC will publish its findings on its website and/or circulate to Access Holders in relation to the matters for its determination; and
  - (v) ARTC will revise the closing RAB and manage Constrained Coal Customer Accounts in accordance with any determination by the ACCC.

#### 4.10 Structure of Charges - Coal Access Rights

For Coal Access Rights:

- (a) Charges may be on the basis of a combination of:
  - (i) actual usage on a per Train Path basis; and
  - (ii) a take or pay component on a per Train Path basis for the Access Rights contracted for under the Access Holder Agreement irrespective of whether the Access Holder uses all or any of the Access Rights.
- (b) Notwithstanding a commitment by the Access Holder to pay the take or pay component of the Charge for Access Rights contracted for under the Access Holder Agreement, the Access Holder may be entitled to a rebate of the take or pay component of the Charges paid following the application of monthly Pricing Zone-wide true-up tests and an annual individual reconciliation.
- (c) The Charges levied in respect of Coal Access Rights shall, subject to paragraph (d) shall not take into account the actual weight of a Train using the Train Path. The Charges shall be calculated on the most efficient size of Train as modelled by the HVCCC from time to time.
- (d) For the period ending 31 December 2014, transitional arrangements may be made by ARTC to ensure that the price per Train Path for rolling stock which is being used on the Network as at the date of this Access Undertaking is set on a basis which will achieve a consistent charge based on gross mass multiplied by distance (\$/gtkm) in respect of each Train Path used by such Trains.

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#### 4.11 Structure of Charges - Non-Coal Access Rights

For Non-Coal Access Rights:

- (a) Charges will comprise:
  - (i) a variable component, which is a function of distance and gross mass (\$/gtkm);
  - (ii) a flagfall component, which is fixed and specific to each Train service type and Segment (\$/km); and
  - (iii) an excess network occupancy component, which is a function of time (\$/hr or part thereof) sought by an Applicant for a Train Path on the Network, which is in excess of:
    - (A) a reasonable allowance for section run times for the applicable Train service type as determined by ARTC;
    - (B) dwells for crossing and passing other Trains as determined and made available by ARTC for the Train Path; and
    - (C) an allowance for the reasonable requirements for operational activities whilst the Train occupies the Network as prescribed in subsection (b),

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for a Pricing Zone.

- (b) Allowances for the reasonable requirements for operational activities whilst the Train occupies the Network for a Pricing Zone are:

Pricing Zone	Allowance for reasonable requirements for operational activities (hr)
Pricing Zone 1	to be advised
Pricing Zone 2	to be advised
Pricing Zone 3	to be advised

- (c) Subject to sub-section (d), the application of the excess network occupancy component relates only to the contracted Train Path, and not the utilisation of the Train Path.
- (d) In determining the excess network occupancy component, ARTC will prorate the flagfall component back to an amount per hour by reference to the total of section run times applicable to the relevant Segment to which the flagfall component applies.
- (e) Except as otherwise provided in the Access Agreement, the flagfall component and excess network occupancy component of the Charges, as applicable, are levied from the date ARTC grants access to the Train Path to the Access Holder until the expiry of that Train Path irrespective of whether such Train Path is utilised.
- (f) The excess network occupancy component will only apply where the Applicant seeks to contract a Train Path on the Network, which is in excess of:
- (i) a reasonable allowance for section run times for the applicable Train service type as determined by ARTC;
  - (ii) dwells for crossing and passing other Trains as determined and made available by ARTC for the Train Path; and
  - (iii) an allowance for the reasonable requirements for operational activities whilst the Train occupies the Network as prescribed in sub-section (b).
- (g) In relation to utilisation of a contracted Train Path, the excess network occupancy component will not be charged in instances where ARTC is not able to provide the contracted Train Path or an agreed substitute Train Path except where the failure to provide the contracted Train Path is a result of an Incident, Third Party Works or an emergency.
- (h) Notwithstanding the structure described above, all elements of the Charge are open to negotiation.

#### 4.12 Pricing Objectives

- (a) In determining Charges, ARTC will have regard to separate cost elements as follows:
  - (i) variable component of costs (“VCC”) being Direct Costs;
  - (ii) fixed component of costs (“FCC”) being fixed operating costs and Depreciation of, and return on, assets existing as at the Commencement Date; and
  - (iii) new capital component of costs (“NCC”) being Depreciation of, and return on, assets commissioned during the Term.
- (b) In determining Charges, ARTC will have regard to the following objectives:
  - (i) achieving full recovery of VCC from all Access Holders on the basis of actual network usage;
  - (ii) achieving maximum recovery of (or contribution to) FCC and NCC from all users;
  - (iii) provide certainty to ARTC through the application of a take or pay (“TOP”) component to fully recover NCC over the economic life of new investments, and recover some or all of FCC from applicable Access Holders (coal users) on the basis of forecasted network usage, or otherwise recover some or all of FCC on the basis of actual network usage;
  - (iv) the proportion of FCC recovered through a TOP component to be consistently applied to all Access Holders holding Coal Access Rights within a Pricing Zone; and
  - (v) provide for an open and equitable mechanism for the application of TOP Charges.

#### 4.13 Indicative Access Charge

- (a) ARTC will determine for each year Indicative Access Charges for Coal Access Rights with certain characteristics (“**Indicative Services**”) established in consultation with the HVCCC having regard to delivery of optimal Coal Chain Capacity, given certain coal chain assumptions agreed with the HVCCC. Coal chain assumptions applicable to the Indicative Service will include the following
  - (i) maximum axle load;
  - (ii) maximum speed;
  - (iii) Train length; and
  - (iv) section run times.
- (b) There may be more than one Indicative Service and Indicative Access Charge within a Pricing Zone. Indicative Service assumptions and Indicative Access

Charges would apply to all Segments within a Pricing Zone. Indicative Service assumptions and Indicative Access Charges may both vary between Pricing Zones.

- (c) Once Indicative Access Charges for Indicative Services are finalised in accordance with **section 4.17**, ARTC will publish Indicative Access Charges on its website in the following format:

Note: These Charges are exclusive of GST.

Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Indicative Service Assumptions
<b>In Pricing Zone 1*</b>			
Indicative Service 1	X.XXX	X.XXX	XXXXXXXXXX
Indicative Service 2	X.XXX	X.XXX	XXXXXXXXXX
<b>In Pricing Zone 2*</b>			
Indicative Service	X.XXX	X.XXX	XXXXXXXXXX
<b>In Pricing Zone 3*</b>			
Indicative Service	X.XXX	X.XXX	XXXXXXXXXX

\*Pricing Zones contain Segments as specified at Schedule E

- (d) ARTC will offer the applicable Indicative Access Charges described in **section 4.13(c)** above to Applicants seeking Coal Access Rights with applicable Indicative Service characteristics.

#### 4.14 Charge differentiation

- (a) In formulating its Charges, ARTC will have regard to a range of factors which impact on its business and Coal Chain Capacity including:
- (i) the particular characteristics of the relevant Service intended to utilise the Access Rights sought, which include axle load, speed, wheel diameter, Train length, origin and destination (including number and length of intermediate stops), departure and arrival times and days of the week;
  - (ii) in relation to Coal Access Rights, the Indicative Access Charges for Indicative Services as applicable;

- (iii) the commercial impact on ARTC's business which includes:
    - (A) the term of the Access Agreement;
    - (B) the potential for growth of the business;
    - (C) the opportunity costs to ARTC;
    - (D) the consumption of ARTC's resources, including Capacity;
    - (E) in relation to Coal Access Rights, the consumption of Coal Chain Capacity;
    - (F) the credit risk associated with the business;
    - (G) the market value of the Train Path sought;
    - (H) the Segments of the Network relevant to the Access Rights being sought; and
    - (I) previously negotiated Charges agreed under the terms of this Undertaking, where relevant, as published by ARTC as set out in **section 2.7(b)**;
  - (iv) logistical impacts on ARTC's business which includes:
    - (A) the impact on other Services and risk of failure of the endorsed Operator to perform its obligations under the Operator Sub-Agreement; and
    - (B) reduced Capacity and, in relation to Coal Access Rights, reduced Coal Chain Capacity and system flexibility;
  - (v) capital or other contributions by the Applicant to ARTC's costs; and
  - (vi) the cost of any Additional Capacity.
- (b) For the purposes of **sections 4.14(a)(iii)(D)** and **(E)** and **section 4.14(a)(iv)(B)** above, ARTC will have regard to the optimal use of the Network for Indicative Services with the objective of optimising Coal Chain Capacity. As such, ARTC will determine the Capacity and Coal Chain Capacity consumption associated with the utilisation of Coal Access Rights with characteristics other than that of Indicative Services having regard to the Capacity and Coal Chain Capacity consumption of Indicative Services on the Network.
- (c) If an Access Holder disagrees with a Charge formulated by ARTC, other than an Indicative Access Charge, then the Access Holder may give ARTC a Dispute Notice within twenty (20) Business Days of being notified of the Charge and the dispute will be resolved by arbitration in accordance with **section 3.15(c)** of the Undertaking.
- (d) If the Dispute Notice given under **section 4.14(c)** concerns Coal Access Rights in a Pricing Zone and ARTC receives Dispute Notices from Access Holders holding two thirds or more of the contracted gtkm for Indicative Services in that Pricing

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Zone in accordance with the requirements in **section 4.17(c)**, then a dispute notified under **section 4.14(c)** will be stayed pending the arbitrator's determination of the dispute notified under **section 4.17(c)**.

#### 4.15 Limits on Charge differentiation

- (a) Subject to **sections 4.14(a)** and **(b)** above, and to ARTC having an obligation under clause 3.4 of the Indicative Access Holder Agreement, ARTC will not, in formulating its Charges, have regard to:
  - (i) the identity of the Applicant; and
  - (ii) whether or not the Applicant is a Government Authority.
- (b) Subject to **sections 4.14(a)** and **(b)**, in formulating its Charges, ARTC will not differentiate between Applicants in circumstances where:
  - (i) the characteristics of the Access Rights sought are alike; and
  - (ii) the Applicants are operating within the same end market.

ARTC will determine whether the characteristics of Access Rights are alike having regard to matters including location, duration and quality of the Train Path, nature of Train consist, characteristics of the Service intended to use the Access Rights sought, longevity of Access Rights, arrival and departure times of the day and week.

#### 4.16 Interim Indicative Access Charges

- (a) ARTC recognises that at the Commencement Date it may be unable to determine Indicative Services and Indicative Access Charges, and Charges applicable to other Services associated with Coal Access Rights, in accordance with **sections 4.13, 4.14** and **4.15**, due to current institutional arrangements, available modelling tools, and timing constraints.
- (b) During the period between the Commencement Date and the time when ARTC is satisfied it is able to determine Indicative Services, Indicative Access Charges, and Charges applicable to other Services associated with Coal Access Rights, in accordance with **sections 4.13, 4.14** and **4.15** ("**the Interim Period**"), ARTC will, using reasonable endeavours, and having regard to available information, determine:
  - (i) Indicative Services ("**Interim Indicative Services**") and Indicative Access Charges ("**Interim Indicative Access Charges**") applicable during the Interim Period; and
  - (ii) Charges for other Services associated with Coal Access Rights applicable during the Interim Period.
- (c) In determining Interim Indicative Access Charges and Charges for other Services associated with Coal Access Rights during the Interim Period under **section 4.16(b)**, ARTC will have regard to the following constraints:

- (i) the institutional arrangements in place for the management and development of Coal Chain Capacity;
  - (ii) the availability of appropriate modelling tools, and necessary input information for such tools, enabling the determination of Coal Chain Capacity and optimum utilisation of Coal Chain Capacity; and
  - (iii) the availability, cost of obtaining, and quality of information reasonably required by ARTC for the purpose of determining Interim Indicative Services and Interim Indicative Access Charges and Charges for other Services associated with Coal Access Rights applicable during the Interim Period.
- (d) Interim Indicative Access Charges for Coal Access Rights with Interim Indicative Service characteristics as described in **section 4.14(e)** will be determined by ARTC each calendar year of the Interim Period
- (e) The following Interim Indicative Access Charges for Interim Indicative Services will apply as at 1 July 2009.

<b>Segments</b>	<b>Non-TOP \$/kgtkm (ex GST)</b>	<b>TOP \$/kgtkm (ex GST)</b>	<b>Indicative Service Assumptions</b>
<b>In Pricing Zone 1*</b>			
Indicative Service 1	X.XXX	X.XXX	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 91 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 2	X.XXX	X.XXX	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable
Indicative Service 3	X.XXX	X.XXX	25 tonne maximum axle load 80kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable
<b>In Pricing Zone 2*</b>			
Indicative Service 1	X.XXX	X.XXX	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 91 wagon train length section run times as per applicable

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Segments	Non-TOP \$/kgtkm (ex GST)	TOP \$/kgtkm (ex GST)	Indicative Service Assumptions
			Hunter Valley standard working timetable
Indicative Service 2	X.XXX	X.XXX	30 tonne maximum axle load 60kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable
<b>In Pricing Zone 3*</b>			
Indicative Service 1	X.XXX	X.XXX	25 tonne maximum axle load 80kph maximum speed (loaded) 80kph maximum speed (empty) 72 wagon train length section run times as per applicable Hunter Valley standard working timetable

- (f) ARTC will offer the Interim Indicative Access Charges to Applicants seeking Coal Access Rights with applicable Interim Indicative Services during the Interim Period.
- (g) At least three (3) months prior to the termination of the Interim Period, ARTC will submit to the ACCC for approval, Indicative Access Charges for Indicative Services to apply in the year following the Interim Period.
- (h) The Indicative Access Charges for Indicative Services will apply in the year following the Interim Period when accepted by the ACCC.

#### 4.17 Process for finalising Indicative Access Charges

- (a) Before the start of each calendar year:
- (i) ARTC will seek forecast coal volumes and likely distribution of volumes across its Operators from each Access Holder for Coal Access Rights. ARTC will have regard to this information (to the extent provided) to forecast actual gross tonnes for Coal Trains in the next calendar year for each Pricing Zone; and
  - (ii) ARTC will determine its annual forecast of costs for the Network in each Pricing Zone which are to be recovered by ARTC in the next calendar year;
- (b) The Indicative Access Charges determined by ARTC under **section 4.13** will be based on the forecasts under **paragraph (a)**.
- (c) ARTC will notify forecasts under **paragraph (a)** and the Indicative Access Charges to those Access Holders holding Coal Access Rights for Indicative

Services at least twenty (20) Business Days before the Indicative Access Charges are due to take effect.

- (d) If Access Holders holding two thirds or more of the contracted gtkm for Indicative Services in the relevant Pricing Zone for the next calendar year give ARTC a Dispute Notice within twenty (20) Business Days of being notified of the Indicative Access Charges setting out that they disagree with the Indicative Access Charges for that Pricing Zone, then the dispute will be resolved by arbitration under **section 3.15(c)**. If less than two thirds of those Access Holders give a Dispute Notice within the required time for a Pricing Zone, the Indicative Access Charges as notified for that Pricing Zone are final and not subject to arbitration under **section 3.15(c)**. Additional Capacity in the Pricing Zone which has been contracted on a conditional basis and which will not be commissioned in the next calendar year will not count towards the two thirds test.
- (e) ARTC will promptly publish the final Indicative Access Charges on its website in the format set out in **section 4.13(c)**:
  - (i) if there is no arbitration - following the end of the thirty (30) Business Day dispute period; or
  - (ii) if there is an arbitration - following the determination by the arbitrator.
- (f) For the Interim Period, all references to Indicative Services and Indicative Access Charges in this **section 4.17** will be read as Interim Indicative Services and Interim Access Charges respectively and all references to **section 4.13** will be read as references to **section 4.16** as appropriate.

## 5 CAPACITY MANAGEMENT

### 5.1 System Assumptions

ARTC must work with the coal terminal operators at the Port of Newcastle to develop a common set of System Assumptions for the Hunter Valley Coal Chain to be used as a single consistent basis for the allocation of capacity on the Network and at each coal terminal at the Port of Newcastle. The System Assumptions must set out reasonable and realistic assumptions for the performance of each element of the Hunter Valley Coal Chain, including the mode of operation of the Hunter Valley Coal Chain and the performance of the individual elements which make it up, including loading points, the Network, rail haulage capacity and the unloading facilities. The development of the System Assumptions may be undertaken through the HVCCC. ARTC must use its reasonable endeavours to agree the System Assumptions with the coal terminal operators.

### 5.2 Capacity Analysis

- (a) A Capacity Analysis will be undertaken by ARTC as part of the preparation of the Indicative Access Proposal. The Capacity Analysis must be made on the basis of the System Assumptions. The Capacity Analysis will identify whether, indicatively, there is sufficient Available Capacity to meet the Applicant's request for Access Rights and, if not, indicatively, the extent to which Additional Capacity is required.

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- (b) Where ARTC believes that there are major impediments to the provision of Additional Capacity to meet an Applicant's request, and that the Additional Capacity that might be necessary would have a significant bearing on the economics of the proposed operation, the Capacity Analysis may be done in more detail which may require more time for the preparation of the Indicative Access Proposal (**section 3.10**). Where a Capacity Analysis is to be done in more detail pursuant to this section, ARTC may charge a fee that is based on reasonable cost and agreed with the Applicant.
- (c) The finalisation of the Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, Train Paths, Charges and terms and conditions of the resultant Access Agreement.
- (d) As part of undertaking its Capacity Analysis, ARTC will consult the HVCCC and will take into account the HVCCC's comments on the availability of Coal Chain Capacity.

### 5.3 Capacity Reservation

- (a) Where an Applicant seeks to execute an Access Agreement relating to new or additional Access Rights more than 6 months prior to utilising those Access Rights and there is sufficient Available Capacity to accommodate those Access Rights until they are utilised such that ARTC is effectively reserving the Capacity equivalent to the Access Rights sought for the Applicant until those Access Rights are utilised, ARTC will, at its absolute discretion, execute the Access Agreement, or an amendment to the Access Agreement covering the Access Right requested, subject to the Applicant agreeing to pay any Reservation Fee that may be sought by ARTC in relation to the period between execution of the Access Agreement and utilisation of the Access Rights.
- (b) In determining the Reservation Fee, ARTC will have regard to the opportunity cost foregone in relation to the reserved Access Rights (which would normally consider the extent of potential revenue lost by ARTC through average utilisation of the Access Rights not available to another user), the period of the reservation, and other demand for the Access Rights. The Reservation Fee will be no greater than 75% of the Indicative Access Charge applicable to the Pricing Zone where the Access Rights are sought, applied to the use of the reserved Access Rights had those Access Rights been utilised by the most commonly utilised Indicative Service for the period of reservation. The Reservation Fee will be reduced to the extent of any utilisation of the Access Rights during the period.

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### 5.4 Shortfall in existing Capacity

- (a) Where there is a shortfall in Capacity to meet all unconditional Capacity Entitlements and ARTC expects that such shortfall will be for a duration of ~~two (2)~~ days or less, ARTC will allocate the Capacity available in accordance with the following principles:
  - (i) Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*, where the Network has sufficient capacity to meet those Access Holders' Capacity Entitlements;

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- (ii) Capacity remaining after the allocation of Capacity under **subsection (i)** will be allocated to Access Holders at ARTC's discretion taking into account ARTC's contractual obligations under Access Agreements and any impact on the efficient utilisation of Capacity and Coal Chain Capacity.
- (b) Where there is a shortfall in Capacity to meet all unconditional Capacity Entitlements and ARTC expects that such shortfall will be for a duration of more than two (2) days, ARTC will allocate the Capacity available in accordance with the following principles:
- (i) Capacity will be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act 1988 (NSW)*, where the Network has sufficient capacity to meet those Access Holders' Capacity Entitlements;
  - (ii) Capacity remaining after the allocation of Capacity under **subsection (i)** will be allocated on an equitable prorate basis according to each Access Holder's unconditional and unused Capacity Entitlements applying immediately before the shortfall arose.
- (c) For the purposes of **sub-sections (a) and (b)**, the Capacity Entitlement held by an Access Holder will be considered an unconditional Capacity Entitlement if all conditions precedent to the conferral of that Capacity Entitlement on the Access Holder under the terms of the relevant Access Agreement, including the completion of designated projects, have been satisfied, or waived by ARTC.
- (d) In the event of any shortfall in Capacity, ARTC will co-ordinate through the HVCCC with the other Hunter Valley Coal Chain infrastructure providers to co-ordinate their responses to the shortfall.

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## 5.5 Shortfall in creation of Additional Capacity

Where there is a delay in the completion of a project creating Additional Capacity such that some, but not all, Additional Capacity becomes available, that Capacity will be allocated among the Access Holders who have Capacity Entitlements to the Additional Capacity on an equitable prorate basis. By way of example, if one Access Holder had 60% of all contracted Capacity Entitlements to the Additional Capacity created by that project, then 60% of the available Additional Capacity will be allocated to that Access Holder.

## 5.6 Capacity resumption, relinquishment and transfer

- (a) The terms of the Access Agreement will provide that ARTC may reduce the Capacity Entitlement of an Access Holder where an Access Holder has under-utilised the Capacity Entitlement granted to it under that Access Agreement. Any decision by ARTC in this regard is subject to the dispute resolution provision in the Access Agreement.
- (b) An Access Holder may also reduce its Capacity Entitlement in accordance with the terms of the Access Agreement.

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- (c) A Capacity Entitlement may be assigned or traded by an Access Holder to a third party in accordance with the assignment or trading provisions of that Access Agreement.

## 5.7 HVCCC reviews

- (a) The HVCCC may participate in each Capacity Analysis and undertake regular reviews of the Committed Capacity and Available Capacity, and ARTC must provide such access, information and assistance as the HVCCC reasonably requires for the purposes of such participation and reviews, including access to all Access Agreements, at no cost to the HVCCC.
- (b) ARTC must provide the HVCCC with at least 30 Business Days' notice of each Capacity Analysis which it carries out to enable HVCCC to participate in the process.
- (c) ARTC must have regard to the HVCCC's recommendations in respect to its Capacity Analyses.

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## 5.8 Capacity Transfer Working Group

ARTC will work with the coal terminal operators at the Port of Newcastle, and coal producers, to develop a capacity transfer system for the transfer of capacity at the terminals and on the Network. HVCCC may be assigned as the administrator of the capacity transfer system. ARTC must update its Access Agreements in respect of Coal Access Rights to be consistent with the capacity transfer system developed, provided it is acceptable to ARTC (acting reasonably).

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# 6 NETWORK CONNECTIONS AND ADDITIONS

## 6.1 Network connections

- (a) In the event that other owners of track not part of the Network wish to connect such track to the Network, ARTC will consent to such a connection provided:
- (i) all relevant approvals from all relevant Government Authorities have been obtained;
  - (ii) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity);
  - (iii) procedural and physical interface arrangements comply with ARTC's existing interface arrangements and there is no impact on safety;
  - (iv) the owners of track not part of the Network ensure that all users of such track comply with the directions of ARTC's Network controllers regarding entry to and exit from the Network;
  - (v) the connection meets ARTC's engineering and operational standards; and

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- (vi) the owners of track not part of the Network meet the initial and continued costs associated with constructing and maintaining the connection.
- (b) If ARTC has refused consent under **section 6.1(a)(ii)**, ARTC will, if requested to do so by the Applicant, notify the Applicant in writing of the reasons why the connection would, in its view or the view of the HVCCC, reduce Capacity or Coal Chain Capacity.

## 6.2 Additional Capacity sought by Applicants

- (a) As provided in **sections 3.9** and **5.1**, ARTC will consider, as part of the negotiation process with an Applicant, any requests for Additional Capacity. ARTC will consent to the provision of Additional Capacity if:
  - (i) in ARTC's opinion, such provision is commercially viable to ARTC having regard to the relevant Access Agreement and ARTC's total business activity; or
  - (ii) the Applicant agrees to meet the cost of the Additional Capacity; and
  - (iii) the Additional Capacity of the Network is, in the opinion of ARTC, technically and economically feasible, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity or Coal Chain Capacity (in assessing Coal Chain Capacity, ARTC will consult the HVCCC, and take into account HVCCC's comments on any reduction of Coal Chain Capacity), meets ARTC's engineering and operational standards and does not compromise ARTC's legitimate business interests.
- (b) In the event ARTC agrees to the creation of Additional Capacity, ARTC's costs of providing that Additional Capacity will be met:
  - (i) by the Applicant reimbursing the relevant costs as and when they are incurred by ARTC;
  - (ii) through increased Charges, or making other periodic payments, reimbursing ARTC for recurring costs, plus an annuity in advance calculated by application of the relevant Rate of Return to ARTC's capital outlay; or
  - (iii) by such other way that ARTC and the Applicant agree, including take or pay arrangements requiring financial commitment by the Applicant to the Additional Capacity over the economic life of that Additional Capacity.
- (c) The option of increasing Charges or making periodic payments including an annuity as set out in **sub-section (b)(ii)**, or some other arrangement as agreed under **sub-section (b)(iii)** is only available to an Applicant if arrangements are made which satisfy ARTC that the risk of the Applicant failing to make such payments is commercially acceptable and is at ARTC's discretion.
- (d) Any Additional Capacity, once created, will be owned and managed by ARTC.

- (e) Where requested to do so by an Applicant, ARTC will provide the Applicant written reasons for the basis of decisions made by it in relation to Additional Capacity.
- (f) If Additional Capacity is subsequently used by another Access Holder, ongoing maintenance and capital cost will be shared from the time of the subsequent use and on the basis of the relative beneficial use of the additional capacity, where total Access revenue exceeds the Ceiling Limit for the relevant Pricing Zone.
- (g) Where the Additional Capacity is initially funded by a capital contribution as contemplated in subsection (b)(i), an equitable form of reconciliation between a subsequent user and the Applicant or Access Holder may apply, where total Access revenue exceeds the Ceiling Limit for the relevant Pricing Zone.
- (h) Additional Capacity sought by Applicants may be governed by separate agreements outside of the Indicative Access Holder Agreement forming part of the Undertaking.

### 6.3 Additional Capacity recommended by the HVCCC

- (a) ARTC will cooperate with the HVCCC in planning expansions of Capacity and Coal Chain Capacity.
- (b) Where the HVCCC recommends an investment to provide Additional Capacity to the Network, ARTC will consent to the provision of Additional Capacity if:
  - (i) in ARTC's opinion, such provision is commercially viable to ARTC having regard to the relevant Access Agreements and ARTC's total business activity (commercial viability would normally be based upon endorsement by the HVCCC's Rail Capacity Group ("the RCG") as contemplated in **section 6.4**, and sufficient take or pay commitments contracted by applicable Access Holders to recover NCC associated with the Additional Capacity over the economic life of the Additional Capacity); and
  - (ii) the Additional Capacity of the Network is, in the opinion of ARTC, technically and economically feasible, consistent with the safe and reliable operation of the Network, will not impact on the safety of any user of the Network, does not reduce Capacity or Coal Chain Capacity, meets ARTC's engineering and operational standards and does not compromise ARTC's legitimate business interests.

### 6.4 Industry consultation

- (a) **Overview**
  - (i) In relation to Additional Capacity sought under **section 6.2** or Additional Capacity identified by ARTC, ARTC will undertake the stages of consultation set out in **sections 6.4(d) to (g)** below. In relation to Additional Capacity sought under **section 6.3**, ARTC will undertake the stages of consultation set out in **sections 6.4(c) to (g)** below.
  - (ii) The objectives of the consultation process are to:

- (A) inform Hunter Valley Coal Chain participants of Additional Capacity requirements and investment strategies;
  - (B) provide a process for Hunter Valley Coal Chain participant input; and
  - (C) provide a process for the applicable industry participants to endorse Capital Expenditure incurred by ARTC in providing Additional Capacity as Prudent.
- (iii) The depth of analysis and documentation prepared at each stage of consultation will reflect the cost, benefits and risks of that option or project.
  - (iv) Where ARTC considers that the process set out below would unjustifiably compromise timely delivery of the project, ARTC may adopt a modified consultation process for that project and advise the RCG accordingly. In particular, where ARTC considers that a project is minor in its scope or cost, that project may be considered with other minor projects and ARTC will consult on the group of minor projects rather than each minor project individually.
  - (v) Any endorsed costs incurred in complying with the provisions of this **section 6.4** will normally be included in the RAB where an option or project is commissioned, or otherwise expensed in the year incurred.
  - (vi) ARTC will reasonably endeavour, to the extent within its control, undertake the stages of consultation set out in **sub-sections (b) to (g)** below as applicable, having regard to the objective of delivering Capacity in line with demand as forecasted by the industry, or as sought by an Applicant.

(b) **The RCG**

- (i) ARTC will convene, and conduct, regular monthly meetings with the RCG for the purpose of consulting with applicable industry representatives and obtaining endorsement of Additional Capacity. ARTC will prepare an agenda for meetings and provide a secretariat. ARTC may seek to consult or seek endorsement from the RCG outside of regular monthly meeting where ARTC considers this will assist project development and delivery.
- (ii) At the commencement of this Undertaking, the RCG will comprise the following membership (as selected by the industry). One representative of:
  - (A) each Access Holder with more than 10% of contracted coal GTK on the Network;
  - (B) all Access Holders with less 10% of contracted coal GTK on the Network;
  - (C) each Operator, in its capacity as an Operator, with more than 10% of contracted coal GTK on the Network who is not an Access Holder

with more than 10% of contracted coal GTK on the Network (in a non-voting capacity).

- (iii) The composition of the RCG may change from time to time as agreed by ARTC and the current members of the RCG at the time. RCG members may or may not be participants in the HVCCC.
- (iv) Only those RCG members who represent Access Holders will be entitled to vote and each RCG member will vote in accordance with the wishes of Access Holders that it is representing, or, where the Access Holder is an Operator, those Coal Customers on whose behalf the Access Rights are held. RCG member voting will be weighted on the basis of contracted coal GTK, in the Pricing Zone in which a project is proposed to occur, and coal GTK expected to be generated in the Pricing Zone following completion of the proposed project.
- (v) The RCG will be involved at each stage of project development and will have the opportunity to endorse each stage before ARTC proceeds to the next stage.
- (vi) ARTC may elect to continue to the next stage of project development without RCG endorsement. Where this occurs, any subsequent expenditure incurred by ARTC on project development or delivery may only be included in the RAB or expensed when incurred with the approval of the ACCC.

**(c) HVCCC**

ARTC will also conduct regular meetings with the HVCCC to co-ordinate its expansion strategy with expansions at the Port of Newcastle, and other changes affecting the System Assumptions. The goal of the discussions will be to ensure, so far as possible, the alignment of port and track capacity and to optimise future investment options, including by:

- (i) reducing delivery times;
- (ii) reducing adverse impact on Hunter Valley Coal Chain Capacity;
- (iii) reducing risk; and
- (iv) reducing cost.

taking account of the performance of the Hunter Valley Coal Chain as a whole,

**(d) Hunter Valley corridor capacity strategy**

- (i) ARTC will develop a Hunter Valley corridor capacity strategy annually.
- (ii) In developing the Hunter Valley corridor capacity strategy, ARTC will base the strategy on the rolling annual capacity forecast developed by the RCG, which will:
  - (A) be based on demand forecasts by existing and prospective coal producers;

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- (B) be aligned with Newcastle port terminal capacity forecasts; and
  - (C) identify maximum future capacity requirement.
- (iii) The Hunter Valley corridor capacity strategy will include capacity expansion options which:
- (A) seek to ensure sufficient Capacity to meet coal producers' combined demand forecasts;
  - (B) take into consideration preferred outcomes of the Coal Chain Master Plan existing capability and future investment commitments in other parts of the coal supply chain, and a reasonable assessment of sunk assets and the costs and risks associated with fluctuations in coal demand and volumes;
  - (C) include a preliminary high level assessment of objectives, and an indicative cost estimate and benefits;
  - (D) include an estimate of cost to be incurred in the Concept Assessment stage; and
  - (E) recommendation of the preferred options.
- (iv) ARTC may seek formal endorsement from the RCG of identified preferred options in the Hunter Valley corridor capacity strategy to proceed to Concept Assessment and for the reasonable costs of undertaking the Concept Assessment to be included in the RAB or expensed in the year incurred.

**(e) Concept Assessment**

- (i) For each option endorsed above at **section 6.4(c)(iv)** and each project creating Additional Capacity accepted by ARTC under **section 6.2(a)**, ARTC will provide a concept assessment report to the RCG.
- (ii) The objective of the concept assessment report will be to enable a preliminary assessment of the potential costs, benefits and risk involved and may include an indicative assessment of:
  - (A) project objectives;
  - (B) broad cost estimates and associated benefits;
  - (C) preliminary financial analysis; and
  - (D) preliminary risk assessment.
- (iii) ARTC may seek endorsement from the RCG to proceed to project feasibility. Endorsement to proceed to project feasibility would include:
  - (A) endorsement of ARTC's actual costs incurred in undertaking concept assessment;

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- (B) endorsement for ARTC's estimated costs to undertake project feasibility,

to be included in the RAB or expensed in the year incurred.

#### (f) **Project Feasibility**

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- (i) For each option endorsed at the concept assessment stage, ARTC will provide a project feasibility report to the RCG.
- (ii) The project feasibility report may include:
  - (A) confirmation of project objectives, including a preliminary functional specification;
  - (B) brief outline of scope;
  - (C) identification of estimated project costs (with a +/-20% range);
  - (D) potential benefits, including capacity, maintenance and operating benefits;
  - (E) preliminary risk assessment;
  - (F) preliminary project management plan, including initial estimate of timeline for milestones;
  - (G) details of any variation to the budgeted costs to undertake Project Feasibility;
  - (H) outline of Project Assessment stage, including an estimate of budget.
- (iii) ARTC may seek formal endorsement from the RCG to proceed to project assessment. Endorsement to proceed to project assessment would include:
  - (A) endorsement of ARTC's actual costs incurred in undertaking project feasibility;
  - (B) endorsement for ARTC's estimated costs to undertake project assessment,

to be included in the RAB or expensed in the year incurred.

#### (g) **Project Assessment**

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- (i) For each option endorsed at the project feasibility stage, ARTC will provide a project assessment report for endorsement to the RCG.
- (ii) The project assessment report will include:
  - (A) project objectives report, including functional specification;
  - (B) scope of work report, including:

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- (i) assessment of technical and operating requirements;
  - (ii) developed concept design, with survey if required; and
  - (iii) independent design verification if required;
- (C) project budget with a+/-10% margin or a larger margin where appropriate for larger projects, an estimate of contingency supported by risk assessment, cost analysis, and basis for contingency;
- (D) financial evaluation, including estimated impact on access pricing;
- (E) developed project management plan which may include:
- (i) project configuration management plan;
  - (ii) project delivery strategy;
  - (iii) resource management plan;
  - (iv) cost management plan;
  - (v) quality management plan;
  - (vi) safety management plan;
  - (vii) procurement management plan;
  - (viii) interface management plan;
  - (ix) scope and budget change management plan; and
  - (x) environmental plan;
- (F) project risk assessment report; and
- (G) Regulators notification, if needed.
- (iii) ARTC may seek formal endorsement from the RCG to proceed to project implementation. Endorsement to proceed to project implementation would include:
- (A) endorsement of ARTC's actual costs incurred in undertaking project assessment;
  - (B) endorsement of any variation between the endorsed estimated cost range identified during project assessment and the project budget identified during project feasibility, and
  - (C) endorsement of ARTC estimated costs to comply with the provisions of project implementation, including costs incurred in obtaining independent expert determination as applicable

to be included in the RAB or expensed in the year incurred.

**(h) Project Implementation**

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**(i) Procurement**

- (A) ARTC may, at its discretion, commence procurement in parallel with project assessment, prior to endorsement to proceed to project implementation.
- (B) For each project endorsed at the project assessment stage, ARTC will undertake, through a tender process, alliance or internal evaluation, detailed confirmation of project scope and cost.
- (C) Where a cost outside of the range, or contingency endorsed in the project assessment stage is confirmed ARTC will seek the endorsement of the RCG for that variation.
- (D) Where ARTC undertakes confirmation of scope and cost through an alliance or internal evaluation, the RCG may, at its cost, seek to review the scope and cost, having regard to all elements of the selected method of project delivery.
- (E) Where the RCG endorses less than the cost confirmed at **section 6.4(g)(i)(C)**, ARTC may refer the matter to an agreed independent expert for a determination as to whether the variation is Prudent, in accordance with **section 6.4(g)(iv)**.
- (F) Upon the independent expert deciding on cost to be taken as Prudent in accordance with **section 6.4(g)(i)(E)**, ARTC will proceed with project implementation.
- (G) Any cost of delay resulting from following this process will be deemed a Prudent direct cost to the project.

**(ii) Project initiation**

ARTC will finalise the project management plan developed during project assessment, including a contract management plan and operational readiness plan.

**(iii) Alignment**

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ARTC will use its reasonable endeavours to consult with the port facility providers to co-ordinate projects with any relevant project at the Port of Newcastle which is necessary for sufficient Network Exit Capability to exist in order for ARTC's project to be fully utilised. ARTC will use its reasonable endeavours to co-ordinate the completion of its projects with the completion of any such projects at the Port of Newcastle as far as is reasonably practicable, so as to minimise the period during which port and track capacity are not aligned.

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(iv) **Project delivery**

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- (A) ARTC will implement the project management plan.
- (B) ARTC will provide progress reports to the RCG at RCG meetings, the nature and frequency of which will be agreed with the RCG. A progress report may include
  - (i) a report on the physical status of work commenced;
  - (ii) an assessment of remaining time and required resources to complete the project;
  - (iii) an assessment of expected resource availability;
  - (iv) identification of any issues; and
  - (v) exceptions, where ARTC would advise the RCG that the project will deviate outside of its planned cost or timing tolerance margins.
- (C) Where a variation to the endorsed project budget identified at **section 6.4(f)(ii)(C)** including contingency, or an endorsed variation at **section 6.4(g)(i)(C)** or arising from a review by an independent expert at **section 6.4(g)(i)(E)**, arises:
  - (i) ARTC may cease construction (where applicable) to submit a revised costing to the RCG for endorsement having regard to the prudence of the variation.
  - (ii) the RCG may endorse all or part of the variation.
  - (iii) Where the RCG endorses less than the full variation, ARTC may refer the matter to an agreed independent expert for review in accordance with **section 6.4(g)(iv)**.
  - (iv) The review of the independent expert will have regard to whether the variation is Prudent.
  - (v) Upon the independent expert deciding on the extent of the variation to be taken as Prudent, ARTC will proceed with Project Implementation.
  - (vi) Any cost of delays resulting from following this process will be deemed a Prudent direct cost to the project.

(v) **Independent expert review**

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- (A) Unless the parties agree otherwise, where ARTC refers a matter to an agreed independent expert under **section 6.4(g)(i)(E)** or **section 6.4(g)(iii)(C)(iii)**, the independent expert will:
  - (i) act as an expert and not an arbitrator;

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- (ii) proceed as quickly as possible and consistent with a fair and proper assessment of the matter;
- (iii) observe the rules of natural justice but will not be required to observe the rules of evidence;
- (iv) while having the right to decide on the form of presentations, encourage a written presentation by each party to be exchanged with the other party, with the opportunity for each party to respond to the other party's presentation; and
- (v) have regard to the principles, methodologies and provisions set out in the Undertaking.

(B) The finding of the independent expert will be final and binding on the parties subject to any rights of review by a court of law.

**(vi) Commissioning**

- (A) ARTC will commission the project into operation upon completion of project delivery; and
- (B) where the project is large and an extended delivery time frame is considered necessary, ARTC may propose to a staged delivery of the project where, upon commissioning of any stage, ARTC may expense financing costs in the year of that commissioning.

**(i) Project close-out**

- (i) Upon completion of project implementation, ARTC will provide a project close-out report for the RCG. A project close-out report may include:
  - (A) formal acceptance of works;
  - (B) outstanding works and if necessary a completion plan;
  - (C) cost report; and
  - (D) verification of benefits delivered.
- (ii) Any Capital Expenditure incurred by ARTC in providing Additional Capacity that is within the cost range, including any contingency endorsed at the Project Assessment stage, or endorsed by the RCG or determined by the independent expert at the project implementation stage, will be taken as prudent.
- (iii) Where Additional Capacity is provided in relation to a particular Pricing Zone, the endorsement of coal producers that hold Coal Access Rights under an Access Holder Agreement, either directly or through RCG representatives, with over 50% of contracted coal gtkm in that Pricing Zone will constitute endorsement by the RCG.

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- (iv) Where Additional Capacity (delivered by way of a single project or series of projects) is provided in relation to a particular Pricing Zone, and that Additional Capacity results in an increase in the Indicative Access Charge for that Pricing Zone by more than 10%, the endorsement of Coal Customers that hold Coal Access Rights under an Access Holder Agreement, either directly or through RCG representatives, with over 70% of contracted coal gtkm in that Pricing Zone will constitute endorsement by the RCG.

## 7 NETWORK TRANSIT MANAGEMENT

### 7.1 Medium Term Capacity Management

- (a) ARTC will undertake medium term capacity planning and will develop the Master Train Plan (“MTP”) having regard to:
  - (i) Capacity Entitlements under existing Access Holder Agreements;
  - (ii) Capacity Entitlements under other Access Agreements; and
  - (iii) the Hunter Valley corridor capacity strategy.
- (b) ARTC will provide the MTP to the HVCCC to assist it in day-to-day scheduling of Trains.

### 7.2 Short Term Capacity Management

(a) ARTC will undertake short term capacity planning, including the development of the Daily Train Plan (“DTP”), having regard to:

- (i) the MTP;
- (ii) any relevant input provided by the HVCCC; and
- (iii) the Network Management Principles (“NMP”s).

(b) Train movements from a coal terminal at the Port of Newcastle to coal mines (or vice versa) must not be planned in the DTP unless ARTC (taking account of the advice of the HVCCC) is satisfied that there is in place in respect of that Train each of the following:

- (i) sufficient Access Rights;
- (ii) sufficient Network Exit Capability at a coal terminal at the Port of Newcastle in respect of coal to be hauled to the Port of Newcastle by the Train (in respect of the outward journey from the Port to the mine, there must be Network Exit Capability in respect of the coal to be hauled to the Port on the return journey); and
- (iii) a contractual obligation in favour of the person for which the coal is being hauled obliging the relevant Operator to run the Train.

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(c) Where the Train movements specified by the HVCCC are in accordance with the relevant Access Agreements the Network Management Principles and the other relevant ARTC requirements, ARTC must include those Train movements in the DTP.

### 7.3 Network Transit Management

ARTC will manage transit on the Network in accordance with the NMPs.

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## 8 PERFORMANCE INDICATORS

ARTC will develop and report on its website performance indicators for the Network. This will include performance indicators developed by ARTC Customers and Operators through the HVCCC that are specific to the operation of Coal Trains and focus on management of the Hunter Valley Coal Chain.

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## 9 DEFINITIONS

### 9.1 Definitions

In this Undertaking, unless inconsistent with the context, words and expressions shall have the following meanings:

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

**“Access”** means access to use the Network, or any part thereof for the purpose of utilising Access Rights;

**“Access Agreement”** means an agreement between an Access Holder and the ARTC for Access Rights;

**“Access Application”** means an application for Access Rights as described in **section 3.7**;

**“Access Holder”** means an Applicant who has been granted Access Rights to the Network;

**“Access Holder Agreement”** means an agreement entered into between ARTC and an Applicant for Coal Access Rights, the current indicative terms and conditions of which are set out in Annexure A;

**“Access Rights”** means Coal Access Rights and Non-Coal Access Rights;

**“Accredited”** means in relation to an Operator, having accreditation as an operator as defined under the Rail Safety Act in New South Wales and **“Accreditation”** bears a corresponding meaning;

**“Additional Capacity”** means, in relation to the Network, the capability of the Network to carry additional task by an enhancement or improvement of the infrastructure associated with the Network;



“**Applicant**” means the person seeking Access Rights under **section 3**, and to become an Access Holder and, to avoid doubt, does not include an Operator seeking to enter into an Operator Sub-Agreement;

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

“**Associated Facilities**” means all associated track structures, over and under track structures, supports (including supports for equipment or items associated with the use of the Network), tunnels, bridges, train 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;

“**Assumptions**” means those statements of reasonable expectation identified as such in the Coal Chain Master Plan;

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

“**Business Day**” means a day which is not a Saturday, Sunday or public or bank holiday in the State of New South Wales;

“**Capacity**” means the capability of the Network for Services, including Additional Capacity, after taking into account:

- (a) possessions of the Network reasonably required by ARTC for maintenance, repair or enhancements; and
- (b) the operation of work Trains;
- (c) requirement for surge capacity reasonably required to deliver reliable operations where demand varies, in an efficient manner; and
- (d) forecast members’ losses;

“**Capacity Analysis**” means the assessment by ARTC as to the Available Capacity of the Network and whether or not there is sufficient Available Capacity to accept the application for Access Rights and, if not, an assessment of the Additional Capacity required to accept the application for Access Rights as described in **section 5**;

“**Capacity Entitlement**” means the Capacity granted to the Access Holder under the Access Agreement in the form of Train Paths, or a certain number of Train Paths to be used in a certain period;

“**Capital Expenditure**” means annual expenditure as incurred by ARTC incorporated in the annual re-valuation of the Network and Associated Facilities as contemplated in **section 4.3**;

“**Ceiling Limit**” has the meaning given in **section 4.2**;

“**Charges**” means the charges payable by the Access Holder for the provision of Access Rights under the Access Agreement;

“**Coal Access Rights**” means the availability of the Train Paths specified in an Access Holder Agreement, and the right to utilise those Train Paths, through an Operator with Coal Trains, on the Network;

“**Coal Chain Capacity**” means the system wide capacity of the Hunter Valley Coal Chain, including below rail, above rail and port services as agreed with the HVCCC from time to time based on a transparent and published set of assumptions;

“**Coal Chain Master Plan**” means a plan developed by the HVCCC on behalf of, and in consultation with, Hunter Valley Coal Chain participants detailing medium to long term forecasts of demand for coal haulage, requirements for Coal Chain Capacity over the applicable forecast period and identifying potential investments in parts of the Hunter Valley Coal Chain infrastructure intended to achieve increases in Coal Chain Capacity

“**Coal Customer**” means a person who owns coal which is to be transported on the Network;

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

“**Committed Capacity**” means that portion of the Capacity that is required to meet the Capacity Entitlements of Customers;

“**Competition Principles Agreement**” means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia;

“**Commencement Date**” has the meaning given to it in **section 2.2**;

“**Constrained Coal Customer**” means an Access Holder:

- (a) who holds Coal Access Rights under a current written access agreement with ARTC; and
- (b) who paid ARTC for access to the Constrained Network and such payments, other than for Direct Costs, formed part of the annual coal access revenue for the Constrained Group of Mines.

“**Constrained Coal Customer Account**” means an account maintained by ARTC for the purpose described in **section 4.8**;

“**Constrained Group of Mines**” means the group of mines and unloading points that are serviced by Coal Trains where the operation of those Coal Trains is entirely within the Constrained Network, and where access revenue on those Segments forming the Constrained Network is:

- (a) closest to if less than; or
- (b) exceeds by the largest amount;

the Economic Cost for the Constrained Network.

**“Constrained Network”** means the group of Segments within the Network bounded by the mine loading points and the Newcastle port where access revenue on those Segments is likely to reach or exceed Economic Cost for those Segments on a stand alone basis;

**“CPI”** means the CPI All Groups, Weighted Average of Eight Capital Cities index number published by the Australian Bureau of Statistics;

**“Credit Support”** means either:

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

**“Direct Cost”** means maintenance expenditure, including major periodic maintenance that varies with usage of the Network, but excluding Depreciation;

**“Depreciation”** has the meaning described in **section 4.6**;

**“Economic Cost”** means the cost described in **section 4.4**;

**“Extension”** means the addition of infrastructure not forming part of the Network when the addition is proposed as part of an Access Application or during the negotiation process;

**“Floor Limit”** has the meaning described in **section 4.2**;

**“gtkm”** means gross tonnes multiplied by kilometres;

**“Government Authority”** means any Commonwealth, State or local government department or other body exercising an executive, legislative, judicial or governmental function;

**“HVCCC”** means Hunter Valley Coal Chain Coordinator 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;

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

- (a) in relation to coal exported through an export terminal at Newcastle, includes those persons:
  - (i) who participate in marketing, mining, loading, transporting, unloading, stockpiling and shiploading activities;
  - (ii) who provide rail or port infrastructure or port services to facilitate those activities; or
  - (iii) who provide vessel or cargo management services, and

- (b) in relation to other coal movements in the Gunnedah, Sydney or Gloucester basin areas of New South Wales, includes those persons:
- (i) who participate in marketing, mining, loading, transporting, unloading and stockpiling activities; or
  - (ii) who provide rail infrastructure to facilitate these activities.

**“Hunter Valley Coal Chain Service Providers”** means those participants in the Hunter Valley Coal Chain who provide rail or port infrastructure or port services to facilitate the movement of coal through the Hunter Valley Coal Chain;

**“Incremental Cost”** means all costs that could be avoided in the medium term if a Segment was removed from the Network;

**“Incident”** has the meaning ascribed to it in the Standard Sub-Operator Agreement, included as a Schedule to Indicative Access Holder Agreement at Annexure A;

**“Indicative Access Charges”** mean the Access Charges described in **section 4.13** as varied from time to time;

**“Indicative Access Proposal”** means the preliminary Access proposal submitted by ARTC under **section 3.9**;

**“Indicative Access Holder Agreement”** means the access holder agreement at Annexure A;

**“Indicative Services”** means Services operating on the Network with characteristics as prescribed in **section 4.13**;

**“Interim Period”** has the meaning given to it in **section 4.16(b)**;

**“Interim Indicative Access Charges”** has the meaning given to it in **section 4.16(b)(i)**;

**“Interim Indicative Services”** has the meaning given to it in **section 4.16(b)(ii)**;

**“kgtkm”** means a thousand gross tonnes multiplied by kilometres travelled;

**“Material Default”** means any breach of a fundamental or essential term or repeated breaches of any of the terms of the agreements referred to in **section 3.4(e)**;

**“Network”** means the network of railway lines delineated or defined in Schedule B, excluding the annexure to Schedule B;

**“Network Exit Capability”** means in the case of Coal Access Rights sought or obtained for the purpose of transporting coal to the Port of Newcastle, sufficient capacity allocated to that Access Holder at the Port of Newcastle to offload the coal transported, or if the Access Holder is an Operator, the Coal Customer on whose behalf the Coal Access Rights are to be used has sufficient capacity at the Port of Newcastle to enable the Operator to offload the coal transported; and in the case of Coal Access Rights sought or obtained for the purpose of transporting coal to a destination other than the Port of Newcastle, an ability to off load the coal transported from the Network;

**“Network Management Principles”** means the principles set out in Schedule C;

“**Non-Coal Access Rights**” means the availability of, Train Paths specified in an Access Agreement, and the right to operate Trains other than Coal Trains on those Train Paths;

“**Non-Segment Specific Assets**” means assets that ARTC cannot directly identify with a Segment;

“**Non-Segment Specific Costs**” means operating costs that ARTC cannot directly identify with a Segment;

“**Operator**” means an Accredited Operator seeking to operate Trains in accordance with the relevant Access Agreement and, where applicable, Operator Sub-Agreement;

“**Operator Sub-Agreement**” means an agreement entered into between ARTC and an Operator, the standard terms and conditions of which are included as a Schedule to the Indicative Access Holder Agreement at **Annexure A**

“**Parent Guarantee**” means a guarantee in the form of Schedule F given by a Related Party of the Access Holder or Operator who has an Acceptable Credit Rating);

“**Performance Indicators**” means the performance indicators described in **Schedule D**;

“**Pricing Zone**” means a grouping of Segments as prescribed in **Schedule E**;

“**Prudent**” means in relation to Capital Expenditure, capital and renewals projects identified, and expenditure incurred, that is:

- (a) taken as prudent in accordance with **section 6.4(h)(ii)**; and
- (b) otherwise, prudent having regard to:
  - (i) need to meet market demand for Capacity and performance of the Network, or the need to extend the economic life of the Network;
  - (ii) whether the scope of works is consistent with that identified in the Hunter Valley corridor capacity strategy, where applicable, current as at the Commencement Date or as varied from time to time;
  - (iii) what is considered to represent an efficient means to achieve that demand or extend that economic life;
  - (iv) what is consistent with existing standard and configuration of adjacent and/or existing infrastructure with similar utilisation and market requirements, or its modern engineering equivalent;
  - (v) expenditure incurred efficiently in implementing the project, in the context of prevailing access and operating requirements, and input costs recognising broader benefits that may arise from delivery through alliance or internally;
  - (vi) adjustments in relation to the timing of commencement and/or commissioning of projects;

(vii) the importance to the industry of anticipated timing for completion of projects having regard to the impact on Coal Chain Capacity and commercial arrangements; and

(vii) where applicable, support by the relevant industry participants;

“**RAB Floor Limit**” has the meaning given in **section 4.3(d)**;

“**Rate of Return**” has the meaning described in **section 4.7**;

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

“**Reservation Fee**” means the fee referred to in **section 5.3**;

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

“**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;

“**Segment**” means a component of the Network as defined in Schedule E and is the smallest component for which the Ceiling Limit and Floor Limit applies;

“**Segment Specific Assets**” means assets that ARTC can directly identify with a Segment;

“**Segment Specific Costs**” means operating costs that ARTC can directly identify with a Segment;

“**Services**” means a Train run by the Operator using the Network which provides railway freight or passenger services including work Trains;

“**Solvent**” means that, in the last five years:

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

“**Standard Operator Sub-Agreement**” means the operator-sub-agreement included as a schedule to Indicative Access Holder Agreement at Annexure A;

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“System Assumptions” means the system assumptions for the Hunter Valley Coal Chain developed in accordance with section 5.1;

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“Term” means the term of this Undertaking as described in **section 2.3**;

“Third Party Works” has the meaning described in Annexure A;

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

“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 the entitlement of the Access Holder to use, through an Accredited Operator, the Network between the locations and any other entitlements as set out in the Access Agreement and consistent with the allocations set out in the DTP;

“Undertaking” means this undertaking as amended from time to time in accordance with **section 2.4**.

## 9.2 Interpretation

In this Undertaking, 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 consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (e) a reference to a section, clause, Part or a Schedule is a reference to a section, clause, Part or Schedule of this Undertaking;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) notices that are required to be given in writing to ARTC may, if so agreed by ARTC, be provided in electronic form;
- (h) 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;
- (i) 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; and
- (j) a reference to \$ and dollars is to Australian currency.

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# SCHEDULES

- A. Essential Elements of Access Holder Agreement
- B. Network
- C. Network Management Principles
- D. Performance Indicators
- E. Segments
- F. Parent Guarantee

# SCHEDULE A - Essential Elements of the Access Agreement

## Access Holder Agreement (Coal Access Rights)

### Essential elements of an Access Holder Agreement for Coal Access Rights:

- 1 provisions consistent with clause 3 of the Indicative Access Holder Agreement (“Grant of Coal Train Paths for the transport of Coal”);
- 2 trading provisions consistent with clause 16.3 (“Permanent Assignments and Trades”), clause 16.4 (“Temporary trade of Train Paths”) and clause 16.5 (“Treatment of Traded and assigned Path Usages”) of the Indicative Access Holder Agreement;
- 3 provisions providing for a rebate of take or pay charges consistent with clause 5.4 (“Calculation of TOP Rebate”); and schedule 2 (“System Monthly True-up”) of the Indicative Access Holder Agreement
- 4 provisions providing for ARTC to allocate existing Capacity and Additional Capacity consistent with clause 6.1 (“Shortfall in existing Capacity”) and clause 6.2 (“Shortfall in creation of Additional Capacity”) of the Indicative Access Holder Agreement;
- 5 provisions allowing ARTC to require, at any time during the term of the Access Holder Agreement that the Access Holder has an Acceptable Credit Rating or delivers Credit Support to ARTC;
- 6 Access Holder’s non-exclusive access to Network;
- 7 Access Holder’s entitlement to Train Paths subject to the matters outside ARTC’s control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator’s trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 8 each party warranting the accuracy of information provided;
- 9 an Access Holder can only utilise its access rights through an Accredited Operator who has entered into an Operator-Sub Agreement with ARTC which has been endorsed by the Access Holder, a copy of which is to be included as an Annexure to the Access Holder Agreement;
- 10 Access Holders paying a Charge for Coal Access Rights based on a combination of actual usage (being a function of distance and gross mass (\$/gtkm) for a Pricing Zone) and on a take or pay basis
- 11 charges to be determined in accordance with section 4.13 and section 4.17 of the Undertaking, as applicable;
- 12 ARTC may charge for access to Extensions and Additional Capacity;
- 13 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;

- 14 ARTC having the ability to vary (temporarily or permanently), remove and review contracted Capacity Entitlements in appropriate circumstances and to take possession of the Network for repairs, maintenance, new works and upgrades;
- 15 under-utilised capacity may be withdrawn by ARTC;
- 16 provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
  - (a) the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
  - (b) the train decision factors which detail the allocation of train priority in real time train control;
- 17 implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 18 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 19 payment of, if payable, legal costs of execution (including any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on the Access Holder Agreement and any document contemplated or allowed by the Access Holder Agreement;
- 20 termination of Access Holder Agreements on termination or cessation of ARTC's leasehold rights;
- 21 appropriate termination and suspension provisions;
- 22 indemnities by the Access Holder and ARTC;
- 23 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 24 the parties agree that any changes in law which materially affects the parties' rights under the Access Holder Agreement is excluded to the extent permitted by law;
- 25 the parties agree to renegotiate the Access Holder Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- 26 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Holder Agreement;
- 27 dispute resolution procedures; and
- 28 an Operator Sub-Agreement including the following elements:
  - (a) a clause enabling ARTC to request the Operator to provide Credit Support if the Operator is unable to demonstrate to ARTC that it meets appropriate prudential requirements;
  - (b) ARTC and Operator holding appropriate Accreditation;
  - (c) ARTC and Operator holding appropriate insurance;

- (d) Operator's entitlement to operate Coal Trains on the Network for the Access Holder is limited to the Access Holder's Coal Access Rights;
- (e) Operator has a non-exclusive access to Network;
- (f) Operator's entitlement to operate Coal Trains on a Train Path is subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator's Trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- (g) provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
  - the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
  - the train decision factors which detail the allocation of train priority in real time train control;
- (h) contracted Train Paths subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, any lawful requirement given by a Governmental Authority and Network Management Principles;
- (i) each party warranting the accuracy of information provided;
- (j) the Operator providing warranties regarding Rolling Stock;
- (k) ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- (l) Operator complying with plans dealing with Incidents, preservation of evidence and implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- (m) Operator complying with the Codes of Practice as published by ARTC from time to time and Instructions issued by ARTC;
- (n) Operator to ensure use of the Network minimises obstruction to the Network, complies with any laws and does not materially affect or damage any part of the Network or ARTC's property;
- (o) Operator to provide and maintain communications equipment compatible with equipment used in the Network Control Centre and provide information to ARTC regarding the provision of train services;
- (p) Operator to provide ARTC with a train manifest for each train service and inform ARTC of any cancellations;
- (q) Operator to ensure that any item hauled is secured and does not become deposited on or adjacent to the Network;
- (r) Operator to comply with applicable and appropriate safety standards;

- (s) the ability of ARTC to temporarily vary the Train Paths by Instruction to the Operator;
- (t) mechanism to change the Operator's Operator Rights due to changes in the Access Holder Agreements or Access Holder nominations;
- (u) the ability of ARTC to inspect and conduct audits on the Operator;
- (v) appropriate termination and suspension provisions;
- (w) the parties agree that any changes in law which materially affects the parties' rights under the Operator Sub-Agreement is excluded to the extent permitted by law;
- (x) the parties agree to renegotiate the Operator Sub-Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- (y) indemnities by the Operator and ARTC in relation to Incidents; and
- (z) dispute resolution procedures.

### Access Agreement (for Non-Coal Access Rights)

#### Essential elements of an Access Agreement for Non-Coal Access Rights:

- 1 provisions providing for ARTC to allocate existing Capacity and Additional Capacity consistent with section 5.4 ("Shortfall in existing Capacity") and section 5.5 ("Shortfall in creation of Additional Capacity) of the Undertaking.
- 2 the right of ARTC to require that Access Holders have an Acceptable Credit Rating or delivery of a Security or Parent Guarantee;
- 3 Access Holder's non-exclusive access to Network;
- 4 Access Holder's entitlement to contracted Train Paths are subject to the matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, material failure of Operator's trains, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 5 each party warranting the accuracy of information provided;
- 6 Access Holders paying a Charge based on a variable component (a function of distance and gross mass \$/gtkm), a flagfall component and an excess network occupancy component;
- 7 ARTC may charge for access to Extensions and Additional Capacity;
- 8 ARTC to conduct Network Control, issue Instructions, maintain and operate the Network in a non-discriminatory manner;
- 9 ARTC having the ability to vary (temporarily or permanently), remove and review contracted Capacity Entitlements in appropriate circumstances and to take possession of the Network for repairs, maintenance, new works and upgrades;

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- 10 under-utilised capacity may be withdrawn by ARTC;
- 11 provisions which allow ARTC to meet its obligations under its NSW lease, including without limitation:
- (a) the provision of all Train Paths will be subject to ARTC's obligations regarding passenger priority; and
  - (b) the train decision factors which detail the allocation of train priority in real time train control;
- 12 implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 13 contracted Train Paths subject to matters outside ARTC's control, legislated passenger priority, safety, emergency, Third Party Works, any lawful requirement given by a Governmental Authority and Network Management Principles;
- 14 provisions which allow ARTC to meet its obligations in relation to third parties' rights to conduct works on the Network;
- 15 payment of, if payable, legal costs of execution (including any associated stamp duty, fees, fines and penalties thereon) in all relevant jurisdictions on the Access Agreement and any document contemplated or allowed by the Access Agreement;
- 16 termination of Access Agreements on termination or cessation of ARTC's leasehold rights;
- 17 indemnities by the Access Holder and ARTC including in relation to Incidents;
- 18 ARTC is not liable for indirect or consequential losses relating to Incidents;
- 19 the parties agree that any change in law which materially affects the parties' rights under the Access Agreement is excluded to the extent permitted by law;
- 20 the parties agree to renegotiate the Access Agreement to the extent that a change in law prevents a party from performing any of its obligations;
- 21 warranties or guarantees from the Access Holder sufficient to meet obligations or potential obligations under the Access Agreement;
- 22 where the Access Holder is an Operator, the Operator holds appropriate Accreditation;
- 23 where the Access Holder is not an Accredited Operator, an obligation on the Accredited Operator to procure the services of an Accredited Operator to operate the Trains on the contracted Train Paths;
- 24 the Access Holder, and where relevant, the Operator holds appropriate insurance;
- 25 the Access Holder or, where relevant, the Operator provides a warranty regarding Rolling Stock;

- 26 the Access Holder and, where relevant, the Operator complies with plans dealing with Incidents, preservation of evidence and implementation and compliance with ARTC's Environmental Licence and environmental management system manual;
- 27 the Access Holder and, where relevant, the Operator complies with Codes of Practice as published by ARTC from time to time and Instructions issued by ARTC;
- 28 the Access Holder and, where relevant, the Operator, ensures use of the Network minimises obstruction to the Network, complies with any laws and does not materially affect or damage any part of the Network or ARTC's property;
- 29 the Access Holder and, where relevant, the Operator provides and maintains communications equipment compatible with equipment used in the Network Control Centre and provide information to ARTC regarding the provision of train services;
- 30 the Access Holder and, where relevant, the Operator provides ARTC with a train manifest for each train service and inform ARTC of any cancellations;
- 31 the Access Holder and, where relevant, the Operator ensures that any item hauled is secured and does not become deposited on or adjacent to the Network;
- 32 the Access Holder and, where relevant, the Operator complies with applicable and appropriate safety standards;
- 33 the ability of ARTC to inspect and conduct audits on the Access Holder;
- 34 appropriate termination and suspension provisions; and
- 35 dispute resolution procedures.



## SCHEDULE B - 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<sup>1</sup>
  5. Muswellbrook 288.900 km to Ulan 435.300 km
  6. Muswellbrook 288.900 km to Gap<sup>2</sup> 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)
- <sup>1</sup> To the extent where the railway line joins the rail network owned by Rail Infrastructure Corporation.

# ANNEXURE 1 TO SCHEDULE B

See Maps ARTC-HV, ARTC3060217 two (2) pages which have been provided as separate maps and form part of the annexure.

This annexure illustrates the Network forming part of the New South Wales Lease as it was on 14 April 2009. The precise details of the Network forming part of the New South Wales Lease will change over the duration of the Undertaking, but not in such a way as to be inconsistent with the textual descriptions in Schedule B. Applicants should refer to ARTC's website for an up to date map of the Network forming part of the New South Wales Lease.

# SCHEDULE C - Network Management Principles

The following definitions apply in this Schedule.

“**Coal Train**” means a Train, the sole purpose of which is carrying coal, whether loaded, empty, operating in or transiting through the Network.

“**Commuter Peak Services**” means RailCorp’s commuter rail passenger services arriving at Newcastle Station between 0600 and 0900 hours and departing Newcastle Station between 1600 and 1800 hours and continuing until they reach their destination point.

“**Discharge Point**” means a facility connected to the Hunter Valley Network at which coal is discharged from Trains.

“**Express Freight Services**” means those freight services capable of maintaining sectional running times that are, or are determined by the appropriate network controller, to operate at faster sectional times than local Frequent-Stopping Services.

“**Frequent-Stopping Services**” means those rail passenger services that stop at most or all stations along their Train Path.

“**Healthy Train**” means a Train that, having regard to the daily train plan applicable on the day:

- (a) presents to the Network on time, is configured to operate to its schedule and operates in a way that it remains able to maintain its schedule; or
- (b) is running late only due to causes within the Network, but only where the root cause is outside the Operator’s control; or
- (c) is running on time, regardless of previous delays.

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

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

“**Integrated Plan**” means the plan prepared by the HVCCC in accordance with the System Rules and provided to all logistics service providers in the Hunter Valley Coal Chain on a 36 hour basis (or such

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other time frame as otherwise agreed by the members of the HVCCC) setting out the plan for the running of Trains, assembly of cargoes and loading of vessels.

“**Limited-Stop Services**” means those rail passenger services that stop at a few selected stations along their Train Path.

“**Long-distance Passenger Services**” means those rail passenger services operating to or from points outside the Sydney metropolitan rail area, excluding RailCorp's CityRail services.

“**Non-Revenue Positioning Movements**” means movements of Trains required for reasons other than revenue services.

“**Special Event**” means a major community, cultural, sporting or similar event within the metropolitan rail area, which is identified as such by a relevant NSW agency, and which may require:

- (a) a special timetable for the operation of RailCorp rail passenger services before, during and after the event; and
- (b) significant operational priority for RailCorp rail passenger services; and
- (c) consequential adjustments to other rail operators' services.

“**System Rules**” mean rules, standards, specifications and processes agreed by the HVCCC for the efficient operation of the Hunter Valley Coal Chain.

“**Train**” means a single unit of rolling stock or 2 or more units of rolling stock including a locomotive or other self propelled unit coupled together to operate on the Track as a single unit.

“**Network Control**” means the control and regulation of all rail operations (including Train Movements, movements of rolling stock and track maintenance vehicles) to ensure the safe, efficient and proper operation of the Network.

“**Train Movement**” means a particular trip by a Train on a Train Path.

“**Train Path**” means the series of network segments over a particular time interval through which a Train can travel and may include stopping points and intervals and fuelling stations and other set down or changeover points.

### **Objectives of Coal Trains and Non-Coal Trains**

In general,

- (a) the primary objective of a Coal Train is to arrive at the Discharge Point in sequence in accordance with the Integrated Plan; and
- (b) the primary objective of a Non-Coal Train is to arrive at its destination or exit the Hunter Valley Network (as the case may be) in accordance with its schedule.

Notwithstanding the above objectives, the requirements of Customers on the Hunter Valley Network are complex and may necessitate the pursuit of different objectives from time to time. Accordingly, ARTC will manage Trains on the Hunter Valley Network having regard to the Integrated Plan and in accordance with the Network Management Principles set out in this Schedule.

In the event of a conflict between two Coal Trains running out-of-course, ARTC will manage Trains in accordance with objective (a) above and, where necessary, will liaise closely with the HVCCC and

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members of the live run operations group to determine the optimum recovery strategy to benefit the Hunter Valley Coal Chain as a whole and, except where required otherwise for reasons of safety or contractual obligation, will seek to implement that course of action.

**Train Decision Factors**


Train Decision Factors apply to resolve the competing interests of Customer’s Trains using the Hunter Valley Network.

General principles guiding train management are:

- (a) all parties are to ensure operational safety is maintained through compliance with safeworking rules, regulations and procedures;
- (b) ARTC is responsible for ensuring the integrity of the track and other infrastructure so that the train plan can be met;
- (c) Operators are responsible for ensuring operating integrity of their Trains, including train crewing, locomotives, wagons and loading so that the train plan can be met; and
- (d) where one or more Trains are late or unhealthy, they will be managed as specified in the matrices below subject to a rail operator’s preferences for its own services.

The two tables are used in conjunction with each other. Table D1 will enable a person undertaking Network Control ("Network Controller") to define the relative priority of two conflicting Trains. Table D2 will specify the type of decision available to the Network Controller in delivering Network Control directions to resolve the potential conflict.

**Table D1 – Train Priority Matrix**

<b>Decreasing order of priority</b>	<b>Type of train service in ARTC Network</b>
From Highest	Long-distance Passenger Services
	Commuter Peak Services and rail passenger services likely to affect Commuter Peak Services or Special Event services.
	Limited -Stop Services that are not Commuter Peak Services or Special Event Services.
	Freight services likely to affect Commuter Peak Services or Special Event services.
	Frequent-Stopping Services that are not Commuter Peak Services.
	Freight Services
To Lowest	Non-Revenue Positioning Movements

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**Table D2 – Decision Matrix**

<b>Trains of Equal Health</b>	<b>Both Healthy One on Time &amp; One Late</b>	<b>Both Late</b>
<b>Equal Priority Trains</b>	<b>Rule 1 + 2</b>	<b>Rule 3</b>
<b>Unequal Priority Trains</b>		<b>Rule 6 + 3</b>
<b>Higher Priority Train is On Time + Lower Priority is Late</b>	<b>Rule 5 + 2</b>	
<b>Higher Priority Train is Late + Lower Priority Train is On Time</b>	<b>Rule 4 + 2</b>	
<b>Trains of Unequal Health</b>	<b>Rule 7 + 2</b>	

**Rule 1:**

- (a) A Healthy Train should be managed such that it will exit on time.
- (b) If a Healthy Train is running late, it should be given equal preference to other Healthy Trains and advanced wherever possible to regain lost time. Any delay to other Healthy Trains as a result of such advancement must be kept to a minimum as defined in Rule 2.

**Rule 2:**

The following delay limits apply to the full journey of a Healthy Train being held back:

- (a) the delay to the individual rail passenger service held back does not exceed 5 minutes;
- (b) there is a plan in place to recover lost time so that the downstream effect on the service held back and on individual subsequent rail passenger services also does not exceed 5 minutes;
- (c) the delay to a freight service held back does not exceed 15 minutes; or
- (d) there is a plan in place to recover lost time so that the downstream effect on the healthy freight service held back and on individual subsequent healthy freight services also does not exceed 15 minutes. Any plan for the recovery of time by freight services must be capable of being achieved prior to their entry into the Sydney metropolitan rail area.

**Rule 3:** Give preference to the Train whose Train performance indicates it will lose least or no more time and even make up time and hold the gain; and consider downstream effect to minimise overall delay.

**Rule 4:** A lower priority Train gets preference. A higher priority Train can be given preference subject to the delay to the lower priority Train being kept to a minimum as defined in Rule 2.

**Rule 5:** A higher priority Train should be given preference over a lower priority Train. A lower priority Train may be given preference over higher priority Train provided the delay to that Train is kept to a minimum as defined in Rule 2.

**Rule 6:** A high priority Train has preference, subject to Rule 3.

**Rule 7:** A Healthy Train should be given preference over an unhealthy Train. An unhealthy Train may be given preference over a Healthy Train provided the delay to that Train is kept to a minimum as defined in Rule 2.



# SCHEDULE D: Performance Indicators

To be determined in accordance with **section 8**.

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## SCHEDULE E - Segments

Pricing Zone	Segment	Description	Length
3	0401	Dartbrook - Werris Creek	114.3
3	0402	Werris Creek - Gap	5.2
1	0915	Islington Jct To Scholey St Jct	1.0
1	0916	Scholey St Jct To Port Waratah	3.5
1	0917	Scholey St Jct To Waratah (Via Coal)	1.4
1	0919	Morandoo & Bullock Island	8.7
1	0925	Waratah To Hanbury Jct (Via Coal)	2.3
1	0926	Hanbury Jct To Sandgate (Via Coal)	1.8
1	0927	Hanbury Jct To Kooragang East Jct	1.1
1	0930	Kooragang East Jct To Kooragang Island	15.3
1	0931*	Kooragang East Jct To Sandgate	0.9
1	0936	Sandgate To Thornton (Via Coal)	12.4
1	0937	Thornton To Maitland (Via Coal)	10.6
1	0944	Telarah To Farley	0.4
1	0946	Maitland To Farley	1.4
1	0947	Farley To Branxton	21.6
1	0948	Branxton To Whittingham	18.5
1	0951	Whittingham To Saxonvale Jct	8.0
1	0952	Saxonvale Jct To Mount Thorley	1.5
1	0955	Whittingham To Camberwell Jct	12.5
1	0956	Camberwell Jct To Glennies Creek	6.8
1	0957	Glennies Creek To Newdell Jct	8.5
1	0958	Newdell Jct To Draytons Jct	9.6
1	0959	Newdell Branch	2.7
1	0961	Draytons Jct To Muswellbrook	17.0
3	0962	Muswellbrook To Dartbrook Jct	7.6
1	0970	Muswellbrook To Bengalla Jct	5.2
2	0971	Bengalla Jct To Anvill Hill	12.8
2	0972	Anvill Hill to Sandy Hollow Junction	25.2
2	0973	Sandy Hollow Jct To Wilpinjong	92.9
2	0974	Wilpinjong To Ulan Colliery Jct	10.3

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

## SCHEDULE F - Parent Guarantee

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# Parent Guarantee and Indemnity

Dated

#insert party name and ABN/ACN/ARBN# ("**Guarantor**")

AUSTRALIAN RAIL TRACK CORPORATION LIMITED (ABN 75 081 455 754) ("**Beneficiary**")

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# Parent Guarantee and Indemnity

## Details

<b>Parties</b>	<b>Guarantor and Beneficiary</b>	
<b>Guarantor</b>	Name	
	ABN	
	Address	
	Telephone	
	Fax	
	Attention	
<b>Beneficiary</b>	Name	<b>AUSTRALIAN RAIL TRACK CORPORATION LIMITED</b>
	ABN	75 081 455 754
	Address	Ground Floor, ARTC Building, Off Sir Donald Bradman Drive, Passenger Terminal Road, Mile End South Australia 5031
	Telephone	
	Fax	
	Attention	
<b>Obligator</b>	Name	<b>[Access Holder/Operator]</b>
	ABN	
	Address	
	Telephone	
	Fax	
	Attention	
<b>Recitals</b>	<b>A</b>	The Obligator has entered into the Agreement with the Beneficiary under the Hunter Valley Coal Network Access Undertaking.
	<b>B</b>	The Guarantor agrees to guarantee the performance of the Obligator's obligations under the Agreement.

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**Governing law** New South Wales

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**Date of deed** See Signing page

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# Parent Guarantee and Indemnity

## General terms

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### 1 Interpretation

#### 1.1 Definitions

These meanings apply unless the contrary intention appears:

**Agreement** means the [Access Holder Agreement/Operator Sub-Agreement] for Indicative Services in the Hunter Valley.

**Authorised Officer** means, in respect of a party, a director or secretary of the party or another person appointed by the party to act as an Authorised Officer under this guarantee and indemnity.

**Beneficiary** means the person or persons so described in the Details.

**Corporations Act** means the Corporations Act 2001 (Cwlth).

**Costs** includes charges and expenses, including those incurred in connection with advisers.

**Details** means the section of this guarantee and indemnity headed "Details".

**Guarantor** means the person or persons so described in the Details. If there are more than one, the Guarantor means each of them individually and every two or more of them jointly.

**Obligor** means the person or persons so described in the Details.

**Taxes** means taxes, levies, imposts, charges and duties imposed by any authority (including stamp and transaction duties) together with any related interest, penalties, fines and expenses in connection with them, except if imposed on, or calculated having regard to, the net income of the Beneficiary.

#### 1.2 References to certain general terms

Unless the contrary intention appears, a reference in this guarantee and indemnity to:

- (a) **(variations or replacement)** a document (including this guarantee and indemnity) includes any variation or replacement of it;
- (b) **(clauses, annexures and schedules)** a clause, annexure or schedule is a reference to a clause in or annexure or schedule to this guarantee and indemnity;
- (c) **(reference to statutes)** a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;

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- (d) **(law)** law means common law, principles of equity, and laws made by parliament (and laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them);
- (e) **(singular includes plural)** the singular includes the plural and vice versa;
- (f) **(person)** the word “person” includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any authority;
- (g) **(executors, administrators, successors)** a particular person includes a reference to the person’s executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
- (h) **(two or more persons)** an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them individually;
- (i) **(jointly and severally)** an agreement, representation or warranty by two or more persons binds them jointly and each of them individually;
- (j) **(reference to a group of persons)** a group of persons or things is a reference to any two or more of them jointly and to each of them individually;
- (k) **(dollars)** Australian dollars, dollars, A\$ or \$ is a reference to the lawful currency of Australia;
- (l) **(calculation of time)** a period of time dating from a given day or the day of an act or event it is to be calculated exclusive of that day;
- (m) **(reference to a day)** a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- (n) **(accounting terms)** accounting standards is a reference to the accounting standards as defined in the Corporations Act and a reference to an accounting term is a reference to that term as it is used in those accounting standards, or, if not inconsistent with those standards, in accounting principles and practices generally accepted in Australia;
- (o) **(meaning not limited)** the words “include”, “including”, “for example” or “such as” when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (p) **(time of day)** time is a reference to #insert place eg Sydney# time;
- (q) **(reference to any thing)** any thing (including any amount) is a reference to the whole and each part of it.

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### 1.3 Number

The singular includes the plural and vice versa.

### 1.4 Headings

Headings (including those in brackets at the beginning of paragraphs) are for convenience only and do not affect the interpretation of this guarantee and indemnity.

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## 2 Guarantee and indemnity

### 2.1 Consideration

The Guarantor acknowledges that the Beneficiary is acting in reliance on the Guarantor incurring obligations and giving rights under this guarantee and indemnity.

### 2.2 Guarantee

The Guarantor unconditionally and irrevocably guarantees to the Beneficiary the Obligor's compliance with the Obligor's obligations in connection with the Agreement, including each obligation to pay money.

If the Obligor does not comply with those obligations on time and in accordance with the Agreement, then the Guarantor agrees to comply with those obligations on demand from the Beneficiary. A demand may be made whether or not the Beneficiary has made demand on the Obligor.

### 2.3 Indemnity

The Guarantor indemnifies the Beneficiary against any liability or loss arising from, and any costs, charges or expenses it incurs, if:

- (a) the Obligor does not, or is unable to, comply with an obligation it has (including an obligation to pay money) in connection with the Agreement; or
- (b) an obligation the Obligor would otherwise have under the Agreement (including an obligation to pay money) is found to be void, voidable or unenforceable; or
- (c) an obligation the Guarantor would otherwise have under clause 2.2 ("Guarantee") is found to be void, voidable or unenforceable; or
- (d) a representation or warranty by the Obligor in the Agreement is found to have been incorrect or misleading when made or taken to be made.

The Guarantor agrees to pay amounts due under this clause on demand from the Beneficiary.

The Beneficiary need not incur expense or make payment before enforcing this right of indemnity.

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## 2.4 Extent of guarantee and indemnity

Each of the guarantee in clause 2.2 (“Guarantee”) and the indemnity in clause 2.3 (“Indemnity”) is a continuing obligation despite any intervening payment, settlement or other thing and extends to all of the Obligor’s obligations in connection with the Agreement. The Guarantor waives any right it has of first requiring the Beneficiary to commence proceedings or enforce any other right against the Obligor or any other person before claiming from the Guarantor under this guarantee and indemnity.

## 2.5 Variations and replacements

The Guarantor acknowledges that the Agreement may be varied or replaced from time to time.

The Guarantor confirms that the obligations guaranteed under clause 2.2 (“Guarantee”) include any obligations under the Agreement as varied or replaced. The Guarantor confirms that this applies regardless of:

- (a) how the Agreement is varied or replaced; and
- (b) the reasons for the variation or replacement; and
- (c) whether the obligations decrease or increase or the Agreement is otherwise more onerous as a result of the variation or replacement.

This clause does not limit clause 2.11 (“Rights of the Beneficiary are protected”).

## 2.6 Acknowledgment

The Guarantor acknowledges that, before entering into this guarantee and indemnity, it:

- (a) was given a copy of the Agreement (and all documents giving rise to an obligation of the Obligor in connection with the Agreement) and had full opportunity to consider their provisions; and
- (b) is responsible for making itself aware of the financial position of the Obligor and any other person who guarantees any of the Obligor’s obligations in connection with the Agreement.

## 2.7 Obligation to pay interest

The Guarantor agrees to pay interest on any amount under this guarantee and indemnity which is not paid on the due date for payment and is not otherwise incurring interest.

The rate of interest applying to each daily balance is the rate 4% per annum above the 60 day Bank Bill Swap Reference Rate last published on or before that day in The Australian Financial Review (or if that rate has not been published, another rate set by the Beneficiary in good faith).

The interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days.

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The Guarantor agrees to pay interest under this clause on demand from the Beneficiary.

## **2.8 Compounding**

Interest payable under clause 2.7 (“Obligation to pay interest”) which is not paid when due for payment may be added to the overdue amount by the Beneficiary at intervals which the Beneficiary determines from time to time or, if no determination is made, every 30 days. Interest is payable on the increased overdue amount at the Interest Rate and in the manner set out in clause 2.7 (“Obligation to pay interest”).

## **2.9 Payments**

The Guarantor agrees to make payments under this guarantee and indemnity:

- (a) in full without set-off or counterclaim, and without any deduction in respect of Taxes unless prohibited by law; and
- (b) in the currency in which the payment is due, and otherwise in Australian dollars, in immediately available funds

## **2.10 No merger**

This guarantee and indemnity does not merge with or adversely affect, and is not adversely affected by, any of the following:

- (a) any other guarantee, indemnity, mortgage, charge or other encumbrance, or other right or remedy to which the Beneficiary is entitled; or
- (b) a judgment which the Beneficiary obtains against the Guarantor, the Obligor or any other person in connection with the Agreement.

The Beneficiary may still exercise its rights under this guarantee and indemnity as well as under the judgment, mortgage, charge or other encumbrance or the right or remedy.

## **2.11 Rights of the Beneficiary are protected**

The rights given to the Beneficiary under this guarantee and indemnity, and the Guarantor’s liabilities under it, are not affected by any act or omission or any other thing which might otherwise affect them under law or otherwise. For example, those rights and liabilities are not affected by:

- (a) any act or omission:
  - (i) varying or replacing in any way and for any reason any agreement or arrangement under which the obligations guaranteed under clause 2.2 (“Guarantee”) are expressed to be owing;
  - (ii) releasing the Obligor or giving the Obligor a concession (such as more time to pay);

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- (iii) releasing any person who gives a guarantee or indemnity in connection with any of the Obligor's obligations;
  - (iv) by which a person becomes a Guarantor after the date of this guarantee and indemnity;
  - (v) by which the obligations of any person who guarantees any of the Obligor's obligations (including obligations under this guarantee and indemnity) may become unenforceable;
  - (vi) by which any person who was intended to guarantee any of the Obligor's obligations does not do so, or does not do so effectively;
  - (vii) by which a person who is co-surety or co-indemnifier is discharged under an agreement or by operation of law;
- (b) a person dealing in any way with the Agreement or this guarantee;
  - (c) the death, mental or physical disability, or liquidation, administration or insolvency of any person including the Guarantor or the Obligor;
  - (d) changes in the membership, name or business of any person; or
  - (e) acquiescence or delay by the Beneficiary or any other person.

#### **2.12 Guarantor's rights are suspended**

As long as any obligation is required, or may be required, to be complied with in connection with this guarantee and indemnity, the Guarantor may not, without the Beneficiary's consent:

- (a) reduce its liability under this guarantee and indemnity by claiming that it or the Obligor or any other person has a right of set-off or counterclaim against the Beneficiary; or
- (b) exercise any legal right to claim to be entitled to the benefit of another guarantee, indemnity, mortgage, charge or other encumbrance given in connection with the Agreement or any other amount payable under this guarantee and indemnity; or
- (c) claim an amount from the Obligor, or another guarantor (including a person who has signed this guarantee and indemnity as "Guarantor"), under a right of indemnity or contribution; or
- (d) claim an amount in the liquidation, administration or insolvency of the Obligor or of another guarantor of any of the Obligor's obligations (including a person who has signed this guarantee and indemnity as "Guarantor").

This clause continues after this guarantee and indemnity ends.

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### 2.13 Reinstatement of rights

Under any Insolvency Law, a person may claim that a transaction (including a payment) in connection with this guarantee and indemnity or the Agreement is void or voidable. If a claim is made and upheld, conceded or compromised, then:

- (a) the Beneficiary is immediately entitled as against the Guarantor to the rights in connection with this guarantee and indemnity or the Agreement to which it was entitled immediately before the transaction; and
- (b) on request from the Beneficiary, the Guarantor agrees to do anything (including signing any document) to restore to the Beneficiary any mortgage, charge or other encumbrance (including this guarantee and indemnity) held by it from the Guarantor immediately before the transaction.

The Guarantor's obligations under this clause are continuing obligations independent of the Guarantor's other obligations under this guarantee and indemnity and continue after this guarantee and indemnity ends.

### 2.14 Costs

The Guarantor agrees to pay or reimburse the Beneficiary on demand for:

- (a) the Beneficiary's Costs in making, enforcing and doing anything in connection with this guarantee and indemnity including legal Costs in accordance with any written agreement as to legal costs or, if no agreement, on whichever is the higher of a full indemnity basis or solicitor and own client basis; and
- (b) all duties, fees, Taxes and charges which are payable in connection with this guarantee and indemnity or a payment or receipt or other transaction contemplated by it.

---

## 3 Notices and other communications

### 3.1 Form - all communications

Unless expressly stated otherwise in this guarantee and indemnity, all notices, certificates, consents, approvals, waivers and other communications in connection with this guarantee and indemnity must be in writing, signed by the sender (if an individual) or an Authorised Officer of the sender and marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way last notified.

### 3.2 Form - communications sent by email

Communications sent by email need not be marked for attention in the way stated in clause 3.1 ("Form - all communications"). However, the email must state the first and last name of the sender.

Communications sent by email are taken to be signed by the named sender.

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### **3.3 Delivery**

Communications must be:

- (a) left at the address set out or referred to in the Details; or
- (b) sent by prepaid ordinary post (airmail, if appropriate) to the address set out or referred to in the Details; or
- (c) sent by fax to the fax number set out or referred to in the Details; or
- (d) sent by email to the address set out or referred to in the Details.

However, if the intended recipient has notified a changed address or fax number, then communications must be to that address or number.

### **3.4 When effective**

Communications take effect from the time they are received or taken to be received under clause 3.5 (“When taken to be received”) (whichever happens first) unless a later time is specified.

### **3.5 When taken to be received**

Communications are taken to be received:

- (a) if sent by post, three days after posting (or seven days after posting if sent from one country to another); or
- (b) if sent by fax, at the time shown in the transmission report as the time that the whole fax was sent; or
- (c) if sent by email:
  - (i) when the sender receives an automated message confirming delivery; or
  - (ii) four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered,

whichever happens first.

---

## **4 General**

### **4.1 Set-off**

The Beneficiary may set off any amount due for payment by the Beneficiary to the Guarantor against any amount due for payment by the Guarantor to the Beneficiary under this guarantee and indemnity.

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#### **4.2 Indemnities**

The indemnities in this guarantee and indemnity are continuing obligations, independent of the Guarantor's other obligations under this guarantee and indemnity and continue after this guarantee and indemnity ends.

#### **4.3 Partial exercising of rights**

If the Beneficiary does not exercise a right or remedy fully or at a given time, the Beneficiary may still exercise it later.

#### **4.4 Remedies cumulative**

The Beneficiary's rights and remedies under this guarantee and indemnity are in addition to other rights and remedies given by law independently of this guarantee and indemnity.

#### **4.5 Each signatory bound**

This guarantee and indemnity binds each person who signs as Guarantor even if another person who was intended to sign does not sign it or is not bound by it.

#### **4.6 Counterparts**

This guarantee and indemnity may consist of a number of copies, each signed by one or more parties to the guarantee and indemnity. If so, the signed copies are treated as making up the one document.

#### **4.7 Governing law**

This guarantee and indemnity is governed by the law in force in the place specified in the Details. The Guarantor and the Beneficiary submit to the non-exclusive jurisdiction of the courts of that place.

**EXECUTED** as a deed

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# Signing page

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

**EXECUTED** by [**Guarantor**] in )  
accordance with section 127(1) of the )  
Corporations Act 2001 (Cwlth) by )  
authority of its directors: )

..... )  
Signature of director )

..... )  
Name of director (block letters) )

..... )  
Signature of director/company )  
secretary\* )  
\*delete whichever is not applicable

..... )  
Name of director/company secretary\* )  
(block letters) )  
\*delete whichever is not applicable

**EXECUTED** by **Australian Rail** )  
**Track Corporation Ltd** in )  
accordance with section 127(1) of the )  
Corporations Act 2001 (Cwlth) by )  
authority of its directors: )

..... )  
Signature of director )

..... )  
Name of director (block letters) )

..... )  
Signature of director/company )  
secretary\* )  
\*delete whichever is not applicable

..... )  
Name of director/company secretary\* )  
(block letters) )  
\*delete whichever is not applicable

# Annexure A - Indicative Access Holder Agreement

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# 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>

---

<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**;

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**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;

Deleted: <#>Schedule Notice Period means a period of 5 years unless otherwise provided in the Train Path Schedule;¶

**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.

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## 2 Term

### 2.1 Term

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

### 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:

$\text{Actual Path Usages}_{M, \dots, M-Y}$  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.

- (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.

- (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. Deleted: weeks  
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  - (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.

(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:

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

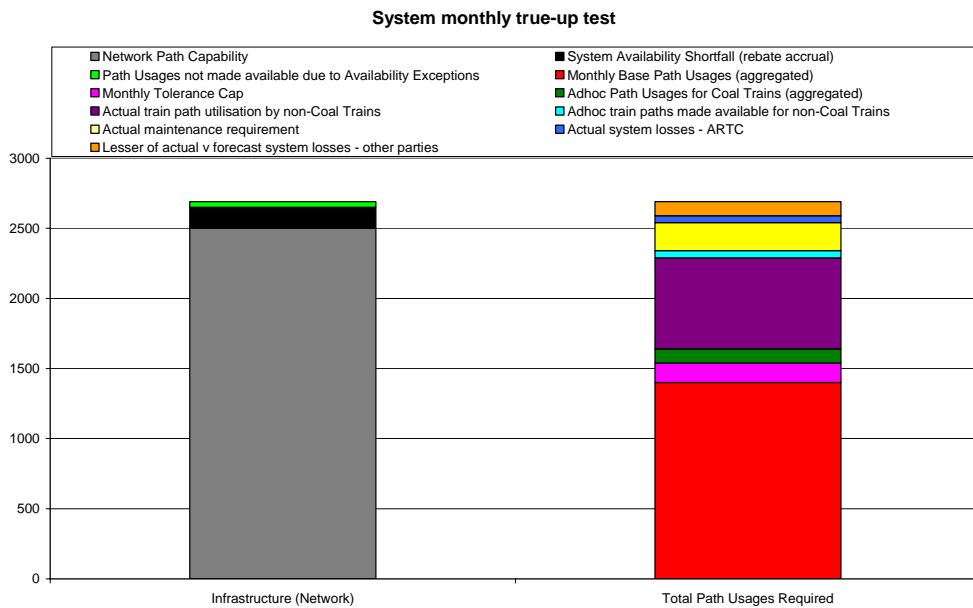
### 1 Monthly report

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

[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

	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"):

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

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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